

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Gregory Swecker

v.

Docket No. EL05-92-001

Midland Power Cooperative

Gregory Swecker

v.

Docket No. EL06-35-000

Grand Junction Municipal Utilities

Gregory Swecker

v.

Docket No. EL06-36-000

Midland Power Cooperative

ORDER GRANTING RECONSIDERATION
AND GIVING NOTICE OF INTENT NOT TO ACT

(Issued February 27, 2006)

1. In this order we grant reconsideration of our “Order Initiating Enforcement Proceeding and Requiring Midland Power Cooperative to Implement PURPA” issued on June 6, 2005.¹ In that order, the Commission initiated an enforcement proceeding pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(h) (2000), and directed Midland Power Cooperative (Midland) to provide Mr. Swecker net metering. The Commission’s enforcement

¹ *Gregory Swecker*, 111 FERC ¶ 61,365 (2005) (June 6 Order).

authority under section 210(h) of PURPA is discretionary. As discussed below, events that have occurred since the issuance of the June 6 Order lead us to conclude that we no longer need to pursue an enforcement proceeding against Midland on behalf of Mr. Swecker.

2. On December 27, 2005, Mr. Swecker filed two new petitions for enforcement pursuant to section 210(h) of PURPA. In Docket No. EL06-35-000, Mr. Swecker asks the Commission to initiate an enforcement proceeding against Grand Junction Municipal Utilities (Grand Junction). In Docket No. EL06-36-000, Mr. Swecker asks the Commission to initiate another enforcement proceeding against Midland. As discussed below, the Commission declines to initiate the enforcement proceedings requested by Mr. Swecker.

Background

3. The history of the relationship between Mr. Swecker and Midland is long. We summarize it briefly here.²

4. In 1998, Mr. Swecker, a retail customer of Midland, bought a small wind generator for his farm. Mr. Swecker and Midland have battled since then over various issues relating to the financial arrangements between Mr. Swecker and Midland. The first dispute related to what the connection charge would be for his qualifying facility (QF); Midland sought to charge Mr. Swecker its standard interconnection charge for QF service, while Swecker claimed to be entitled to be charged the lower residential/farm charge.³ In the course of this dispute Midland disconnected Mr. Swecker's electric service for nonpayment. Mr. Swecker then, in early 1999, in docket No. EL99-41-000, filed his first petition asking the Commission to require Midland to provide service to his farm at the residential/farm rate and to award damages.

² More details of this relationship are contained in prior Commission orders addressing Swecker's four prior petitions for enforcement of PURPA, the most recent of which was addressed in the June 6 Order, as well as a request by Central Iowa Power Cooperative (CIPCO), the generation and transmission cooperative that Midland is a member of, and by thirteen of its members for a waiver of the Commission's regulations implementing PURPA.

³ The residential/farm charge was \$2000, while the QF charge was \$5,712.17. The rate for service was also calculated differently for residential/farm service than for QF service.

5. The Commission declined to initiate an enforcement action against Midland.⁴ The Commission stated that the Commission's enforcement authority was discretionary and that it was not required to undertake an enforcement action.⁵ However, since the Commission chose not to undertake enforcement action, the petitioner was free to bring an enforcement action against the unregulated utility in the appropriate court. The Commission noted that it had, to date, chosen (with one exception, which it later vacated) not to bring enforcement actions pursuant to section 210(h)(2)(A) of PURPA, and the Commission chose not to do so there as well. The Commission explained:

The Commission's established policy is to leave to state regulatory authorities or nonregulated electric utilities and to appropriate judicial fora issues relating to the specific application of PURPA requirements to the circumstances of individual QFs.⁶

6. The Commission also pointed out that the disconnection was not a matter within its jurisdiction and that the Commission had no authority to award damages as requested by Mr. Swecker.⁷

7. Mr. Swecker brought his dispute with Midland back to the Commission in October 2000, in Docket No. EL01-12-000. Mr. Swecker claimed that Midland had incorrectly calculated its avoided cost rate payable to QFs. Mr. Swecker alleged that Midland's actual avoided cost was much higher than the rate Midland offered to pay. Mr. Swecker requested the Commission to compel Midland to provide any and all data from which Midland's avoided costs might be derived. Mr. Swecker, while his petition was pending before this Commission, filed a request to pursue the matter in a judicial forum. Because both of the parties expressed a desire to pursue the matter in court, the Commission dismissed the petition to allow Mr. Swecker to file in an appropriate court.⁸

⁴ *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 (1999) (1999 Order).

⁵ *Id.* at 61,721.

⁶ *Id.* at 61,722 (quoting *Cuero Hydro Electric, Inc. v. City of Cuero, Texas*, 77 FERC ¶ 61,114 (1996), *reconsideration denied*, 85 FERC ¶ 61,124 (1998)).

⁷ *Id.* 61,722.

⁸ *Gregory Swecker v. Midland Power Cooperative*, 96 FERC ¶ 61,085 (2001).

8. Mr. Swecker brought his dispute with Midland to the Commission again in 2003, in Docket No. EL03-53-000.⁹ Mr. Swecker stated that he had brought the dispute back to the Commission because Midland had previously argued to this Commission that the case should be decided in a state forum and, when the dispute was in a state forum, argued that the dispute was preempted by PURPA and could not be decided by the state. Mr. Swecker stated that, because the state courts ruled that they lack jurisdiction, he had returned to the Commission with his request that the Commission require Midland to fulfill its obligation to purchase power from his QF at Midland's avoided cost rate and to sell him supplemental and backup power.

9. The Commission granted Mr. Swecker's 2003 petition for enforcement.¹⁰ The Commission explained that Midland's actions, viewed as a whole, had been inconsistent with PURPA's goals of encouraging the development of non-utility generation and removing structural barriers to such generation. The Commission stated that Midland was required by PURPA to purchase from Mr. Swecker, and found Midland's actions with respect to Mr. Swecker to be in violation of that requirement. When the order issued, the current status of the Iowa judicial proceedings was that the Iowa Supreme Court had found that net metering was required under Iowa law. The Commission accordingly found that Midland must offer Mr. Swecker net metering. The Commission strongly encouraged Midland to accommodate Mr. Swecker in a manner that would be consistent with PURPA. However, the Commission also encouraged the parties to attempt to settle the matter before the Commission filed its enforcement petition in United States District Court.

10. Midland filed what it labeled a request for rehearing and vacatur of the November 19 Enforcement Petition Order. The National Rural Electric Cooperative Association (NRECA) also filed for rehearing. Subsequently, Midland and Swecker entered into a Settlement Agreement. The Commission approved the Settlement Agreement, dismissed the requests for rehearing as moot, and declined to vacate the November 19 Enforcement Petition Order.¹¹

⁹ On June 3, 2003, Mr. Swecker amended his complaint by expressing opposition to what was then an anticipated request by CIPCO for a waiver of certain regulations implementing PURPA. CIPCO's request was for a waiver for both itself and its members, including Midland. This separate, yet related, issue was addressed in Docket No. EL03-219-000, where the Commission denied CIPCO's request for waiver of the requirements of PURPA. *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004) (*CIPCO*).

¹⁰ *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (November 19 Enforcement Petition Order).

¹¹ *Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 (2004).

11. A few months later, however, Mr. Swecker once again filed a petition for enforcement. In the April 6, 2005 petition, in Docket No. EL05-92-000, Mr. Swecker requested that Midland purchase power from Mr. Swecker at the price at which Midland purchases power from CIPCO, Midland's power supplier; Mr. Swecker asserted this price constitutes Midland's avoided cost. Mr. Swecker also requested that the sale from his QF to Midland be billed with net data collected from a single meter (instead of from the two meters proposed by Midland) and stated that such net metering is appropriate because it is a simple way to determine the kilowatts that are available for sale from the QF. Mr. Swecker requested that the Commission undertake an enforcement proceeding to require Midland to provide Mr. Swecker net metering.

12. Attached to Mr. Swecker's petition was a recent decision of the Iowa Supreme Court which reversed its earlier decision that required Midland to provide net metering.¹² The Iowa Supreme Court ruled that there was not a requirement in either federal law or Iowa state law that a non-regulated utility such as Midland offer net metering. The Iowa Supreme Court continued that what was really at issue was a policy decision – whether all nonregulated electric utilities in Iowa would be required to use net metering for all QFs. The Iowa Supreme Court ruled this was not for Iowa courts to decide. The Iowa Supreme Court stated that the policy decision to require (or not require) net metering was for either the Iowa legislature, the Iowa Utilities Board or for this Commission to make. The Iowa Supreme Court also required Midland to make its cost data available to the public (including Mr. Swecker) at Midland's office.

13. Mr. Swecker contended that the arguments Midland made to the Iowa Supreme Court concerning the Iowa courts' authority to require net metering were inconsistent with what Midland argued before the Commission. Mr. Swecker argued that Midland was in effect saying that neither Iowa courts nor the Commission have authority to address whether Midland must provide Mr. Swecker a net metering arrangement. Mr. Swecker argued that these inconsistent arguments were part of Midland's attempt to avoid its obligation to comply with PURPA.

14. The Commission granted Mr. Swecker's then most-recent petition for enforcement.¹³ The Commission found that, on the record before it, Midland should provide net metering.¹⁴

¹² *Windway Technologies v. Midland Power Cooperative*, 2005 Iowa Sup. LEXIS 40 (April 1, 2005).

¹³ *See supra* note 1.

¹⁴ June 8 Order, 111 FERC ¶ 61,365 at P 45-46.

Currently Pending Matters

Reconsideration

15. Requests for reconsideration of the June 6 Order were filed by Midland,¹⁵ NRECA,¹⁶ and the National Rural Utilities Cooperative Finance Corporation. Each argues that the Commission exceeded its authority in finding that Midland should provide net metering; each would have the Commission decline to initiate an enforcement proceeding.¹⁷ Midland argues that it has consistently agreed to buy the electric output from Mr. Swecker's QF at rates and under terms and conditions that the Iowa Utilities Board (IUB) and the Iowa courts have found to be reasonable and proper.

16. Mr. Swecker and others filed answers to the requests for reconsideration.

17. On December 21, 2005, NRECA asked the Commission to take notice of an Iowa District Court for Hamilton County December 5, 2005 decision in *Windway Technology, Inc. v. Midland Power Cooperative* (December 5 Ruling). NRECA argues that the Iowa District Court's ruling supports its request for reconsideration because it demonstrates that the Commission erred in ruling that Midland had acted in bad faith in its dealings with Mr. Swecker. NRECA notes that the Iowa District Court in the December 5 Ruling dismissed a damage claim filed by Mr. Swecker against Midland, refused to alter the avoided cost rate for past periods, and determined that, because net metering was not required under either PURPA or state law, Mr. Swecker was not damaged by not being offered net metering.

18. Mr. Swecker opposed the motion to take notice of the Iowa District Court's December 5 Ruling.

Additional Petitions for Enforcement

19. On December 27, 2005, Mr. Swecker filed two additional petitions for enforcement. A petition for enforcement of PURPA was filed against Grand Junction in Docket No. EL06-35-000, and a petition for enforcement of PURPA was filed against

¹⁵ In a separate letter dated July 22, 2005, Midland informed the Commission of criminal charges brought against Mr. Swecker. Mr. Swecker was with charged meter tampering and theft of power from Midland and from Grand Junction.

¹⁶ NRECA also filed a motion asking the Commission to reconsider its decision not to vacate its November 19, 2003 Order in Docket No. EL03-53-000.

¹⁷ Each suggested that the Commission adopt the reasoning of the dissent to the June 6 Order.

Midland in Docket No. EL06-36-000. Mr. Swecker still proposes that Midland provide net metering. Mr. Swecker, who in addition to his farm also owns a business in Grand Junction, proposes that any excess power produced by his facility that is not used at his farm be wheeled by Midland to Grand Junction, at no charge to Mr. Swecker, for use in his business in Grand Junction. Mr. Swecker further proposes that any excess power that is not used first at the farm, and then at the business, should be bought by either Grand Junction or Midland. Mr. Swecker proposes to choose which utility should purchase the excess power, following his own “determination” of the avoided costs of both Midland and Grand Junction. Mr. Swecker seeks data from both Grand Junction and Midland so that he can determine their avoided costs. Mr. Swecker claims that the avoided cost of both utilities is the rate at which they purchase power.

20. Notice of the two petitions for enforcement were published in the *Federal Register*,¹⁸ with protests or interventions due on or before January 17, 2006.

21. Grand Junction filed an answer in Docket No. EL06-35-000. Grand Junction points out that the arrangement Swecker desires with Grand Junction requires Mr. Swecker to make transmission arrangements to move his QF power from the farm, located on Midland’s system, to Grand Junction. Grand Junction states that this would, in fact, require transmission arrangements with three different utilities: Midland, CIPCO, and Alliant Energy. Grand Junction states that Mr. Swecker has not made the required transmission arrangements. Grand Junction concludes that, without arrangements to deliver power to Grand Junction, Mr. Swecker’s proposal amounts to a proposal for Grand Junction to pay for electric energy that Mr. Swecker is delivering to Midland. Grand Junction argues that nothing in PURPA requires such a result. Grand Junction also argues that Mr. Swecker’s new proposal, outlined in the two new enforcement petitions, violates Mr. Swecker’s contract with Midland, and is not required by PURPA.

22. Midland filed an answer in Docket No. EL06-36-000. Midland claims that granting the petition would compel Midland to provide free wheeling over its own system, as well as over transmission systems that it neither owns, operates nor controls. Midland also argues that Mr. Swecker’s most recent proposal would require it to purchase power from Mr. Swecker’s QF at rates that exceed Midland’s avoided cost. Midland concludes that nothing in Mr. Swecker’s most recent petition requires Commission enforcement action.

¹⁸ 71 Fed. Reg. 2035 (2006).

Discussion

Procedural Matters

23. Because Docket No. EL05-92-000 was a petition for enforcement under section 210(h) of PURPA, rehearing does not lie, either on a mandatory or a discretionary basis.¹⁹ Thus, while Midland, NRECA, and the National Rural Utilities Cooperative Finance Corporation styled their pleading in Docket No. EL05-92-001 as requests for rehearing, we have described them above, and treat them, in our discretion, as requests for reconsideration.

Requests for Reconsideration

24. We will grant reconsideration of our June 6 Order. Events have occurred since issuance of the June 6 Order that convince us that we need not pursue an enforcement proceeding. Most importantly, on August 8, 2005, Congress amended section 111(d) of PURPA by its passage of the Energy Policy Act of 2005 (EPAAct 2005).²⁰ In addition, Mr. Swecker filed new petitions for enforcement in Docket Nos. EL06-35-000 and EL05-36-000, which raise questions about whether the Commission can achieve Mr. Swecker's objectives by proceeding with the enforcement proceeding in Docket No. EL05-92-000.

25. As we have pointed out in the past, section 210(f) of PURPA requires each state regulatory authority and each nonregulated electric utility to implement this Commission's regulations under PURPA.²¹ Section 210(h)(2)(A) of PURPA²² empowers, but does not require, the Commission to enforce PURPA against any "State

¹⁹ See *Southern California Edison Company*, 71 FERC ¶ 61,090 at 61,305 (1995); *New York State Electric & Gas Corporation*, 72 FERC ¶ 61,067 at 61,340 (1995).

²⁰ Pub. L. 109-58, § 1251, 119 Stat. 594, 962 (2005).

²¹ 16 U.S.C. § 824a-3(f) (2000). As a nonregulated utility, Midland's implementation can properly proceed on a case-by-case basis.

²² 16 U.S.C. § 824a-3(h)(2)(A) (2000).

regulatory authority or nonregulated electric utility”²³ Section 210(h)(2)(B) of PURPA²⁴ in turn, permits any qualifying small power producer, among others, to petition the Commission to enforce PURPA.

26. The Commission’s enforcement authority under section 210(h)(2)(A) is discretionary. The Commission has historically been reluctant to exercise this discretionary authority.²⁵ The June 6 Order was a rare exception to the general rule. Recent Congressional action and the new petitions filed by Mr. Swecker lead us to conclude that we no longer need to exercise our enforcement authority on his behalf.

27. First, in section 1251 of EAct 2005, enacted two months after our June 6 Order, Congress revised PURPA to require state regulatory authorities and nonregulated utilities to consider adopting net metering. Section 1251 of EAct 2005, which amended PURPA, provides that each state regulatory authority and each nonregulated utility shall consider “mak[ing] available upon request net metering service to any electric consumer that the electric utility serves”²⁶ within two years of enactment of EAct 2005 and shall complete consideration of this new standard within three years of enactment. Congress thus provided a specific process for states and nonregulated utilities to consider whether to make available net metering. Congress has directed Midland, a nonregulated utility, three years from enactment of EAct 2005 to consider whether to make available net metering on its own.

28. We believe in light of this specific guidance from Congress on what, as relevant here, nonregulated utilities must do, and when, we should not further intrude. Our prior decision to seek enforcement on Mr. Swecker’s behalf was made pursuant to the provision in PURPA that gives the Commission the discretion to enforce PURPA

²³ As we have previously noted, Midland is a “nonregulated electric utility” within the meaning of section 3(9) of PURPA, 16 U.S.C. § 2602(9) (2000).

²⁴ 16 U.S.C. § 824a-3(h)(2)(B) (2000).

²⁵ Indeed, the two times that the Commission has initiated an enforcement proceeding against Midland are two of the only three occasions (and the other the Commission later vacated) in which the Commission, to date, has chosen to bring an enforcement action pursuant to section 210(h)(2)(A).

²⁶ “Net metering service” was defined as “service to an electric consumer under which electric energy generated by that electric consumer from an eligible on-site generating facility and delivered to the local distribution facilities may be used to offset electric energy provided by the electric utility to the electric consumer during the applicable billing period.”

generally. Accordingly, we do not believe it appropriate that we go to court to require Midland to provide net metering when Congress enacted a specific provision of law that directs Midland to consider whether or not to provide net metering on its own. In this case, the specific direction from Congress should control over the general.

29. In addition to the recent enactment of EAct 2005, Mr. Swecker's filing of the petitions in Docket Nos. EL06-35-000 and EL06-36-000 has caused us to rethink our decision to exercise our discretion and pursue an enforcement proceeding. A decision to initiate an enforcement proceeding is essentially a decision that the Commission is prepared to go to court on Mr. Swecker's behalf. Mr. Swecker's recent petitions ask the Commission to seek different and expanded relief. As discussed below, Mr. Swecker's new request asks the Commission for assistance in obtaining relief that is beyond the scope of, and simply not required by, PURPA. Thus, if we were to pursue the enforcement proceeding that originated out of Docket No. EL05-92-000, we would be seeking relief that does not achieve Mr. Swecker's currently desired result. Under these circumstances we do not believe it appropriate to pursue this enforcement action on Mr. Swecker's behalf.

Docket Nos. EL05-35-000 and EL05-36-000

30. In the two petitions for enforcement, Mr. Swecker proposes a new use of the electric output of his QF. First, he proposes to have a net metering arrangement for his farm. Any excess power produced by his QF, not used at his farm, would be wheeled, at Midland's expense, to Grand Junction's system and then credited against the load of the business Mr. Swecker operates in Grand Junction. If there is any excess power at the end of a billing period, Mr. Swecker would have either Grand Junction or Midland pay him for that excess, at an avoided cost rate determined by Mr. Swecker pursuant to a method chosen by him.

31. This new relief Mr. Swecker seeks is simply not required by PURPA and the Commission will not initiate an enforcement proceeding on Mr. Swecker's behalf. While, under section 292.303(d) of our regulations, a utility which would otherwise be obligated to purchase from a QF may transmit the QF's power to another electric utility (if the QF agrees), charges for transmission are not a part of the rate which the electric utility to which the power is transmitted is obligated to pay the QF;²⁷ in other words, the QF is required to pay the relevant transmission charges. In Order No. 69, the Commission explained that the transmission charges would be determined pursuant to

²⁷ 18 C.F.R. § 292.303(d) (2005).

Part II of the Federal Power Act or pursuant to state law, depending on whether the utility (or utilities) providing the transmission service are or are not subject to the jurisdiction of the Commission.²⁸

32. Finally, there is no requirement that Grand Junction provide a credit for or pay for electric energy from Mr. Swecker unless he has made arrangements for its delivery to Grand Junction.²⁹

33. The Commission's enforcement authority under section 210(h)(2)(A) of PURPA is discretionary. As the Commission pointed out in its 1983 Policy Statement, "the Commission is not required to undertake enforcement action."³⁰ If the Commission chooses not to undertake enforcement action within 60 days of the filing of the petition, the petitioner, here Mr. Swecker, may then bring an enforcement action directly against respondent, here Midland and/or Grand Junction, in the appropriate court.³¹

34. For the reasons stated above, the Commission gives notice that it declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA

The Commission orders:

(A) The requests for reconsideration filed in Docket No. EL05-92-001 are hereby granted, as discussed in the body of this order.

²⁸ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, FERC Stats & Regs., Regulations Preambles 1977-1981 ¶ 30,128 at 30,872, 45 *Fed. Reg.* 12,214 at 12,220 (1980).

²⁹ While arguments have been made that the relief Mr. Swecker seeks is inconsistent with the existing contract between Midland and Mr. Swecker, we do not rule on those arguments here.

³⁰ *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 at 61,545 (1983).

³¹ *Id.*; 16 U.S.C. § 824a-3(h)(2) (2000). The Commission may intervene in such a proceeding as a matter of right.

(B) Notice is hereby given that the Commission declines to initiate an enforcement proceeding under section 210(h)(2)(A) of PURPA as requested in Docket Nos. EL06-35-000 and EL06-36-000.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.