

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Gregory Swecker

v.

Docket No. EL05-92-002

Midland Power Cooperative

ORDER DENYING RECONSIDERATION

(Issued April 21, 2006)

1. In this order we deny reconsideration of the Commission's February 27, 2006 order in this proceeding.<sup>1</sup>

**Background**

2. This proceeding concerns the relationship between Gregory Swecker, a qualifying facility (QF) owner, and Midland Power Cooperative (Midland). For purposes of this order,<sup>2</sup> we will recite only a very brief summary of that history.

3. Following Mr. Swecker's purchase of a small wind generator for his farm, Mr. Swecker and Midland failed to agree on the rates, terms and conditions for the sale of power by Mr. Swecker to Midland. A principal bone of contention was Mr. Swecker's request that Midland provide "net metering" service.

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<sup>1</sup> *Gregory Swecker*, 114 FERC ¶ 61,205 (2006) (February 27 Order).

<sup>2</sup> The Commission summarized the history of the proceedings in the February 27 Order and noted that more details could be found in the Commission's earlier orders addressing four prior petitions for enforcement as well as the Commission's order addressing 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

4. Prior to 2005, Mr. Swecker filed four petitions for enforcement pursuant to section 210(h) of Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(h) (2000). The Commission declined to initiate an enforcement proceeding based on the first three petitions, reciting the discretionary nature of the action requested and the Commission's long-standing policy of not undertaking enforcement proceedings. The Commission in each case also noted that its decision not to initiate an enforcement proceeding meant that Mr. Swecker was free to bring his own enforcement action against the unregulated utility in the appropriate court.

5. However, based in part on a ruling of the Iowa Supreme Court that Midland was required to provide net metering, the Commission granted the fourth petition (in Docket No. EL03-53-000), but gave the parties time to settle the dispute before the Commission itself went to the appropriate court to seek enforcement of PURPA. The parties entered a settlement agreement, which the Commission approved.<sup>3</sup>

6. Subsequently, Mr. Swecker filed his fifth enforcement petition, in Docket No. EL05-92-000. Mr. Swecker argued that the Iowa Supreme Court had reversed its decision that Midland was required to provide net metering, and that Midland, relying on the settlement agreement, had discontinued net metering. Mr. Swecker asked the Commission itself to go to court to require Midland to resume net metering. The Commission decided to initiate an enforcement proceeding.<sup>4</sup> Midland (and others) sought reconsideration of the June 6 Order. While reconsideration was pending, two significant events occurred that caused the Commission to reconsider its June 6 Order.

7. First, and 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).<sup>5</sup> In section 1251 of EPAAct 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 EPAAct 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

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<sup>3</sup> *Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 (2004).

<sup>4</sup> *Gregory Swecker*, 111 FERC ¶ 61,365 (2005) (June 6 Order).

<sup>5</sup> Pub. L. 109-58, § 1251, 119 Stat. 594, 962 (2005).

electric utility serves”<sup>6</sup> within two years of enactment of EPAct 2005 and shall complete consideration of this new standard within three years of enactment. The Commission concluded that Congress had thus provided a specific process for states and nonregulated utilities, including Midland, to consider whether to make available net metering. The Commission also concluded that, in light of the specific guidance from Congress on what nonregulated utilities must do, and when, the Commission should not further intrude.<sup>7</sup> The Commission stated that its decision in the June 6 Order 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 generally. The Commission concluded that it was not appropriate for the Commission to 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 – *i.e.*, that the specific direction from Congress should control.<sup>8</sup>

8. Second, Mr. Swecker filed two additional petitions for enforcement that sought relief beyond the scope of and not required by PURPA.<sup>9</sup>

### **Petition for Reconsideration**

9. On March 22, 2006, Mr. Swecker filed a request for reconsideration of the February 27 Order. Mr. Swecker argues, among other things, that the February 27 Order was arbitrary and capricious, that the Commission did not act in accordance with law and instead acted in violation of the Fifth and Fourteenth Amendments to the Constitution, and that the Commission denied Mr. Swecker the right to net metering and to an avoided cost rate.

### **Discussion**

10. As we stated in our February 27 Order, the Commission’s authority to go to court on a petitioner’s behalf to enforce PURPA is discretionary. Historically, the Commission

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<sup>6</sup> “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.”

<sup>7</sup> February 27 Order, 114 FERC ¶ 61,205 at P 27-28.

<sup>8</sup> *Id.* at P 28.

<sup>9</sup> *Id.* at P 29; *accord id.* at P 30-34.

has been reluctant to exercise this authority.<sup>10</sup> Nothing raised by Mr. Swecker on reconsideration convinces us that, in light of the two concerns highlighted in the February 27 Order, we have abused our discretion in following our traditional practice and opting not to go court on Mr. Swecker's behalf.<sup>11</sup>

The Commission orders:

The March 22, 2006 request for reconsideration filed in this proceeding is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>10</sup> *See id.* at P 26 & n.25.

<sup>11</sup> Our decision not to grant Mr. Swecker's petition for enforcement permits Mr. Swecker to go to court on his own behalf