

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gregory Swecker

Docket No. EL05-92-000

(June 8, 2005)

Commissioner Kelliher's dissenting statement to the order issued June 6, 2005 in the above-referenced proceeding is attached.

Linda Mitry,
Deputy Secretary.

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Joseph T. KELLIHER, Commissioner *dissenting*:

I disagree with the Commission's decision to grant the enforcement petition and order Midland to provide the Complainant with net metering.

It is not clear what the Commission's authority is to require Midland to provide net metering. As the Commission previously explained, the Settlement Agreement underlying the instant complaint "provides that should the Iowa Supreme Court rule that Midland is not required to provide net metering pursuant to applicable law, Midland may discontinue the arrangement on a prospective basis."¹ As the Commission's order points out, the Iowa Supreme Court ultimately ruled that there is no requirement under federal or Iowa state law that a nonregulated utility such as Midland must offer net metering.² In light of the Iowa Supreme Court's ruling, the Settlement Agreement expressly authorized Midland to discontinue its net metering arrangement with the Complainant. Thus, the Settlement Agreement provides no basis for the Commission's decision to direct Midland to provide Complainant with net metering.

In addition, nothing in PURPA expressly authorizes the Commission to order net metering, and the Commission has never previously interpreted PURPA as requiring net metering.³ To the contrary, the Commission has ruled that it is a matter for the state legislature to decide whether, and to what extent, a nonregulated utility is required to net meter.⁴ I do not believe that the Commission should reverse that decision in response to

¹ *Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 at P 12 (2004).

² Order at P 18 citing *Windway Technologies v. Midland Power Cooperative*, 2005 Iowa Sup. LEXIS 40 (April 1, 1005).

³ *Central Iowa Power Cooperative*, 108 FERC ¶ 61,282 at P 20 (2004).

⁴ *Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 at P 22 (2003).

the Complainant's dissatisfaction with the Iowa Supreme Court's decision.

In short, there is no express provision in PURPA authorizing the Commission to require a nonregulated utility to provide net metering, and the Iowa Supreme Court has determined that Iowa state law does not require Midland to provide net metering. The Settlement Agreement does not require Midland to provide net metering either. As there is no basis under PURPA, state law, or the Settlement Agreement for requiring Midland to provide the Complainant with net metering, and I would deny the petition.

Joseph T. Kelliher