

111 FERC ¶ 61,365
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gregory Swecker

Docket No. EL05-92-000

ORDER INITIATING ENFORCEMENT PROCEEDING AND REQUIRING
MIDLAND POWER COOPERATIVE TO IMPLEMENT PURPA

(Issued June 6, 2005)

1. On April 5, 2005, Mr. Gregory Swecker of Dana, Iowa, filed a petition for enforcement pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(h) (2000). Mr. Swecker asks the Commission to require Midland Power Cooperative (Midland)¹ to purchase electricity from and sell electricity to Mr. Swecker's qualifying facility (QF) as required by section 210 of PURPA and the Commission's implementing regulations. As discussed below, Midland will be directed to provide Mr. Swecker with net metering. While Midland has argued that such action would be inconsistent with a settlement agreement previously approved by the Commission, we do not agree. We take this action today because the history of the Swecker/Midland relationship demonstrates to us that the Commission must act more aggressively to assure that Mr. Swecker's small wind-powered QF interconnected with a nonregulated electric utility is afforded its PURPA rights.

Background

2. In 1998, Mr. Swecker, a retail customer of Midland, bought a small wind generator for his farm. He purchased the generator with the intention of generating electricity to use on his farm and selling the excess energy to Midland. Midland met with Mr. Swecker and began the process of negotiating a contract to purchase Mr. Swecker's QF output. The parties were unable to reach agreement, and in fact, at one point Midland disconnected the electric service to Mr. Swecker's farm.

3. Mr. Swecker subsequently filed three successive petitions for enforcement action with the Commission. As discussed below, the third petition for enforcement resulted in the Commission initiating an enforcement proceeding which was later terminated when the parties reached a settlement. Mr. Swecker has now returned to the Commission with a fourth petition for enforcement action.

¹ Midland is a distribution cooperative and a member of Central Iowa Power Cooperative (CIPCO), a generation and transmission cooperative.

4. The first case was filed in February 1999, in Docket No. EL99-41-000. Mr. Swecker asked the Commission to require Midland to provide three-phase service to his farm at the residential/farm rate and to order Midland to pay him damages that were caused by the disconnection of his electric service. The Commission declined to initiate an enforcement proceeding, noting that the Commission's enforcement authority under section 210(h)(2)(A) of PURPA is discretionary and that its established policy is to leave to state regulatory authorities or nonregulated electric utilities and to appropriate judicial fora issues relating to the application of PURPA to specific QFs. The Commission urged both parties to seek a resolution through Alternative Dispute Resolution procedures.²

5. Mr. Swecker next brought his dispute with Midland 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. 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 pending matter in a judicial forum. Since 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.³

6. The dispute returned to the Commission for a third time in 2003. Mr. Swecker stated that he had brought the dispute back to the Commission because Midland 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 Mr. Swecker's QF at Midland's avoided cost rate and to sell Mr. Swecker supplemental and backup power.

7. 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 that was applicable to 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.⁴ The Commission denied the waiver because

² *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 (1999).

³ *Gregory Swecker v. Midland Power Cooperative*, 96 FERC ¶ 61,085 (2001).

⁴ *Central Iowa Power Cooperative*, 105 FERC ¶ 61,239 (2003), *reh'g denied*, 108 FERC ¶ 61,282 (2004) (*CIPCO*).

CIPCO had not made the required demonstration that compliance with the Commission's regulations was not necessary to encourage cogeneration and small power production. This finding was based on the fact that Midland had not engaged in good faith dealings with Mr. Swecker.⁵ The Commission said:

We find that Petitioners have not demonstrated that compliance with the utility purchase obligation is not necessary to encourage cogeneration and small power production or is not otherwise required under section 210 of PURPA. The mandate of section 210 of PURPA is to encourage cogeneration and small power production. The Commission attempted to implement that mandate by prescribing rules with the specific purpose of avoiding situations where QFs are required to go through onerous and complex procedures to sell electricity to an interconnected utility. When individuals such as Mr. Swecker are forced to endure years of litigation before selling QF output to Midland's system (and we note that they are still not selling,) we are unable to make the requisite finding, *i.e.*, that our regulations governing arrangements between electric utilities and QFs are not necessary to encourage cogeneration and small power production in Petitioners' service area.

We are particularly concerned with the strategy of CIPCO, as demonstrated by its member Midland, to fight vigorously a QF's efforts to sell rather than negotiate with the QF in good faith. We are also disturbed by Midland's arguing to us that its dispute with Mr. Swecker should be resolved in state fora, and then arguing in state fora that PURPA preempted the state legislature from requiring Midland to enter into a net metering arrangement. (Midland should have raised the PURPA preemption issue before this Commission when the Sweckers were before the Commission previously, because this Commission has responsibility for interpreting PURPA in the first instance.) In an order issued concurrently with this order, addressing the Swecker's renewed effort to have the Commission initiate an enforcement proceeding against Midland, we in fact rule that PURPA does not preempt a state legislature from requiring net metering arrangements, even if the state legislature has provided that certain utilities' rates are not otherwise to be regulated by the State Commission.^[6]

⁵ 105 FERC ¶ 61,239 at P 18.

⁶ *Id.* at P 19-20 (footnote omitted).

8. In denying rehearing, the Commission said:

In their request for rehearing, Petitioners list numerous examples of what they claim to be examples of waivers being granted under similar circumstances. However, the circumstances were not similar. None of those cases presented such a clear example of a utility using every means at its disposal to avoid making purchases from QFs. In short, Midland's actions actively discouraged QF development, contrary to the requirements of PURPA.

The Petitioners also argue that the Commission erred in the November 19 Waiver Order by concluding that CIPCO and its Members had not engaged in good faith dealings with Mr. Swecker. The Commission is cognizant that there are two points of view in every conflict. Nevertheless, the facts viewed as [a] whole indicate a resistance on the part of Midland to allowing Mr. Swecker to interconnect and sell power. By arguing to the Commission that their dispute with Mr. Swecker should be resolved in state fora, and then arguing in state fora that PURPA preempted the state legislature from requiring Midland to enter into a net metering arrangement, Petitioners attempted to create a situation where the Sweckers would have no forum in which to bring their concerns regarding net metering.^[7]

November 19 Enforcement Petition Order

9. Due to the unique factual circumstances presented, the Commission exercised its discretion and initiated an enforcement proceeding against Midland in the November 19, 2003 Order.⁸ We found that initiating such a proceeding was appropriate because for over five years Midland had abused its role as a "nonregulated electric utility" under PURPA to frustrate Mr. Swecker's attempts to exercise his rights as a QF.

10. We 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. We noted that Midland was required by PURPA to purchase from Mr. Swecker's facility, and we found its actions with respect to Mr. Swecker to be in violation of that requirement. When the order issued, the current status of the Iowa proceedings was that the Iowa Supreme Court had found that net metering was required under Iowa law. The Commission accordingly found that Midland must fulfill the mandate of PURPA and offer Mr. Swecker a net metering arrangement.

⁷ 108 FERC ¶ 61,282 at P 17-18.

⁸ *Gregory Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (November 19 Enforcement Petition Order).

We strongly encouraged Midland to do more to accommodate Mr. Swecker in a manner that would be consistent with PURPA, and we also encouraged the parties to attempt to settle the matter before the Commission filed its enforcement petition in U.S. District Court.

11. Midland requested rehearing, arguing that the November 19 Enforcement Petition Order overturned 20 years of Commission precedent. Midland asserted that there was no basis for an enforcement action against Midland, and that it had at all times acted in good faith in all of its dealings with Mr. Swecker.

12. Midland also asserted that it should not be ordered to adopt net metering. Midland argued that the November 19 Enforcement Petition Order was wrong in concluding that Iowa state law requires nonregulated electric utilities like Midland to adopt net metering, and that neither PURPA nor any other federal law require nonregulated utilities to adopt net metering.

Settlement Agreement

13. On April 28, 2004, Midland filed a settlement agreement (Agreement) reached by Gregory and Beverly Swecker (the Sweckers) and Midland with the assistance of the Commission's Dispute Resolution Service. Under the Agreement, the avoided cost rate for purchases of power by Midland from the Sweckers would be the rate approved by the Iowa district court, which was then 2.53 cents per kilowatt hour. The Agreement further provided that should the Iowa district court in the future, after taking into account appropriate law, regulations and case precedent, determine an avoided cost that differs from the previously determined avoided cost, the newly determined avoided cost would be used to calculate payments to the Sweckers, effective on the date selected by the Iowa district court. The Agreement also provided that the Sweckers would be billed by Midland on a "net energy basis" utilizing net metering. However, the Agreement also provides that, should the Iowa Supreme Court rule that Midland is not required to provide net metering pursuant to applicable law, and net metering is not otherwise required by other applicable law or regulation, Midland may discontinue net metering on a prospective basis. Net metering was also to continue to be offered if the Iowa Supreme Court upheld the lower court's decision requiring net metering with the Sweckers. Also, under the Agreement, Midland was to complete installation of three-phase service and additional instrumentation and equipment within 21 days after the Sweckers paid for connection costs and provided proof of insurance coverage to Midland. According to Midland, it completed such installation as of April 27, 2004.

14. Midland, upon submission of the Agreement, argued that the Commission should vacate the November 19 Enforcement Petition Order because submission of the Agreement eliminated the need for an enforcement action in this proceeding. Midland also argued that the order should be vacated because it erroneously found that Midland had acted in bad faith in dealing with the Sweckers.

September 21 Order

15. On September 21, 2004, the Commission issued an order approving the Agreement, terminating the enforcement proceeding, and dismissing the requests for rehearing as moot.⁹ However, the Commission declined to vacate the November 19 Enforcement Petition Order. We stated:

The determination to vacate an order is an equitable one, requiring exceptional circumstances. We are not persuaded that Midland has shown exceptional circumstances requiring vacatur of the previous order. Moreover, Commission orders serve to provide significant informational benefits to the public by announcing the Commission's intentions for the future. The opportunity to anticipate the agency's actions facilitates long range planning and promotes uniformity.¹⁰

16. We also noted that after the parties executed the settlement agreement, in which they agreed to abide by the Iowa Supreme Court's determinations regarding both net metering and avoided costs, and after the various back-and-forth pleadings filed earlier during the year, the Iowa Supreme Court issued an order in which it found that Iowa's net metering requirements were applicable to Midland, and required Midland to file updated avoided cost data. In light of the Agreement and the Iowa Supreme Court's decision, we believed that the requests for rehearing of the Commission's November 19 Enforcement Petition Order were moot and dismissed them.

April 6 Petition

17. On April 6, 2005, Mr. Swecker filed the instant and fourth petition for PURPA enforcement. In his petition, Mr. Swecker requests that Midland provide Mr. Swecker with the price at which Midland purchases power from CIPCO, Midland's power supplier; Mr. Swecker asserts this price constitutes Midland's avoided cost. Mr. Swecker also requests 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 states 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 requests that the Commission undertake an enforcement proceeding to require Midland to provide Mr. Swecker a net metering arrangement. In addition, Mr. Swecker complains that Midland has continued to take inconsistent positions in Iowa courts, arguing there that the Iowa courts do not have authority to order net metering, while arguing to the Commission that only the Iowa legislature or courts, and not the Commission, can decide whether Midland

⁹ *Gregory Swecker v. Midland Power Cooperative*, 108 FERC ¶ 61,268 (2004) (September 21 Order).

¹⁰ *Id.* at P 28 (footnotes omitted).

must provide net metering. Finally, Mr. Swecker accuses Midland of misusing its members' funds to hire lawyers to circumvent the rights of members who wish to use and promote renewable energy. Mr. Swecker alleges that this practice drives up the cost of electric power to Midland's members in violation of state and federal law.

18. 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.¹¹ 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 the 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.

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

20. Notice of Mr. Swecker's petition was published in the *Federal Register*,¹² with protests and interventions due on or before April 27, 2005.

21. On April 27, 2005, Midland filed an answer to Mr. Swecker's petition. Midland requests that the Commission dismiss Mr. Swecker's petition. Midland contends that the Iowa Supreme Court found that Midland is not required to offer net metering under any applicable law. Midland further argues that under the Commission-approved Agreement, signed in April 2004, the parties agreed to abide by the Iowa Supreme Court's decision on this issue. Midland urges that Mr. Swecker's petition be dismissed because it seeks to collaterally attack the Iowa Supreme Court's decision on net.

22. Midland contends that it has fully complied with the Agreement by: (1) interconnecting Mr. Swecker's facility to its distribution system on April 27, 2004; (2) installing and operating a net metering system during the pendency of the Iowa Supreme Court proceeding; (3) providing three-phase backup service; and (4) purchasing the Mr.

¹¹ *Windway Technologies, et al. v. Midland Power Cooperative*, 2005 Iowa Sup. LEXIS 40 (April 1, 2005).

¹² 70 Fed. Reg. 19,949 (2005).

Swecker's excess energy at Midland's avoided cost rate. Midland further contends that Mr. Swecker has consistently sought an avoided cost rate that is twice the rate determined by Midland in accordance with the Commission's regulations for determining avoided cost rates in an all-requirements arrangement. Midland adds that an Iowa district court approved Midland's avoided cost rate determination of 2.5394 cents per kilowatt hour in 2002.

23. Midland contends that the Iowa district court judge instructed Midland to develop a rate based on the charges it paid to CIPCO. Midland states that its calculation of its avoided cost rate included both an energy charge and a demand charge assessed on a kilowatt hour basis that Midland would pay to CIPCO under the applicable CIPCO rate schedule. Midland explains that in April 2004, the energy rate that CIPCO charges to Midland increased from 1.7814 cents per kilowatt hour, which was the energy rate charged by CIPCO for the first three months of 2004, to 1.8314 cents per kilowatt hour. The demand charge was, and remains, 0.75 cents per kilowatt hour. Based on this information and using the same methodology that was approved by the Iowa district court, Midland states its avoided cost is 2.5814 cents per kilowatt hour for 2004, slightly higher than the 2002 avoided cost rate approved by the state court. Midland adds that its avoided cost data was provided to Mr. Swecker on numerous occasions.

24. Midland argues that, in contrast, the 5.4 cent per kilowatt hour rate sought by Mr. Swecker is Midland's average wholesale cost. Midland argues that it is wrong to substitute a utility's average purchased cost for its avoided cost. Midland further contends that this Commission has determined that an average wholesale cost is not an appropriate proxy for avoided costs. Midland contends that a utility is not required to prove the justness and reasonableness of the rate at which it purchases energy from a QF in an all requirements supply situation; Midland continues that an avoided cost rate calculated consistent with the Commission's regulations is deemed to be just and reasonable. Midland concludes that the avoided-cost rate it has calculated (*i.e.*, 2.5814 cents per kilowatt hour) is consistent with Commission regulations and precedent and does not provide the Commission the basis to institute an enforcement proceeding.

25. Midland argues that Mr. Swecker's allegations of bad faith are completely baseless, given that Midland has abided by every decision entered by the Iowa Utilities Board, the Iowa courts, Federal District Court and this Commission.

26. Midland also argues that its implementation structure is grounded in section 210(f) PURPA itself. According to Midland, Congress provided in section 210(f)(1) of PURPA that each individual State regulatory authority should implement the Commission rules for each electric utility for which they have ratemaking authority. Congress then provided separately in section 210(f)(2) of PURPA that each non-regulated electric utility should implement the Commission's rules for itself and its member-owners. Midland argues that Congress accorded each State regulatory authority and each non-regulated electric utility the individual obligation and authority, after notice and opportunity for public hearing, to adopt its own local plan and procedure for implementing PURPA.

Midland states that section 210(f) of PURPA does not require State regulatory authorities and non-regulated electric utilities to coordinate or to adopt identical rules, and in fact places them on the same level with regard to PURPA implementation.

27. Comments in support of Mr. Swecker were filed by Scott Ibeling, Tyler McNeal, Leroy Hall, Weldon Coldiron, and Central College. Late comments were filed by Roger Wahl, and Gareth Gingerich. Dr. Blair Henry (Dr. Henry) and Welch Motels, Inc. (Welch Motels) filed motions to intervene in support of Mr. Swecker.

28. A motion to intervene and comments in support of Midland was filed by the National Rural Electric Cooperative Association. A motion to intervene and protest in support of Midland was filed by the Cooperative Finance Corporation.

29. Mr. Swecker filed an answer to Midland's answer. Midland filed an answer to various comments filed. Midland also requests that the Commission deny Welch Motels' and Dr. Henry's motions to intervene, and to reject the comments filed by other individuals. Beverly Swecker, Dr. Henry and Leroy Hall responded to Midland's answer. Midland filed a response to various answers.

30. Welch Motels is a wind generator owner in Iowa and also a named plaintiff in the Iowa Supreme Court proceedings referred to earlier in this order. Welch Motels argues that the Iowa Supreme Court held that it is this Commission's responsibility to determine if net metering should be required of nonregulated utilities. Welch Motels requests that the Commission require net metering for nonregulated utilities, or make it absolutely clear to state courts that they have the authority and duty to require net metering in order to enforce PURPA.

31. Dr. Henry is professor at the University of North Dakota in Grand Forks and the President of the Northwest Council on Climate Change. Dr. Blair supports Mr. Swecker's request that the Commission require Midland to provide QFs with "net metering" and require Midland essentially to pay Mr. Swecker the same price for electricity purchased by Midland from Mr. Swecker as Midland charges Mr. Swecker for electricity purchased by Mr. Swecker from Midland. Dr. Henry also requests that the Commission enact rules providing for a more reliable, effective and consistent implementation of PURPA. Dr. Henry suggests that these rules require every electric utility, including every rural electric cooperative and other nonregulated utilities, to: (a) regularly provide disclosure of avoided cost information –in a single format approved by the Commission (Dr. Henry suggests that these submissions be in electronic format by e-mail and/or internet); (b) calculate "avoided cost" that is no less than the wholesale price paid by that utility to obtain the electricity and no more than the price the utility charges the QF for electricity (which he calls a "net metering" price); (c) disclose every effort to encourage and support clean energy development by QFs. Dr. Henry also suggests that the Commission also provide penalties for those that fail to implement regulations implementing PURPA.

32. Dr. Henry states he has conducted an investigation that indicates a disregard of the requirements of PURPA by the rural electric cooperatives in Iowa; Dr. Henry argues that this disregard of PURPA is part of a much larger deliberate abuse of federal law by rural electric cooperatives. He states that there also seems to be a number of examples of discriminatory pricing by rural electric cooperatives. Dr. Henry points to an example of a landowner working with a North Dakota rural electric cooperative. Dr. Henry comments there is an extremely wide range of avoided costs reported for coal power production by utilities in North Dakota, *i.e.*, he states the avoided cost reported by Xcel Energy, a utility regulated by the Commission, is over twice as high as the avoided cost reported by the states largest rural electric cooperative, Basin Electric. Dr. Henry states this fact, combined with a pervasive campaign of misinformation, has discouraged landowners from investing in wind energy development – all contrary to PURPA.

33. Dr. Henry states that his investigation concluded that rural electric cooperatives in the Midwest have covertly, intentionally and persistently thwarted significant wind energy development; that the rural electric cooperatives in the Midwest have designed a well-organized campaign to discourage customers from developing wind energy; and that rural electric cooperatives have claimed exemption from nearly every regulation – federal, state or local as part of their efforts to thwart the development of electric generation from wind energy. Dr. Henry states all of these actions are contrary to both the letter and the spirit of PURPA.

Discussion

Procedural Matters

34. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹³ the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Notwithstanding Midland's opposition to the intervention of Welch Motels and Dr. Henry, we find good cause exists to grant intervention. We are satisfied that Welch Motels and Dr. Henry have expressed an interest in the outcome of this proceeding that is not represented by another party, and that their participation will not result in undue delay or prejudice. In addition, Midland has presented no valid reason to exclude the comments filed in support of Mr. Swecker's petition, and we will deny its motion to dismiss the comments.

35. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹⁴ prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We

¹³ 18 C.F.R. § 385.214 (2004).

¹⁴ 18 C.F.R. § 385.213(a)(2) (2004).

will accept all answers filed because they have provided information that has assisted us in our decision-making process.

Enforcement Proceeding

36. In our November 19 Enforcement Petition Order, we noted that we normally do not grant petitions for enforcement.¹⁵ Nevertheless, in that order we initiated an enforcement proceeding and we will do so again here. The facts presented there and the facts presented here warranted, and warrant, our taking such action. We thus will grant Mr. Swecker's request to initiate an enforcement proceeding.

37. Mr. Swecker asks the Commission to require Midland to implement PURPA by offering a net metering arrangement and/or by paying Mr. Swecker an avoided cost rate that is the same price it pays its full requirements supplier. When we last addressed the dispute between Midland and Mr. Swecker, we ultimately approved a settlement between the parties. The Agreement was entered into during the pendency of Midland's appeal to the Iowa Supreme Court of a lower court decision finding that Midland must provide "net metering" to Mr. Swecker. After the Agreement was filed, the Iowa Supreme Court affirmed the lower court's finding that "net metering" was required.¹⁶ The Commission noted this in its September 21 Order.¹⁷ Midland sought rehearing of the Iowa Supreme Court's decision. The Iowa Supreme Court recently granted rehearing and found that Iowa law does not require Midland to offer Mr. Swecker net metering.¹⁸

38. Midland argues that the Iowa Supreme Court's April 1, 2005 Order ends the dispute. Midland argues that Mr. Swecker is "now seeking to renege on the Commission approved agreement, and is attempting, once again, to have Midland pay an avoided cost rate that is twice Midland's actual avoided cost rate,"¹⁹ and that the petition for enforcement collaterally attacks the Iowa Supreme Court's decision on net metering and imposes an unlawful avoided cost rate.

39. First, we address the provision of the Agreement concerning the determination of Midland's avoided cost. The avoided cost rate that Midland agrees to pay Mr. Swecker is set forth in section 14 of the Agreement. Section 14 provides:

¹⁵ 105 FERC ¶ 61,238 at P 18.

¹⁶ *Windway Technologies v. Midland Power Cooperative*, 2004 Iowa Sup. Lexis 213 (2004).

¹⁷ 108 FERC ¶ 61,268 at P 29.

¹⁸ *Windway Technologies, et al. v. Midland Power Cooperative*, 2005 Iowa Sup. LEXIS 40 (April 1, 2005).

¹⁹ Midland Answer at 2.

[Mr. Swecker] agrees to sell to [Midland], and [Midland] agrees to purchase from [Mr. Swecker], electric power and energy generated by [Mr. Swecker's] QF and delivered to the point of interconnection with [Midland's] system. [Midland] shall obtain from the regular meter the necessary information to calculate the net amount of energy delivered by [Mr. Swecker] on or about the first calendar day of each month and shall remit any amounts due within twenty (20) days thereafter. [Midland] agrees to receive said electric power and energy. Consistent with the ruling by the Iowa District Court – Hamilton Co., No. LACV 25993 dated June 18, 2002, the Cooperative shall pay to [Mr. Swecker] 2.5394 cents per kilowatt hour for excess energy and capacity generated by their facility from start up of production. Should the Iowa District Court in the future, after taking into account appropriate law, regulations and case precedent determine the avoided cost figure to be different from the previously avoided cost determined by the Iowa District Court – Hamilton Co., No. LACV 25993, dated June 18, 2002, the newly determined avoided cost determination will be used to calculate payments to [Mr. Swecker], to be effective on a date selected by the Iowa District Court.

40. To summarize, this section of the Agreement provides that Midland is to pay the rate determined by the Iowa district court, *i.e.*, 2.5394 cents per kilowatt hour, “for excess energy and capacity generated by [Mr. Swecker's] facility from startup of production.” This “excess energy” is the “net amount of energy delivered by [Mr. Swecker].” Therefore, the Agreement specifically linked the avoided cost rate to be paid to Mr. Swecker, the 2.5394 cents per kilowatt hour rate determined by the Iowa district court, with a “net” energy measurement, that is, the use of net metering.

41. Net metering is likewise addressed in section 5A of the Agreement;²⁰ Midland points to section 5A in support of its contention that Mr. Swecker's instant petition is in violation of the Agreement. Section 5A, in relevant part, provides:

The parties agree that their decision to bill [Mr. Swecker's] existing cogeneration facility on a “net energy basis” as set out above shall commence when [Mr. Swecker's] cogeneration facility begins receiving three-phase electric power and energy from [Midland], or thirty (30) days after the date [Midland] notifies [Mr. Swecker] in writing that such service is available, whichever shall first occur. Any future court or administrative action resulting in a decision that [Midland] is not required to offer net metering will not change the ‘net energy basis’ of the Agreement retroactively. [Midland] reserves the right to terminate such net metering

²⁰ Sections 2 and 5 of the Agreement likewise reflect the concept of netting.

arrangement and billing on a “net energy basis” if the Iowa Supreme Court rules in its favor on this issue, and net metering is not otherwise required by other applicable law or regulation.

42. We read section 5A of the Agreement as requiring net metering until such time, if any, that the Iowa Supreme Court rules in Midland’s favor, and thereafter as permitting, but *not* requiring, termination of net metering if the Iowa Supreme Court rules in Midland’s favor. Moreover, section 5A of the Agreement also provides that Midland will still be bound by the net metering arrangement if net metering is “otherwise required by applicable law or regulation.”²¹ We see nothing in the Agreement that prohibits Mr. Swecker from requesting that the Commission require Midland to implement PURPA by using net metering. (As discussed below, in this order, we will require Midland to implement PURPA by adopting net metering arrangements for Mr. Swecker’s, and all similarly situated, QFs.) We thus conclude that section 5A of the Agreement is not inconsistent with Mr. Swecker filing the petition (or with our requiring Midland to implement PURPA by offering net metering arrangements to Mr. Swecker’s, and all similarly situated, QFs). Indeed, the reference in section 5A to the possibility that Midland could otherwise be required by law or regulation to offer net metering contemplates the possibility of just this result.

43. We next turn to Midland’s argument that Mr. Swecker’s petition constitutes a collateral attack on the Iowa Supreme Court’s April 1, 2005 Order. In the April 1, 2005 Order, the Iowa Supreme Court determined that the issue of whether net metering should be required involved “implementation” of PURPA as opposed to an application of implementing regulations. The Iowa Supreme Court continued that implementation of PURPA was an issue that this Commission should address, while application of implementing regulations was an issue that states (and state courts) should address. The Iowa Supreme Court further concluded that a decision whether net metering was required in this particular case as an implementation of PURPA was a policy issue that state courts should not address. Mr. Swecker’s petition, asking the Commission to find that implementation of PURPA by Midland warrants net metering, thus involves an issue that the Iowa Supreme Court decided was beyond its authority and which it declined to decide. Accordingly, Mr. Swecker’s petition does not constitute a collateral attack on the Iowa Supreme Court’s April 1, 2005 Order, but rather asks us to decide an issue that the Iowa Supreme Court found that it would not decide.

44. Having determined that neither the Agreement nor the Iowa Supreme Court’s recent decision foreclose Mr. Swecker’s petition, we turn to the substance of the petition.

²¹ Section 5A, in fact, goes on to expressly reserve Mr. Swecker’s rights under section 292.304(d) of the Commission’s regulations. *See* 18 C.F.R. § 292.304(d) (2004).

Mr. Swecker asks the Commission to require Midland to provide net metering,²² and/or to find that Midland's avoided cost must be based on what it pays CIPCO. Midland responds that the sale of power from Mr. Swecker's QF to Midland should be measured with a one-way meter and should be billed at an avoided cost rate of 2.5394 cents per kilowatt hour, and that the sale of power by Midland to Mr. Swecker should be measured by a separate one-way meter and be billed at Midland's retail rate.

45. We find that on the record before us Midland must provide net metering.²³ We have previously recognized that PURPA does not explicitly require net metering;²⁴ we have also recognized, however, that the Iowa Utility Board's requirement that state regulated utilities in Iowa offer net metering to small generators similar to Mr. Swecker's QF is consistent with PURPA and does not result in a rate exceeding a utility's avoided costs.²⁵ The issue here is whether Midland must provide net metering. We find that it must. As we previously found, Midland, a nonregulated utility that implements PURPA itself, has taken advantage of its nonregulated status to avoid implementing PURPA. We further found that "Midland should grant Mr. Swecker's request for net metering."²⁶ Subsequently we approved an Agreement between Mr. Swecker and Midland that provided for net metering. Further, as we explained above, the Iowa Supreme Court's April 1, 2005 Order left the implementation of PURPA, *i.e.*, whether to order Midland to provide net metering to the Commission.

²² This would be accomplished with what, in the Agreement, is called a "regular meter" that runs both forward and backwards.

²³ Some of the comments filed in this proceeding suggest that the Commission make generic findings as to what electric utilities must do for or pay to QFs. We do not believe that the record in this proceeding provides an appropriate basis for making such generic determinations.

²⁴ *CIPCO*, 108 FERC ¶ 61,182 at P 20.

²⁵ See *MidAmerican Energy Company*, 94 FERC ¶ 61,340 at 62,263 (2001) (*MidAmerican*). In implementing PURPA, the Commission recognized that net billing arrangements would be appropriate in some situations. *Id.*; *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, Regulations Preambles 1977-1981 ¶ 30,128 at 30,879, *order on reh'g*, Order No. 69-A, *FERC Stats. & Regs.*, Regulations Preambles 1977-1981 ¶ 30,160 (1980), *aff'd in part and reversed in part sub nom. American Electric Power Services Corporation v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. American Paper Institute, Inc. v. American Electric Power Service Corporation*, 461 U.S. 402 (1983).

²⁶ 105 FERC ¶ 61,238 at P 21.

46. Requiring Midland to offer net metering to Mr. Swecker and other similarly situated QFs will ensure that a principal purpose of PURPA will be met, *i.e.*, encouraging alternative sources of energy and reducing the nation's dependence on fossil fuels.²⁷ Offering net metering to small wind-powered facilities, moreover, is consistent with the provisions of PURPA that ensure that utilities do not pay more than the incremental cost of power, while ensuring that wind-powered facilities are paid an avoided-cost rate for electricity sold from their QFs.²⁸ In the context of the Midland/Swecker dispute, where an avoided cost calculation for "excess power" provided when net metering is offered has already been agreed to, we find that net metering is the most appropriate means to assure that Midland complies with the mandates of PURPA.²⁹

47. Finally, we cannot help but note that Midland has used the legal process to thwart efforts to compel it to comply with PURPA for seven years, with a long history of using every means at its disposal³⁰ to avoid its obligation to purchase from Mr. Swecker's small wind-powered QF.³¹

²⁷ See *FERC v. Mississippi*, 456 U.S. 742, 745-51 (1982).

²⁸ *Id.*

²⁹ Regarding the appropriate avoided cost rate in this circumstance, we note that, while Midland purchases virtually all of its power for more than 5 cents per kilowatt hours, as noted above the parties previously agreed to use net metering coupled with an avoided cost rate of 2.5394 cents per kilowatt hour (that is, the rate determined by the Iowa district court) for "excess energy and capacity." Inasmuch as our determination on the net metering issue places the parties in the same position they previously agreed to, we see no reason to disturb what they previously agreed to and we will use the avoided cost rate provided for in the Agreement.

³⁰ The pleadings before us indicate that Midland has, for a second time, disconnected Mr. Swecker's electric service. *Cf. Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 at 61,720 (1999) (discussing the earlier disconnection of electric service).

³¹ In this regard, the legal fees Midland paid for litigating this dispute here and in court surely must exceed what it would have cost Midland to enter a net metering arrangement with the Mr. Swecker long ago. But, as Midland is not a Commission-regulated public utility, it is not for this Commission to consider the reasonableness of the rates that Midland charges its power sales customers.

The Commission orders:

Mr. Swecker's petition for enforcement is hereby granted, as discussed in the body of this order.

By the Commission. Commissioner Kelliher dissenting with a separate statement to be issued later.

(S E A L)

Linda Mitry,
Deputy Secretary.