

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gregory Swecker

v.

Docket No. EL03-53-001

Midland Power Cooperative

ORDER ACCEPTING SETTLEMENT, TERMINATING ENFORCEMENT
PROCEEDING AND DISMISSING REQUEST FOR REHEARING AS MOOT

(Issued September 21, 2004)

1. On November 19, 2003, the Commission issued an order¹ granting a petition for enforcement action filed by Mr. Gregory Swecker of Dana, Iowa against Midland Power Cooperative (Midland). Mr. Swecker, in his petition for enforcement, asked the Commission to require Midland to purchase electricity from and sell electricity to Mr. Swecker's qualifying facility (QF) as required by the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Commission's implementing regulations. Following issuance of our order initiating enforcement action, the parties, working with the Commission's Dispute Resolution Service, reached a settlement. In this order we approve the settlement, terminate the enforcement proceeding, and dismiss the requests for rehearing as moot.

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 him and began the process of negotiating a contract to purchase Swecker's QF output. Mr. Swecker was dissatisfied with the terms Midland offered. During these initial negotiations, Midland disconnected the electric service to Mr. Swecker's farm.

¹ 105 FERC ¶ 61,238 (2003) (November 19 Enforcement Petition Order).

3. Mr. Swecker then filed three successive petitions for enforcement action with the Commission. This 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 clearly 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 specific application of PURPA to QFs. The Commission urged both parties to seek a resolution through ADR procedures.²

4. 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 the Sweckers. 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

5. 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 has returned to the Commission with his request that the Commission require Midland to fulfill its obligation to purchase power from the Sweckers' QF at Midland's avoided cost rate and to sell Mr. Swecker supplemental and backup power.

November 19 Enforcement Petition Order

6. Due to the unique factual circumstances presented, we decided to initiate an enforcement proceeding against Midland in the November 19 Enforcement Petition Order. 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.

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

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

7. 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 the Swecker facility, and we found its actions with respect to Mr. Swecker to be in violation of that requirement. 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 Federal District Court.

Requests for Rehearing and other Pleadings

8. On December 19, 2003, Midland requested rehearing, arguing that the November 19 Enforcement Petition Order overturned 20 years of Commission precedent. Midland asserts that there is no basis for an enforcement action against Midland. Midland asserts that it has at all times acted in good faith in all of its dealings with Mr. Swecker. Midland asserts that it has offered contracts to purchase power from Mr. Swecker's facility at Midland's avoided cost and to provide backup service to that facility, only to have their efforts rejected by Mr. Swecker. As a result of litigation before state fora, Midland asserts that most of its proposed contract rates, terms and conditions have been upheld, including its avoided cost calculations. Midland argues that it is Mr. Swecker who has been excessively litigious, and notes that Mr. Swecker continues to seek an avoided cost rate that is twice the Midland rate that has been upheld in state court.

9. Midland also asserts that it should not be ordered to adopt net metering. Midland argues that the November 19 Enforcement Petition Order is wrong in concluding that Iowa state law requires nonregulated electric utilities like Midland to adopt net metering. Midland also asserts that neither PURPA nor any other federal law require nonregulated utilities to adopt net metering. Midland further argues that there is no evidence in this proceeding that would otherwise support specifically mandating in this case that Midland adopt net metering for its QFs. Midland also asserts that the Commission is incorrect to the extent that it relies on proposed energy legislation as a basis for ordering net metering in this proceeding, arguing that Midland should not be subject to legislation that has not been enacted.

10. The National Rural Electric Cooperative Association (NRECA) also seeks rehearing. NRECA asserts that each of the issues Mr. Swecker raises have been addressed in state fora, such as Midland's avoided costs and whether state law requires Midland to provide service to Mr. Swecker under a net metering arrangement. NRECA also argues that the Commission should not reverse its long standing precedent of not addressing implementation issues, asserting that doing so would create confusion for nonregulated electric cooperatives seeking to comply with PURPA.

11. On December 29, 2003, Mr. Swecker responded to Midland's request for rehearing. Subsequently, on April 14, 2004, Mr. Swecker filed a motion for enforcement action, arguing that nearly six months after issuance of the November 19 Enforcement Petition Order, Midland was still acting in bad faith and had refused to propose acceptable terms. Shortly thereafter, Midland responded, asserting that the Commission should dismiss Mr. Swecker's motion with prejudice. Midland argues that Mr. Swecker's motion was filed during settlement negotiations when Midland and Mr. Swecker were close to finalizing a settlement and agreement for service, and was filed for the purpose of derailing settlement negotiations.

Settlement Agreement

12. 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 will be the rate approved by the Iowa district court. The Agreement also provides that the Sweckers will 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, Midland may discontinue the arrangement on a prospective basis. 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. Midland argues that the Commission should vacate the November 19 Enforcement Petition Order because submission of the agreement eliminates the need for an enforcement action in this proceeding. Midland also argues that the order should be vacated because it erroneously states that Midland has acted in bad faith in dealing with the Sweckers.

13. NRECA filed comments in support of the Agreement and requests that the November 19 Enforcement Petition Order be vacated. NRECA asserts that there was no basis in law or fact for the Commission's institution of an enforcement action against Midland in this proceeding. NRECA also expresses concern that the order could encourage specious litigation against utilities that have complied in good faith with PURPA and the Commission's implementing regulations. In the alternative, if the Commission decides not to vacate the order, NRECA requests that the Commission explicitly clarify that it intended the order to be limited to the facts and parties of this case, and that it should not be read to unsettle or overturn established precedent regarding the implementation of PURPA.

14. On May 17, 2004, Mr. Swecker filed an answer to Midland's April 28 filing. Mr. Swecker states that it would be inappropriate for the Commission to vacate the November 19 Enforcement Petition Order in its entirety, because Midland has not yet entered into a contract based on what he states is new documented data on the rates at which Midland purchases their energy and capacity. Mr. Swecker does state that an agreement has been reached between himself and Midland as to the terms and conditions of service, backup power and net metering.

15. Central College in Pella, Iowa filed a motion to intervene and an answer to NRECA's comments. Central College asserts that it is opposed to NRECA's attempt to limit the implications of the November 19 Enforcement Petition Order to the facts of the instant case because, it asserts, there are many more individuals attempting to incorporate small-scale renewable energy projects that are unable to do so because cooperatives claim that they cannot and will not offer net metering arrangements based on the fact that they are nonregulated electric utilities and have the right to adopt their own interpretation of PURPA.

16. On May 25, 2004, Mr. Swecker filed a motion for enforcement to require Midland to enter into a contract with avoided costs set at the rate of 5.4 cents per kilowatt hour, and asserts that Midland has not provided any documentation that its avoided cost is less than this amount. The Iowa district court previously found that the avoided cost rate would be 2.5394 cents per kilowatt hour "until [Midland] provides data to support a different avoided cost for it."⁴ Mr. Swecker argues that new data recently provided by Midland justify the higher rate of 5.4 cents per kilowatt hour, and that the Iowa district court's determination of the lower rate was based on false information provided by Midland.

17. On May 26, 2004, NRECA filed additional comments. NRECA opposes Central College's motion to intervene, arguing that it has not demonstrated good cause for intervening at such a late date in the proceeding. NRECA argues that Central College's comments, if accepted, would undermine the settlement by attacking important parts of the settlement that have finally been resolved after years of negotiations and litigation.

18. On May 30, 2004, Midland filed comments in response to Mr. Swecker's May 17 assertion that the Commission should not vacate the November 19 Enforcement Petition Order. Midland argues that Mr. Swecker's concerns about avoided costs and net metering were addressed in section 14 of the Agreement. Midland also argues that Central College has offered no legal or factual basis for intervening at this late time in the Commission proceeding. Midland also asserts that Central College's comments are a direct attack against the Agreement reached by the Sweckers and Midland.

⁴ *Windway Technologies, Inc., et al. v. Midland Power Cooperative*, No. LACV 25993 (Iowa Dist. Ct. Hamilton County 2002).

19. On May 30, 2004, Mr. Swecker filed an answer to NRECA's response to Central College's comments. Mr. Swecker asserts that Central's comments, if accepted, would not undermine the Agreement.

20. On June 9, 2004, Midland filed an answer to Mr. Swecker's May 25, 2004 motion to require Midland to enter into a contract with Mr. Swecker with avoided costs set at 5.4 cents per kilowatt hour. Midland asserts that Mr. Swecker is apparently attempting to sidestep the provisions of the Agreement he entered approximately six weeks previously, which sets the avoided cost rate and specifies how it can be changed. Midland asserts that, under the Agreement, the rate for purchases from Mr. Swecker would be 2.5394 cents per kilowatt hour for excess energy and capacity generated by Mr. Swecker's facility. Midland notes that this is the rate set by the Iowa district court in its June 18, 2002 decision,⁵ and asserts that the Agreement further provides that Mr. Swecker can challenge any updated rate in Iowa district court.

21. Midland also asserts that avoided cost rate disputes should be decided in state fora, citing an earlier Commission order involving the same parties.⁶ Midland points out that Mr. Swecker originally brought the lawfulness of its PURPA implementation plan before the Iowa district court, and that that court has already properly adjudicated the avoided cost rate.

22. NRECA also filed an answer to Mr. Swecker's May 25, 2004 motion. NRECA argues that Mr. Swecker is attempting to ignore the terms of the Agreement and evade the Iowa district court's ruling on Midland's avoided cost rate. NRECA also argues that Mr. Swecker is attempting to overturn longstanding judicial and Commission precedent regarding avoided cost determinations.

23. On September 9, 2004, NRECA filed a supplemental request for rehearing.

⁵ Midland also argues that, although Mr. Swecker apparently did not like the Iowa district court's ruling, he never bothered to appeal it and instead is now engaging in a collateral attack of that decision.

⁶ *Gregory Swecker v. Midland Power Cooperative*, 87 FERC ¶ 61,187 at 61,722 (1999) (citing *Cuero Hydro Electric, Inc. v. City of Cuero*, 85 FERC ¶ 61,124 at 61,467 (1998)).

Discussion

A. Procedural Issues

24. Central College filed a motion to intervene out of time. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention.⁷ Central College has not met this higher burden of justifying its late intervention.

25. We will reject NRECA's request to supplement its request for rehearing as we have no authority to accept materials in support of rehearing if such materials are filed after the 30-day statutory deadline for submitting materials in support of rehearing.⁸

B. Settlement Agreement and Requests for Rehearing

26. In the November 19 Enforcement Petition Order, we encouraged the parties to settle this matter. With the aid of the Commission's Dispute Resolution Service, settlement was achieved. Settlement was certainly the best resolution for this dispute between Mr. Swecker and Midland, and we congratulate both, as well as our Dispute Resolution Service, for reaching settlement given the protracted and sometimes bitter history between the parties.

27. The Agreement constitutes a reasonable resolution of this proceeding, is in the public interest, and will be approved.

28. Because the Agreement resolves the outstanding issues in this proceeding, we will terminate the enforcement proceeding ordered against Midland. However, we decline to vacate the November 19 Enforcement Petition Order. The determination to vacate an order is an equitable one, requiring exceptional circumstances.⁹ We are not persuaded that Midland has shown exceptional circumstances requiring vacatur of the previous

⁷ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC 61,250 at P 7 (2003).

⁸ See, e.g., *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177 at 61,623 (1991); *Public Service Company of New Hampshire, New England Power Company*, 56 FERC ¶ 61,105 at 61,403 (1991).

⁹ *Vermont Yankee Nuclear Power Corp.*, 96 FERC ¶ 61,286 (2001); *Town of Neligh, et al.*, 94 FERC ¶ 61,075 at 61,348 (2001).

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

29. After the parties executed the Agreement, in which the parties 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 this year, the Iowa Supreme Court issued an order in which it found that Iowa's net metering requirements were applicable to Midland,¹¹ and required Midland to file updated avoided cost data.¹² Given the Agreement and the Iowa Supreme Court decision, we believe that the requests for rehearing of the Commission's November 19 Enforcement Petition Order are moot and we will accordingly dismiss them.

The Commission orders:

(A) The Agreement is hereby approved, as discussed in the body of this order.

(B) The enforcement proceeding ordered against Midland in the November 19 Enforcement Petition Order is hereby terminated, as discussed in the body of this order.

(C) The requests for rehearing of the November 19 Enforcement Petition Order are hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁰ *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 269 (D.C. Cir. 1999) (quoting *Pacific Gas & Electric Co. v. FERC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

¹¹ *Windway Technologies, et al. v. Midland Power Cooperative*, 2004 Iowa Sup. LEXIS 213,*8 (July 21, 2004).

¹² *Id.* *12.