UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Gregory R. Swecker	)	
&	)	
Beverly F. Swecker	)	
Complainants	)	
	)	
v.	)	**Docket Nos. EL11-39-000**
	)	**EL11-39-001**
	)	
Midland Power Cooperative	)	
&	)	
State of Iowa	)	
Respondents	)	

REQUEST FOR REHEARING AND CLARIFICATIONS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE

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REQUEST FOR REHEARING AND CLARIFICATIONS OF THE NATIONAL RURAL ELECTRIC COOPERATIVE

Pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Commission's Rules and Practice of Procedure,[2] the National Rural Electric Cooperative ("NRECA") hereby requests rehearing ("Request for Rehearing") of the order issued by the Federal Energy Regulatory Commission ("FERC" or the "Commission") on December 15, 2011 in the above-captioned proceeding.[3] In the December 15th Order, the Commission found that Midland's disconnecting retail service to the qualifying facility ("QF") owned by Gregory & Beverly Swecker (the "Complainants") – who refuse to pay Midland's bill for such service – was inconsistent with Midland's obligations under the

[1] 16 U.S.C. § 824l(a) (2006). NRECA notes that the American Public Power Association ("APPA") has filed today a motion to intervene out of time in which it notes support of this NRECA Request for Rehearing. If APPA's motion to intervene out of time is granted, then this Rehearing Request should be considered a Joint Request of both APPA and NRECA.

[2] 18 C.F.R. § 385.713 (2010).

[3] *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Coop. and State of Iowa*, 137 FERC ¶ 61,200 (2011) ("December 15th Order").

Public Utility Regulatory Policies Act of 1978, as amended ("PURPA"). The December 15th Order also directed the parties to dispute resolution on the issue of Midland's avoided cost rate. This Order goes beyond a notice to enforce or not to enforce PURPA and makes a final decision on the disconnection issue. Although NRECA has not been involved in the discussions between Midland and the Complainants, NRECA has reviewed the December 15th Order and various filings in the docket, and has been a party to prior proceedings involving Midland and the Complainants. The Commission should grant rehearing of the December 15th Order and reaffirm its earlier Notice of Intent Not To Act[4] on the Complainants' petition,[5] because the December 15th Order is arbitrary and capricious, an unexplained departure from Commission precedent, and beyond the scope of the Commission's authority provided under PURPA. In support of this Request for Rehearing, NRECA states the following:

I. EXECUTIVE SUMMARY

The December 15th Order errs to the extent that it seeks to create new rules under PURPA requiring prior Commission approval for retail service disconnection where a QF customer fails to pay its retail electric service bills. The Commission simply does not have jurisdiction under PURPA over retail disconnection. As discussed in Section V.A.(2), the Commission stated in two prior proceedings involving the Complainants and Midland that it has no such jurisdiction over retail disconnection. Even if the Commission did have jurisdiction over retail disconnection, the December 15th Order improperly seeks to amend the Commission's PURPA regulations to establish this new

[4] *Gregory R. Swecker, et al.*, 136 FERC ¶ 61,085 ("Notice of Intent Not To Act"); *aff'd* 137 FERC ¶ 61,035 (2011).

[5] *Gregory R. Swecker, et al.* Petition for Enforcement, Docket No. EL11-39-000 (May 6, 2011) ("Petition").

requirement without following the notice and comment rulemaking process required under section 210(a) of PURPA and seeks to impose this new requirement retroactively upon Midland.[6] Moreover, the December 15th Order ignores the Commission-approved 2004 Agreement between the parties,[7] which expressly permits retail service disconnection of the Complainants for non-payment.

The PURPA section cited by the December 15th Order does not provide a basis for this newly required approval for retail disconnection. Specifically, Section 210(m) of PURPA deals with complete termination of the PURPA purchase and sale obligations that can only be reinstated after a QF applies to the Commission.[8] Based on NRECA's review,[9] Midland is not seeking termination of its sale obligation to Complainants or any other QF and is actually continuing to offer to sell such service to the Complainants, while continuing to provide this service to the other QFs on its system. Midland also continues to purchase power from QFs, including from the Complainants.

PURPA does require utilities to sell retail back-up service to QFs, but does not require that they provide such service for free. For example, under the Commission's rate/tariff regulations, a "sale" requires the customer to pay or compensate the supplier for such service.[10] If the Complainants refuse to pay their bill, then they are refusing to purchase the offered service. Clearly rules regarding termination of the PURPA sale obligation under section 210(m) do not apply to Midland's disconnection of the

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6 16 USC § 824a-3(a). *See also infra* Section V.A.

7 "Agreement for Electric Service to a Qualifying Facility and for Purchase of Surplus Demand and Energy from a Qualifying Facility", dated as of April 14, 2004, at Sections 5, ("2004 Agreement") attached as Exhibit A to Answer to Complaint of Midland Power Coop., Docket No. EL11-39-000 (June 3, 2011) ("Midland Answer").

8 *See* 16 USC 824a-3(m); *and* 18 CFR §§ 292.312 and 313.

9 *See infra*. n. 17.

10 *See* 18 CFR § 35.2(a).

Complainants. In addition, it is improper under section 210(h) of PURPA for the Commission to enforce a new rule where it lacks underlying jurisdiction, or where, even if the Commission had jurisdiction, the rule was not properly promulgated under section 210(a) of PURPA. In no case should such a new rule apply retroactively to Midland.

Further, section 210(m) of PURPA, as implemented by Order Nos. 688 and 688-A, preserves the rights and remedies under existing QF contracts entered into prior to the Energy Policy Act of 2005 ("EPAct 2005"). The 2004 Agreement predates the enactment of EPAct 2005, when section 210(m) was added. So even if section 210(m) did apply to retail service disconnection, which it does not, the Commission must honor the provisions of the 2004 Agreement, which explicitly allow Midland to disconnect the Complainants to remedy their non-payment for retail service.[11]

The December 15th Order also fails to take into account that the QF in question is being served under the same retail service rate schedule as all other QF customers of Midland, and that the Iowa Utilities Board (the "IUB") expressly found that Midland's disconnection of retail service to the Complainants was appropriate and consistent with all state requirements for disconnecting retail service. Moreover, as Midland has noted in its filings, it relied on prior Commission orders involving the same parties where the Commission stated it had no jurisdiction over retail service disconnection.

The crux of the underlying dispute is that the Complainants refuse to pay their retail service bill to Midland, because they claim they are entitled to credits for power sold based on a rate far in excess of Midland's avoided cost rate. The December 15th

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[11] *See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. &Regs. ¶ 31,233 at PP 14 and 205 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008). 16 USC 824a-3(m)(6); *and* 18 C.F.R. § 292.314.

Order directed the parties to DRS to address Midland's avoided cost rate, but failed to address Midland's arguments why its avoided cost rate is proper. Midland noted that its rate is based on the Iowa district court's decision that set Midland's avoided cost rate and the methodology to be used; is in the 2004 Agreement between the parties that incorporated the Iowa court's findings and under which the rate has been escalated since 2004; and was upheld in the recent IUB orders. Failing to account for these relevant points is in error, and the Commission should clarify that Midland's actions were appropriate in light of Midland's reasonable reliance on its contractual commitments to Complainants and the relevant Commission and state precedent.

II. PROCEDURAL HISTORY

A. Description of the NRECA

As discussed in NRECA's motion to intervene in this docket,[12] NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states, or 12 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA members generate approximately 50 percent of the electric energy they sell and purchase the remaining 50 percent from non-NRECA members. The vast majority of NRECA members are not-for profit, consumer-owned cooperatives. NRECA's members also include approximately 66 generation and transmission ("G&T") cooperatives, which generate and transmit power to 668 of the 846 distribution cooperatives. The G&Ts are owned by the distribution cooperatives they serve. The remaining distribution

[12] Doc-less Motion to Intervene of National Rural Electric Coop. Assn., Docket No. EL11-39-000 (May 26, 2011).

cooperatives that are not members of G&Ts receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

NRECA and its members have a long history of supporting renewable energy and QFs. Many NRECA members purchase their electric energy from QFs. In Iowa, while rural electric cooperatives ("RECs") serve approximately 15% of the customers in the state, such cooperatives have more QFs as customers and power suppliers than Iowa's investor owned utilities ("IOUs"), who serve approximately 70% of the electric customers in Iowa.[13] The following chart summarizes the comparison between these IOUs and RECs:[14]

[13] Investor Owned Electric Utilities Statement of Income from Iowa Electric Operations For the Year Ended December 31, 2010, *available at* http://www.state.ia.us/government/com/util/docs/misc/annual_reports/Electric/2010%20Electric.xls (last visited January 16, 2012).

[14] *See* MidAmerican Energy Company, Alternate Energy Production Annual Report 2010, Docket No. AEP-2011-1511 (March 30, 2011), *available at* https://efs.iowa.gov/efiling/groups/external/documents/docket/063373.xlsx; *and* Interstate Power and Light Company, Alternate Energy Production Annual Report 2010, Docket No. IAC-2011-1511 (March 30, 2011), *available at* https://efs.iowa.gov/efiling/groups/external/documents/docket/062802.pdf (showing that MidAmerican Energy Company and Interstate Power & Light Company each has approximately 60 MW in Alternate Energy Production/QF capacity). REC data was gathered from information from the Iowa Association of Electric Cooperatives. NRECA did not previously believe that the chart above would be relevant to the proceeding. However, in light of the December 15th Order, NRECA believes it may assist the Commission in its review. Accordingly, NRECA provides this chart for the Commission's consideration.

QF Interconnections as of 12/31/10					
	MidAmerican	IPL	REC	Total IOU and REC	Percentage
<10 kW	37	4	65	106	37.2%
10 - 50 kW	17	30	62	109	38.2%
51 - 100 kW	6	4	30	40	14.0%
>100 kW	3	22	5	30	10.5%
TOTAL	63	60	162	285	100%
	*	*	**		

* Source: IOU filings with IUB.

** REC data from information gathered by the Iowa Association of Electric Cooperatives.

*** Municipal interconnection data was not readily available.

REC Interconnections by year	
Prior to 2008	39
2008	5
2009	45
2010	73

B. Description of the current proceeding

As noted above, the Complainants filed a petition for PURPA enforcement in the above-captioned proceedings, seeking a higher-than avoided cost rate. In response to this Petition, the Commission issued its Notice of Intent Not To Act, which it reaffirmed after the Complainants' request for reconsideration.[15]

Subsequently, in response to Midland's notices to the Complainants that they would disconnect their retail electric service if the customers continued to fail to pay their retail service bills, the Complainants made filings in the above-captioned dockets

[15] *See* Petition; *and see* Notice of Intent Not To Act; *aff'd* 137 FERC ¶ 61,035 (2011).

claiming that disconnection was improper.[16] Midland responded to these filings, explaining its compliance with IUB regulations on disconnection and Midland Tariff provisions, the IUB order permitting Midland to disconnect, the provisions in the 2004 Agreement with the Complainants allowing for customer retail disconnection in the event of non-payment, and the Commission's prior statements in 1999 and 2006 that it did not have jurisdiction over retail disconnection.[17] NRECA had been a party to that earlier 2006 proceeding wherein the Commission stated that it had previously found that it lacked jurisdiction over disconnection.[18] After review of the disconnection issues presented in the Complainants pleadings in this above-captioned proceeding, the Commission issued its December 15th Order, finding that the disconnection was inconsistent with PURPA and setting the avoided costs for dispute resolution. However, for the reasons explained below, the December 15 Order was in error, and NRECA therefore requests rehearing and clarification.

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16 *See* Supplemental Information and Request for an Injunction against Disconnection, Docket No. EL11-39-001 (Oct. 11, 2011) (filed the same day as the Commission's order affirming the original Notice of Intent Not To Act in Docket No. EL11-39); Supplemental Information / Request, Docket No. EL11-39-001 (Oct. 25, 2011); Supplemental Information Request for Order for Reconnection, Docket No. EL11-39-001 (Oct. 27, 2011); Supplemental Information and Second Request, Docket No. EL11-39-001 (Oct. 31, 2011); Gregory R. Swecker Request, Docket No. EL11-39-001 (Nov. 10, 2011); Supplemental Information / Request of Gregory R. Swecker, Docket No. EL11-39-001 (Nov. 14, 2011); Report/Form of Gregory R. Swecker, Docket No. EL11-39-001 (Dec. 09, 2011); *and* Response to Midland, Docket No. EL11-39-001 (Dec. 13, 2011). (The sizeable list of these repetitious and incorrect filings by the Complainants, also demonstrates the need for Commission clarification that Midland's avoided cost rate and actions were appropriate, as discussed herein, in order to avoid future litigation).

17 Midland Power Cooperative's Response to Notice of Threat of Disconnection, Docket No. EL11-39-001 (Oct. 19, 2011); Midland Power Cooperative Response to Notice of Disconnection, Docket No. EL11-39-001 (Nov. 8, 2011); Midland Power Cooperative Letter re: Clarification regarding avoided cost data, Docket No. EL11-39-001 (Nov. 14, 2011); Midland Power Cooperative Response to Dec. 9 Filing by Complainants, Docket No. EL11-39-001 (Dec. 9, 2011); *and* Answer to Pleading/Motion of Midland Power Cooperative, Docket No. EL11-39-001 (Jan. 3, 2011).

18 *See e.g.* NRECA Request for Rehearing, Docket No. EL05-92-001, p. 5 (July 6, 2005). *Gregory Swecker v. Midland Power Coop., et al.*, 114 FERC ¶ 61,205 at P6 (2006).

III. STATEMENT OF ISSUES

In accordance with 18 C.F.R. § 385.713(c)(2), NRECA specifies the following issues:

1. Whether the December 15th Order is arbitrary, capricious, an abuse of discretion, an unexplained departure from precedent, not in accordance with the law, and in excess of its statutory jurisdiction because the Commission does not have jurisdiction over retail disconnection, because the December 15th Order seeks to create new rules requiring prior approval for retail disconnection of customers in the event of non-payment without following the statutorily required rulemaking process under PURPA, and because the December 15th Order seeks to enforce a new rule on retail service disconnection not properly promulgated under PURPA and seeks to apply it retroactively to Midland.[19]

2. Whether the December 15th Order is arbitrary, capricious, and an abuse of discretion due to its failure to provide an adequately understandable and reasoned rationale for its decision, its failure to acknowledge that the dispute is governed by a Commission approved settlement between the parties (the 2004 Agreement) that expressly allows Midland to disconnect retail service to the Complainants in case of non-payment, and its failure to address the other relevant precedent raised by Midland that support its action, such as the IUB regulations, Midland Tariff provisions, an IUB order expressly permitting the disconnection at issue, and prior Commission statements that it lacks jurisdiction over disconnection of retail service to QFs, which all underscore the reasonableness of Midland's disconnection actions.[20]

3. Whether the December 15th Order is arbitrary, capricious, an abuse of discretion, not in accordance with the law, and an unexplained departure from precedent, to the extent that it fails to take into account and place weight upon Midland's paying an avoided cost rate that is consistent with the 2004 Agreement and related Iowa and Commission precedent.[21]

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[19] 5 U.S.C. § 706(2)(A)(2006); 16 USC §824a-3(a), (h), and (m)(6). *Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1149 (D.C. Cir. 1980) ("it is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute."); *Nat'al Ass'n of Regulatory Util. Comm'ers* v. FCC, 533 F.2d 601, 617 (D.C.Cir.1976); *and Real v. Simon*, 510 F.2d 557, 564 (5th Cir. 1975) ("There can be no doubt that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations.").

[20] 5 U.S.C. § 706(2)(A)(2006); *G.I. Trucking v. United* States, 708 F.2d 1421, 1423 (9th Cir. 1983) (failure of agency to adequately explain the reasons for its action required the action to be set aside); *PSEG Energy Res. & Trade LLC v. FERC* 10-1103, 2011 WL 6450762 (D.C. Cir. Dec. 23, 2011) (Commission's failure to respond to "facially legitimate objections" rendered its decision arbitrary and capricious); *PPL Wallingford Energy LLC* v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers* v. FERC, 254 F.3d 289, 299 (D.C. Cir. 2001)).

[21] *Id. See also* 18 C.F.R. § 292.304(a)(2) and (b)(2) (2011); *Am.Paper Institute, Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *Conn.Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1039 (D.C. Cir.

(continued...)

IV. SPECIFICATION OF ERRORS

In accordance with 18 C.F.R. § 385.713(c)(1), NRECA specifies the following errors:

1. The December 15th Order erred by attempting to amend its PURPA regulations to encompass disconnection of retail service to QFs for non-payment, even though the Commission has no jurisdiction under PURPA over such retail disconnection issues and the Commission stated in two prior disputes involving the Complainants that that it does not have jurisdiction over disconnection.

2. The December 15th Order erred by acting beyond the scope of its statutory jurisdiction. In any event, to create a new rule under PURPA, such as the prior approval requirement for retail service disconnection in the December 15th Order, the Commission is required to follow the notice and comment procedures required under section 210(a) of PURPA.

3. The December 15th Order erred by finding that section 210(m) of PURPA applies to disconnections of retail service for a customer's non-payment, even though neither the termination of the PURPA sale obligation under section 210(m) nor any other provision of PURPA applies to this proceeding, because Midland is not seeking to terminate its sale obligation and continues to offer to sell to the Complainants. The Complainants have rejected Midland's offer to sell, through their refusal to pay for this retail service.

4. The December 15th Order erred by its apparent requirement that Midland provide retail electric service to the Complainants without payment, while PURPA instead requires Midland to *sell* to the Complainants. A sale clearly requires the Complainants to pay Midland for the service provided.

(...continued)

2000); *Greensboro Lumber Co. v. Ga.Power Co.*, 643 F. Sup. 1345, 1368-69 (N.D. Ga. 1986), aff'd, 844 F.2d 1538 (11th Cir. 1988); *Conn. Light & Power*, 70 FERC ¶ 61,012 at 61,029, n. 46 (1995); *Roger and Emma Wahl v. Allamakee-Clayton Elec. Coop.*, 115 FERC ¶ 61,318, *reh'g denied*, 116 FERC ¶ 61,134 (2006) ("*Allamakee*") (providing that a utility is not required to pay more than its avoided cost rate for QF power). *See also, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA*, Order No. 69, FERC Stats. & Regs. Regulation Preambles 1977-1981 ¶ 30,128 at 30,866 (1980) (stating, "[t]he utility's avoided incremental costs (and not average system costs) should be used to calculate avoided costs."), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160, *aff'd in part and vacated in part, Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir 1982), rev'd in part, *Am. Paper Institute, Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983); *and Western Farmers Elec. Coop*., 115 FERC ¶ 61,323 at n. 11 (2006) (providing that average costs should not be the basis for an all-requirements customer's avoided cost rate). *See also Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 53 Fed. Reg. 9331 (Mar. 22, 1988), 53 Fed. Reg. 31,882 (Aug. 22, 1988), FERC Stats. & Regs. [1988-1998] ¶ 32,457 at n.91 (1988) (stating "The avoided cost rate paid by the full requirements customer ought to equal the supplying utility's avoided cost"); *North Little Rock Cogeneration, L.P. and Power Sys., Ltd. v. Entergy Servs., Inc. and Arkansas Power & Light Co., Entergy Servs., Inc.*, 72 FERC ¶ 61,263 at n.4 (1995); *Allamakee*, at P 10; and *Western Farmers Elec. Coop.*, 115 FERC ¶ 61,323 at P 27 (2006). *See also infra* Section V.B.

5. The December 15th Order erred by finding that Midland's disconnection actions were inconsistent with PURPA, while section 210(h) of PURPA only provides the Commission with limited authority to bring enforcement actions in federal district court of rules properly promulgated under section 210(a) of PURPA. As the prior approval requirement in the December 15th Order was not the subject of a 210(a) rulemaking, enforcement of this new requirement and application of it retroactively to Midland are improper.

6. The December 15th Order erred through its failure to honor the rights and remedies under the 2004 Agreement to disconnect retail electric service for non-payment, even though section 210(m) of PURPA preserves the rights and remedies under existing, pre-EPAct 2005 contracts like the 2004 Agreement.

7. The December 15th Order erred by its failure to acknowledge that the dispute is governed by an existing Commission-approved settlement, thus encouraging plaintiffs to re-litigate previously settled disputes.

8. The December 15th Order erred by failing to explain adequately the rationale behind its determination that Midland is required to seek prior approval to disconnect the Complainants for their failure to pay their retail electric service bill, and by failing to address Midland's arguments why its disconnection actions were proper in light of the specific circumstances involved.

9. The December 15th Order erred to the extent that it would find that Midland's avoided cost rate for QF power is improper.

V. ARGUMENTS

A. PURPA does not require utilities to seek prior approval to disconnect retail service to individual QFs in non-payment situations.

1. Imposing a new rule that prior approval is required for retail service disconnection due to customer non-payment is inconsistent with PURPA.

The December 15th Order at Paragraphs 28 – 39 imposes a new rule, requiring electric utilities to first obtain FERC approval before they can disconnect a retail customer which refuses to pay its electric bill. While not completely clear, the Commission seems to require that before Midland could disconnect its retail service to

Complainants due to non-payment, Midland must first seek prior Commission approval under section 210(m).[22]

The December 15th Order is arbitrary and capricious, not based on reasoned decision making, and non-compliant with section 210(a) of PURPA to the extent it establishes a new requirement requiring Commission pre-approval for disconnection of retail service customers who refuse to pay their bills per tariffs on file with the state commission.[23]

a. Neither Section 210(m) of PURPA nor any other PURPA rule requires prior Commission approval for retail disconnection for nonpayment.

Neither section 210(m) nor any other of the Commission's PURPA waiver requirements apply here,[24] because Midland is not seeking termination or waiver of its purchase or sale obligations under PURPA, with regard to all QFs or any individual QF. Section 210(m) of PURPA and Order No. 688, refer to termination of the sale obligation, not to a service disconnection easily and immediately remedied by the customer's simple payment of their bills.[25] Midland seeks to disconnect a single customer who refuses to pay his retail service bill, calculated according to the same rate for retail service that all other QFs on Midland's system pay.

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22 *See* the December 15th Order at PP 1, and 28-39.

23 *See Motor Vehicle Ass'n of U.S. v. State farm Mut. Auto Ins. Co*., 463 U.S. 29, 54-57 (1983); *Edison Mission Energy, Inc. v. FERC,* 394 F.3d 964, 968 (D.C. Cir. 2005); *Am. Gas Ass'n v. FERC,* 593 F.3d 14, 19-20 (D.C. Cir. 2010); *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1115-1116, 1121 (D.C. Cir. 2002); *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1020-22 (DC Cir. 1999); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) (regarding the need for explanation in reasoned decision-making); *and Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1149 (D.C. Cir. 1980) ("it is axiomatic that no order or regulation issued by an administrative agency can confer on it any greater authority than it has under statute."). *Supra* n. [20 and 21].

24 *See* 16 USC § 824a-3(m) and 18 CFR §§ 292.310 and 312.

25 *Id.*; Order No. 688, at PP 200-202; *and* Order No. 688-A, at P 123-127

b. PURPA does not require utilities to give retail electric service away for free.

As the December 15th Order notes,[26] PURPA requires utilities to "sell" retail back up service to QFs.[27] However, PURPA does not require utilities to give retail service away for free. As the Commission's rate/tariff regulations make clear, "selling" means the exchange of electric service in return for some form of compensation.[28] Such sale obligation thus requires that the QF customer pay for such retail service. QFs should not be able to shirk their obligations to pay for service under PURPA, and then complain when such service is disconnected.

c. Section 210(h) of PURPA limits the Commission's enforcement authority to PURPA rules properly promulgated under section 210(a).

The December 15th Order found that Midland's disconnection actions were inconsistent with PURPA, stating that Midland was first required to seek Commission approval to terminate or waive Midland's PURPA sale obligation.[29] The Commission does not have authority over retail service disconnection. The December 15th Order thus appears to establish a new requirement for prior approval for retail service disconnection where a customer refuses payment, in an area where the Commission does not have jurisdiction over the matter.

Aside from the Commission's lack of authority under PURPA over retail disconnection, even if there were such jurisdiction, in order to create the new requirement

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[26] December 15th Order, at P 29.

[27] *See* 18 CFR § 292.303(b).

[28] *See* 18 CFR § 35.2(a) (stating, "*Electric service* shall include the utilization of facilities owned or operated by any public utility to effect any of the foregoing sales or services whether by leasing or other arrangements. As defined herein, *electric service* is without regard to the form of payment or compensation for the sales or services rendered ….") (emphasis added).

[29] December 15th Order, at PP 1, and 28-39.

for prior approval for such disconnection, the Commission would be required to follow the formal notice and comment rulemaking procedures required under Section 210(a) of PURPA. As the new prior approval requirement was not enacted through such a process, enforcement of the requirement is improper because section 210(h) of PURPA only provides the Commission with limited authority to bring enforcement actions in federal district court of rules properly promulgated under section 210(a) of PURPA.[30] In no case should such a new rule apply retroactively to Midland or any other electric utility.

d. PURPA preserves rights and remedies under existing contracts like the 2004 Agreement.

NRECA also notes that the 2004 Agreement between the parties makes clear that the Complainants are to pay for retail back up service per the rate schedule attached to the contract, and that Midland has demonstrated that such rate schedule is on file with the IUB.[31] The 2004 Agreement also reflects Midland's right to disconnect as a remedy for the Complainants' non-payment of their retail service bills. For example, Section 9 of the 2004 Agreement states:

> The notice of pending disconnection for failure to pay bills shall be a written notice setting forth the reason for the notice and the final date by which the account is to be

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30 16 USC § 824a-3(h)(1) (stating, "For purposes of enforcement of any rule prescribed by the Commission under subsection (a) with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act [16 USCS §§ 824 et seq.], such rule shall be treated as a rule under the Federal Power Act…") (section 210(h)(2) also permits the Commission to bring an enforcement action against any state regulatory authority or non-regulated entity failing to adopt a PURPA implementation plan consistent with the Commission's PURPA rules, however this rule does not apply in this case as Midland has a proper PURPA implementation plan). *See also* 16 USC § 825(m)(a) (stating also that "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this [FPA] …it may in its discretion bring an action in the proper District Court of the United States….") (also demonstrating that the federal courts, and not the Commission should be the enforcer).

31 *See* 2004 Agreement, at Section 5; *and* Midland Answer at p. 5; *and Midland Power Coop. Response*, Docket No. EL11-39-001 (Oct. 19, 2011).

> settled or other specific action taken. Any such disconnection for failure to pay shall be consistent with applicable state law and Iowa Utilities Board regulations…. The final date for disconnection shall not be less than twelve (12) days after the notice is rendered. Discontinuance of service shall not relieve the Member-Consumer of any of its obligations under this Agreement.[32]

Even if section 210(m) did apply to retail service disconnection due to non-payment, the December 15th Order's failure to honor the rights and remedies under the 2004 Agreement is inconsistent with section 210(m)(6) of PURPA which states:

> Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval … to purchase electric energy or capacity from or to sell electric energy or capacity to a qualifying cogeneration facility or qualifying small power production facility under this Act (including the right to recover costs of purchasing electric energy or capacity).[33]

The 2004 Agreement was in existence and accepted by the Commission prior to the EPAct of 2005 and qualifies for the savings clause under the Commission's PURPA rules. Therefore, the December 15th Order errs by failing to mention section 210(m)(6) of PURPA and to honor and preserve the 2004 Agreement and its provisions permitting disconnection of retail service in non-payment situations.

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[32] Section 9 of the 2004 Agreement.

[33] 16 USC 824a-3(m)(6); *see also* Order No. 688, at PP 14 and 205; *and* 18 C.F.R. § 292.314. *See also Papago Tribal Util. Auth.*, 723 F.2d at 955 ("In the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances."); and *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 (D.C. Cir. 2003) (internal citations omitted) ("In performing this task [of determining the plain meaning of a contract], [we] should construe the contract as a whole so as to give meaning to all of the [contract's] express terms."); *see also Southern Co. Servs.*, 353 F.3d at 35 ("Contracts must be read as a whole, with meaning given to every provision.") (internal citations omitted). The Commission should honor the unambiguous terms of the 2004 Agreement.

2. Commission precedent states that disconnection is not within its jurisdiction.

The new prior approval requirement is particularly inappropriate when applied to Midland, who has stated in filings in this docket that it relied on the Commission's 2006 "Order Granting Reconsideration and Giving Notice of Intent Not to Act" in Docket No. EL05-92 ("the 2006 Order"), involving Midland and the Complainants, where the Commission stated that "disconnection was not a matter within its jurisdiction."[34] The Commission referenced a 1999 Order Dismissing Petition for Enforcement Action ("1999 Order") in which it concluded that "We [the Commission] point out that the matter of the disconnection appears to be a matter within the authority of the IUB."[35] The disconnection issue arose in that 1999 proceeding, because as here, the Complainants refused to pay their bills for retail electric service and Midland disconnected them for this non-payment.[36] The 1999 Order's disclaimer of jurisdiction, referenced again in the 2006 Order (post EPAct of 2005), therefore occurred under the same circumstances as those involved in this proceeding.

The 2006 Order also cited to a prior case involving disconnection of a QF where the Commission chose not to act, stating that, "the disconnection does not appear to be inconsistent with any of our regulations implementing PURPA. The regulations are clear

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[34] *See Gregory Swecker v. Midland Power Coop., et al.*, 114 FERC ¶ 61,205 at P 6 ("2006 Order"), *order denying reconsid.*, 115 FERC ¶ 61,084 (2006) (citing *Gregory Swecker v. Midland Power Coop.*, 87 FERC ¶ 61,187, at 61,722 (1999) ("1999 Order")).

[35] 1999 Order, at 61,722 (1999).

[36] *Id*., at 61,720.

that the obligation of an electric utility to purchase QF-generated power and to interconnect with a QF is not absolute."[37]

The 2006 Order was issued after the enactment of EPAct 2005. Though the 2006 Order referenced EPAct 2005 with respect to a different issue (net metering), it does not mention any new requirement for Commission approval of retail service disconnection due to non-payment in light of EPAct 2005 (which added section 210(m) to PURPA), even though this issue was discussed in the description of the factual disputes between the parties and raised in NRECA's 2005 Request for Rehearing in that docket.

NRECA's 2005 Request for Rehearing in that docket, filed prior to the Commission's 2006 Order reversing the earlier order in that docket that initiated enforcement proceedings, criticized the earlier order's failure to acknowledge IUB findings on disconnection. The 2005 NRECA Request for Rehearing stated, "The Order appears to rely on the fact that Midland has twice disconnected Complainant's meter without acknowledging that the IUB Staff found that Complainant had inappropriately refused to pay Midland for service and had even been diverting power from Midland."[38]

Therefore, it appears that Midland reasonably relied on the Commission's statements in the 1999 Order and 2006 Order that disconnection falls within the jurisdiction of the IUB, rather than the Commission. Those 1999 and 2006 Commission statements were made under virtually the same circumstances as those involved in the present proceeding and should be upheld. Moreover, the Notice of Intent Not To Act in

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[37] *Cuero Hydro Electric, Inc. v. City of Cuero, Texas*, 77 FERC P 61,114 (1996), *reconsid. denied,* 85 FERC P 61,124 (1998)). Cited to in the 2006 Order at n. 6.

[38] NRECA Request for Rehearing, Docket No. EL05-92-001, p. 5 (July 6, 2005). The Commission did not rule on either NRECA's or Midland's rehearing requests, finding them moot in light of its acceptance of the 2004 Agreement. *See* 2006 Order at P 10.

this proceeding to grant the Complainants' requested remedy of a Commission order prohibiting Midland disconnecting them.[39] This was not approval to disconnect, of course, but did make it even more reasonable for Midland to rely on the Commission's statement in the 2006 Order disclaiming jurisdiction.

3. Midland's disconnection actions appear consistent with IUB precedent.

Midland's actions also seem consistent with the IUB's May 27, 2011 order that clearly refused to grant the Complainants a stay of Midland's disconnection procedures and stated that the Complainants could avoid disconnection by paying their bill. The IUB further noted that it would be unfair for Midland's other retail member-consumers to subsidize Midland's service to a non-paying customer like the Complainants.[40] As the IUB stated:

> Mr. Swecker also asked that his electric service not be discontinued for some indefinite period. The Board will treat this request as a request for stay of disconnection….
>
> For reasons set forth in the Board's April 22, 2011, order denying Mr. Swecker's request for formal proceedings and this order, the Board believes that Mr. Swecker has little likelihood of succeeding on the merits of his position. In addition, while Mr. Swecker could suffer harm from disconnection, there is no allegation or evidence that such harm would be irreparable and, <u>in any event, Mr. Swecker can avoid this harm by paying his electric bill</u>. <u>If a stay were granted, Midland and its member-consumers would suffer harm because they would absorb the cost of providing service to Mr. Swecker</u>. There are no public interest factors which have been brought to the Board's attention that would support a stay. Thus, none of the four factors supports granting a stay. Based on this analysis of

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[39] Notice of Intent Not to Act, at PP 1-2.

[40] *See also Gregory Swecker v. Midland Power Coop.*, Docket No. FCU-2011-0008, 2011 Iowa PUC LEXIS 123 (Apr. 22, 2011); *reh'g denied*, 2011 Iowa PUC LEXIS 165, at *10-13 (May 27, 2011).

> the four-factor test, the Board will deny the request to stay disconnection.[41]

The Office of Consumer Advocate refused to intervene on Complainants' behalf in that IUB proceeding.[42] It is also unjust, unreasonable, and inconsistent with PURPA for Midland's other member-customers, including other QFs, to bear the burden of the Complainants' unpaid retail electric service bill.

4. The 2004 Agreement, approved as a settlement between the parties, expressly permitted disconnection of the Complainants' retail service for non-payment

The 2004 Agreement also represents a Commission approved settlement that resolves all of the issues raised in the above-captioned proceeding.[43] As noted above, the 2004 Agreement permits disconnection of retail service to the Complainants if they failed to pay for this service.[44] The December 15th Order's failure to honor the 2004 Agreement would discourage settlement and encourage plaintiffs to re-litigate previously settled disputes. This is against the public interest and the Commission has previously articulated a strong commitment towards honoring contracts and Commission approved settlements.[45]

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41 *Gregory Swecker v. Midland Power Coop.*, Docket No. FCU-2011-0008, 2011 Iowa PUC LEXIS 165, at *11-13 (2007) (citations omitted) (emphasis added).

42 *See* Midland Answer, at Exhibit E.

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

44 *See* Section 9 of the 2004 Agreement.

45 *See e.g., Sunoco, Inc. (R&M) v. Transcontinental Gas Pipe Line Corp.*, 111 FERC ¶ 61,400 at P 33 (2005) (stating that not to enforce the settlement agreement "would fly in the face of common sense and equity and, most importantly, would undermine the Commission's jurisdiction to enforce the sanctity of jurisdictional contracts and settlements it approves") (emphasis added); *Transcon. Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1181 (D.C. Cir. 2007) ("FERC also has had a long-term policy in favor of enforcing settlements."); and *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 407 (D.C. Cir. 2005) (stating, "Like FERC, we think it obvious that pipelines and their customers might hesitate to enter rate settlements if a subset of settling parties could later pull the rug out from under them. Accordingly, although petitioners point out that approval of the proposed agreement here could have brought significant benefits …, FERC hardly abused its discretion in holding that a strong commitment to preexisting settlements would better

(continued...)

Moreover, the December 15th Order fails to honor existing rights and remedies under the 2004 Agreement, even though section 210(m)(6) preserves existing contracts, such as the 2004 agreement. As discussed above in Section V.A., this is in error.

B. Midland's avoided cost rate appears appropriate in light of the 2004 Agreement and related Iowa and Commission precedent.

The underlying dispute involves the Complainants' request — played out now over 10 years before a number of federal and state agencies and courts — that Midland pay them a rate that far exceeds Midland's avoided costs. Their sole basis for not paying their bill is that Midland should pay for their power based on Midland's average wholesale costs, a demand which has been rejected by a state court in a case involving these same parties, and which the Commission has rejected as a basis for avoided cost rates for all-requirements customers like Midland. However, the December 15th Order errs by failing to address Midland's arguments and evidence as to why the avoided cost rate paid to Complainants is appropriate under PURPA.

Midland has placed in the record evidence showing that its avoided cost rate is consistent with Iowa and Commission precedent and the 2004 Agreement.[46] NRECA notes that Midland's avoided cost rate was reviewed and determined by an Iowa district court involving an earlier dispute with the Complainants, where the court addressed an

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(...continued)

serve the public interest than allowing modifications over the objection of one or more parties."). *See also NSTAR Elec. Co. v. ISO New England, Inc*., 120 FERC ¶ 61,261, at P 33 (providing, "Collateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, thwart the finality and repose that are essential to administrative efficiency, and are therefore strongly discouraged.").

[46] *See e.g.,* Midland Answer, at Section V.A. (discussing Midland's avoided cost rate); *and supra* n. 17.

"as-applied" PURPA claim.[47] Although the underlying dispute is the Complainants' claim for a higher than avoided cost rate based on average wholesale cost, the Iowa district court rejected it,[48] and the Commission has consistently rejected average wholesale cost as a basis for avoided cost rates of all-requirements customers.[49] The recent 2011 IUB orders refused to find that Midland's payments to the Complainants at a rate different from the rate paid to its wholesale suppliers violated Iowa code.[50] NRECA also notes that this rate (and the methodology for escalating it) is set forth in the 2004 Agreement between the parties, which, as noted above, Commission Staff helped negotiate and was approved by the Commission in 2004.[51]

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47 *Windway Techs., Inc. v. Midland Power Coop*., No. LACV25993 at 22-24 (Iowa Dist. Ct., Hamilton Co., June 18, 2002).

48 *Id.*, at * 23 (stating, "FERC's regulations indicate that it is not the average system cost which should be used to calculate avoided cost.").

49 The Complainants seek to be paid for QF power based on Midland's average wholesale cost, however, the Commission has held that the average wholesale cost is not the basis for the avoided cost rate of an all-requirements customer. *See e.g.* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, Order No. 69, FERC Stats. & Regs. Regulation Preambles 1977-1981 ¶ 30,128 at 30,866 (1980) (stating, "[t]he utility's avoided incremental costs (and not average system costs) should be used to calculate avoided costs."), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160, *aff'd in part and vacated in part, Am. Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir 1982), *rev'd in part, Am. Paper Inst., Inc. v. Am.n Elec. Power Serv. Corp.*, 461 U.S. 402 (1983) (emphasis added). *See also Roger and Emma Wahl v. Allamakee-Clayton Elec. Coop.*, 115 FERC ¶ 61,318, *reh'g denied*, 116 FERC ¶ 61,134, at P 10 (2006) (stating, "In Order No. 69, the Commission determined that the avoided cost of a full requirements customer is the avoided cost of the full requirements supplier because it is the supplier that avoids generation when the full requirements customer purchases from a QF. The Commission has consistently followed this rule."); and *Western Farmers Elec. Coop*., 115 FERC ¶ 61,323 at P 27 (2006) ("The Commission has consistently held that the avoided costs of an all-requirements customer to be those of its all-requirements supplier") (citations omitted). *See also* (rejecting average costs as the basis for Midland's avoided cost rate in the CIPCO service territory).

50 *See also Gregory Swecker v. Midland Power Coop.*, Docket No. FCU-2011-0008, 2011 Iowa PUC LEXIS 123, at *13 (Apr. 22, 2011); *reh'g denied*, 2011 Iowa PUC LEXIS 165, at *10-13 (May 27, 2011) (stating, "His argument is that he should be paid the same rate as Midland pays for its generation and transmission costs to CIPCO and Corn Belt. However, the two services are not the same. Mr. Swecker is only selling excess energy, while CIPCO and Corn Belt are selling energy, transmission, and other services. Because the services are not the same, the different rates do not establish a violation of Iowa Code § 476.21.").

51 *See* 2004 Agreement, at Section 14. *Supra* Section V.A.

Thus, it appears that Midland has acted appropriately in paying an avoided cost rate consistent with their agreement with the Complainants and with PURPA, in light of the Iowa court, IUB and Commission precedent. As a result, the Commission should re-affirm its Notice of Intent Not to Act and clarify that Midland's avoided cost rate for QF power in its CIPCO service territory is proper under PURPA. Such clarification would further the Commission's goal of preserving the sanctity of existing contracts, and the related goal of avoiding re-litigation of previously settled disputes.

VI. CONCLUSION

For the reasons set forth above, NRECA respectfully requests that the Commission accept this Request for Rehearing and Clarifications. The Commission should (i) make clear that there is no prior Commission approval required for disconnecting a QF for non-payment of its bill for retail back-up service and (ii) that Midland has paid and is paying an appropriate avoided cost rate.

Respectfully submitted,

/s/ *Richard Meyer* _____
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January 17, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rule of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing "Request for Rehearing and Clarifications of the National Rural Electric Cooperative Association" on all persons designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 17th day of January, 2012.

/s/ Candice Castaneda
Candice Castaneda