

166 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Gregory and Beverly Swecker

Docket Nos. EL14-9-002

v.

Midland Power Cooperative

Gregory and Beverly Swecker

EL14-18-002

v.

Midland Power Cooperative and Central Iowa Power
Cooperative

Gregory and Beverly Swecker

QF11-424-006

ORDER DENYING REHEARING

(Issued March 21, 2019)

1. On July 17, 2017, Gregory and Beverly Swecker (Sweckers) filed a petition requesting the Commission to take action against Midland Power Cooperative (Midland) and Central Iowa Power Cooperative (CIPCO) with regard to the Commission regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹. On February 20, 2018, the Commission denied the Sweckers' request.² On February 23, 2018, the Sweckers filed what is essentially a request for rehearing of

¹ 16 U.S.C. § 824a-3 (2012).

² *Swecker v. Midland Power Cooperative*, 162 FERC ¶ 61,146 (2018) (February 20 Order).

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the February 20 Order.³ As discussed below, the Commission denies the Sweckers' request for rehearing.

I. Background

A. Regulatory Background

2. Section 292.302 of the Commission's regulations,⁴ as relevant here, provides that a State-regulated electric utility above a certain size shall provide to its State regulatory authority and maintain for public inspection the estimated avoided cost on the electric utility's system stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next five years, and each nonregulated electric utility above a certain size shall maintain said information for public inspection.⁵ Under section 292.302, smaller electric utilities must provide comparable data sufficient to enable qualifying facilities (QF) to estimate the electric utility's avoided costs for the same periods as the larger electric utilities. Section 292.302 further provides that, if a smaller electric utility is legally obligated to obtain all of its requirements for electric energy and capacity from another electric utility, that smaller electric utility must provide the comparable data of its supplying utility and the rates at which it currently purchases such energy and capacity.⁶ Section 292.302 also provides that, should a smaller electric utility fail to provide such information on request, a QF may apply either to the State regulatory authority that has ratemaking authority over the utility or to the Commission for an order requiring the information to be provided.⁷

B. February 20 Order

3. In the February 20 Order, the Commission concluded that, based on the evidence presented in the proceeding, the Sweckers had not shown that the avoided cost

³ The Sweckers' February 23 request, which asks that the Commission "clarify" and make "correction of the record" regarding the February 20 Order, is being treated as a request for rehearing of the February 20 Order; rehearing was tolled on March 26, 2018.

⁴ 18 C.F.R. § 292.302 (2018).

⁵ 18 C.F.R. § 292.302(b)(1).

⁶ 18 C.F.R. § 292.302(c)(1).

⁷ 18 C.F.R. § 292.302(c)(2).

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information Midland and CIPCO provided⁸ to date was inconsistent with the Commission's regulations or with PURPA.⁹ In particular, the Commission noted that Attachment 1 to the Midland and CIPCO response to the Sweckers' request for cost data included a document provided to the Sweckers in January 2017. Attachment 1 contained the prices for combined energy and capacity or for energy only along with seasonality payments for 2017 and projected payments for 2018-2021. Thus, the Commission concluded that Attachment 1 demonstrated that Midland and CIPCO had provided the Sweckers the section 292.302(c)-required comparable data consistent with the requirements of section 292.302(b). Accordingly, the Commission denied the Sweckers' request.

II. Request for Rehearing and Responses

A. Sweckers' Request for Rehearing

4. In their February 23 request, the Sweckers ask that the Commission issue "an expedited order to clarify and for correction of the record."¹⁰ The Sweckers contend that the February 20 Order is in "direct conflict with the Commission's previous orders."¹¹

⁸ February 20 Order, 162 FERC ¶ 61,146 at P 25; *see* Midland and CIPCO August 7 Response at 4, Attachment 1.

⁹ February 20 Order, 162 FERC ¶ 61,146 at P 23.

¹⁰ Sweckers February 23 Request at 1.

¹¹ *Id.* at 2 (referring to orders dated May 15, 2014; June 16, 2014; December 18, 2014; April 8, 2016; and June 3, 2016; referring to an Enforcement Action issued November 19, 2003 (presumably *Swecker v. Midland Power Cooperative*, 105 FERC ¶ 61,238 (2003) (requiring Midland to enter into a contract with the Sweckers); and referring to "the latest Enforcement Order in EL18-48" (presumably *Swecker v. Midland Power Cooperative*, 162 FERC ¶ 61,072 (2018) (Notice of Intent Not to Act)). *See also* Sweckers February 23 Request Attachment (consisting of the following orders and notices: *Swecker v. Midland Power Cooperative*, 147 FERC ¶ 61,114 (2014) (Notice of Intent Not to Act); *Swecker v. Midland Power Cooperative*, 149 FERC ¶ 61,236 (2014) (order denying request for reconsideration of Notice of Intent Not to Act); *Swecker v. Midland Power Cooperative*, Docket No. ER02-1059-000 (Apr. 8, 2016) (delegated order) (Notice of Filing); *Swecker v. Midland Power Cooperative*, Docket No. ER02-1059-000 (June 16, 2014) (delegated order granting rehearing for further consideration); *Swecker v. Midland Power Cooperative*, 155 FERC ¶ 61,237 (2016) (Notice of Intent Not to Act); *Swecker v. Midland Power Cooperative*, 162 FERC ¶ 61,072 (2018) (Notice of Intent Not to Act)).

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According to the Sweckers, previously the Commission issued Notices of Intent Not to Act stating the Sweckers could proceed to the appropriate court for enforcement of PURPA. The Sweckers claim that in the February 20 Order the Commission “flipped-flopped” by issuing an order on the avoided cost data request and not issuing a “Notice of Intent Not to Act.”¹² Additionally, the Sweckers contend that “the incremental full avoided cost data is at the heart of [their] request for full [e]nforcement of PURPA . . . [and] the Commission has acted arbitrar[ily] and capricious[ly] [in its denial resulting in the] showing [of] bias by intentionally derailing [them] . . . and allowing Midland to receive unjust enrichment and ill-gotten gains from the illegal conversion of [their] QF property interest.”¹³

5. Further, the Sweckers contend that the Sweckers provided evidence of Midland’s and CIPCO’s full incremental avoided costs based on their USDA-RUS Financial and Statistical Reports (Financial and Statistical Reports)¹⁴ and evidence that Midland was not paying either Midland’s or CIPCO’s full incremental avoided cost rate as part of a scheme to fraudulently conceal and manipulate data to avoid Midland’s obligations pursuant to PURPA.¹⁵

6. According to the Sweckers, Midland’s and CIPCO’s Financial and Statistical Reports document the full incremental avoided costs of Midland and CIPCO, and Midland’s Schedule C and Attachment I¹⁶ are “merely a manipulation of data to avoid Midland’s compliance with PURPA and to avoid Midland’[s] legally enforceable obligations.”¹⁷

¹² *Id.* at 2

¹³ *Id.* We note that the fact that the Commission has not ruled in the Sweckers’ favor does not, as they instead suggest, make the Commission’s action definitionally arbitrary or capricious and does not definitionally demonstrate bias.

¹⁴ USDA-RUS Financial and Statistical Reports, Form 7, among other things, contains the rates at which Midland purchases power from CIPCO, which is updated on an annual basis.

¹⁵ Sweckers’ February 23 Request at 2.

¹⁶ Schedule C is CIPCO’s price schedule for qualifying facilities, and Attachment I is Midland’s correspondence to the Sweckers enclosing CIPCO’s avoided cost rates.

¹⁷ Sweckers’ February 23 Request at 2-3.

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7. The Sweckers also contend that Midland's Schedule C does not address a QF's option to choose between an "as available" purchase arrangement and a purchase over a specified term.¹⁸ The Sweckers assert that the February 20 Order is in error because it fails to order Midland "to provide documented data in order for a QF to determine at the QF's options in regard to the avoided costs over specified time, as required under 292.304(d) Purchases 'as available' or pursuant to a legally enforceable obligation."¹⁹

8. Additionally, the Sweckers maintain that the Commission erred in holding that section 292.302(b)'s requirement that a nonregulated electric utility maintain for public

inspection the estimated avoided cost on the electric utility's system stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next five years, does not apply to Midland.

Acknowledging that "Midland (other than [for] resale) does not exceed 500 million kilowatt-hours [of sales]," the Sweckers opine that the Commission's statement regarding the application of this regulation is erroneous.²⁰ They contend²¹ that it is "indisputable that CIPCO exceeded 500 million Kilowatt-hours over sales to Midland which subjects CIPCO to comply with 292.302(b)."²² Further, the Sweckers assert that the "Commission is in error in failing to enforce 292.302(2) [sic] in that each utility including Midland and CIPCO are subject to 292.302(b) mandatory requirements after June 30, 1982 . . . [and that] [t]he Commission must correct its order to comply with the requirement of PURPA after June 30, 1982."²³

9. Likewise, the Sweckers contend that the Commission is in error in its application of section 292.302(c) and failed to give effect to the regulation.²⁴

10. The Sweckers also contend that the February 20 Order is "arbitrary and capricious as part of Midland's scheme to avoid Midland's legally enforceable obligations in

¹⁸ *Id.* at 3. They add that Midland and CIPCO were not granted a waiver of the Commission's requirements in this regard. *Id.* at 3-4.

¹⁹ *Id.* at 8 (emphasis omitted).

²⁰ *Id.* at 6.

²¹ The Sweckers provide no documentary support.

²² *Id.* at 7.

²³ *Id.*

²⁴ *Id.* at 7-8.

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attempting to raise *res judicata* issues when the material facts provide that the Iowa District Court for Hamilton County . . . ordered that the avoided cost was to be the rate at which Midland purchases from CIPCO, and was to be updated every two years if not more often”²⁵ They also contend that the Iowa Supreme Court ordered Midland to make available to the public the rate at which Midland purchases from CIPCO and that a United States Court of Appeals “found that the Swecker’s [sic] had secured orders that the full avoided cost rate was to be the rate at which Midland purchased from CIPCO consistent with [their] regulatory rights at 18 C.F.R. 292.303(d).”²⁶

B. Midland and CIPCO’s Response

11. Midland and CIPCO did not file a formal response;²⁷ however, they submitted a letter indicating, among other things, that the February 20 Order correctly applies the Commission’s regulations with regard to avoided cost data and appropriately concludes that Midland and CIPCO have provided the necessary data with regard to the rates for power purchased from the Sweckers.²⁸

12. Midland and CIPCO argue that there is no need for the Commission to issue any clarifications or corrections to its properly-decided February 20 Order dismissing the Sweckers’ avoided cost data claims and that the Sweckers’ February 23 request should be rejected.²⁹

C. Subsequent Responses

13. The Sweckers’ responded to Midland and CIPCO, reiterating arguments raised in their February 23 request for rehearing. Both sides subsequently filed further answers to their successive pleadings.

²⁵ *Id.* at 10. *See Swecker v. Midland*, 807 F.3d 883 (8th Cir. 2015) (recapping the lengthy litigation among the parties in state court and federal court as well as before the Commission and Iowa Utilities Board).

²⁶ *Id.* at 10-11.

²⁷ Midland and CIPCO indicated in their informal correspondence their willingness to file a formal response if requested by the Commission. Midland and CIPCO Response at 1.

²⁸ *Id.* at 1.

²⁹ *Id.* at 3.

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III. Discussion

14. As an initial matter, section 713(d) of the Commission's Rules of Practice and Procedure does not permit answers to requests for rehearing.³⁰ To the extent Midland's and CIPCO's correspondence is an answer, it is hereby rejected. Subsequent pleadings by the parties are impermissible answers to answers, and are likewise rejected.³¹

15. At the outset, in response to the Sweckers' claim that we have acted inconsistently by not issuing a "Notice of Intent Not to Act" in this instance, we note that a "Notice of Intent Not to Act" is appropriately issued in the context of a Petition for Enforcement,³² and, while the Sweckers have filed such petitions in other proceedings, they filed a different petition here which warranted different Commission action.

16. As to the merits, the Sweckers assert that the Commission's findings in the February 20 Order are inconsistent with PURPA and the Commission's regulations implementing PURPA. We disagree. Nothing raised in the Sweckers' request for rehearing warrants a change to our February 20 Order. Thus, we deny the Sweckers' request for rehearing.

17. The issue in this proceeding was, and is, comparatively straight-forward: whether Midland and CIPCO have provided avoided cost and rate information consistent with the Commission's regulations. The Commission's earlier order concluded that they have, and we reaffirm that determination here.

18. The February 20 Order explained that Midland is a cooperative whose total sales of electric energy for purposes other than resale do not exceed 500 million kilowatt-hours,³³ and thus section 292.302(b) of the Commission's regulations does not itself apply to Midland.³⁴ Contrary to the Sweckers' assertion that the Commission erred in

³⁰ 18 C.F.R. § 385.713(d) (2018).

³¹ 18 C.F.R. § 385.213(a)(2) (2018)

³² For example, the May 15, 2014, June 3, 2016, and January 30, 2018 Notices of Intent Not to Act were issued by the Commission in response to petitions for enforcement filed by the Sweckers. *See supra* note 11.

³³ *Accord* Sweckers' February 23 Request at 6.

³⁴ February 20 Order, 162 FERC ¶ 61,146 at P 24; *see Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,869, (cross-referenced at 10 FERC ¶ 61,150), *order on reh'g*, Order No. 69-A, FERC Stats. & (continued ...)

this interpretation, the regulation and the record evidence support such an interpretation and application.³⁵ Once the Commission established that Midland was not subject to the provisions of section 292.302(b), the Commission properly held Midland to the provisions of section 292.302(c).

19. Specifically, section 292.302(c), in pertinent part, requires small electric utilities to provide cost data comparable to the data utilities subject to section 292.302(b) are required to provide. That is, these smaller electric utilities are to provide avoided costs stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next of five years or, with regard to an electric utility which is legally obligated to obtain all of its requirements for electric energy and capacity from another electric utility, provide the data of its supplying utility and the rates at which it currently purchases such energy and capacity.

20. The record in this proceeding indicates that Midland and CIPCO have provided the necessary data to the Sweckers. Specifically, as we explained in the February 20

Regs. ¶ 30,160 (1980) (cross-referenced at 11 FERC ¶ 61,166), *aff'd in part and vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) (relying on section 133 of PURPA, 16 U.S.C. § 2643, and section 290.101 of the Commission's regulations, 18 C.F.R. § 290.101 (1980), implementing that section of PURPA, as they then existed, explaining that section 292.302(b) is applicable to those utilities "meeting the requirements of [section 292.302(a)]," and that section 292.302(a) "applies to each electric utility whose total sales of electric energy for purposes other than resale exceeded 500 million kWh during any calendar year").

Section 292.302(a)(1), which became effective on March 20, 1980, specifies that, for subsection (b) to be applicable, a utility must make sales for purposes other than resale (i.e., retail sales) of more than 500 million kWh in a calendar year. Section 292.302(a)(2) essentially adds an extension of time to comply for certain utilities; a utility whose sales for purposes other than resale (i.e., retail sales) were over 500 million kWh and who was thus subject to subsection (b), but whose retail sales were still less than 1,000 million (i.e., one billion) kWh, did not need to comply with subsection (b) for another two years, that is, until June 30, 1982.

³⁵ *Id.*

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Order, Midland and CIPCO have provided the necessary avoided cost data over the specified time frame to the Sweckers.³⁶

21. The Sweckers' contention that the February 20 Order is in error in light of Iowa court rulings is misplaced. The Sweckers' request in this matter was for the Commission to take action pursuant to section 292.302 – Availability of electric utility system cost data. Based on the review of the record evidence, the Commission properly concluded that cost data had been provided to the Sweckers consistent with the Commission's regulations, and this interpretation does not impinge upon any state court rulings.

22. Finally, insofar as the Sweckers seek to raise issues regarding the avoided cost rate as applied, their recourse is elsewhere and is not a basis for objecting to the Commission's interpretation of its regulations in this proceeding.³⁷ Similarly, the Sweckers' concern that the Commission's interpretation of section 292.302 hinders QFs from entering into as-available purchase arrangements or legally enforceable obligations is also misplaced. The avoided cost data requirements established in the aforementioned regulation, and the Commission's orders, do not hinder electric utilities and QFs from entering into such contractual arrangements.

23. Accordingly, we deny the Sweckers' request for rehearing.

The Commission orders:

The Sweckers' request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁶ February 20 Order, 162 FERC ¶ 61,146 at P 25; *see Swecker v. Midland Power Cooperative*, 142 FERC ¶ 61,207 at P 36 (2013).

³⁷ February 20 Order, 162 FERC ¶ 61,146 at P 23 n.33.