ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

No. 13-1184

MIDLAND POWER COOPERATIVE AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: MAY 1, 2014

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

To counsel's knowledge, the parties before this Court and before the Federal Energy Regulatory Commission in the underlying agency proceeding are as listed in the brief of Petitioners.

B. Rulings Under Review:

1. Order Finding Disconnection Inconsistent With The Requirements Of The Public Utility Regulatory Policies Act Of 1978, *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, FERC Docket No. EL11-39-001, 137 FERC ¶ 61,200 (Dec. 15, 2011) ("Declaratory Order"), R. 37, JA 3; and

2. Order Denying Requests For Rehearing and Renewing Notice Of Intent Not To Act, *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, FERC Docket No. EL11-39-002, 142 FERC ¶ 61,207 (Mar. 21, 2013) ("Rehearing Order"), R. 53, JA 14.

C. Related Cases:

The orders under review in this proceeding have not previously been before this Court or any other court.

/s/ *Lisa B. Luftig*
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Attorney

May 1, 2014

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GLOSSARY

Br.	Opening Brief of Petitioner Midland Electric Cooperative, Petitioner National Rural Electric Cooperative, and Intervenor American Public Power Association
Commission or FERC	Federal Energy Regulatory Commission
Midland	Petitioner Midland Electric Cooperative
Intervenors	Intervenors Iowa Utilities Board and National Association of Regulatory Utility Commissioners
Int. Br.	Opening Brief of Intervenors Iowa Utilities Board and National Association of Regulatory Utility Commissioners
JA	Joint Appendix
P	Denotes a paragraph number in a Commission order
PURPA	Public Utility Regulatory Policy Act of 1978, as amended by the Energy Policy Act of 2005
R.	Indicates an item in the certified index to the record
Declaratory Order	*Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, Order Finding Disconnection Inconsistent With The Requirements Of The Public Utility Regulatory Policies Act of 1978, 137 FERC ¶ 61,200 (Dec. 15, 2011), R. 37, JA 3
Rehearing Order	*Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, Order Denying Requests For Rehearing And Renewing Notice Of Intent Not To Act, 142 FERC ¶ 61,207 (Mar. 21, 2013), R. 53, JA 14

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ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Gregory and Beverly Swecker own and operate a small wind facility in Iowa which generates electricity. The facility qualifies for certain regulatory treatment under the Public Utility Regulatory Policies Act of 1978 ("PURPA") – which is why it is referred to as a "Qualifying Facility." Under PURPA, the Sweckers are entitled to interconnect with, and sell power to, the local electric utility, Midland Power Cooperative ("Midland"), at avoided cost rates.

For 15 years, the Sweckers and Midland have been litigating their respective rights and obligations under PURPA. This appeal, brought by Midland and the National Rural Electric Cooperative Association (collectively, "Cooperatives"), presents to the Court just two of the many orders issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") addressing the parties' PURPA responsibilities. These two orders find only that Midland cannot disconnect at this time and that Midland – following settlement efforts and a related federal district court case – can initiate a broader termination action in the future.

The issues presented on appeal are:

1) Whether Cooperatives' challenges are ripe for this Court's immediate review, when the Commission only made initial, temporary findings that Midland's disconnection was inconsistent with agency regulations, and deferred to a future termination proceeding additional legal and factual issues;
2) Whether the Court lacks statutory jurisdiction over new arguments raised by Cooperatives, not previously made to the Commission, that seek to expand the scope of this narrow proceeding;
3) Assuming jurisdiction, whether the Commission reasonably found that Midland, on this record, had not satisfied any of the available exemptions to the

mandatory purchase and sale requirements prior to terminating service to the Qualifying Facility; and

4) Whether the Commission acted within its discretion to defer to the future termination proceeding further findings on the parties' statutory responsibilities under PURPA and the Commission's regulations thereunder.

COUNTERSTATEMENT OF JURISDICTION

As discussed in Section I of the Argument, *infra*, the Commission Orders are not ripe for this Court's immediate review. The Orders only made preliminary, narrow findings, leaving additional issues for resolution in the termination proceeding the Commission anticipated in this continuing dispute. *See Gregory and Beverly Swecker v. Midland Power Cooperative and State of Iowa*, "Order Finding Disconnection Inconsistent With The Requirements Of The Public Utility Regulatory Policies Act of 1978," 137 FERC ¶ 61,200, P 39 (2011) ("Declaratory Order"), R. 37, JA 11 ("[W]here the Sweckers have indicated that they intend to pursue the matter in Federal Court, we do not believe disconnection is justified, but must wait for the conclusion of the Sweckers' enforcement action under PURPA"), PP 41-42, JA 12 (directing the parties to see if FERC-assisted negotiations may result in a settlement, and stating that if the parties are unable to reach agreement, "the Commission will then decide what steps it will take next in this proceeding"); *Gregory and Beverly Swecker v. Midland Power Coop. and State of Iowa*, "Order

Denying Requests For Rehearing And Renewing Notice Of Intent Not To Act," 142 FERC ¶ 61,207, P 35 (2013) ("Rehearing Order"), R. 53, JA 26 ("[U]pon conclusion of any Federal court proceeding brought by the Sweckers to enforce PURPA, the Commission will consider a petition to allow disconnection of the Sweckers from Midland for nonpayment").

The Iowa District Court dismissed the Sweckers' case on December 30, 2013. As of the date of filing of this brief, Midland has not yet made any filing to terminate service with the Commission. Because the resolution of this case would benefit from further development of the legal and factual issues in the context of the termination proceeding, and because Midland has legal recourse to recover any amounts owed by the Sweckers, the issues are not fit for immediate review.

Assuming ripeness, Cooperatives base appellate jurisdiction on PURPA Section 210(h), 16 U.S.C. § 824a-3(h). *See* Br. 5 ("Section 210(h) of PURPA provides that an enforceable PURPA requirement under section 210(f)(1) 'shall be treated as a rule enforceable under the Federal Power Act,' 16 U.S.C. § 824a-3(h)(2)[(A)], and under Section 313 of the Federal Power Act '[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such a proceeding may obtain review of such order . . . in the United States Court of Appeals for the District of Columbia.'") (quoting 16 U.S.C. § 825*l*(b)).

This Court has found that one category of PURPA Section 210 cases are not judicially reviewable, in the first instance, in the United States courts of appeals. *See, e.g.*, *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995) (dismissing for lack of jurisdiction FERC notice of intent not to initiate enforcement action); *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1489 (D.C. Cir. 1997) (same). This Court has allowed other types of PURPA Section 210 cases to proceed immediately to the courts of appeals. *See, e.g.*, *Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008) (reviewing rulemaking pursuant to PURPA Section 210(m)); *Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987) (reviewing Commission waiver of PURPA requirements).

To the extent Midland avails itself of judicial review under the Federal Power Act, it must satisfy all statutory prerequisites to Federal Power Act review. As discussed in Section II of the Argument, *infra*, the Federal Power Act limits this Court's jurisdiction to objections "urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." 16 U.S.C. § 825*l*(b). This strictly construed statutory limitation, as well as the general requirement of exhausting administrative remedies, bars the Court from hearing multiple arguments Cooperatives failed to raise to the Commission, and which they now present to this Court in the hope of expanding the scope of this otherwise

narrow proceeding. Unpreserved arguments can – and more properly should be – presented to the Commission in the upcoming termination proceeding.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

The Commission has been involved in several previous disputes between the Sweckers and Midland. In this latest dispute, the Sweckers claimed that they were owed a higher avoided cost rate for energy from their Qualifying Facility and, based on that belief, withheld payment as a set off from amounts they claimed they were owed from Midland. The Commission initially declined to get involved, issuing a "Notice of Intent Not To Act" on the Sweckers' petition. R. 13, JA 1. Under PURPA Section 210(h)(2)(B), the "Notice of Intent Not To Act" allowed the Sweckers to pursue their claim in U.S. District Court. *See* 16 U.S.C. § 824a-3(h)(2)(B). As soon as the Commission issued the Notice, however, Midland fully disconnected the Qualifying Facility, preventing it from selling power to Midland and eliminating back-up power supply to the Qualifying Facility. The Sweckers then filed with the Commission two urgent requests for reconnection.

Faced with the Sweckers' requests, the Commission made limited findings establishing that Midland's unilateral disconnection of the Qualifying Facility was inconsistent with Commission regulations, found Midland should reconnect the

Qualifying Facility, at least for now, and established settlement procedures to aid the parties in settling their dispute. The parties were unable to resolve their differences through settlement procedures, so the Commission denied rehearing and renewed its "Notice of Intent Not To Act," thereby allowing the Sweckers to proceed to Iowa District Court pursuant to rights afforded by PURPA. The Commission invited Midland to initiate a termination proceeding, and develop a more substantial record, once the avoided cost issue was resolved. *See, e.g.*, Declaratory Order at P 39, JA 11 ("it may be that there are circumstances where failure to pay a bill will justify disconnection," but deferring final judgment until after a decision in federal district court proceeding and Midland's filing with FERC of a termination proceeding); Rehearing Order at PP 33-35, JA 25-26 (same; noting the complex presence of retail service and PURPA service obligations, and that "the two services are so intertwined physically that disconnection of one cannot be done without disconnection of the other").

STATEMENT OF THE FACTS

I. BACKGROUND

A. Statutory And Regulatory Background

PURPA was part of a package of legislation entitled the "National Energy Act." *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). PURPA was designed to combat a nationwide energy crisis by encouraging conservation of oil and natural

gas and promoting the development of alternative energy sources. Titles I and III of PURPA "relate to regulatory policies for electricity and gas utilities" and "are designed to encourage the adoption of certain retail regulatory policies" for purposes of increasing conservation and efficiency. *Id*. at 746-47. Title II of PURPA, specifically Section 210 of PURPA, 16 U.S.C. § 824a-3, was designed to encourage the development of cogeneration and small power production facilities. *Id*. at 750.

Under Section 210 of PURPA, and in order "[t]o counter traditional electric utilities' reluctance to deal with these nontraditional facilities, the PURPA charges the Commission with implementing mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power productions facilities (collectively, 'qualifying facilities')." *So. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006). The Commission promulgated regulations requiring a utility to purchase "any energy and capacity which is made available from a qualifying facility," 18 C.F.R. § 292.303(a), and to sell "any energy and capacity requested by the qualifying facility." *Id*. § 292.303(b). "While the utility must sell electricity to a [qualifying facility] at regulated tariff rates, the utility must buy electricity from the [qualifying facility] at a rate equal to the utility's full 'avoided cost.'" *So. Cal.*

Edison, 443 F.3d at 95 (citing *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1040 (D.C. Cir. 2000)).

Under Section 210(h) of PURPA, 16 U.S.C. § 824a-3(h), Commission rules implementing PURPA can be enforced in federal district court by FERC or a private party against a state regulatory commission or an nonregulated utility. *See Indus. Cogenerators*, 47 F.3d at 1234. When a petition for enforcement is filed, if FERC does not initiate an enforcement action within 60 days, then the petitioning party may do so. *Id*. (citing 16 U.S.C. § 824a-3(h)(2)(B)).

After almost three decades of change in the electric energy industry, Congress enacted legislation in 2005, the Energy Policy Act of 2005, creating a new PURPA Section 210(m), granting the Commission the ability to terminate the mandatory purchase and sale obligation. *See* 16 U.S.C. § 824a-3(m). Congress gave the Commission authority to determine whether the circumstances specified in Section 210(m)(1) are satisfied (generally, non-discriminatory access to a competitive electricity market), thereby allowing a utility to be relieved of its obligation to purchase power from a qualifying utility. *See id*. § 824a-3(m)(3). Section 210(m)(5) allows termination of the obligation to sell back-up power to a qualifying facility upon Commission findings of retail competition and findings that the utility is not required by law to sell electric energy in its territory. *See id*. § 824a-3(m)(5). Section 210(m)(6) grandfathers the rights and remedies of any

party under any contract or obligation in effect or pending approval on August 8, 2005. *See id*. § 824a-3(m)(6).

In response to this new authority, the Commission promulgated regulations for the processing of applications to terminate the mandatory purchase and sale obligation. *See* New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, 71 Fed. Reg. 64,342 (Nov. 1, 2006), *aff'd Am. Forest and Paper Ass'n*, 550 F.3d 1179. The Commission's regulations detail the circumstances under which the Commission would terminate an electric utility's obligation to purchase from a qualifying facility (18 C.F.R. §§ 292.309, 292.310) and the process for terminating the obligation to sell back-up power to a qualifying facility (*id*. § 292.312).

B. History of Dispute

The Sweckers and Midland have a long history of litigation. A brief description of these past disputes provides necessary context for the present dispute.

In 1998, the Sweckers, retail customers of Midland, bought a 65 kilowatt wind generator for their farm in Iowa. Since that time, the Sweckers and Midland have engaged the Commission in disagreements over various elements of their PURPA arrangement. *See, e.g., Gregory Swecker v. Midland Power Coop.*, 87 FERC ¶ 61,187 (1999) (notice of intent not to act on disagreement over proper

interconnection charge); *Gregory and Beverly Swecker v. Midland Power Coop.*, 96 FERC ¶ 61,085 (2001) (notice of intent not to act on proper calculation of avoided cost rate based on parties' agreement to pursue in state court); *Gregory Swecker v. Midland Power Coop.*, 105 FERC ¶ 61,238 (2003) (notice of enforcement regarding avoided cost rate).

In its 2003 order initiating an enforcement action over the proper avoided cost rate, the Commission encouraged the parties to settle the matter before the Commission filed an enforcement petition in Federal court. The Sweckers and Midland entered into a Settlement Agreement ("2004 Settlement Agreement"), which the Commission approved. *See Gregory Swecker v. Midland Power Coop.*, 108 FERC ¶ 61,268 (2004).

Shortly after the Commission's order approving the 2004 Settlement Agreement, Mr. Swecker once again filed a petition for enforcement under Section 210(h) of PURPA, seeking changes to the avoided cost rate and net metering (*i.e.*, netting sales and purchases using one meter instead of two separate meters). The Commission initially granted Mr. Swecker's petition for enforcement, finding that Midland was required to provide net metering to the Qualifying Facility. *See Gregory Swecker v. Midland Power Coop.*, 111 FERC ¶ 61,365 (2005). Shortly thereafter, the Commission granted reconsideration of that order on the basis that subsequent legislation, the Energy Policy Act of 2005, provided a specific process

for states and nonregulated entities to consider net metering. *See Gregory Swecker v. Midland Power Coop.*, 114 FERC ¶ 61,205, P 27 (2006), *reh'g denied*, 115 FERC ¶ 61,084 (2006), *mandamus denied, Gregory and Beverly Swecker v. FERC*, No. 06-1170 (D.C. Cir. May 7, 2007).

C. The Current Proceeding

Their latest dispute began on May 6, 2011, with the Sweckers filing a petition to enforce PURPA against Midland and the State of Iowa. The Sweckers claimed that Midland had refused to purchase the excess electric energy produced by the Qualifying Facility at Midland's full avoided cost. They asked the Commission to declare that the full avoided cost rate is the rate that Midland pays its full-requirements supplier for power. The Sweckers also asked the Commission for payment of power that had been delivered to Midland from 2004 to April 1, 2011, at the rate the Sweckers claim is the proper (higher) avoided cost rate. Finally, the Sweckers asked that Midland be prohibited from disconnecting the Qualifying Facility until all violations and complaints have been resolved.

On August 5, 2011, the Commission issued a "Notice of Intent Not To Act," declining to initiate an enforcement action against Midland. *See Gregory and Beverly Swecker v. Midland Power Coop. and State of Iowa*, 136 FERC ¶ 61,085, R. 13, JA 1, *reconsideration denied*, 137 FERC ¶ 61,035 (2011), R. 16, JA 2. Even though the Commission's Notice did nothing more than indicate its intent not

to pursue an enforcement action – thereby allowing the Sweckers to pursue their own action in Iowa District Court – Midland disconnected the Qualifying Facility despite PURPA provisions and implementing regulations making such an unilateral course of action impermissible. Following that disconnection, on October 27 and October 31, 2011, the Sweckers filed with the Commission requests for an expedited order for reconnection. *See* R. 20, JA 473; R.21, JA 475.

D. The Commission's Orders

1. Declaratory Order

On December 15, 2011, the Commission issued an order finding Midland's disconnection to be inconsistent with its obligations under PURPA and Commission regulations. *See* Declaratory Order PP 28-31, JA 9. The Declaratory Order lists the Commission's regulations governing a utility's purchase and sale obligations under PURPA (18 C.F.R. § 292.303(a), (b)) and the available exemptions to those obligations. *Id*. PP 29-38, JA 9-11. Based on that review, the Commission concluded that Midland's disconnection of the Qualifying Facility resulted in an effective cessation of purchases from the Qualifying Facility. *Id*. P 37, JA 11. Because Midland's justification for the disconnection (non-payment of retail electric service bill) did not fall within any of the exemptions to its purchase obligation, and because "Midland has not claimed relief under [S]ection 210(m), nor filed a petition seeking [S]ection 210(m) of PURPA relief pursuant to sections

292.309 and 292.310 of the Commission's regulations," the Commission found that "Midland's disconnection action is inconsistent with its purchase obligation under PURPA and our regulations." *Id*. PP 32-37, JA 9-11.

Next, the Commission concluded that Midland's obligation to sell back-up power to the Qualifying Facility is comprehensive under PURPA and Commission regulations. *Id*. P 38, JA 11. The Declaratory Order notes that the only exemption to the obligation to sell in PURPA is contained in Section 210(m), which provides for an exemption from the obligation to sell only upon a Commission finding of retail competition, or a Commission finding that the electric utility is not required by State law to sell electric energy in its territory. *Id*. (citing 16 U.S.C. § 824a-3(m); 18 C.F.R. § 292.312), JA 11.

Although noting that Midland had not claimed relief under PURPA Section 210(m), the Commission stated that "it may be that there are circumstances where failure to pay a bill will justify disconnection." *Id*. P 39, JA 11. However, the Commission deferred any such findings until Midland seeks authorization to terminate, and that any future disconnection should "wait for the conclusion of the Sweckers' enforcement action under PURPA." *Id*. The Commission also directed the Commission's Dispute Resolution Service to see if assisted negotiations could result in a settlement agreement. *Id*. P 41, JA 12. If the parties are unable to settle the dispute, the Commission stated it "will then decide what steps it will take next

in this proceeding." *Id*. P 42, JA 12. In the meantime, "Midland shall reconnect with the [Qualifying Facility]." *Id*. Ordering Para. (A), JA 13.

2. Rehearing Order

The parties were unable to settle their dispute. R. 39, JA 575. On rehearing, the Commission concluded that "nothing raised on rehearing convinces us that we erred in the [Declaratory Order] in finding that Midland must seek Commission approval to disconnect the Sweckers." Rehearing Order P 30, JA 24. Under the narrow circumstances here, the Commission explained that "PURPA does not allow service to a [qualifying facility] to be disconnected unilaterally by and at the sole discretion of the interconnected purchasing/selling electric utility (here, Midland), merely because that electric utility also happened to be selling retail service." *Id*. P 33, JA 25. Where service to a retail customer and service to a qualifying facility "are so intertwined physically that disconnection of one cannot be done without disconnection of the other, as is the case here, the requirements of PURPA and our implementing regulations must prevail over the proposed unilateral action of the interconnected purchasing/selling utility." *Id*., JA 26. (In a separate statement concurring with this finding, Commissioner Norris noted that "[i]f the [Iowa Utilities Board] and Midland find a way to separate the jurisdictional questions here – such as building a second interconnection to the [Qualifying Facility] that would allow the [Qualifying Facility] to retain service

despite the disconnection of retail service – I am open to other solutions that will respect state retail jurisdiction while fulfilling the Commission's responsibilities under federal law." Rehearing Order (Norris, Commn'r, concurring), JA 30.)

As the Commission explained, "prior to the Commission's implementation of [S]ection 210(m) of PURPA, which was added to PURPA by the Energy Policy Act of 2005, the Commission . . . in practice left issues regarding disconnection of [qualifying facilities] for nonpayment of bills to state regulatory authorities or nonregulated utilities." *Id*. P 32, JA 25. However, in implementing the Energy Policy Act of 2005, the Commission addressed, and provided specific regulations covering, how an electric utility may terminate its obligations to purchase from and sell to qualifying facilities. *Id*. Based on this new grant of jurisdiction and Congress' clarification on the acceptable grounds for termination, the Commission distinguished this case from prior Commission orders cited by Cooperatives. *Id*. n.45, JA 25.

In response to arguments raised by Cooperatives that the 2004 Settlement Agreement allows for termination consistent with Iowa state law, the Commission explained that the 2004 Settlement Agreement was approved prior to the Energy Policy Act of 2005, which clarified the Commission's jurisdiction over the termination of mandatory purchase and sale obligations. *Id*. P 33, JA 26. Therefore, the Commission determined that "allowing the 2004 Settlement

Agreement to control would be inconsistent with our obligations under PURPA, and the Commission regulations." *Id*., JA 26. Additionally, the Commission found no inconsistency between the terms of the 2004 Settlement Agreement and requiring Midland to first follow the Commission's rules for terminating its obligation to sell to the Sweckers. *Id*. n.50, JA 26. The Commission made no findings on whether the 2004 Settlement Agreement satisfied PURPA Section 210(m)(6), since Midland had not filed to terminate under that provision. *Id*. P 33, JA 26 ("disconnection, in the circumstances presented here, may not occur without following the Commission's regulations for authorization to be relieved of the obligation to sell to a QF") (citing Declaratory Order P 39, JA 11).

Although the Commission restated its earlier finding that disconnection "must wait for the conclusion of the Sweckers' enforcement action under PURPA" (Rehearing Order P 34, JA 26), the Commission granted Cooperatives' and the Iowa Utilities Board's alternative requests for declaratory findings to expedite the resolution of the avoided cost dispute. The Commission found "no merit in the Sweckers' contention that Midland's avoided cost must be the price at which Midland purchases power from its supplier, rather than that supplier's avoided cost." *Id*. P 36, JA 27. The Commission also noted that the rate Midland pays the Sweckers is the rate that the Sweckers agreed to in the 2004 Settlement Agreement – and that, pursuant to 18 C.F.R § 292.301(b), an electric utility and qualifying

facility may agree on their own to a negotiated rate. *Id*. P 36, JA 28. The Iowa District Court relied on these findings in granting summary judgment for Midland. *See Gregory and Beverly Swecker v. Midland Power Coop.*, No. 4:13-cv-00250 (S.D. Iowa Dec. 30, 2013).

Commissioner Clark issued a separate statement. *See* Rehearing Order (Clark, Commn'r, dissenting in part), JA 31. Commissioner Clark concurred in the Commission's decision not to initiate an enforcement action over the avoided cost dispute, yet dissented over whether Midland could disconnect the Qualifying Facility for nonpayment of a retail bill. He found that "the Sweckers should not be able to avoid disconnection and payment for services by framing this as a PURPA dispute." *Id*., JA 32. Additionally, Commissioner Clark found that the 2004 Settlement Agreement gives Midland explicit authority to disconnect consistent with Iowa law and that he would have "deferred to the Iowa Utilities Board's jurisdiction over this matter instead of asserting Commission jurisdiction under PURPA." *Id*.

SUMMARY OF ARGUMENT

The Commission's Orders found only that Midland's unilateral disconnection of the Sweckers' Qualifying Facility, at this time, based only upon a limited record, when the Sweckers are claiming a PURPA right for a particular avoided cost rate, was inconsistent with Commission regulations. Cooperatives'

objection to this limited finding is premature. It is properly presented only after the completion of federal district court litigation over the calculation of the avoided cost rate, and only after a future filing by Midland, if still aggrieved, to terminate service to the Qualifying Facility. Such a filing, as the Commission explained, would allow the agency to more fully explain its decision based upon a fuller record, and allow the agency to fix the rights and remedies of the parties with finality. Because the current appeal is filed in advance of such a termination filing, it should be dismissed for lack of ripeness.

Additionally, Cooperatives (and supporting Intervenors) impermissibly ask this Court to reach well outside the scope of the arguments presented to the Commission. They present additional arguments in support of terminating service to the Qualifying Facility – arguments that can, and should, be presented to the Commission should Midland, following a decision by the federal district court, decide to initiate a formal termination action against the Sweckers. To the extent Cooperatives present this Court with a sneak preview of arguments they may present to the Commission in the future, they have failed to comply with exhaustion principles and express statutory limitations on this Court's appellate jurisdiction.

If Cooperatives' arguments are jurisdictionally or prudentially permissible, the Court should affirm that the Commission's limited findings were proper and

supported by the record. The Commission's reasonable interpretation of its own regulations, as applied to these particular circumstances, is entitled to deference and is entirely consistent with PURPA. The Commission satisfactorily explained any perceived inconsistency with prior cases. In addition, the Commission acted well within its discretion to defer addressing arguments about termination under Section 210(m) of PURPA until such time as Midland files an application to the Commission under Section 210(m). Under the circumstances, the Commission's actions were reasonable and should be upheld.

ARGUMENT

I. THE COMMISSION'S ORDERS ARE NOT RIPE FOR REVIEW

Because the Commission's Orders were issued at an interim stage of what was anticipated to be a longer adversary process, the Orders reflect narrow findings and conclusions that provided no occasion for the Commission to opine on several issues raised by Cooperatives. The Court should dismiss this Petition for three reasons. First, the Commission reasonably found that the application of PURPA Section 210(m), added to the statute in 2005 and granting the Commission authority to terminate PURPA responsibilities in certain circumstances, and issues surrounding whether the grandfathering provision in Section 210(m)(6) would apply to the 2004 Settlement Agreement (if it remains valid – a disputed fact in the record), required a fully developed termination filing on which the Commission

could rule on a fully developed record. Second, deferring review in this case would conserve judicial resources by allowing the Commission to potentially narrow the issues in the first instance. Third, the benefits of delayed review significantly outweigh any hardship to Cooperatives because, although Midland may be owed money for the electric service it is providing during this interim period, the amount is relatively small and Midland has legal recourse to recover it from the Sweckers.

A. The Court Would Benefit From Further Development Of The Legal And Factual Issues In This Ongoing Dispute

Cooperatives have petitioned for review prematurely; the Commission never has had the opportunity to consider a developed record in a notice of termination proceeding. To decide whether a case is ripe, courts consider the "'fitness of the issues for judicial decision' and the extent to which withholding a decision will cause 'hardship to the parties.'" *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Prudential ripeness is important because it "prevents courts from 'entangling themselves in abstract disagreements over administrative policies, and . . . protects the agencies from judicial interference' in an ongoing decision-making process." *Id.* (quoting *Abbott Labs.*, 387 U.S. at 148).

Here, there is an incomplete record. The Orders under review are preliminary and subject to clarification or modification in the termination

proceeding anticipated (indeed, invited) by the Commission in its Orders. *See* Declaratory Order P 39, JA 11 ("That said, it may be that there are circumstances where failure to pay a bill will justify disconnection. . . . Here, where the Sweckers have indicated that they intend to pursue the matter in Federal court, we do not believe disconnection is justified, but must wait for the conclusion of the Sweckers' enforcement action under PURPA"), *id*. PP 41-42, JA 12 (directing FERC Dispute Resolution Service to assist with settlement negotiations; if parties are unable to reach agreement, "the Commission will then decide what steps it will take next in this proceeding"); Rehearing Order P 35, JA 26 ("[U]pon conclusion of any Federal court proceeding brought by the Sweckers to enforce PURPA, the Commission will consider a petition to allow disconnection of the Sweckers from Midland for nonpayment").

Indeed, one of the central issues in Cooperatives' appeal (Br. 44-51), the application of PURPA Section 210(m), 16 U.S.C. § 824a-3(m), was found by the Commission to be beyond the scope and better addressed in a later termination proceeding. *See* Declaratory Order P 32, JA 10 (finding exemption under PURPA Section 210(m) inappropriate for immediate consideration because "Midland has not claimed relief under [S]ection 210(m), nor filed a petition seeking [S]ection 210(m) of PURPA relief pursuant to sections 292.309 and 292.310 of the Commission's regulations"). Similarly, Cooperatives argue (Br. 49-51) that the

new termination regulations do not apply in these circumstances because PURPA Section 210(m)(6) preserved Midland's rights under the 2004 Settlement Agreement to disconnect the Sweckers for nonpayment. The Commission deferred ruling on Section 210(m) issues unless and until Midland files to terminate pursuant to this provision. The Commission simply saw "no inconsistency between requiring Midland to first follow the Commission's rules for terminating its obligation to sell to the Sweckers and the provision in the 2004 Settlement Agreement which permits disconnection for nonpayment of bills." Rehearing Order n.50, JA 26.

In a termination proceeding, the Commission could resolve the case using regulations not even mentioned here. For example, Midland might try to avail itself of a regulation which provides the Commission the option of waiving the obligation to sell power to a qualifying facility after notice and opportunity to comment, followed by a Commission finding that the sale will "(i) [i]mpair the electric utility's ability to render adequate service to its customers; or (ii) place an undue burden on the electric utility." 18 C.F.R. § 292.305(b)(2).

Additionally, whether the 2004 Settlement Agreement is still a valid contract is a disputed fact in the record. *See* Midland Answer, Exhibit A (correspondence between Mr. Swecker and Midland), R. 7, JA 225-349 ("[W]ith this letter I am giving you notice as in accordance of the April 14, 2004 [Settlement Agreement]

of a six months[’] notice of cancellation of the [Settlement Agreement],” JA 286; “As indicated in our September 30th letter Midland will continue to fully perform under the agreement for its remaining term; we understand that you wish to terminate the agreement as of April 14, 2006,” JA 290); *see also* Rehearing Order n.57, JA 28 (“Midland makes inconsistent statements in the record as to whether the 2004 Settlement is binding”). This Court would benefit from a better understanding of these legal and factual issues.

B. Delaying Review Would Serve Multiple Purposes Of The Prudential Ripeness Doctrine

The reasons underpinning the prudential ripeness doctrine counsel in favor of dismissal in this case. In particular, delaying review in this case would further FERC’s “‘interest in crystallizing its policy before that policy is subjected to judicial review and the court’s interests in avoiding unnecessary adjudication and in deciding issues in a concrete setting.’” *Am. Petroleum Inst.*, 683 F.3d at 387 (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999)). This is especially valuable in this case presenting statutory and regulatory interpretation challenges (particularly to PURPA Section 210(m) and implementing regulations) where this Court would “afford the agency’s interpretation significant deference.” *Id*. at 389 (“It is more consistent with the conservation of judicial resources to make that deference-bound review after the agency has finalized its application of the relevant statutory text.”).

Delaying review can allow an agency to correct its own mistakes, possibly narrow the issues, or potentially avoid the need for review entirely. *See id*. at 387. In this case, delaying review until such time as the Commission acts on a notice of termination would likely "allow[] for more intelligent resolution of any remaining claims and avoid[] inefficient and unnecessary 'piecemeal review.'" *Id*. (citing *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21, 30 (D.C. Cir. 1984)); *see also Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992) (stating Court's insistence "on the standard of one case, one appeal").

Finally, as discussed in Section II, *infra*, Cooperatives raise several arguments on appeal that have not been presented to the agency. Although these arguments are statutorily barred from consideration right now, dismissal would offer the Cooperatives an opportunity to raise many, if not all, of these arguments in the termination proceeding.

C. Delaying Review Will Not Cause Undue Hardship To The Parties

In contrast to the substantial benefits derived from dismissing the present action – which include allowing the Commission to properly address the issues raised in this matter in the first instance by developing a fuller record – there is little if any identifiable hardship to Cooperatives. Where, as here, the relative balance of interests so favors dismissal, courts routinely defer review. *See*, *e.g.*, *Am. Petroleum Inst.*, 683 F.3d at 389 ("To outweigh these 'institutional interests in

the deferral of review,' any hardship caused by that deferral must be 'immediate and significant.'") (quoting *Devia v. NRC*, 492 F.3d 421, 427 (D.C. Cir. 2007)); *see also, e.g., N.Y. State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037 (D.C. Cir. 1999) (dismissing petition as unripe); *N. Ind. Pub. Serv. Co. v. FERC*, 954 F.2d 736 (D.C. Cir. 1992) (same).

It is entirely within Midland's power (not the Commission's) to ripen this case by filing a notice of termination with the Commission. Now that settlement efforts have failed, and the Iowa District Court proceeding brought by the Sweckers pursuant to PURPA Section 210(h)(2)(B) over the avoided cost rate has concluded, there are no remaining impediments to Midland returning to the agency with an application for termination. As found relevant in prior cases, "the timing of the future event we are awaiting to ripen (or solve) this dispute" – here, action by FERC on Midland's forthcoming application to terminate – "is not within the discretion of or controlled by the agency as would usually be the case." *Am. Petroleum Inst.*, 683 F.3d at 389. Both PURPA and Commission regulations provide that the Commission must act on a notice of termination within ninety days. *See* 16 U.S.C. § 824a-3(m)(3); 18 C.F.R. §§ 292.310(a), 292.312(a).

In the limited interim period, any hardship to Midland is not significant. Even if this Court were to accept Cooperatives' characterization of the Orders as an "injunctive order compelling Midland to reconnect the [Qualifying Facility] and

keep them reconnected while any potential complaints might be disputed," Br. 28, this would not provide a sufficient basis for immediate review. "Even if a case is 'constitutionally ripe,' though, there may also be 'prudential reasons for refusing to exercise jurisdiction.'" *Am. Petroleum Inst.*, 683 F.3d at 386 (quoting *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003)). Requiring Midland to participate in a further agency proceeding is not sufficient harm to outweigh the benefits of delaying review. "It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-43 (1980)).

Likewise, the suggestion that Midland is providing service to the Qualifying Facility and the Sweckers "for free" (Br. 53) is undermined by Midland's legal recourse to pursue any amounts still owed. We note that, as of June 2011, just prior to Midland's disconnection of the Qualifying Facility, the amount owed by the Sweckers to Midland was $476.54. *See* Midland Answer, Exhibit D, JA 329. The fact that Midland has legal recourse to recover amounts owed is a proper consideration for the Court in considering hardship to the parties. *See N.Y. State Elec. & Gas Corp.*, 177 F.3d at 1041 (finding refund provision that mitigates potential injury a proper consideration in evaluating hardship). In any event,

"[c]onsiderations of hardship that might result from delaying review 'will rarely overcome the finality and fitness problems inherent in attempts to review tentative positions.'" *Am. Petroleum Inst.*, 683 F.3d at 389 (quoting *Pub. Citizen Health Research Grp.*, 740 F.2d at 31).

II. THE COURT LACKS STATUTORY JURISDICTION TO CONSIDER CHALLENGES NOT PRESENTED FIRST TO THE AGENCY

Cooperatives raise several new, broad arguments never raised to the Commission; in so doing, they seek to fundamentally alter the case beyond the narrow issues addressed by the Commission in its Orders. On appeal, Cooperatives raise the following new objections: (i) whether the Commission was statutorily barred from finding that Midland should reconnect the Qualifying Facility (Br. Section II); (ii) whether a Commission regulation (*i.e.*, 18 C.F.R. § 292.301(b)) allows parties to contract around regulations and thus whether the 2004 Settlement Agreement is controlling (Br. Section III.B.2); (iii) new statutory interpretation arguments over whether Section 210(m) of PURPA applies in these circumstances (Br. Section III.C); and (iv) statutory interpretation arguments that Title I of PURPA provides the States exclusive authority over retail disconnection issues (Br. Section IV.C). Each of these new arguments should be dismissed for lack of jurisdiction, and all otherwise lack merit as discussed in Argument Sections III and IV, *infra*.

"A party must first raise an issue with an agency before seeking judicial review." *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 962 (D.C. Cir. 2007) (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952)). In addition to general administrative exhaustion principles, to the extent Cooperatives avail themselves of the judicial review provision in the Federal Power Act (*see supra* pp. 4-5), they are required to follow the strict rehearing requirements in the Act.

It is well established that a petitioner's failure to raise an objection in its application for rehearing deprives this Court of jurisdiction under section 313(b) of the Federal Power Act. 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so"); *see also*, *e.g.*, *Xcel Energy Services, Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007) (dismissing for lack of jurisdiction arguments not urged before FERC). Further, in order to be properly preserved, these objections must be reasonably articulated. *See Conn. Dep't of Pub. Util. Control v. FERC*, 593 F.3d 30, 36 (D.C. Cir. 2010) (declining to hear specific arguments when raised only in a "general way" on rehearing); *see also Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004) (objections not

explicitly presented in proceedings below, but arguably "implicit" in other objections, were not properly preserved).

Cooperatives cannot argue that any of the above arguments were raised on rehearing – or even implied from their rehearing requests. In particular, Cooperatives' threshold argument – that the Commission can only enforce its PURPA regulations through an enforcement action in the United States District Court under PURPA Section 210(h) – is exactly the kind of argument that should have been raised to the Commission yet never was. Despite the elaborate argument in Cooperatives' brief, Cooperatives' rehearing requests provide scant reference to section 210(h) at all, and the context of those limited mentions reveal that they were aimed at a different argument altogether.

Cooperatives' challenges on rehearing were to whether the Commission needed to follow notice and comment rulemaking procedures under PURPA Section 210(a), not whether the Commission needed to proceed to U.S. District Court under Section 210(h). *See* Midland Rehearing Request at 16, 25, R. 46, JA 55, 64 ("Under section 210(h) of PURPA, the Commission lacks authority to enforce a new requirement if those requirements were not enacted pursuant to section 210(a)"); s*ee also* NRECA Rehearing Request at 11, 14, R. 47, JA 92, 95 ("[S]ection 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 new prior approval requirement in the [Declaratory Order] was not the subject of a 210(a) rulemaking, enforcement of this new requirement and application of it retroactively to Midland are improper"). Neither explicit nor implicit in those rehearing requests is the suggestion that the Commission's actions are *ultra vires* or in the wrong forum. "The Commission cannot be asked to make silk purse responses to sow's ear arguments." *City of Vernon v. FERC*, 845 F.2d 1042, 1047 (D.C. Cir. 1998).

Further, it was critical for Cooperatives to raise this and its other statutory interpretation challenges to the Commission, so that the Commission is not deprived of deference on a matter of statutory interpretation. *See Pub. Serv. Elec. and Gas Co. v. FERC*, 485 F.3d 1164, 1171 (D.C. Cir. 2007). "The advent of heightened deference under *Chevron* [*U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)] sharpens the need for reasonable articulation of a statutory claim. Such articulation gives the agency an opportunity to respond and thus, guided by its familiarity with the statute and policy context, to exercise the discretion contemplated by *Chevron* to find a deference-worthy interpretation." *Id*. This same reasoning applies to challenges involving the interpretation of regulations. *See Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154-55 (D.C. Cir. 2006) (recognizing the multiple benefits of exhaustion of administrative remedies, including production of a useful record for subsequent judicial consideration).

Finally, Cooperatives cannot satisfy any exception to the exhaustion requirement. "Absent a 'clear showing of irreparable injury'" beyond the usual time and expense to pursue an administrative remedy, "the 'failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process.'" *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 108 (D.C. Cir. 1986) (quoting *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1, 24 (1974)). Midland's claims of economic loss, arising from the Sweckers' non-payment of retail bills, can be pursued elsewhere and do not rise to the level of irreparable harm. *See id*. at 108 ("Economic loss does not, in and of itself, constitute irreparable harm.") (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

III. ASSUMING JURISDICTION, THE COMMISSION'S ORDERS SHOULD BE AFFIRMED ON THE MERITS

The Commission made only limited, preliminary findings in this case. The Commission deferred, to a future termination proceeding, detailed issues of whether Midland could satisfy agency regulations – in particular those implementing PURPA Section 210(m) – if, following related district court litigation, Midland continues to desire to terminate service to the Qualifying Facility. Even if the Court were to find jurisdiction over the claims raised by Cooperatives (and supporting Intervenors), the Commission's narrow findings were reasonable, not inconsistent with PURPA, and a proper exercise of the Commission's discretion.

A. Standard Of Review

Courts afford "'substantial deference to an agency's interpretation of its own regulations,' according the agency's interpretation thereof 'controlling weight' unless it be 'plainly erroneous or inconsistent with the regulation.'" *St. Luke's Hospital v. Sebelius*, 611 F.3d 900, 904-05 (D.C. Cir. 2010) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Central Vt. Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000) (same); *N. Border Pipeline Co. v. FERC*, 129 F.3d 1315, 1318 (D.C. Cir. 1997) (same).

The Court reviews findings in FERC PURPA orders under the Administrative Procedure Act's arbitrary and capricious standard. *See*, *e.g.*, *Am. Paper Inst., Inc. v. Am. Elec. Power Svc. Corp.*, 461 U.S. 402, 412-13 (1983) (applying arbitrary and capricious standard to Commission orders implementing PURPA). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

B. The Commission Reasonably Determined That Midland's Disconnection Was Inconsistent With Commission Regulations

Midland disconnected service to the Qualifying Facility without satisfying any of the exemptions in the Commission regulations, including the option of filing

an application to terminate under 18 C.F.R. §§ 292.309, 292.310. Cooperatives and Intervenors claim that, despite the Sweckers' avoided cost PURPA claims, Midland did not have to satisfy any of the exemptions because: (i) they were only obligated to "offer" to purchase or sell from the Qualifying Facility, and the Sweckers' payment of their retail bill is a condition of the purchase or sale; (ii) disconnection for non-payment of a retail bill is not "termination" under Commission regulations; and (iii) the regulations do not mention retail disconnection as an available exemption, and therefore they do not apply. None of these arguments can refute the reasonable interpretation the Commission applied to its regulations.

1. The Commission Reasonably Found That Midland Was Obligated To Purchase From, And Sell To, The Qualifying Facility

The Commission found that Midland has an obligation to purchase and sell to the Qualifying Facility under Section 210(a) of PURPA, as implemented through Commission regulations 18 C.F.R. § 292.303(a) (obligation to purchase), 18 C.F.R. § 292.303(b) (obligation to sell), and 18 C.F.R. § 292.303(c) (obligation to interconnect). *See* Declaratory Order PP 29-31, JA 9. Cooperatives argue that Midland was only required to "offer" to sell or purchase, and therefore Midland can disconnect pursuant to state law. *See* Br. 40.

First, this interpretation is inconsistent with Commission regulations which mandate the purchase of capacity and energy "made available from a qualifying facility." 18 C.F.R. § 292.303(a). The word "offer" (or any variation) does not appear in the relevant Commission regulations. Second, a case cited by Cooperatives, *Cuero Hydroelectric, Inc. v. City of Cuero,* 77 FERC ¶ 61,114 (1996), is unhelpful to their appeal. In that case, the Commission found that 18 C.F.R. § 292.303(a) was not violated because the qualifying facility *itself* requested disconnection. 77 FERC ¶ 61,114 at ¶ 61,442 ("The correspondence submitted by the City in response to Cuero Hydro's petition indicates to our satisfaction that the disconnection is not the type of unilateral, unexpected occurrence suggested by Cuero Hydro."). Those circumstances are readily distinguishable from the present case, where "the electric utility is being accused of violating PURPA" – a fact central to the Commission's decision. Declaratory Order P 39, JA 11; *see also* Rehearing Order P 34, JA 26. The Sweckers did not ask to be disconnected; the Qualifying Facility was "disconnected unilaterally by and at the sole discretion of the interconnected purchasing/selling electric utility (here, Midland)." Rehearing Order P 33, JA 25.

2. The Commission Reasonably Found That Midland Had Not Satisfied Any Exemptions To The Mandatory Purchase And Sale Obligations

The Commission next concluded that Midland had not satisfied any of the three available exemptions in its regulations to the mandatory purchase obligation. First, the Commission found that utilities could be exempted under PURPA Section 210(m), upon a finding of a competitive market, but that any exemption under this provision required application to the Commission under 18 C.F.R. §§ 292.309 and 292.310. Declaratory Order P 32, JA 9-10; *see also* Rehearing Order P 20, JA 20-21. The Commission also looked at two other possible exemptions (§ 292.304(f)(1) (light loading conditions) and § 292.307(b) (system emergencies)) and found that Midland had not satisfied either of these exemptions on this record. *See* Declaratory Order PP 33-36, JA 10-11. Based on the unavailability of any purchase exemption (and in the absence of filing for an exemption under Section 210(m)), the Commission concluded that Midland was not relieved of its purchase obligation.

The Commission also reviewed the exemptions available for termination of the obligation to sell back-up power to qualifying facilities. The Commission reasonably concluded that an available exemption to the obligation to sell in PURPA is contained in Section 210(m), which provides for an exemption only upon a finding of the Commission of certain retail competition, or a finding that

the electric utility is not required by law to sell electric energy in its territory. Declaratory Order P 38, JA 11 (citing 16 U.S.C. § 824a-3(m)(5); 18 C.F.R. § 292.312). Since Midland had not filed an application to terminate sales to the Qualifying Facility, the Commission reasonably found that Midland still had the obligation to sell capacity and energy to the Qualifying Facility and that disconnection – at least at this time – was inconsistent with that obligation. Declaratory Order P 38, JA 11.

Cooperatives are unable to argue, at this time, that Midland satisfies one of the available exemptions. Rather, they make a negative inference by arguing that "[n]o FERC regulation prohibits disconnection of a customer's retail service for non-payment, and neither Section 210(m) of PURPA nor any other PURPA section requires FERC approval for a utility to perform such disconnection." Br. 38. First, this statement is incorrect, since the Commission has found that the mandatory purchase and sale requirements do qualify as statutory and regulatory prohibitions on disconnection. *See* Declaratory Order P 37, JA 11; Rehearing Order P 31, JA 24. Second, the issue of whether a retail billing dispute can be a basis for termination of PURPA responsibilities is beyond the scope of the Orders. The Commission merely noted that "there *may* be circumstances where failure to pay a bill would justify disconnection." Declaratory Order P 39 (emphasis added), JA 11; Rehearing Order P 34 (emphasis added), JA 26. The Commission deferred any

concrete findings to a contemplated future termination proceeding. It was sufficient for the Commission to reach only the narrow issue of whether Midland had, at that point, satisfied any of the exemptions to the mandatory purchase and sale requirements.

Cooperatives also complain that disconnection is something distinct from termination, one being temporary and another being permanent. Br. 47. The Commission sees "little if any distinction in practice between disconnection and termination." Rehearing Order P 31 n.43, JA 24. As the Commission reasoned, "[w]hile the former is claimed to be temporary, it can also be permanent in practice. And while the latter is claimed to be permanent, because our regulations allow for subsequently undoing a termination, *see* 18 C.F.R. § 292.313, it can also be temporary in practice." *Id*. The Commission's reasonable explanation is not inconsistent with any Commission regulation or practice, and its interpretation should be respected. *See P.R. Elec. Power Auth. v. FERC*, 848 F.2d 243, 249 (D.C. Cir. 1988) (noting, in PURPA case, that Court "owe[s] the Commission even more deference in its interpretation of its own regulations than in the reading of its statutory mandate").

C. The Commission's Interpretation Is Consistent With PURPA, Appropriately Distinguishes Prior Cases, And Does Not Require Formal Notice And Comment Rulemaking

Cooperatives argue that the Commission's Orders are inconsistent with PURPA (Br. 29, 31, 55-57), inconsistent with Commission precedent (Br. 42), required notice and comment rulemaking procedures (Br. 42), and are otherwise arbitrary and capricious (Br. 57-59). The limited record demonstrates that Cooperatives are wrong on each count.

1. The Commission's Findings Are Consistent With PURPA

Cooperatives (and supporting Intervenors) try to portray Midland's attempted disconnection as merely one for failure to meet retail billing obligations. *See* Br. 40-42. According to this argument, the Sweckers failed to pay their retail bills to Midland, so Midland can disconnect with the Sweckers, and only the state retail public service commission, the Iowa Utilities Board, can order reconnection. *See* Br. 55-57.

But this case is not so simple. As the Commission recognized, "[w]hile the Sweckers take retail service from Midland and such retail service is normally beyond our jurisdictional reach, that is not the end of the matter." Rehearing Order P 33, JA 25. Due to the circumstances of this particular interconnection, there are both retail consequences and PURPA consequences arising from Midland's disconnection. *Id*., JA 25 ("The Sweckers also have a [Qualifying Facility], and service to that [Qualifying Facility] pursuant to PURPA – interconnecting with and both buying from the [Qualifying Facility] and selling to the [Qualifying Facility]

– can only be disconnected in very limited circumstances."); *see also* Rehearing Order (Norris, Commn'r, concurring), JA 30 ("Unfortunately, these two issues cannot currently be separated because there is only one existing interconnection to the Sweckers' farm and residence and the relevant [Qualifying Facility].").

States and nonregulated utilities, such as Midland, can exercise jurisdiction within their retail authority. Yet in circumstances such as these, involving a retail disconnection and also the disconnection of a PURPA qualifying facility, a state or nonregulated authority's exercise of jurisdiction cannot be to the exclusion of the Commission's proper exercise of its own authority under PURPA – authority that Congress has entrusted to FERC to administer.

Cooperatives' references to other portions of PURPA beyond the Commission's administration (Br. 56, citing Title I of PURPA) are beside the point. Title I was promulgated to encourage conservation and efficiency (*see FERC v. Mississippi*, 456 U.S. at 746-47), and it makes no mention of qualifying facilities created in Title II. The details set forth in supporting Intervenors' brief (Int. Br. 11) demonstrate that State disconnection rules (i.e., special procedures for the sick, handicapped and elderly, involving door tagging or other requirements) are not specific to the circumstances involving qualifying facilities and can continue to be applied to retail customer disconnections.

The Commission here acted only in response to the Sweckers' emergency requests for reconnection, and only to the limited extent necessary to preserve the status quo, to allow settlement efforts or statutorily-contemplated district court litigation to continue, and until Midland files an application to terminate. All the Commission did was find that Midland's unilateral action did not fit within the provisions of PURPA that it administers and the PURPA regulations it has promulgated thereunder. Cooperatives have failed to demonstrate that the Commission's interpretation is underserving of the deference the agency receives in interpreting the statute it administers and the regulations implementing that statute. *See Am. Forest and Paper Ass'n*, 550 F.3d at 1180 (applying *Chevron*, 467 U.S. 837, to FERC interpretation of PURPA); *see also Nat'l Cable & Telecommunications Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009).

2. The Commission Reasonably Explained Any Departure With Precedent

"[I]t is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent." *Nat'l Cable*, 567 F.3d at 667. "Yet it is also equally axiomatic that an agency is free to change its mind so long as it supplies 'a reasoned analysis.'" *Id*. (citing *Motor Vehicle Mfrs.*, 463 U.S. 29, 57).

Cooperatives cite (Br. 42) three Commission orders that they believe firmly established the Commission's recognition of State jurisdiction over retail

disconnection under these circumstances. The Commission distinguished these orders as arising prior to the Commission's implementation of Section 210(m) of PURPA, following its addition in the Energy Policy Act of 2005. Although one order cited by Cooperatives was issued after the Energy Policy Act of 2005, the Commission explained that it was issued prior to finalizing its regulations implementing Section 210(m) and therefore did not reflect the Commission's formal understanding of how the Act affects an electric utility's right to disconnect a qualifying facility. *See* Rehearing Order n.45, JA 25.

Additionally, the three orders themselves lack any clear disclaimer of jurisdiction under these circumstances. First, in the 1996 *Cuero Hydroelectric* case (*see supra* p. 35), the qualifying facility (Cuero Hydro) claimed it was wrongfully disconnected from the grid for a two-month period. The Commission declined to take an enforcement action based on Cuero Hydro's failure to explain the circumstances of its disconnection. Far from disclaiming jurisdiction over the matter, the Commission relied on statements and supporting documentation from the electric utility showing disconnection was at Cuero Hydro's own request. 77 FERC ¶ 61,114 at 61,442. On that basis, the Commission explained that the disconnection "does not appear to be inconsistent with any of our regulations implementing PURPA," because "the parties' correspondence indicates that they agreed to suspend the mandatory purchase requirement and interconnection

requirements that otherwise would apply to the city." *Id*. As mentioned above, the Commission based its decision on its satisfaction that the disconnection was not a "unilateral, unexpected occurrence." *Id*. These circumstances are readily distinguishable from Midland's unilateral disconnection of the Sweckers' Qualifying Facility.

The only other Commission orders Cooperatives can identify that remotely address disconnection of a qualifying facility happen to involve the same parties in this dispute. First, in 1999, the Commission exercised its discretion not to initiate an enforcement action against Midland over its refusal to provide a certain kind of electric service (three-phase service) to the Qualifying Facility and denied Mr. Swecker's request for damages resulting from Midland's disconnection of the Qualifying Facility for non-payment of $389.30. *See Gregory Swecker v. Midland Power Coop*., 87 FERC ¶ 61,187 (1999). The Commission cited to *Cuero Hydro*, as well as to the Commission's "established policy . . . to leave to state regulatory authorities or nonregulated utilities and to appropriate judicial fora issues relating to the specific application of PURPA requirements to the circumstances of individual [qualifying facilities]." 87 FERC ¶ 61,187 at 61,722. The 1999 order not only predates Congress' 2005 grant of authority to the Commission over terminations, but merely restates general Commission policy disfavoring enforcement actions under PURPA. *See Gregory Swecker v. Midland Power*

Coop., 114 FERC ¶ 61,205, P 5 (2006) (in describing the 1999 order, "[t]he Commission noted that it had, to date, chosen (with one exception, which it later vacated) not to bring enforcement action pursuant to section 210(h)(2)(A) of PURPA, and the Commission chose not to do so there as well."). Although the 1999 order notes that "disconnection *appears* to be a matter within the authority of the [Iowa Utilities Board]," and that "disconnection of Mr. Swecker's electric service *appears* to be a matter of state rather than Federal law" (emphases added), these tentative observations in dicta within one Commission order cannot be treated as disclaiming jurisdiction over disconnection of qualifying facilities, and termination of PURPA responsibilities, for non-payment of retail bills. Finding that the Iowa Utilities Board may provide a venue for some retail recourse does not equate to a finding that the Commission lacks authority over all related PURPA matters.

Then, in 2006, also prior to final Commission regulations implementing its new termination authority, the Commission reflected back on the 1999 order in addressing another dispute between the Sweckers and Midland. Describing the 1999 order, the "Background" provides that "[t]he Commission also pointed out that the disconnection was not a matter within its jurisdiction and that the Commission has no authority to award damages as requested by Mr. Swecker." 114 FERC ¶ 61,205 at P 5. This summary paraphrase of the Commission's earlier

statement cannot be treated as a disclaimer of jurisdiction over retail disconnection of a qualifying facility. As the Rehearing Order here explains, "it was not intended to be a holding on the then jurisdiction over disconnection." Rehearing Order n.45, JA 25 (citing *Boston Edison Co.*, 101 FERC ¶ 61,068, at P 9 n.4 (2002) ("we note that we typically do not resolve matters in the background section of an order; rather, the background section of an order is just that, background")).

3. Notice And Comment Rulemaking Was Not Required

Cooperatives argue (Br. 42) that the Commission changed an "interpretive rule" and, therefore, notice and comment rulemaking procedures were required. As background, the Administrative Procedure Act excepts "interpretive rules" from its general requirement that rules be subject to notice and comment procedures. *See, e.g., United Technologies Corp. v. EPA*, 821 F.2d 714, 718 (D.C. Cir. 1987). Interpretive rules "simply state[] what the administrative agency thinks the underlying statute means, and only reminds affected parties of existing duties." *Id*. (internal quotations and brackets omitted); *see also N.Y. State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128, 131 (2d Cir. 2001) (holding FERC did not need to follow notice and comment rulemaking procedures because "continuous challenge" rule was an interpretive rule under PURPA) (citing 15 U.S.C. § 553(b)(A)). However, "[o]nce an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify

the regulation itself; through the process of notice and comment rulemaking." *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

But here, as the Commission explained, there is no change in interpretation. *See* Rehearing Order n.39, JA 22 ("As the discussion below makes plain, our action in the [Declaratory Order] as well as in this order do not constitute a change in our regulations."). The Sweckers' emergency filing presented the first opportunity since implementation of the Energy Policy Act of 2005 for the Commission to explain how new PURPA Section 210(m) and the Commission's regulations thereunder affect an electric utility's right to disconnect a qualifying facility. *See* Rehearing Order n.45, JA 25 (distinguishing earlier orders). It is on the basis of this newly-enacted legislation that the Commission distinguished the three cases Cooperatives mention. *See United Technologies Corp.*, 821 F.2d at 723 (holding that agency did not "change" its prior definition where construing newly-enacted statutory language, and therefore was not constrained by previous definitions).

In any event, the Commission's prior orders can hardly be characterized as offering uniform interpretation, or clear and consistent Commission policy on disconnection. In *Alaska Professional Hunters*, this Court held that an agency's consistent practice over a 30-year period could not be changed without notice and

comment. *See* 177 F.3d at 1035. In contrast, there are but three Commission orders remotely addressing the situation here. As discussed above, the Commission's limited statements were vague, conditional, and, at least with respect to *Cuero Hydro*, supportive of the Commission's findings here. None of those few prior statements could "rise to the level of a well-established practice." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081-86 (D.C. Cir. 1987) (en banc); *see also Metwest Inc. v. Sec'y of Labor*, 560 F.3d 506, 509-10 (D.C. Cir. 2009) ("conditional or qualified statements, including statements that something 'may be' permitted, do not establish definitive and authoritative interpretations").

4. The Commission Struck An Appropriate Balance Between Requiring Compliance With Its Regulations And The Relative Merits Of The Underlying Dispute

Part of Cooperatives' indignation over the Commission's action may come from the relative merits of the Sweckers' underlying dispute. The Commission sympathized with Cooperatives' position: "Given that the rate the Sweckers seek is inconsistent with our precedent, we see no reason why we should initiate an enforcement proceeding on behalf of the Sweckers to establish an avoided-cost rate methodology inconsistent with our precedent." Rehearing Order P 36, JA 27. The Commission even went so far as to grant Cooperatives' and the Iowa Utilities Board's request for a declaration on the merits. *Id*. ("We find no merit in the

Sweckers' contention that Midland's avoided cost must be the price at which Midland purchases power from its supplier, rather that supplier's avoided cost (which Midland states that it is using as its avoided cost)."). The Iowa District Court used these findings in granting Midland's Motion to Dismiss. *See Gregory and Beverly Swecker v. Midland Power Coop.*, No. 4:13-cv-00250, at *10, JA 754 ("As set forth above, FERC previously examined the avoided cost rate issue Plaintiffs attempt to reargue herein. As FERC specified, the avoided cost rate for Midland is the avoided cost rate of its full requirements supplier").

Nevertheless, the Sweckers had a claim (regardless of merit) and a legal right under PURPA to bring it. *See* Declaratory Order P 40 n.23, JA 12 (citing 16 U.S.C. § 824a-3(h)(2)(B)). To allow Midland unilaterally to disconnect the Qualifying Facility on the basis that Midland was correct on the merits would be inconsistent with Commission regulations implementing PURPA. Rather, the Commission appropriately found that disconnection awaits resolution of the Sweckers' PURPA claim, and at the same time assisted with expediting that process.

IV. THE COMMISSION ACTED WITHIN ITS DISCRETION TO DEFER ADDRESSING CERTAIN ISSUES TO THE TERMINATION PROCEEDING

The Commission made the limited finding that Midland had not satisfied any exemption to its mandatory purchase and sale obligations. The Commission also

made the narrow finding that the 2004 Settlement Agreement did not pose as a bar to the Commission applying its regulations. Although Cooperatives raise several arguments about the Commission's interpretation of PURPA Section 210(m) and whether the 2004 Settlement Agreement is a candidate for grandfathering under Section 210(m) (*see* Br. Section III.C), these issues are beyond the scope of the Commission Orders. *See* Declaratory Order P 32, JA 10 (explaining that section 210(m) "is not at issue here, as Midland has not claimed relief under section 210(m), nor filed a petition seeking section 210(m) of PURPA relief pursuant to sections 292.309 and 292.310 of the Commission's regulations), P 38, JA 11 ("In either case, cessation of sales to a QF requires an application to the Commission. Midland has not applied for relief from the obligation to sell to the Sweckers' QF."). Additionally, statutory interpretation arguments distinguishing "existing" contracts from "new" contracts under Section 210(m) of PURPA (Br. Section III.C) were never raised to the Commission and should be dismissed for lack of jurisdiction. *See supra* p. 29 (discussing jurisdictional prerequisite).

It was appropriate and within the Commission's discretion to defer findings on PURPA Section 210(m), including whether the grandfathering provision in Section 210(m)(6) would apply to the 2004 Settlement Agreement. *See*, *e.g.*, *Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos*., 498 U.S. 211, 230 (1991) (The question of "how best to handle related, yet discrete, issues in

terms of procedures" is a matter committed to agency discretion; "[t]he [lower] court clearly overshot the mark" if it required the agency – there, the FERC – to resolve a particular issue in a particular proceeding in a particular way) (internal citations omitted); *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) ("An agency has broad discretion to determine when and how to hear and decide the matters that come before it.") (citing cases); *N. Border Pipeline*, 129 F.3d at 1319 (same). This is especially true given the conflicting evidence in the record over whether the 2004 Settlement Agreement has been terminated. *See supra* pp. 23-24.

In addition to being a matter committed to agency discretion, deferral to a termination proceeding is also required by PURPA and FERC regulations. Specifically, Midland must comply with specific notice requirements in PURPA for any such termination. *See* 16 U.S.C. § 824a-3(m)(3) ("After notice, including sufficient notice to potentially affected qualifying co-generation facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met"); *see also* 18 C.F.R. § 292.310 (detailing notice procedures for termination of purchase obligation); 18 C.F.R. § 292.312 (a) (detailing notice procedures for termination of obligation to sell).

The Commission's decision to defer making findings on any termination of service to the Qualifying Facility until the Iowa District Court proceeding concluded was also reasonable. Similar to ripeness considerations followed by this Court (*see supra* pp. 20-28), it was appropriate for the Commission to await resolution of the underlying merits decision over the avoided cost rate prior to making any findings on whether termination would be proper. *See Gregory and Beverly Swecker v. FERC*, No. 06-1170 (D.C. Cir. May 7, 2007) (denying petition for a writ of mandamus, seeking disclosure of Midland avoided cost data, because of existence of alternative remedy in Iowa state courts).

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed for lack of ripeness. If not, arguments presented in the petition that were not presented to the agency should be dismissed for lack of jurisdiction. Any remaining objections should be denied on the merits.

Respectfully submitted,

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February 18, 2014
FINAL BRIEF: May 1, 2014

Midland Power Cooperative, et al. v. FERC **Docket No. EL11-39-002**
D.C. Cir. No. 13-1184

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 11,361 words, not including the (i) cover page, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) addendum.

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May 1, 2014

ADDENDUM
STATUTES AND REGULATIONS

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STATUTES:

REGULATIONS:

REGULATIONS:

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

gress (in its annual report or in the report required under subsection (a) of this section if appropriate) the results of any examination under the preceding sentence.

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub. L. 95–617, title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term ''incremental cost of alternative electric energy'' means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act,[2] from State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing, if the Commission deter-

[1] So in original. Probably should be followed by a comma.

[2] See References in Text note below.

mines such exemption is necessary to encourage cogeneration and small power production.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act[2] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section 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 U.S.C. 824 et seq.], such rule shall be treated as a rule under the Federal Power Act [16 U.S.C. 791a et seq.]. Nothing in subsection (g) of this section shall apply to so much of the operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility as are subject to the jurisdiction of the Commission under part II of the Federal Power Act.

(2)(A) The Commission may enforce the requirements of subsection (f) of this section against any State regulatory authority or nonregulated electric utility. For purposes of any such enforcement, the requirements of subsection (f)(1) of this section shall be treated as a rule enforceable under the Federal Power Act [16 U.S.C. 791a et seq.]. For purposes of any such action, a State regulatory authority or nonregulated electric utility shall be treated as a person within the meaning of the Federal Power Act. No enforcement action may be brought by the Commission under this section other than—

(i) an action against the State regulatory authority or nonregulated electric utility for failure to comply with the requirements of subsection (f) of this section[3] or

(ii) an action under paragraph (1).

(B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

(i) Federal contracts

No contract between a Federal agency and any electric utility for the sale of electric energy by such Federal agency for resale which is entered

[3] So in original. Probably should be followed by a comma.

into after November 9, 1978, may contain any provision which will have the effect of preventing the implementation of any rule under this section with respect to such utility. Any provision in any such contract which has such effect shall be null and void.

(j) New dams and diversions

Except for a hydroelectric project located at a Government dam (as defined in section 3(10) of the Federal Power Act [16 U.S.C. 796(10)]) at which non-Federal hydroelectric development is permissible, this section shall not apply to any hydroelectric project which impounds or diverts the water of a natural watercourse by means of a new dam or diversion unless the project meets each of the following requirements:

(1) No substantial adverse effects

At the time of issuance of the license or exemption for the project, the Commission finds that the project will not have substantial adverse effects on the environment, including recreation and water quality. Such finding shall be made by the Commission after taking into consideration terms and conditions imposed under either paragraph (3) of this subsection or section 10 of the Federal Power Act [16 U.S.C. 803] (whichever is appropriate as required by that Act [16 U.S.C. 791a et seq.] or the Electric Consumers Protection Act of 1986) and compliance with other environmental requirements applicable to the project.

(2) Protected rivers

At the time the application for a license or exemption for the project is accepted by the Commission (in accordance with the Commission's regulations and procedures in effect on January 1, 1986, including those relating to environmental consultation), such project is not located on either of the following:

(A) Any segment of a natural watercourse which is included in (or designated for potential inclusion in) a State or national wild and scenic river system.

(B) Any segment of a natural watercourse which the State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural, or scenic attributes which would be adversely affected by hydroelectric development.

(3) Fish and wildlife terms and conditions

The project meets the terms and conditions set by fish and wildlife agencies under the same procedures as provided for under section 30(c) of the Federal Power Act [16 U.S.C. 823a(c)].

(k) "New dam or diversion" defined

For purposes of this section, the term ''new dam or diversion'' means a dam or diversion which requires, for purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards or similar adjustable devices)[4]

(*l*) Definitions

For purposes of this section, the terms ''small power production facility'', ''qualifying small power production facility'', ''qualifying small power producer'', ''primary energy source'', ''cogeneration facility'', ''qualifying cogeneration facility'', and ''qualifying cogenerator'' have the respective meanings provided for such terms under section 3(17) and (18) of the Federal Power Act [16 U.S.C. 796(17), (18)].

(m) Termination of mandatory purchase and sale requirements

(1) Obligation to purchase

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying cogeneration facility or qualifying small power production facility has nondiscriminatory access to—

(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and (ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

(2) Revised purchase and sale obligation for new facilities

(A) After August 8, 2005, no electric utility shall be required pursuant to this section to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for qualifying cogeneration facilities established by the Commission pursuant to the rulemaking required by subsection (n) of this section.

(B) For the purposes of this paragraph, the term ''existing qualifying cogeneration facility'' means a facility that—

(i) was a qualifying cogeneration facility on August 8, 2005; or

(ii) had filed with the Commission a notice of self-certification, self recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by subsection (n) of this section.

[4] So in original. Probably should be followed by a period.

(3) Commission review

Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) have been met.

(4) Reinstatement of obligation to purchase

At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.

(5) Obligation to sell

After August 8, 2005, no electric utility shall be required to enter into a new contract or obligation to sell electric energy to a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that—

(A) competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(B) the electric utility is not required by State law to sell electric energy in its service territory.

(6) No effect on existing rights and remedies

Nothing in this subsection affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on August 8, 2005, 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).

(7) Recovery of costs

(A) The Commission shall issue and enforce such regulations as are necessary to ensure that an electric utility that purchases electric energy or capacity from a qualifying cogeneration facility or qualifying small power production facility in accordance with any legally enforceable obligation entered into or imposed under this section recovers all prudently incurred costs associated with the purchase.

(B) A regulation under subparagraph (A) shall be enforceable in accordance with the provisions of law applicable to enforcement of regulations under the Federal Power Act (16 U.S.C. 791a et seq.).

(n) Rulemaking for new qualifying facilities

(1)(A) Not later than 180 days after August 8, 2005, the Commission shall issue a rule revising the criteria in 18 CFR 292.205 for new qualifying cogeneration facilities seeking to sell electric energy pursuant to this section to ensure—

(i) that the thermal energy output of a new qualifying cogeneration facility is used in a productive and beneficial manner;

(ii) the electrical, thermal, and chemical output of the cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility; and

(iii) continuing progress in the development of efficient electric energy generating technology.

(B) The rule issued pursuant to paragraph (1)(A) of this subsection shall be applicable only to facilities that seek to sell electric energy pursuant to this section. For all other purposes, except as specifically provided in subsection (m)(2)(A) of this section, qualifying facility status shall be determined in accordance with the rules and regulations of this Act.

(2) Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that—

(A) was a qualifying cogeneration facility on August 8, 2005, or

(B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 CFR 292.207 prior to the date on which the Commission issues the final rule required by paragraph (1).

(Pub. L. 95–617, title II, §210, Nov. 9, 1978, 92 Stat. 3144; Pub. L. 96–294, title VI, §643(b), June 30, 1980, 94 Stat. 770; Pub. L. 99–495, §8(a), Oct. 16, 1986, 100 Stat. 1249; Pub. L. 101–575, §2, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 109–58, title XII, §1253(a), Aug. 8, 2005, 119 Stat. 967.)

REFERENCES IN TEXT

The Federal Power Act, referred to in subsecs. (e), (h), (j)(1), and (m)(7)(B), is act June 10, 1920, ch. 285, 41

§ 292.301 Scope.

(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) *Negotiated rates or terms.* Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

§ 292.302 Availability of electric utility system cost data.

(a) *Applicability.* (1) Except as provided in paragraph (a)(2) of this section, paragraph (b) applies to each electric utility, in any calendar year, if the total sales of electric energy by such utility for purposes other than resale exceeded 500 million kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding calendar year.

(2) Each utility having total sales of electric energy for purposes other than resale of less than one billion kilowatt-hours during any calendar year beginning after December 31, 1975, and before the immediately preceding year, shall not be subject to the provisions of this section until June 30, 1982.

(b) *General rule.* To make available data from which avoided costs may be derived, not later than November 1, 1980, June 30, 1982, and not less often than every two years thereafter, each regulated electric utility described in paragraph (a) of this section shall provide to its State regulatory authority, and shall maintain for public inspection, and each nonregulated electric utility described in paragraph (a) of this section shall maintain for public inspection, the following data:

(1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 megawatts for systems with peak demand of 1000 megawatts or more, and in blocks equivalent to not more than 10 percent of the system peak demand for systems of less than 1000 megawatts. The avoided costs shall be 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 5 years;

(2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and capacity, and for capacity retirements for each year during the succeeding 10 years; and

(3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

(c) *Special rule for small electric utilities.* (1) Each electric utility (other than any electric utility to which paragraph (b) of this section applies) shall, upon request:

(i) Provide comparable data to that required under paragraph (b) of this section to enable qualifying facilities to estimate the electric utility's avoided costs for periods described in paragraph (b) of this section; or

(ii) With regard to an electric utility which is legally obligated to obtain all 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.

(2) If any such electric utility fails to provide such information on request, the qualifying facility may apply to the State regulatory authority (which has ratemaking authority over the electric utility) or the Commission for an order requiring that the information be provided.

(d) *Substitution of alternative method.* (1) After public notice in the area served by the electric utility, and after opportunity for public comment, any

State regulatory authority may require (with respect to any electric utility over which it has ratemaking authority), or any non-regulated electric utility may provide, data different than those which are otherwise required by this section if it determines that avoided costs can be derived from such data.

(2) Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated utility which requires such different data shall notify the Commission within 30 days of making such determination.

(e) *State Review.* (1) Any data submitted by an electric utility under this section shall be subject to review by the State regulatory authority which has ratemaking authority over such electric utility.

(2) In any such review, the electric utility has the burden of coming forward with justification for its data.

[45 FR 12234, Feb. 25, 1980; 45 FR 24126, Apr. 9, 1980]

§ 292.303 Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305, unless exempted by § 292.312, energy and capacity requested by the qualifying facility.

(c) *Obligation to interconnect.* (1) Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnection costs with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection shall be determined in accordance with § 292.306.

(2) No electric utility is required to interconnect with any qualifying facility if, solely by reason of purchases or sales over the interconnection, the electric utility would become subject to regulation as a public utility under part II of the Federal Power Act.

(d) *Transmission to other electric utilities.* If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses pursuant to § 292.304(e)(4) and shall not include any charges for transmission.

(e) *Parallel operation.* Each electric utility shall offer to operate in parallel with a qualifying facility, provided that the qualifying facility complies with any applicable standards established in accordance with § 292.308.

[Order 688, 71 FR 64372, Nov. 1, 2006; 71 FR 75662, Dec. 18, 2006]

§ 292.304 Rates for purchases.

(a) *Rates for purchases.* (1) Rates for purchases shall:

(i) Be just and reasonable to the electric consumer of the electric utility and in the public interest; and

(ii) Not discriminate against qualifying cogeneration and small power production facilities.

(2) Nothing in this subpart requires any electric utility to pay more than the avoided costs for purchases.

(b) *Relationship to avoided costs.* (1) For purposes of this paragraph, ''new capacity'' means any purchase from capacity of a qualifying facility, construction of which was commenced on or after November 9, 1978.

(2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section

(3) A rate for purchases (other than from new capacity) may be less than

energy itself or purchased an equivalent amount of electric energy or capacity.

(f) *Periods during which purchases not required.* (1) Any electric utility which gives notice pursuant to paragraph (f)(2) of this section will not be required to purchase electric energy or capacity during any period during which, due to operational circumstances, purchases from qualifying facilities will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself.

(2) Any electric utility seeking to invoke paragraph (f)(1) of this section must notify, in accordance with applicable State law or regulation, each affected qualifying facility in time for the qualifying facility to cease the delivery of energy or capacity to the electric utility.

(3) Any electric utility which fails to comply with the provisions of paragraph (f)(2) of this section will be required to pay the same rate for such purchase of energy or capacity as would be required had the period described in paragraph (f)(1) of this section not occurred.

(4) A claim by an electric utility that such a period has occurred or will occur is subject to such verification by its State regulatory authority as the State regulatory authority determines necessary or appropriate, either before or after the occurrence.

§ 292.305 Rates for sales.

(a) *General rules.* (1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent system-wide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics.

(b) *Additional services to be provided to qualifying facilities.* (1) Upon request of a qualifying facility, each electric utility shall provide:

(i) Supplementary power;

(ii) Back-up power;

(iii) Maintenance power; and

(iv) Interruptible power.

(2) The State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and the Commission (with respect to any nonregulated electric utility) may waive any requirement of paragraph (b)(1) of this section if, after notice in the area served by the electric utility and after opportunity for public comment, the electric utility demonstrates and the State regulatory authority or the Commission, as the case may be, finds that compliance with such requirement will:

(i) Impair the electric utility's ability to render adequate service to its customers; or

(ii) Place an undue burden on the electric utility.

(c) *Rates for sales of back-up and maintenance power.* The rate for sales of back-up power or maintenance power:

(1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both; and

(2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages of the utility's facilities.

§ 292.306 Interconnection costs.

(a) *Obligation to pay.* Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics.

(b) *Reimbursement of interconnection costs.* Each State regulatory authority (with respect to any electric utility over which it has ratemaking authority) and nonregulated utility shall determine the manner for payments of

interconnection costs, which may include reimbursement over a reasonable period of time.

§ 292.307 System emergencies.

(a) *Qualifying facility obligation to provide power during system emergencies.* A qualifying facility shall be required to provide energy or capacity to an electric utility during a system emergency only to the extent:

(1) Provided by agreement between such qualifying facility and electric utility; or

(2) Ordered under section 202(c) of the Federal Power Act.

(b) *Discontinuance of purchases and sales during system emergencies.* During any system emergency, an electric utility may discontinue:

(1) Purchases from a qualifying facility if such purchases would contribute to such emergency; and

(2) Sales to a qualifying facility, provided that such discontinuance is on a nondiscriminatory basis.

§ 292.308 Standards for operating reliability.

Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may establish reasonable standards to ensure system safety and reliability of interconnected operations. Such standards may be recommended by any electric utility, any qualifying facility, or any other person. If any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility establishes such standards, it shall specify the need for such standards on the basis of system safety and reliability.

§ 292.309 Termination of obligation to purchase from qualifying facilities.

(a) After August 8, 2005, an electric utility shall not be required, under this part, to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility if the Commission finds that the qualifying cogeneration facility or qualifying small power facility production has nondiscriminatory access to:

(1)(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and

(ii) Wholesale markets for long-term sales of capacity and electric energy; or

(2)(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

(ii) Competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(3) Wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in paragraphs (a)(1) and (a)(2) of this section.

(b) For purposes of § 292.309(a), a renewal of a contract that expires by its own terms is a ''new contract or obligation'' without a continuing obligation to purchase under an expired contract.

(c) For purposes of § 292.309(a)(1), (2) and (3), with the exception of paragraph (d) of this section, there is a rebuttable presumption that a qualifying facility has nondiscriminatory access to the market if it is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, and Commission-approved interconnection rules. If the Commission determines that a market meets the criteria of § 292.309(a)(1), (2) or (3), and if a qualifying facility in the relevant market is eligible for service under a Commission-approved open access transmission tariff or Commission-filed reciprocity tariff, a qualifying facility may seek to rebut the presumption of access to the market by demonstrating, *inter alia*,

that it does not have access to the market because of operational characteristics or transmission constraints.

(d)(1) For purposes of §292.309(a)(1), (2), and (3), there is a rebuttable presumption that a qualifying facility with a capacity at or below 20 megawatts does not have nondiscriminatory access to the market.

(2) For purposes of implementing paragraph (d)(1) of this section, the Commission will not be bound by the one-mile standard set forth in §292.204(a)(2).

(e) Midwest Independent Transmission System Operator (Midwest ISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO–NE), and New York Independent System Operator (NYISO) qualify as markets described in §292.309(a)(1)(i) and (ii), and there is a rebuttable presumption that qualifying facilities with a capacity greater than 20 megawatts have nondiscriminatory access to those markets through Commission-approved open access transmission tariffs and interconnection rules, and that electric utilities that are members of such regional transmission organizations or independent system operators (RTO/ISOs) should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia*, that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(f) The Electric Reliability Council of Texas (ERCOT) qualifies as a market described in §292.309(a)(3), and there is a rebuttable presumption that qualifying facilities with a capacity greater than 20 megawatts have nondiscriminatory access to that market through Public Utility Commission of Texas (PUCT) approved open access protocols, and that electric utilities that operate within ERCOT should be relieved of the obligation to purchase electric energy from the qualifying facilities. A qualifying facility may seek to rebut this presumption by demonstrating, *inter alia*, that:

(1) The qualifying facility has certain operational characteristics that effectively prevent the qualifying facility's participation in a market; or

(2) The qualifying facility lacks access to markets due to transmission constraints. The qualifying facility may show that it is located in an area where persistent transmission constraints in effect cause the qualifying facility not to have access to markets outside a persistently congested area to sell the qualifying facility output or capacity.

(g) The California Independent System Operator and Southwest Power Pool, Inc. satisfy the criteria of §292.309(a)(2)(i).

(h) No electric utility shall be required, under this part, to enter into a new contract or obligation to purchase from or sell electric energy to a facility that is not an existing qualifying cogeneration facility unless the facility meets the criteria for new qualifying cogeneration facilities established by the Commission in §292.205.

(i) For purposes of §292.309(h), an ''existing qualifying cogeneration facility'' is a facility that:

(1) Was a qualifying cogeneration facility on or before August 8, 2005; or

(2) Had filed with the Commission a notice of self-certification or self-recertification, or an application for Commission certification, under §292.207 prior to February 2, 2006.

(j) For purposes of §292.309(h), a ''new qualifying cogeneration facility'' is a facility that satisfies the criteria for qualifying cogeneration facilities pursuant to §292.205.

[Order 688, 71 FR 64372, Nov. 1, 2006; 71 FR 75662, Dec. 18, 2006]

§ 292.310 Procedures for utilities requesting termination of obligation to purchase from qualifying facilities.

(a) An electric utility may file an application with the Commission for relief from the mandatory purchase requirement under § 292.303(a) pursuant to this section on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in § 292.309(a)(1), (2) or (3) have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in § 292.309(a)(1), (2) or (3) have been met.

(b) Sufficient notice shall mean that an electric utility must identify with names and addresses all potentially affected qualifying facilities in an application filed pursuant to paragraph (a).

(c) An electric utility must submit with its application for each potentially affected qualifying facility: The docket number assigned if the qualifying facility filed for self-certification or an application for Commission certification of qualifying facility status; the net capacity of the qualifying facility; the location of the qualifying facility depicted by state and county, and the name and location of the substation where the qualifying facility is interconnected; the interconnection status of each potentially affected qualifying facility including whether the qualifying facility is interconnected as an energy or a network resource; and the expiration date of the energy and/or capacity agreement between the applicant utility and each potentially affected qualifying facility. All potentially affected qualifying facilities shall include:

(1) Those qualifying facilities that have existing power purchase contracts with the applicant;

(2) Other qualifying facilities that sell their output to the applicant or that have pending self-certification or Commission certification with the Commission for qualifying facility status whereby the applicant will be the purchaser of the qualifying facility's output;

(3) Any developer of generating facilities with whom the applicant has agreed to enter into power purchase contracts, as of the date of the application filed pursuant to this section, or are in discussion, as of the date of the application filed pursuant to this section, with regard to power purchase contacts;

(4) The developers of facilities that have pending state avoided cost proceedings, as of the date of the application filed pursuant to this section; and

(5) Any other qualifying facilities that the applicant reasonably believes to be affected by its application filed pursuant to paragraph (a) of this section.

(d) The following information must be filed with an application:

(1) Identify whether applicant seeks a finding under the provisions of § 292.309(a)(1), (2), or (3).

(2) A narrative setting forth the factual basis upon which relief is requested and describing why the conditions set forth in § 292.309(a)(1), (2), or (3) have been met. Applicant should also state in its application whether it is relying on the findings or rebuttable presumptions contained in § 292.309(e), (f) or (g). To the extent applicant seeks relief from the purchase obligation with respect to a qualifying facility 20 megawatts or smaller, and thus seeks to rebut the presumption in § 292.309(d), applicant must also set forth, and submit evidence of, the factual basis supporting its contention that the qualifying facility has nondiscriminatory access to the wholesale markets which are the basis for the applicant's filing.

(3) Transmission Studies and related information, including:

(i) The applicant's long-term transmission plan, conducted by applicant, or the RTO, ISO or other relevant entity;

(ii) Transmission constraints by path, element or other level of comparable detail that have occurred and/or are known and expected to occur, and any proposed mitigation including transmission construction plans;

(iii) Levels of congestion, if available;

(iv) Relevant system impact studies for the generation interconnections, already completed;

(v) Other information pertinent to showing whether transfer capability is available; and

(vi) The appropriate link to applicant's OASIS, if any, from which a qualifying facility may obtain applicant's available transfer capability (ATC) information.

(4) Describe the process, procedures and practices that qualifying facilities interconnected to the applicant's system must follow to arrange for the transmission service to transfer power to purchasers other than the applicant. This description must include the process, procedures and practices of all distribution, transmission and regional transmission facilities necessary for qualifying facility access to the market.

(5) If qualifying facilities will be required to execute new interconnection agreements, or renegotiate existing agreements so that they can effectuate wholesale sales to third-party purchasers, explain the requirements, charges and the process to be followed. Also, explain any differences in these requirements as they apply to qualifying facilities compared to other generators, or to applicant-owned generation.

(6) Applicants seeking a Commission finding pursuant to §292.309(a)(2) or (3), except those applicants located in ERCOT, also must provide evidence of competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In demonstrating that a meaningful opportunity to sell exists, provide evidence of transactions within the relevant market. Applicants must include a list of known or potential purchasers, *e.g.*, jurisdictional and non-jurisdictional utilities as well as retail energy service providers.

(7) Signature of authorized individual evidencing the accuracy and authenticity of information provided by applicant.

(8) Person(s) to whom communications regarding the filed information may be addressed, including name, title, telephone number, and mailing address.

[Order 688, 71 FR 64372, Nov. 1, 2006, as amended by Order 688–A, 72 FR 35892, June 29, 2007]

§ 292.311 Reinstatement of obligation to purchase.

At any time after the Commission makes a finding under §§292.309 and 292.310 relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in §292.309(a), (b) or (c) are no longer met. After notice, including sufficient notice to potentially affected electric utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in §292.309(a), (b), or (c) which relieved the obligation to purchase, are no longer met.

[Order 688, 71 FR 64372, Nov. 1, 2006]

§ 292.312 Termination of obligation to sell to qualifying facilities.

(a) Any electric utility may file an application with the Commission for relief from the mandatory obligation to sell under this section on a service territory-wide basis or a single qualifying facility basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in paragraphs (b)(1) and (b)(2) of this section have been met. After notice, including sufficient notice to potentially affected qualifying facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in

paragraphs (b)(1) and (b)(2) of this section have been met.

(b) After August 8, 2005, an electric utility shall not be required to enter into a new contract or obligation to sell electric energy to a qualifying small power production facility, an existing qualifying cogeneration facility, or a new qualifying cogeneration facility if the Commission has found that;

(1) Competing retail electric suppliers are willing and able to sell and deliver electric energy to the qualifying cogeneration facility or qualifying small power production facility; and

(2) The electric utility is not required by State law to sell electric energy in its service territory.

[Order 688, 71 FR 64372, Nov. 1, 2006; 71 FR 75662, Dec. 18, 2006]

§ 292.313 Reinstatement of obligation to sell.

At any time after the Commission makes a finding under § 292.312 relieving an electric utility of its obligation to sell electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in Paragraph (b)(1) and (b)(2) of this section are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to sell electric energy under this section if the Commission finds that the conditions set forth in paragraphs (b)(1) and (b)(2) of this section are no longer met.

[Order 688, 71 FR 64372, Nov. 1, 2006]

§ 292.314 Existing rights and remedies.

Nothing in this section affects the rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority or non-regulated electric utility on or before August 8, 2005, 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).

[Order 688, 71 FR 64372, Nov. 1, 2006]

Subpart D—Implementation

AUTHORITY: Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601 *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.*, Federal Power Act, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, E.O. 12009, 42 FR 46267.

SOURCE: Order 69, 45 FR 12236, Feb. 25, 1980, unless otherwise noted.

§ 292.401 Implementation of certain reporting requirements.

Any electric utility which fails to comply with the requirements of § 292.302(b) shall be subject to the same penalties to which it may be subjected for failure to comply with the requirements of the Commission's regulations issued under section 133 of PURPA.

[45 FR 12236, Feb. 25, 1980. Redesignated by Order 541, 57 FR 21734, May 22, 1992]

§ 292.402 Waivers.

(a) *State regulatory authority and non-regulated electric utility waivers.* Any State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or non-regulated electric utility may, after public notice in the area served by the electric utility, apply for a waiver from the application of any of the requirements of subpart C (other than § 292.302 thereof).

(b) *Commission action.* The Commission will grant such a wavier only if an applicant under paragraph (a) of this section demonstrates that compliance with any of the requirements of subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under section 210 of PURPA.

[45 FR 12236, Feb. 25, 1980. Redesignated by Order 541, 57 FR 21734, May 22, 1992]

Midland Power Cooperative, et al. v. FERC **Docket No. EL11-39-002**
D.C. Cir. No. 13-1184

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 1st day of May 2014, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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