

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>MR. AND MRS. GREGORY SWECKER,</p> <p style="padding-left: 100px;">Complainants,</p> <p style="padding-left: 100px;">vs.</p> <p>MIDLAND POWER COOPERATIVE,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-99-3 (C-99-76)</p>
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ORDER DENYING RESPONDENT'S MOTION

(Issued January 12, 2000)

On December 21, 1999, Midland Power Cooperative (Midland) filed a Motion to Strike and Disregard Portions of Office of Consumer Advocate (OCA) Response to Midland's Answers Prepared in Response to Administrative Law Judge's (ALJ's) Questions. In its motion, Midland stated that it was allowed to file additional testimony after the hearing to respond to specific questions or issues set out by the Administrative Law Judge. Midland stated that the OCA was also allowed to file additional testimony after the hearing based on specific information the OCA objected to during the hearing. Midland listed the material objected to by the OCA in its motion. It stated that the OCA had objected to the portions of Midland's testimony regarding the basis for its co-generation tariff which had been provided in answers to ALJ questions 1, 3, 4, and 5. Midland argued that portions of the OCA response

went beyond the information objected to, and thus went beyond the scope of the additional testimony allowed to be filed subsequent to the hearing. Specifically, Midland argues that the OCA did not object to the answer to question 27, and therefore it should not be allowed to present additional testimony in reference to the response to question 27. Midland moved to strike those portions of the OCA testimony which referred to the response to question 27.

In its response to Midland's Motion to Strike, the OCA stated it had objected to portions of Midland's response to ALJ questions 1, 3, 4, and 5, in which Midland maintained it had relied on Woodbury County REC's tariff to design its cogeneration rates. The OCA stated this was precisely the kind of information it had sought through discovery, but which was not disclosed by Midland until the day of the hearing. The OCA further stated Midland referred to Woodbury County REC's tariff in its response to question 27, as well as in its response to questions 1, 3, 4, and 5, and that the OCA's objection at the hearing had been to Attachment 3, the Woodbury County REC tariff. The OCA stated that at the hearing, it was given the opportunity to look at the additional information submitted by Midland on the day of hearing, including the Woodbury County REC tariff, and "to present additional testimony, based on that information...." The OCA argued its additional testimony which Midland seeks to strike was directly responsive to the additional information submitted by Midland. The OCA argued that the OCA's additional testimony properly responded to Midland's use of the information in its response to question 27, and

was equally responsive and relevant to Midland's answers to questions 1, 3, 4, and 5, in which Midland disclosed its reliance on the Woodbury County REC tariff. The OCA argued its additional testimony was responsive to Midland's decision to pattern its rates on a single REC, showed most RECs do not use a separate rate structure for co-generators, and identified one rate structure from an REC which permits separate rates when there is an empirical basis for doing so. The OCA argued that by alleging reliance on another REC's rate structure in response to questions 1, 3, 4, and 5, Midland opened the door to comparisons of rate structures used by other RECs as brought out in the OCA's additional testimony. The OCA further argued that it did not look into tariff provisions of other RECs prior to hearing because Midland did not disclose it patterned its rate structure after another Iowa REC until the day of hearing, and Midland's response to discovery directly impacted the OCA's preparation for hearing. The OCA argued that it requested the basis of Midland's rate provisions in discovery, and Midland did not disclose the information regarding reliance on the Woodbury County REC until the day of hearing. The OCA argued that the ALJ's ruling at hearing on the OCA's motion to strike allowed the OCA to respond to the additional information Midland presented at hearing, and that the OCA's additional testimony was properly within this scope and thus should be permitted.

At the hearing, the OCA objected to portions of Midland's answers to the ALJ's questions regarding whether Midland used data to develop the structure of

rates under the co-generation tariffs other than the data used to develop the tariff for non-generating three-phase customers. In its answers, Midland stated it had relied on its cost of service study, the Woodbury County Rural Electric Cooperative (REC) co-generation tariff, Corn Belt Power Cooperative's PURPA Implementation Plan, assistance from Gary Phann, and projected and expected load characteristics of a co-generator to develop its co-generation tariff. The OCA objected to these answers and some of the attached exhibits, because it stated it had asked for the information in discovery in data request number 8, and Midland did not provide the information to the OCA. (Prior to hearing, Midland stated its cost of service study was the basis for its co-generation rate, and did not provide any of the other information as a basis.) The first time the OCA saw the answers and exhibits objected to was at the hearing. At that time, the OCA requested the answers and certain exhibits be stricken from the record. (Tr. 497-99) The information requested to be stricken included testimony that Midland relied on the Woodbury County REC co-generation tariff in structuring its own co-generation tariff, and the Woodbury County tariff (Attachment 3, Exhibit 223).

At the hearing, the undersigned ruled that although there had not been intent by Midland to mislead the OCA by not providing the information in response to the data request, the OCA did not have the opportunity to use the information to evaluate the case, and therefore would be given the opportunity to do so by cross-examination and by submission of additional testimony based on the information

after the hearing. (Tr. 501-02) The OCA was also given the opportunity to amend any answers previously given and refer to previously given testimony to cure the problem. (Tr. 502)

Midland interprets this ruling too narrowly in its motion to strike. The OCA had specifically requested the information in discovery prior to hearing, and Midland did not provide it. Midland only provided the information in answers to questions posed by the ALJ. The ALJ's questions were issued November 17, 1999. Midland provided its answers in written form the morning of the hearing. The OCA moved to strike the portions of the answers which provided the information it had previously requested in discovery. Although Midland made a mistake in interpreting the OCA's data request, and was apparently confused as to what had been requested, the OCA was denied the opportunity to have the requested information to be able to prepare for hearing. The ruling was a compromise to allow Midland the opportunity to present the evidence and withstand the OCA's motion to strike. Therefore, the intent of the ruling was to give the OCA a fair opportunity to respond to the requested information subsequent to hearing. It is immaterial that the OCA did not specifically object to the answer to question 27, or that it referred to that question in its additional testimony. The OCA's testimony is directly responsive to the objected to information provided by Midland at the hearing. The additional testimony provided by the OCA is well within the response contemplated by the ruling, and should not be struck.

IT IS THEREFORE ORDERED:

The Motion to Strike and Disregard Portions of Office of Consumer Advocate Response to Midland's Answers Prepared in Response to Administrative Law Judge's Questions filed by Midland Power Cooperative on December 21, 1999, is hereby denied.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

Dated at Des Moines, Iowa this 12th day of January, 2000.