STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: MIDWEST RENEWABLE ENERGY PROJECTS LLC, Petitioner, v. INTERSTATE POWER AND LIGHT COMPANY, Respondent.	DOCKET NOS. AEP-05-1 AEP-05-2 AEP-05-3 AEP-05-4

ORDER DENYING MOTIONS TO HOLD DOCKETS IN ABEYANCE AND SETTING TIME FOR ANSWERS OR RESPONSES

(Issued September 21, 2005)

On August 12, 2005, Interstate Power and Light Company (IPL) filed with the Utilities Board (Board) a motion to hold Docket No. AEP-05-1 in abeyance. This docket involves a petition filed by Midwest Renewable Energy Projects LLC (Midwest Renewable) on January 12, 2005, which asked the Board to determine specific rates to be paid by IPL for purchases of qualifying energy and/or capacity for a certain qualifying small power production facility (QF). The petition also asked that the Board order IPL to purchase such energy and/or capacity from the facility pursuant to a long-term agreement that may, but need not, convey to IPL any emission credits, alternate energy credits, or similar tradable certificates.

On August 15, 2005, IPL filed similar motions to hold Docket Nos. AEP-05-2, 3, and 4 in abeyance. These dockets involve three petitions filed by Midwest Renewable on July 26, 2005, that are similar to the petition filed in Docket No. AEP-05-1. Each petition asked the Board to determine rates to be paid to another QF under the Public Utility Regulatory Policies Act of 1978 (PURPA). In other words, four AEP petitions are before the Board involving four separate QF facilities.

Midwest Renewable filed resistances to the motions and memoranda in support of the resistances on September 2, 2005. IPL filed replies to the resistances on September 12, 2005. Midwest Renewable responded to IPL's replies on September 16, 2005.

A brief procedural background and current status is useful for putting these dockets in context. Docket No. AEP-05-1 is almost completed. The petition was docketed as a formal proceeding on January 27, 2005, and the parties have had multiple opportunities to submit prefiled testimony and exhibits. Two separate evidentiary hearings were held. Initial briefs were filed on May 13, 2005. Because of additional evidence that the parties submitted, reply briefs were not filed until August 8, 2005. The docket is before the Board for decision, pending the decision on the motion to hold in abeyance.

The other three cases are in an identical procedural posture. Midwest Renewable filed the petitions on July 26, 2005. IPL filed motions to hold in abeyance on August 15, 2005. Other than responses and replies to the motions, there has been no other activity in Docket Nos. AEP-05-2, 3, and 4.

In support of its motions to hold in abeyance, IPL said that the Board's authority to establish the avoided cost rates to be paid by IPL to QFs is provided by Section 210 of PURPA. IPL noted the Energy Policy Act of 2005 (EPACT2005) added a subsection to PURPA which provides that no electric utility shall be required to enter into a new contract or obligation to purchase electricity for a QF if the Federal Energy Regulatory Commission (FERC) finds that the QF has nondiscriminatory access to competitive wholesale markets that have the characteristics described in section 824a-3(m).

IPL said that on August 12, 2005, it was filing at FERC a petition for declaratory order asking FERC to determine that IPL is no longer required to enter into a new contract or obligation to purchase electricity under PURPA. A copy of the petition for declaratory order is attached to IPL's motions. IPL is also asking FERC to determine that IPL has no obligation to enter into a purchase power agreement (PPA) with any unbuilt QF project, such as those of Midwest Renewable. IPL argued that the savings clause contained in EPACT2005, which provides that the changes do not impact the rights or remedies of any party with a contract or obligation that is in effect or pending approval before a state regulatory commission, does not apply to the Midwest Renewable projects because there is no existing contract and no contract before the Board pending approval.

IPL requested that the dockets be held in abeyance pending a FERC ruling on its petition for declaratory order. IPL said that the resources of the parties and the Board should not be expended until FERC determines whether IPL will have any

future obligation with regard to Midwest Renewable's planned facilities. The amendments to PURPA quoted in the motions indicated a final FERC determination should be made within 90 days of filing.

Midwest Renewable, in its resistances and memoranda, analyzed IPL's request as if it were a motion for stay, using the four factors set forth in Iowa Code § 17A.19(5)"c" and Teleconnect Co. v. Iowa State Commerce Com'n, 366 N.W.2d 511, 513 (Iowa 1985). Midwest Renewable said the factors are: (1) the extent to which IPL is likely to prevail before FERC in obtaining a declaratory order that will affect this docket; (2) the extent to which IPL will suffer irreparable harm if the stay is denied; (3) the extent to which a stay will substantially harm other parties to this docket; and (4) the extent to which the public interest is affected by the grant or denial of the stay.

With respect to the first factor, Midwest Renewable said that it disagreed with IPL's interpretation of the savings clause and that while there is no executed QF contract, there is an existing obligation by IPL to purchase such power before the appropriate state regulatory authority. Pursuant to 199 IAC 15.1, Midwest Renewable argued that the intent and purpose of the AEP dockets is to approve an obligation by IPL to purchase energy or capacity from a QF. Midwest Renewable noted that a purchase obligation is also contained in IPL's tariffs.

Midwest Renewable stated IPL's motions contained no allegation that it would suffer irreparable injury if the motions were not granted. IPL's assertion that

additional resources of the Board and the parties would have to be expended does not come close to meeting the standard for a stay.

The third factor is harm to other parties if the stay is granted. Here, because of an 18-month limit for completion of a facility to be eligible for state tax credits, Midwest Renewable argued any stay means that it might have to forfeit its credits because the facilities could not be operational within 18 months. Iowa Code § 476B.5(3). Because of delays in obtaining turbines, a stay could also impact Midwest Renewable's eligibility for federal tax credits. Midwest Renewable finally noted that the 90-day time limit for a FERC ruling only applied to one of the questions, whether QFs in IPL's electric service territory have nondiscriminatory access to competitive markets, and not the second question, whether IPL is obligated to enter into PPAs with any QF that is currently unbuilt and not in operation. Midwest Renewable concluded that any FERC ruling issued within the 90-day time limit would likely not provide definitive answers.

Midwest Renewable said the final factor, impact on the public interest, favored denying the motions. Midwest Renewable said any delay would frustrate the state's policy of encouraging development of alternate energy production facilities. Iowa Code § 476.41.

On September 12, 2005, IPL replied to Midwest Renewable's resistances. IPL said the four-factor test Midwest Renewable cited for stays was not applicable to these proceedings because IPL has merely requested a delay in the proceedings. IPL stated the delay was requested because of changes made to PURPA by

EPACT2005, which is the underlying basis for the Board's jurisdiction. IPL went on to argue, however, that even if the four-factor test were used, IPL's motions to hold in abeyance should be granted.

IPL noted that there is no contract or obligation pending approval before the Board such that the PURPA savings provision found in EPACT2005 would apply. IPL said the purpose of the proceedings before the Board is to establish the rate and other terms for a proposed future obligation, not to approve an obligation between two parties. IPL maintained the purpose of the savings clause is to prevent abrogation of existing PPAs and that some states, unlike Iowa, have a final PPA approval process associated with cost recovery by a utility. Therefore, IPL believes it will prevail on the merits of the savings clause before FERC.

IPL next argued a delay would not materially disadvantage either party because turbines are not immediately available. In a Wisconsin proceeding, Midwest Renewable has moved a proposed in-service date for a wind facility back to December 31, 2007. IPL also argued that the public interest favored putting a hold on Board action until FERC ruled on the jurisdictional issue.

On September 16, 2005, Midwest Renewable filed responses to IPL's replies. Midwest Renewable argued that IPL's request for a delay in the proceedings is equivalent to a request for stay.

Midwest Renewable noted that it was unreasonable to expect FERC to issue a ruling any time soon that would deprive the Board of jurisdiction in this docket. Midwest Renewable said several intervenors in the FERC proceeding argued IPL's

petition for declaratory order was deficient on its face because it fails to provide any factual data or analysis to support its contention that the statutory requirements regarding access to competitive markets have been satisfied. Midwest Renewable also argued that, contrary to IPL's assertions, it had undertaken efforts to secure turbines from third parties who have purchased turbines from vendors for 2006.

The Board does not see any significance in denoting IPL's request as a request for a "delay" or a request for a "stay." The impact is the same—halting the Board's AEP dockets until FERC issues a ruling on IPL's declaratory order petition.

While the Board has acknowledged it is not explicitly bound by the four-factor test when ruling on a stay application, the Board has nevertheless found it appropriate to use the test in such rulings. Fibercomm, L.C., et al., v. AT&T Communications of the Midwest, Inc., "Order Denying Motion for Stay," Docket No. FCU-00-3 (4/26/02). The Board will examine the four factors as they apply to IPL's requests.

The first factor is IPL's likelihood of success on the merits, that is, the likelihood IPL will get a favorable ruling from FERC. It is not clear that FERC will in fact rule on IPL's declaratory petition within 90-days. Even if FERC does rule, it is not clear that FERC will answer all the questions posed in a manner such that the Board no longer has anything to determine in the AEP dockets. As pointed out by Midwest Renewable, the 90-day deadline may not apply to all of the questions presented in the declaratory order docket. In addition, some of the comments and protests filed at FERC argue that IPL's filing is incomplete. If FERC agrees, the

Board believes the 90-day clock would not begin to run until there is additional information filed. There is too much uncertainty both on the timing and the content of any FERC ruling for this factor to favor IPL.

Second, IPL has made no showing of irreparable harm if its request for delay is denied. IPL's main justification is that a stay would preserve the resources of the Board and the parties. As the Board has previously said:

> The Board will deny Qwest's motion for a stay of these proceedings while the FCC considers Qwest's petition for a declaratory ruling. Qwest's main justification for a stay is the claim that it might preserve the Board's resources, depending upon the action taken by the FCC, but the fact is that the Board has already expended the majority of resources required to decide this matter, . . .

AT&T Corporation v. Qwest Corporation, "Order Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing," Docket No. FCU-02-2 (5/29/02), p. 19. In Docket No. AEP-05-1, all that is left is for the Board to issue a decision. If a delay were granted, the record might become stale, making a Board decision more difficult and time-consuming. While the other dockets have just begun, minimal resources will have to be expended prior to the expiration of the FERC 90-day period (assuming it is running). Because the dockets request similar relief, prefiled testimony is likely in some cases to be substantially similar. A hearing will not be scheduled before the 90 days expires. If FERC issues a definitive ruling within that time, the hearing date can be adjusted or cancelled.

Third, Midwest Renewable has shown that any delay may cause it prejudice. Turbines must be located, and the tax credits Midwest Renewable is eligible for under

Chapter 476B contain time limits for the facility becoming operational. The delay could also impact Midwest Renewable's eligibility for federal tax credits, if they are not renewed.

Fourth, the impact on the public interest appears to tilt toward denying the request for delay. If the state proceedings are delayed, thereby causing Midwest Renewable to terminate its project because of the unavailability of turbines or the state tax credit, a renewable energy project with its resulting jobs and economic impact will be lost.

In examining the four factors individually and collectively, the Board finds that the delay or stay request will be denied. The timing and definitiveness of any FERC order has not been satisfactorily established and the Board is concerned that any stay could be much longer than 90 days. While some resources will have to be expended, they are minimal, particularly when compared to the prejudice that Midwest Renewable may suffer by a delay. IPL will have ten days from the date of the order to file an answer or response in Docket Nos. AEP-02, 3, and 4.

IT IS THEREFORE ORDERED:

1. The "Motion to Hold Docket in Abeyance" filed by Interstate Power and Light Company on August 12, 2005, in Docket No. AEP-05-1, is denied.

2. The "Motion to Hold Docket in Abeyance" filed by Interstate Power and Light Company on August 15, 2005, in Docket No. AEP-05-2, is denied.

3. The "Motion to Hold Docket in Abeyance" filed by Interstate Power and Light Company on August 15, 2005, in Docket No. AEP-05-3, is denied.

4. The "Motion to Hold Docket in Abeyance" filed by Interstate Power and Light Company on August 15, 2005, in Docket No. AEP-05-4, is denied.

5. Interstate Power and Light Company shall file answers or responses in Docket Nos. AEP-05-2, 3, and 4 within ten days from the date of this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

/s/ Elliott Smith

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 21st day of September, 2005.