

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<p>IN RE:</p> <p>MIDWEST RENEWABLE ENERGY PROJECTS LLC,</p> <p style="text-align:right">Petitioner,</p> <p style="text-align:center">v.</p> <p>INTERSTATE POWER AND LIGHT COMPANY,</p> <p style="text-align:right">Respondent.</p>	<p>DOCKET NOS. AEP-05-2 AEP-05-3 AEP-05-4</p>
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**ORDER GRANTING STAY**

(Issued July 7, 2006)

**I. PROCEDURAL HISTORY**

On February 7, 2006, Interstate Power and Light Company (IPL) filed with the Utilities Board (Board) a motion to hold consolidated Docket Nos. AEP-05-2, AEP-05-3, and AEP-05-4 (collectively, Consolidated Dockets) in abeyance pending the outcome of a rule making proceeding initiated by the Federal Energy Regulatory Commission (FERC), identified as Docket No. RM06-10. The FERC rule making is designed to implement provisions of the Energy Policy Act of 2005 (EPACT 2005) that exempt utilities, under certain circumstances, from their requirement to purchase energy from qualifying facilities (QFs) under the Public Utilities Regulatory Policies

Act of 1978 (PURPA). Midwest Renewable Energy Projects LLC (Midwest Renewable) filed an objection to the motion on March 9, 2006.

The three AEP dockets pending before the Board involve three separate petitions filed by Midwest Renewable on July 26, 2005. Each petition asked the Board, among other things, to determine rates to be paid to a QF under PURPA. In other words, three AEP petitions are before the Board involving three separate QFs. The Board consolidated the three dockets by order issued October 27, 2005.

By way of background, this is the second time IPL has requested that the Consolidated Dockets be held in abeyance. The Board denied a similar motion by order issued September 21, 2005, in Docket Nos. AEP-05-1 through AEP-05-4 (September Order); at that time, however, FERC had not issued its notice of proposed rule making. In addition, the September Order also dealt with Docket No. AEP-05-1, an earlier filing by Midwest Renewable asking the Board to determine rates to be paid to another QF under PURPA that was not consolidated with the other three AEP dockets.

The Board issued its final decision in Docket No. AEP-05-1 on December 28, 2005, setting the avoided cost rate for IPL's purchases of energy or capacity from Midwest Renewable's proposed qualifying facility small power production facility in Worth County that are made pursuant to PURPA and 199 IAC 15 at \$29 per MWh. A rehearing order was issued June 12, 2006, directing IPL to update its Electric Generation Expansion Analysis System (EGEAS) results. IPL's EGEAS results

played a significant role in the Board's determination of avoided cost. Because the Board limited the rehearing to an update of the EGEAS analysis, Midwest Renewable's motion to consolidate Docket No. AEP-05-1 with the other three AEP dockets, which was part of the relief it requested on rehearing, was denied.

## **II. IPL'S POSITION**

IPL asked that the Board hold the Consolidated Dockets in abeyance, pending the outcome of a FERC rule making (Docket No. RM06-10) which, if adopted by FERC as proposed, would exempt IPL and other utility members of the Midwest Independent System Operator (MISO) from their requirements to purchase from PURPA QFs. IPL argued that the savings clause contained in EPACT 2005 does not apply to Midwest Renewable's projects that are the subject of the Consolidated Dockets.

IPL said the savings clause, which is incorporated into the proposed rules, protects the rights and remedies of QFs under any contract or obligation in effect or pending approval before a state regulatory authority, regardless of the QF's stage of construction. However, IPL said this savings clause does not apply to the wind projects at issue in the Consolidated Dockets, contrary to Midwest Renewable's arguments, because there are no contracts or binding obligations pending approval in these dockets. IPL maintained that Midwest Renewable did not even seek contracts with IPL before filing its petitions in the Consolidated Dockets. IPL further argued that the savings clause protection for QFs, regardless of their stage of

construction, does not apply to Midwest Renewable's projects, which apparently have not commenced construction.

IPL noted the Board's previous denial of IPL's motion was based on a four-factor test. IPL said the four factors used by the Board in the September Order were: (1) the likelihood that IPL would obtain a FERC exemption from its PURPA purchase obligation, (2) the extent to which IPL would suffer irreparable harm if its motion was denied, (3) the extent to which other parties would be harmed if IPL's motion was granted, and (4) the public interest impact. Regarding the first factor, likelihood of success, IPL argued it is likely to obtain FERC exemption based on its status as a MISO utility under the EPACT and FERC's proposed rules. IPL also noted that Midwest Renewable's projects are unlikely to be grandfathered under the savings clause because there is no contract or obligation to purchase pending before the Board. IPL noted that Midwest Renewable's projects are not under construction but only in the early planning stage.

Regarding the second factor, irreparable harm, IPL said that its previous motion included Docket No. AEP-05-1, which was nearing completion of the hearing process before the Board at that time, and its current motion involves only the Consolidated Dockets, which have not progressed beyond the early pleadings stage. Also, IPL stated that experience with Docket No. AEP-05-1 shows that the Consolidated Dockets will require IPL to spend significant resources, and that wasting these resources will cause IPL irreparable harm.

Regarding the third factor, harm to other parties, IPL suggested Midwest Renewable will not be harmed, but may actually benefit by avoiding the expense of unnecessary litigation if IPL's motion is granted. Otherwise, IPL noted the indefinite nature of Midwest Renewable's projects makes it difficult to see how Midwest Renewable is harmed if the Consolidated Dockets are delayed pending the outcome of FERC's rulemaking.

Similarly, IPL said the fourth factor, the public interest, would be served by avoiding the expense of unnecessary litigation. Again, given the indefinite nature of Midwest Renewable's projects, IPL said it is not clear that delaying the dockets will make project completion less likely. IPL noted that a similar docket before the Public Service Commission of Wisconsin involving Midwest Renewable has been held in abeyance since August 29, 2005.

## **II. MIDWEST RENEWABLE'S POSITION**

Midwest Renewable argued that IPL's motion was defective and should be summarily rejected. Rule IAC 7.12 requires that motions "based on matters that do not appear of record shall be supported by affidavit;" Midwest Renewable alleged that IPL's motion makes factual allegations about the status of Midwest Renewable's projects with no reference to the record, and with no affidavit of any kind.

Midwest Renewable noted that IPL's motion is similar to its previous motion that was rejected by the Board in the September Order. Midwest Renewable argued

an application of the four-factor test used in the September Order should also lead to rejection of IPL's current motion.

Regarding the first factor, Midwest Renewable said the outcome of the FERC rulemaking is no more certain than IPL's earlier FERC petition for exemption, and that IPL has offered nothing that shows otherwise; similarly, IPL has offered nothing showing why the savings clause would not apply to Midwest Renewable's projects (other than factual allegations about the status of Midwest Renewable's projects, unsupported by the record or by affidavit).

Regarding the second factor, Midwest Renewable argued that IPL does not show how litigation expense will cause IPL irreparable harm, and noted that the Board did not regard this as sufficient justification in IPL's previous motion.

Regarding the third factor, Midwest Renewable maintained the Board previously determined that delay would harm Midwest Renewable in terms of obtaining tax credits and wind turbines. Midwest Renewable argued that IPL offers nothing showing that this has changed (again, other than factual allegations about Midwest Renewable's projects, unsupported by the record or by affidavit). Midwest Renewable rejected as specious the IPL notion that Midwest Renewable would benefit by avoiding unnecessary litigation.

Regarding the fourth factor, Midwest Renewable noted the Board previously determined that "the public interest appears to tilt toward denying the request for stay" because of the possible termination of Midwest Renewable's projects and

resulting loss of jobs and associated economic benefits. Midwest Renewable argued that IPL has offered nothing showing that this has changed (other than factual allegations about Midwest Renewable's projects, unsupported by the record or by affidavit). Midwest Renewable alleged that a delay in the consolidated proceedings for determining contract prices would seriously impair Midwest Renewable's ability to enter into timely contracts with IPL and complete its wind projects.

Midwest Renewable concluded its arguments by noting that the MISO Day-2 energy market will have been in operation for over one year, and will provide what Midwest Renewable views as incontrovertible data for establishing avoided cost contract rates for each of Midwest Renewable's wind projects in the consolidated dockets.

### III. ANALYSIS

In its September Order, the Board said it would use the four-factor test used in Teleconnect Co. v. Iowa State Commerce Com'n, 366 N.W.2d 511, 513 (Iowa 1985) for stay requests in ruling on IPL's motion. The Board noted in the September Order that while the Board 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 four factors used by the Board were: (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.

The Board will also apply the four-factor test here. As was true in the September Order, the Board will treat IPL's motion as a request for stay, even though it is styled as a motion to hold in abeyance. The Board does not see any significance in how the request is styled because the requested effect is the same—halting the Board's AEP dockets until FERC issues a final rule making.

The September Order fully sets forth the Board's reasons for denying IPL's initial request for stay, and is incorporated by reference here. However, events that have occurred since the September Order necessitate application of the four-factor test to the changed circumstances.

The first factor is the likelihood IPL will obtain a FERC exemption from its PURPA purchase obligation. IPL based its initial request, which was denied in the September Order, on the general provisions of the newly-enacted EPACT 2005. IPL's request was made prior to any FERC determinations as to how the new provisions would be implemented. The current motion is based on proposed rules, which includes a preliminary finding by FERC that members of MISO, such as IPL, would be exempt from PURPA QF purchase obligations. See, Docket No. RM06-10, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, 1/19/06, ¶ 12. While FERC could choose to not adopt this

blanket exemption in final rules, its preliminary finding, and the statutory basis for it in EPACT 2005, suggest there is a substantial likelihood that IPL will be exempted from its statutory QF purchase obligations.

FERC's proposed rules also implement the EPACT 2005 savings clause, which protects the rights and remedies of QF's under contract or obligation, either in effect or pending approval before a state regulatory authority, and regardless of the QF's stage of construction. There are no contracts or obligations pending before the Board in the Consolidated Dockets; what is pending are three petitions to set PURPA avoided cost rates for three separate wind projects. No procedural schedule has been set; in fact, a procedural schedule for the Consolidated Dockets was not to be set until the conclusion of Docket No. AEP-05-1, pursuant to the order consolidating dockets issued October 27, 2005. The Board now views the first factor as favoring IPL because there is now a greater likelihood than at the time the September Order was issued that IPL will be exempted from its statutory QF purchase obligations for the three AEP projects at issue.

Midwest Renewable argued that IPL used facts not in the record to support its motion, and that it failed to supply an affidavit as required by 199 IAC 7.12. However, the primary "facts" IPL alluded to were that there was no contract or obligation pending between IPL and Midwest Renewable for any of the three projects in the Consolidated Dockets; this information is within the purview of IPL's counsel and does not require an affidavit for support. IPL also noted that none of the projects

appears to be in construction; the Board views this statement as opinion and not fact; Midwest Renewable could have corrected this opinion if it was incorrect, but chose not to.

The second factor is the extent to which IPL would suffer irreparable harm if its motion were denied. Docket No. AEP-05-1 is not impacted by IPL's current motion. In addition, no procedural schedule has been set in the Consolidated Dockets. Therefore, the additional litigation expense from the consolidated dockets could be viewed as a harmful and wasteful use of IPL's resources, which might be recoverable from IPL's ratepayers in a future rate proceeding.

The third factor is the harm suffered by other parties (Midwest Renewable) if a stay is granted. In the September Order, the Board noted that procedural delay might adversely affect Midwest Renewable's ability to obtain wind turbines, and federal and state tax credits. However, since then, Midwest Renewable and its affiliates have withdrawn their eligibility applications for state tax credits, for the proposed wind projects in the Consolidated Dockets.<sup>1</sup> Thus, the state tax credits are no longer a factor in determining potential harm to Midwest Renewable. Also, for other wind projects, Midwest Renewable and its affiliates have indicated they intend to sell energy directly into the MISO energy market.<sup>2</sup> Although, Midwest Renewable

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<sup>1</sup> Specifically, Midwest Renewable and its affiliates withdrew their 199 IAC 15.18 eligibility applications for Barton Windpower, LLC, (AEP-05-3) on 2/3/06, Barton Windpower II, LLC, (AEP-05-2) on 2/3/06, and Winnebago Windpower II LLC (AEP-05-4) on 2/8/06.

<sup>2</sup> *Application for Certification of Eligibility for Wind Energy Tax Credits*, Northern Iowa Windpower III, LLC, (6/24/05) and Winnebago Windpower, LLC, (6/27/05) 199 IAC 15.18. Both applications identify the LLCs as 100 percent owned by Midwest Renewable Energy Projects, LLC (MREP), which in turn

has not indicated this same intent in the Consolidated Dockets, Midwest Renewable's access to MISO competitive energy markets appears to significantly reduce the potential harm to Midwest Renewable.<sup>3</sup>

The fourth and final factor concerns the impact of IPL's motion on the public interest. The Board's determination of public interest impact in IPL's previous motion was largely based on the potential harm to Midwest Renewable, the resulting negative impact on jobs and the state economy, and the apparent lack of counterbalancing influence from the other two factors. The Board in reviewing the four factors, however, did not reach an emphatic conclusion but said the factors "tilted toward" denial of IPL's motion.

Now, with the change in circumstances since the September Order, a balancing of the four factors strongly favors granting a stay. Among other things, the Board is concerned with expending significant resources on dockets where there is a significant likelihood that any results will be rendered moot by the FERC rule making; unlike Docket No. AEP-05-1, here no procedural schedule has been set, meaning that almost all of the resources required to litigate the Consolidated Dockets have not

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is 100 percent owned by MREC Partners, LLC, which in turn is 76 percent owned by Midwest Renewable Energy Corporation (MREC). The applications further state that MREC is a fully certified Market Participant in the MISO Day-Ahead electric wholesale energy market.

<sup>3</sup> That is, if Midwest Renewable has access to MISO competitive energy markets through an affiliated MISO market participant (see footnote 2 above), then it could be argued that Midwest Renewable no longer needs the protection of the PURPA purchase obligation – consistent with FERC's "preliminary finding" in RM06-10 that would give MISO members blanket exemption from their PURPA QF purchase obligations.

yet been expended. The Board will stay the Consolidated Dockets pending the outcome of the FERC rule making in Docket No. RM06-10.

**IV. ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

Docket Nos. AEP-05-2, AEP-05-3, and AEP-05-4 are stayed pending the outcome of a rule making proceeding by the Federal Energy Regulatory Commission, identified as Docket No. RM06-10.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 7<sup>th</sup> day of July, 2006.