

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>MIDWEST RENEWABLE ENERGY PROJECTS LLC,</p> <p style="padding-left: 40px;">Petitioner,</p> <p style="text-align:center">v.</p> <p>INTERSTATE POWER AND LIGHT COMPANY,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>DOCKET NOS. AEP-05-2 AEP-05-3 AEP-05-4</p>
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**ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT AND
SETTING DEADLINE FOR SUBMISSION OF PROPOSED SCHEDULE**

(Issued October 3, 2007)

On August 27, 2007, Interstate Power and Light Company (IPL) filed a "Motion for Partial Summary Judgment" and a "Supporting Statement and Memorandum" for the motion. IPL stated that Docket Nos. AEP-05-1, AEP-05-2, AEP-05-3, and AEP-05-4 all deal, in whole or in part, with the determination of an avoided cost for IPL's purchase of wind energy from Midwest Renewable Energy Projects LLC (MREP) pursuant to a legally enforceable obligation. IPL argues that Iowa Rule of Civil Procedure 1.981(3) provides that a moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." IPL argues that MREP's initial petitions in Docket Nos. AEP-05-2, AEP-05-3, and AEP-05-4, (the consolidated dockets), filed July 25, 2005, requested

a determination of an avoided cost calculated at the time the obligation is incurred pursuant to 199 IAC 15.5(5)"b," the same request made in Docket No. AEP-05-1, filed January 12, 2005. IPL noted that MREP subsequently amended its petition to include a request to determine avoided cost based on a different method. However, it argues, the issue of the determination of an avoided cost based on the time that the legally enforceable obligation was incurred is common between the consolidated dockets and AEP-05-1. IPL argues the issue of avoided cost has been extensively litigated in Docket No. AEP-05-1 and no outstanding material issues of fact remain regarding avoided cost. Therefore, argues IPL, it is appropriate to grant partial summary judgment on the issue of avoided cost, and establish such cost at approximately \$36.45 for MREP's remaining three 80-megawatt (MW) wind projects at issue in this case.

In its supporting memorandum, IPL stated that the Board determined an avoided cost of \$37.05 per megawatt-hour (MWh) based on a 30-MW wind generation facility over a 20-year contract term in Docket No. AEP-05-1. IPL stated the Board based this avoided cost, in part, on IPL's Electric Generation Expansion Analysis System (EGEAS) results with certain select adjustments in order to determine the most accurate avoided cost possible, based on the time the legally enforceable obligation was created. IPL argues that, because the four dockets were filed closely in time, the same basic information used in the calculation of the avoided cost via the EGEAS model, as accepted by the Board in Docket No. AEP-05-1, would also be appropriate for use in the consolidated dockets. IPL argues that if the avoided cost is calculated at the time the legally enforceable obligation is incurred,

the same EGEAS inputs, as adjusted by the Board in AEP-05-1, would also be appropriate for use in the consolidated dockets. IPL argues the Board-ordered updated EGEAS analysis, based on the same data inputs and assumptions used to generate IPL's 2006 PURPA Report, as adjusted by the Board in its May 31, 2007, "Order on Rehearing," is the most up-to-date and appropriate information for use in determining the avoided cost in the consolidated dockets.

IPL notes the avoided cost in AEP-05-1 was based on 30 MW of output from the wind facility in that docket, and the petitions in the consolidated dockets anticipate 80 MW of output for each facility. IPL argues the \$37.05 figure will need to be adjusted to account for this difference. IPL argues that information sufficient to make this calculation exists in the record in AEP-05-1 through the testimony of IPL witness Mr. Brent Kitchen. IPL argues that Mr. Kitchen testified the reduction or addition of MWs affects the calculated avoided cost by an increase or decrease of approximately \$0.60 per 50 MW of wind power. IPL also notes that with the Board's accepted minor revisions to the EGEAS analysis approved in AEP-05-1, it is reasonable to assume that the \$0.60 amount may vary slightly. However, IPL argues, it is also reasonable to assume that using the same EGEAS analysis as approved in AEP-05-1, the avoided cost for an 80-MW wind facility would be approximately \$36.45 per MWh. IPL stated that an EGEAS analysis incorporating the Board's revisions approved in AEP-05-1 can be easily accomplished based on facts already existing in the record of AEP-05-1 and need not be re-litigated in this proceeding.

IPL also requested that the Board set the total avoided cost for the consolidated dockets based on the full energy output on an "as available" basis from the 80-MW facilities as the Board did in AEP-05-1 with respect to the 30-MW facility.

IPL argues that the only remaining issue in the consolidated dockets is with regard to MREP's request to examine "time of delivery" pricing. It argues that no genuine issue as to any material fact exists with respect to the avoided cost determination and that any issues regarding avoided cost have been thoroughly examined and litigated in AEP-05-1. Therefore, it argues, it is appropriate to grant summary judgment on the issue of avoided cost and limit these proceedings to the issue of "time of delivery" pricing. IPL argues it is entitled to partial summary judgment on the avoided cost determination and requests the Board to set avoided cost for the proposed facilities at \$36.45 per MWh. IPL did not include a proposed schedule with its motion.

MREP filed a "Resistance to Motion for Partial Summary Judgment" on September 10, 2007.¹ MREP argues the consolidated dockets involve three separate determinations of avoided cost: a) an avoided cost rate for purchases of energy/capacity, pursuant to a legally enforceable obligation over a period of time, as determined at the time the legally enforceable obligation is incurred; b) an avoided cost rate for purchases of energy/capacity, pursuant to a legally enforceable

¹ In its filing, MREP stated that its September 26, 2005, supplement to each petition showed that ultimate ownership of the three facilities at issue in these dockets had shifted from Midwest Renewable Energy Projects LLC to Midwest Renewable Energy Projects II LLC. Midwest Renewable Energy Projects II LLC filed the resistance. The use of MREP will therefore refer to either Midwest Renewable Energy Projects LLC or Midwest Renewable Energy Projects II LLC, depending on the context and which entity is correct.

obligation over a period of time, as determined at the time of delivery; and c) an avoided cost rate for purchases of energy/capacity, on an as available basis, as determined at the time of delivery. MREP states IPL is requesting summary judgment with respect to the avoided cost determination in (a), but not with respect to those in (b) and (c). Therefore, MREP argues, even if the Board were to grant the motion for partial summary judgment, determination of avoided cost rates in (b) and (c) would still be necessary. Furthermore, MREP argues, IPL has failed to show it is entitled to summary judgment with respect to the avoided cost determination specified in (a).

MREP points out that testimony has not yet been filed in this proceeding and IPL did not submit affidavits. Therefore, it argues, the only factual record upon which IPL can rely in support of its motion are the documents, pleadings, and transcripts from Docket No. AEP-05-1, officially noticed in this docket in the order issued August 29, 2007. MREP argues that a motion for summary judgment should only be granted if the supporting evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. MREP argues IPL has the burden of showing the absence of a genuine issue and that summary judgment is appropriate only if the conflict concerns the legal consequences of undisputed facts. MREP further argues that even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions.

MREP argues that IPL has not shown that the material "facts" imported from the Docket No. AEP-05-1 documents are undisputed or true. It also argues that the

Board explicitly stated in its order on rehearing that the determination of avoided cost in Docket No. AEP-05-1 applied solely and exclusively to the output from the specific 30-MW facility at issue in that docket. MREP argues that the consolidated dockets involve three different 80-MW facilities with a total capacity of 240 MW, and consequently, the "facts" imported from Docket No. AEP-05-1 into this consolidated docket cannot be deemed to establish any determination of avoided cost applicable to the facilities in this docket, either separately or in the aggregate. MREP argues that neither the evidentiary record in Docket No. AEP-05-1 nor any findings or determinations made by the Board in that docket are sufficient to entitle IPL to summary judgment on any avoided cost determination sought by MREP in this consolidated docket.

MREP further argues that IPL, "in apparent recognition of the severely limited scope of the avoided cost determination" in AEP-05-1, argues that the \$37.05 per MWh avoided cost determination from AEP-05-1 can be adjusted to \$36.45 per MWh for use in this consolidated docket based on the testimony of an IPL witness (Mr. Kitchen) in AEP-05-1. MREP argues it was unable to provide rebuttal evidence regarding this testimony in Docket No. AEP-05-1 because the testimony first appeared during live direct examination by IPL's counsel of Mr. Kitchen, who took the stand after MREP's witness had testified and MREP had presented its case. MREP disputes Mr. Kitchen's adjustment evidence and disagrees with it and with the manner in which IPL has attempted to use it in this consolidated docket. MREP argues IPL's supporting statement indicates the suggested adjustment is based on one or more assumptions and would require the performance of an additional

EGEAS analysis that does not appear in the record upon which the motion for summary judgment is based. MREP argues the adjustment is therefore not only disputed but not completely supported by the evidentiary record on which the motion is predicated.

MREP also argues that circumstances material to the determination of an avoided cost have changed significantly from those reflected by the evidentiary record in Docket No. AEP-05-1 and cites to an article containing quotations from Alliant Energy Vice President Mr. Zuhlke comparing the costs of purchasing wind power with constructing a wind farm. MREP states it intends to argue in this consolidated docket that the per-MWh costs associated with IPL's planned self-owned wind power generation projects are directly relevant to the determination of the avoided cost purchase rates in this consolidated docket and new information exists that was not available or considered by the Board in Docket No. AEP-05-1. MREP argues this information is not reflected in the record in this proceeding, it is entitled to present the evidence and argument in this docket, and the grant of the motion would deny MREP the right to do so.

MREP argues that the avoided cost determination in AEP-05-1 was substantially based on IPL's EGEAS analysis filed on July 11, 2006, which was based on data inputs and assumptions that were out-of-date at the time it was filed. MREP argues IPL's summary judgment motion asks the Board to establish the avoided cost purchase rate in this consolidated docket based on this stale and out-of-date EGEAS analysis and information that does not and cannot reflect IPL's real avoided cost at the present time. MREP argues this would violate 18 CFR

§ 292.304(d) and 199 IAC 15.5(5), which require that avoided cost be calculated as of the time the contract obligations are incurred at the beginning of the specified term of the purchase contract MREP is pursuing with IPL. Therefore, it argues, IPL is not and cannot be entitled to summary judgment on this avoided cost determination issue.

MREP further argues that for the purpose of ruling on the motion, the "facts" imported into this consolidated docket from AEP-05-1 must be deemed to be disputed as a matter of law. MREP argues these dockets are ratemaking proceedings before a regulatory administrative agency. MREP argues it initiated these dockets pursuant to 199 IAC 15.5(4), which provides that rates for purchases from qualifying facilities shall be determined in contested case proceedings before the Board, unless agreed to by the qualifying facility and utility. MREP further argues it is a well-established principle of regulatory law that ratemaking proceedings are legislative in nature and, therefore, ratemaking decisions are not *res judicata* in subsequent ratemaking proceedings.²

Finally, MREP argues, IPL has not carried its burden to show there is no genuine issue of material fact in this consolidated docket. MREP argues that, even if it is assumed that the material facts are beyond dispute (which it denies), reasonable minds could nonetheless draw different inferences and reach different conclusions on the basis of those facts. MREP argues that IPL has failed to demonstrate it is entitled

² *Res judicata* is a generic historical term that encompasses claim preclusion and issue preclusion. *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146 (Iowa 1983). For clarity's sake, the parties should use claim preclusion or issue preclusion, depending on which is meant, rather than *res judicata*.

to summary judgment as a matter of law regardless of whether the facts upon which the motion is based are disputed. It argues that the law prohibits the grant of summary judgment in this ratemaking proceeding on the basis of any decision or findings of the prior ratemaking proceeding, and the motion should be denied.

MREP noted that the order issued July 24, 2007, directed the parties to include proposed procedural schedules with their summary judgment filings for consideration in the event the summary judgment motion was denied, but stated it had not yet discussed a detailed procedural schedule with counsel for the other parties. MREP stated it was willing to accept any reasonable procedural schedule that protected the due process rights of the parties and would result in a final Board decision in this consolidated docket by the end of 2007.

On September 10, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a "Response to Motion for Partial Summary Judgment." The Consumer Advocate stated it participated in Docket No. AEP-05-1 in which the Board approved a levelized 20-year avoided cost rate of \$37.05 per MWh for the full energy output of MREP's proposed 30-MW wind facility. The Consumer Advocate stated that the petitions in the consolidated dockets filed on July 26, 2005, requested the Board's determination of avoided cost rates for three additional proposed 80-MW wind facilities. The Consumer Advocate noted that the Board, recognizing that the final decision in Docket No. AEP-05-1 may impact the decision in the consolidated dockets, ordered that the hearing in the consolidated dockets should not be scheduled until the rehearing decision in AEP-05-1 was issued.

The Consumer Advocate stated that MREP initially elected to have the purchase rates based on IPL's avoided costs calculated at the time the obligations were incurred rather than at the time of delivery. The Consumer Advocate noted that IPL's motion for partial summary judgment requested the Board to determine an avoided cost of \$36.45 for the three 80-MW facilities at issue in this case in accordance with the EGEAS-derived avoided cost determinations approved by the Board in AEP-05-1 and based on MREP's election of an avoided cost rate "calculated at the time the obligation is incurred," as allowed in 199 IAC 15.5(5)"b." The Consumer Advocate noted that IPL's motion requests the Board to set the total avoided cost in the consolidated dockets based on the "full energy output on an 'as available' basis" from the 80-MW facilities.

The Consumer Advocate noted that MREP's petitions in the consolidated dockets were filed on July 26, 2005. The Consumer Advocate stated that the mandatory purchase obligations asserted by MREP are based on the Public Utility Regulatory Policies Act (PURPA). However, the Consumer Advocate stated, PURPA Section 210(m), enacted on August 8, 2005, as part of the Energy Policy Act of 2005 (EPACT), terminated the mandatory purchase obligations for qualifying facilities (QFs), such as the wind facilities at issue in these dockets, if they have nondiscriminatory access to a competitive energy market. The Consumer Advocate noted that Section 210(m) contains a savings clause for any contract or obligation in effect or pending approval before the appropriate State regulatory authority on the date of enactment and that the Board and FERC ruled that IPL continues to have a PURPA obligation to purchase power from the three 80-MW wind facilities at issue in

this case because MREP's avoided cost petitions were filed with the Board on July 26, 2005, prior to the enactment of Section 210(m).³

The Consumer Advocate stated that on January 3, 2007, MREP filed an amendment to its petitions in the consolidated dockets to include the following paragraph 6A:

Board rule 15.5(5)"a" provides that if MREP chooses to provide energy to IPL as and when MREP determines energy to be available for purchases, the purchase rates shall be based on IPL's avoided costs calculated at the time of delivery. If purchase rates determined pursuant to ¶ 6 are insufficient, in MREP's judgment, to ensure the viability of the project, MREP desires to have purchase rates based on IPL's avoided costs calculated at the time of delivery of "as available" energy.

The Consumer Advocate argues it is not clear whether this new purchase basis asserted after enactment of Section 210(m) satisfies the Section 210(m) savings clause. However, the Consumer Advocate argues, it appears that IPL's motion for summary judgment addresses only the determination of avoided cost calculated in accordance with 199 IAC 15.5(5)"b" as initially requested by MREP, based on the full energy output of the three 80-MW facilities "calculated at the time the obligation is incurred."

The Consumer Advocate stated it agrees with IPL that the avoided cost determination approved in Docket No. AEP-05-1, based on the same data inputs and assumptions used to generate IPL's most recent PURPA avoided cost report (as adjusted by the Board in its May 31, 2007, "Order on Rehearing"), is appropriate for

³ *Midwest Renewable Energy Projects LLC v. Interstate Power and Light Co.*, Docket Nos. AEP-05-2, AEP-05-3, AEP-05-4, "Order Dissolving Stay and Directing Scheduling of Prehearing Conference" (July 26, 2006); FERC Docket No. EL06-9-000, "Order Granting Petition for Declaratory Order," 116 FERC ¶ 61,017 (July 7, 2006).

setting avoided cost calculated at the time the obligation was incurred in accordance with 199 IAC 15.5(5)"b" in the consolidated dockets. The Consumer Advocate argues this is consistent with the Board's desire to rely on an EGEAS estimate of IPL's avoided cost, and recognizes that the purchase obligations in the consolidated dockets arose within the same time frame of the updated EGEAS analysis used in Docket No. AEP-05-1. The Consumer Advocate argues that the timing of the petitions in relation to IPL's avoided costs is significant because the purchase obligation is based on the savings clause in PURPA Section 210(m). Therefore, the Consumer Advocate supports IPL's motion for partial summary judgment.

On September 17, 2007, IPL filed a "Response to Resistance to Motion for Partial Summary Judgment." IPL stated that MREP claims, among other things, that: a) it has requested three separate avoided cost determinations; b) the material facts of Docket No. AEP-05-1 cannot be demonstrated as undisputed, or even true; c) the avoided cost determination was limited exclusively to the specific 30-MW facility at issue in Docket No. AEP-05-1; d) MREP did not have a chance to rebut the \$0.60 adjustment advocated by IPL witness Mr. Kitchen; e) significant changes since the prior avoided cost determination prohibit its use in the consolidated dockets; f) the EGEAS analysis must again be updated to calculate the avoided cost at the present time; and g) *res judicata* is not applicable in ratemaking proceedings.

IPL stated that it was compelled to respond to MREP's assertion that it has requested three separate avoided cost determinations even though the assertion is seemingly unrelated to the motion for partial summary judgment. IPL argues that, prior to filing its resistance, MREP has not requested "an avoided cost rate for

purchases of energy/capacity, pursuant to a legally enforceable obligation over a period of time, as determined at the time of delivery." IPL objects to the addition of this third avoided cost calculation at this point. IPL argues that MREP continues to seek a moving target price, and a price that is most beneficial to itself without regard to IPL's customers. IPL argues that continued price shopping by MREP must be stopped and this attempt at another late modification to its initial petitions must be denied. However, IPL states, it is only requesting partial summary judgment on the issue of the avoided cost determination based on "an avoided cost rate for purchases of energy/capacity, pursuant to a legally enforceable obligation over a period of time, as determined at the time the legally enforceable obligation is incurred."

IPL argues it did not have to file affidavits in support of its motion because the facts are already a matter of record pursuant to the order taking official notice issued August 29, 2007. IPL further argues that in its order on rehearing, issued May 31, 2007, the Board relied on certain facts in order to make its final determination on the avoided cost issue. IPL argues that MREP did not request reconsideration or rehearing on those facts, the time to dispute the facts the Board relied on has passed, MREP has exhausted its administrative remedies, and those facts may legally be considered final and no longer in dispute.

IPL argues the possibility of drawing two inconsistent conclusions from the evidence does not mean that the Board's decision and findings of fact cannot be relied upon. IPL argues that when facts are in dispute and reasonable minds may differ on the conclusions to be drawn from the evidence, findings of fact made by an

agency are conclusive. Therefore, IPL argues, MREP's allegation that these facts remain in dispute is legally erroneous.

IPL challenges MREP's allegation that the Board limited its avoided cost determination to the 30-MW facility at issue in Docket No. AEP-05-1. IPL argues the limitations expressed by the Board were triggered by a concern of the Consumer Advocate that there was a lack of a firm guarantee from MREP that it would sell its full energy output from the facility to IPL. IPL alleges that the Consumer Advocate requested the Board condition any determination on review and approval of final contract terms between MREP and IPL. Although the Board did not do so, the Board did condition its approval upon sale of the full energy output to IPL. IPL argues this condition was based on the Board's concern that MREP could sell its energy output to the wholesale market when market prices were higher than IPL's levelized avoided cost rate and sell to IPL at levelized avoided cost when market prices were lower, and that in this event, IPL would end up paying more than avoided cost for MREP's selective as-delivered output. IPL argues this concern sparked the Board's limitation language, not the unique nature of the avoided cost determination. Therefore, it argues, the Board is not prohibited from extending the avoided cost determination in AEP-05-1 to the consolidated dockets.

IPL challenges MREP's assertion that it did not have the opportunity to rebut the \$0.60 adjustment per 50 MW figure advocated by IPL witness Mr. Kitchen because it only appeared in live testimony during Mr. Kitchen's examination by IPL counsel after MREP's witness took the stand. IPL asserts that Mr. Kitchen's testimony first appeared in confidential rebuttal testimony that was prefiled on

November 6, 2006. Therefore, IPL argues, MREP had adequate time to prepare rebuttal to this calculation and present such rebuttal at hearing or in prefiled rebuttal testimony. IPL argues that it therefore can be inferred that the evidence was not rebutted because it would have been unfavorable to MREP. IPL also argues that MREP's failure to rebut the evidence may justify the presumption that the evidence is true. Therefore, argues IPL, it is reasonable to assume, based on MREP's inaction, that the \$0.60 adjustment is accurate.

IPL challenges MREP's allegation that, because of changes in the electric industry since the issuance of the avoided cost determination less than four months ago, new facts and evidence are available for consideration in the avoided cost determination in the consolidated dockets. IPL argues that Mr. Zuhlke's statements cited by MREP do not mark a "significant change of circumstances," the information presented is not new, and MREP failed to include Mr. Zuhlke's qualifying statement regarding the comparison of costs. IPL argues there is no new information contained in the statement that was not readily available during Docket No. AEP-05-1. IPL argues that matters of ownership versus purchased power agreements were discussed in that docket and did not contradict Mr. Zuhlke's statements in the article. IPL argues that MREP is looking for any mechanism possible to continue to litigate an issue that has already been decided.

IPL states that MREP requested that the EGEAS analysis be updated to "present time" values. However, argues IPL, this would contradict MREP's request for a determination of avoided cost "at the time the legally enforceable obligation is incurred."

IPL argues that contrary to MREP's paraphrase of 199 IAC 15.5(5)"b," the word "contract" does not appear before the second instance of the word "obligation," and is not contained in the paragraph at all. IPL argues that instead, only the word "obligation" is used, implying that the term refers instead to the use of "legally enforceable obligation" in the rule. IPL argues that a regulation should not be given a meaning beyond its express terms.

IPL states that MREP asserts the creation of a legally enforceable obligation in continuing these proceedings. However, IPL argues, because the pricing is not favorable, MREP subversively contests the legally enforceable obligation in determining the avoided costs. IPL argues that MREP already enjoys the benefits of an avoided cost determination made in AEP-05-1 based on certain factors incorporated in the EGEAS analysis post-creation of the legally enforceable obligation. IPL argues that the consolidated dockets were filed only six and one-half months after AEP-05-1, and any legally enforceable obligation associated with these four dockets was created nearly contemporaneously. IPL argues that MREP should not be allowed to continue to push out the calculation of the avoided cost based on the creation of the legally enforceable obligation to two years post-creation of such obligation. IPL argues MREP should not be allowed to use the legally enforceable obligation as both a shield and a sword. IPL argues that MREP should either accept a calculated cost based on the time that the legally enforceable obligation was incurred (pursuant to its own initial petitions), or it should abandon the legally enforceable obligation in order to calculate a current avoided cost price. IPL argues that MREP should not be allowed to have it both ways, contrary to the clearly

expressed language of 199 IAC 15.5(5)"b." IPL states that MREP protests any use of *res judicata* in a ratemaking proceeding. IPL stated it does not contest the fact that the Board is not strictly bound by *res judicata*. However, IPL argues, the Board is not prohibited from relying on its prior decisions, particularly when the same issues, the same analysis, and the same evidence would be presented in each.

IPL argues the issues in these four cases are so similar that they could arguably meet the test set forth in *Israel v. Farmers Mutual Insurance Association of Iowa*, which IPL states recognized that "an adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination."⁴ The case also set forth four prerequisites for issue preclusion, which IPL argues are met in this consolidated docket. IPL argues that the four dockets, one decided and three not, involve the determination of the avoided cost as calculated at the time of the creation of the legally enforceable obligation. IPL argues the Board has already determined that the EGEAS analysis is appropriate for such a calculation, and has already updated the information in that analysis beyond the actual creation of the legally enforceable obligation. IPL argues that, since the four dockets were filed nearly contemporaneously, use of the same calculation, and base information for the same calculation, is appropriate. IPL further argues that the issue of determination of avoided cost as calculated at the creation of the legally enforceable obligation was not only raised and litigated, it was the focal point of the entire proceeding in Docket No. AEP-05-1. IPL argues the

⁴ The undersigned notes that this quote relates to the Court's discussion of claim preclusion, as opposed to issue preclusion, which is not being argued by IPL. *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146 (Iowa 1983).

issue was material and relevant to the disposition of the prior action. Finally, IPL argues, the Board's avoided cost determination in AEP-05-1 was necessary and essential in the resulting judgment. IPL argues that, while the Board is not obligated to rely on *res judicata*, it is certainly not prohibited from looking to its past decisions for guidance, and in this case, for the evidence and material facts already on record in order to issued a decision on the motion for partial summary judgment.

IPL reiterated its position that there remains no genuine issue as to any material fact with regard to the determination of the avoided cost calculation based on the time the legally enforceable obligation was created. IPL argues because of the close proximity in time of the filing of the four dockets, the same basic information used in the calculation of the avoided cost via the EGEAS model, as accepted by the Board in Docket No. AEP-05-1, would also be appropriate for use in the consolidated dockets. IPL argues that if the avoided cost is calculated at the time the legally enforceable obligation is incurred, the same EGEAS inputs, as adjusted by the Board in Docket No. AEP-05-1, would also be appropriate for use in the consolidated dockets. IPL argues the avoided cost determination has been thoroughly examined and justly and reasonably determined in the prior docket. It argues the only real remaining issue in the consolidated dockets is with regard to MREP's request to also examine "time of delivery" pricing. Therefore, IPL argues, it is appropriate to grant partial summary judgment on the issue of avoided cost and limit these proceedings to the issue of "time of delivery" pricing.

Analysis

Summary judgment should be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); Iowa R. Civ. P. 1.981(3). A fact issue is generated if reasonable minds can differ on how the issue should be resolved. *Schlueter v. Grinnell Mut. Reins. Co.*, 553 N.W.2d 614, 616 (Iowa Ct. App. 1996). The moving party has the burden to show the nonexistence of any genuine issue of material fact. *Schlueter*, at 615. The record must be viewed in the light most favorable to the nonmoving party. *Robinson*, at 875; *Thorp Credit, Inc. v. Gott*, 387 N.W.2d 342, 343 (Iowa 1986). Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw from them different inferences and reach different conclusions. *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982).

It cannot be said that there is no genuine issue of material fact with respect to whether the avoided cost determination made in Docket No. AEP-05-1, with the \$0.60 adjustment proposed by IPL, should be used in these consolidated dockets for the avoided cost rate calculated at the time the legally enforceable obligation is incurred. IPL argues it is appropriate to use the \$37.05 figure, less the \$0.60 adjustment to account for the difference between the 30-MW facility in AEP-05-1 and the 80-MW facilities in the consolidated dockets. MREP argues it is not. The issue of whether the \$0.60 per 50 MW figure is correct is still contested. Although IPL proposes the \$0.60 figure, it appears from the testimony of Mr. Kitchen that this was an approximate figure, and IPL states in its supporting statement that it is

reasonable to assume this figure may vary slightly with the Board's minor revisions to the EGEAS analysis. Although it appears IPL was correct that the figure was introduced in prefiled testimony, and therefore MREP had the opportunity to contest it in the prior case, this does not mean there is no genuine issue of material fact whether it is appropriate to use it in this proceeding.

One issue of material fact in this case is how the avoided cost determination should be made. It is unclear at this stage of the proceedings, before any testimony has been filed, whether the circumstances in this case are so similar to those in Docket No. AEP-05-1 that the inputs and assumptions used in the latest EGEAS analysis and the underlying rationale used by the Board to determine the avoided cost rate in AEP-05-1 should be used in this case. IPL appears to favor use of the EGEAS analysis (with the \$0.60 adjustment), and MREP appears to be contemplating the use of other types of evidence as well. The undersigned notes that in Docket No. AEP-05-1, while the Board found the EGEAS analysis to be most persuasive, it did not find that an EGEAS analysis was the only method that can be used to determine avoided cost.

In addition, MREP argues the prior EGEAS analysis should be updated. One of the basic issues yet to be determined appears to be when the legally enforceable obligations were incurred, or are to be considered to have been incurred, in these consolidated dockets. IPL and the Consumer Advocate appear to believe it was on the date MREP filed its petitions, although this is not specifically stated. (IPL Response, page 9; Consumer Advocate Response, page 4.) MREP appears to believe it will be at the beginning of the specified term of the purchase contract

MREP is pursuing with IPL, although this is also not clearly stated. (MREP Resistance, paragraph 9.) This issue affects the question of whether it is reasonable to use the avoided cost figure from AEP-05-1 and its underlying EGEAS inputs and assumptions in this consolidated docket or whether they should be updated. The issue is somewhat complicated by the PURPA savings clause issue, raised by the Consumer Advocate in its response to the motion, whether MREP's amended petitions, filed after the enactment of EPACT Section 210(m), should be included in the Section 210(m) savings clause. The Board and FERC orders only dealt with the original petitions filed prior to the enactment of Section 210(m).

Therefore, since there are still genuine issues of material fact to be determined regarding the most reasonable avoided cost rate, calculated at the time the legally enforceable obligation is incurred, for the three 80-MW facilities at issue in this proceeding, the motion for partial summary judgment should be denied.

Although the motion for summary judgment is denied in this order, the undersigned notes that the Board's orders in Docket No. AEP-05-1 may provide useful guidance and will be considered with respect to the issues in this consolidated docket. If a party wishes to assert that it is appropriate to make the same (or a different) decision on an issue in this case that the Board previously made in Docket No. AEP-05-1, the party must cite to the record showing the Board's prior decision and the evidence and argument presented on the issue, and must explain why it is appropriate to make the same (or a different) finding in this case as the Board made in the prior case.

IPL's arguments and the Consumer Advocate's argument appear to be more in the nature of an issue preclusion argument rather than a summary judgment argument. In fact, in its response to MREP's resistance, IPL makes an issue preclusion argument in response to MREP's assertion that *res judicata* cannot be used by the Board in this case. The parties may choose to argue whether issue preclusion may be used in this type of case and whether or not issue preclusion is appropriate for certain issues in this case later in this proceeding. However, IPL's current motion is for partial summary judgment. Therefore, arguments regarding issue preclusion are not relevant to the summary judgment motion and will not be considered or ruled on. If any party chooses to raise an issue preclusion argument in the future, the party must provide specific citations to the record in Docket No. AEP-05-1 showing where the issue was litigated, the evidence presented on the issue, and how the Board ruled on the issue.

199 IAC 15.5(5) sets forth three options for the calculation of avoided costs. It appears to the undersigned that MREP's original petitions filed July 26, 2005, and its amendments to the petitions filed January 3, 2007, request the Board to set avoided cost rates based on each of the three options set forth in the rule. However, the petition and amendments are not entirely clear, and based upon IPL's statements in its response to the resistance at pages 2-3, it was apparently not clear to IPL what MREP requested in its petitions and amendments. Therefore, the undersigned will require MREP to file a statement clarifying whether its petitions and amendments request the Board to determine avoided cost rates according to each of the three options set forth in 199 IAC 15.5(5). If this is not the case, MREP must explain

exactly what it is requesting the Board to determine with respect to avoided cost rates in this consolidated docket.

The parties did not include proposed procedural schedules with their motion and responses. The undersigned is willing to consider the needs of the parties in setting the procedural schedule and hearing date for this docket. Therefore, the parties should file a proposed procedural schedule for consideration as set forth below.

IT IS THEREFORE ORDERED:

1. The motion for partial summary judgment filed by Interstate Power and Light Company on August 27, 2007, is hereby denied.
2. On or before October 17, 2007, Midwest Renewable Energy Projects II, LLC, shall file a clarifying statement as discussed in the body of this order.
3. On or before October 17, 2007, the parties shall file a proposed procedural schedule to be considered in setting the procedural schedule and hearing date in this proceeding.

UTILITIES BOARD

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

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 3rd day of October, 2007.