IN THE COURT OF APPEALS OF IOWA

No. 6-836 / 06-0276
Filed March 14, 2007

WINDWAY TECHNOLOGIES, INC., WELCH MOTELS, INC., GREGORY SWECKER, and BEVERLY SWECKER,
Plaintiffs-Appellants,

vs.

MIDLAND POWER COOPERATIVE,
Defendant-Appellee.

Appeal from the Iowa District Court for Hamilton County, David R. Danilson, Judge.

Plaintiffs appeal from a district court summary judgment ruling that dismissed their claims against the defendant. **AFFIRMED.**

Wallace L. Taylor, Cedar Rapids, for appellants.

Thomas W. Polking and John A. Gerken of Wilcox, Polking, Gerken, Schwarzkopf & Copeland, P.C., Jefferson, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Plaintiffs Windway Technologies, Inc. (Windway), Welch Motels, Inc. (Welch), and Gregory and Beverly Swecker (Sweckers) appeal from a district court summary judgment ruling that dismissed their claims against defendant Midland Power Cooperative (Midland). We affirm the district court.

I. Background Facts and Proceedings.

The Sweckers and Welch purchased wind-powered generators from Windway. They sought to reduce their energy expenses by producing their own power and hoped to sell any excess energy to Midland, a nonregulated utility. Customers who buy from and sell energy to a utility are known as cogenerators or small power production facilities (QFs).[1] The present dispute arose when the Sweckers and Welch sought to connect their generators to the electric distribution system operated by Midland. Midland took the position that purchases and sales of energy by and to QFs should be separately measured and billed. The Sweckers and Welch took the position that Midland was required to provide "net metering," where one meter measures the total energy flow to and from a QF, and only the net purchase or sale is billed.

When no agreement could be reached, the plaintiffs filed suit against Midland. The plaintiffs made multiple claims against the utility, most of which were based on an allegation that Midland's tariffs violated the Public Utility

[1] In various orders relating to this matter the Federal Energy Regulatory Commission (FERC) uses the term "qualifying facility," or "QF," to refer to the Sweckers' wind-powered facility. For ease of reference, we will use this term in relation to the generating facilities of both the Sweckers and Welch.

Regulatory Policies Act (PURPA).[2] The parties agreed to bifurcate the issues for trial, and a bench trial was held on the limited issue of whether the tariffs violated federal or state law. In relevant part, the plaintiffs requested an order requiring Midland to comply with PURPA by (1) providing net metering and (2) purchasing excess power generated by the Sweckers and Welch at its own avoided cost rather than the avoided cost of Corn Belt, which supplied power to Midland in the area affecting Welch, and Cipco, which supplied power to Midland in the area affecting the Sweckers.

In a June 2002 decree, the district court determined net metering was consistent with PURPA's regulations and concluded Midland was required to offer net metering. It determined PURPA required Midland to purchase excess power at its own avoided costs, but that as to Corn Belt this requirement had been preempted by a waiver. The court determined Midland's avoided cost in the Cipco area was 2.5394 cents per kilowatt hour, and directed Midland to file with the Federal Energy Regulatory Commission (FERC), at least every two years, data from which Midland's avoided cost could be derived. The court ordered that, in the Cipco area, Midland's avoided cost "shall be 2.5394 cents per kilowatt hour until it provides data to support a different avoided cost for it."

Midland sought an interlocutory appeal, which was granted by our supreme court. *Windway Techs., Inc. v. Midland Power Coop*., 696 N.W.2d 303 (Iowa 2005) (*Windway I*). The supreme court considered two issues: (1) whether net metering was required under either PURPA or state law and

[2] The petition also included a claim asserting that Midland's general manager had defamed the Sweckers. However, this claim is not at issue on appeal.

(2) whether state courts have the authority to impose upon Midland obligations that are not required under either federal or state law. *Id*. at 306.

The supreme court concluded that net metering was not required by state or federal law and therefore Midland's tariffs did not violate PURPA. *Id*. at 309. The court determined PURPA did not require net metering, either explicitly or implicitly. *Id*. at 307. The court noted the absence of any statute, rule, federal case, or regulatory decision indicating that PURPA required a nonregulated utility to use net metering, and the fact the "FERC has repeatedly stated that it would leave the implementation of PURPA to state regulatory authorities and nonregulated utilities, including the determination as to whether to institute net energy billing for [QFs]." *Id*. The court rejected the plaintiffs' contention that, even absent any authority requiring net metering, it was appropriate for the court to exercise its own "discretion" to order Midland to provide net metering. *Id*. The court concluded that "[t]o exercise discretionary authority over a nonregulated utility's implementation of PURPA would place the Iowa courts in the position of acting as a regulatory board for such utilities," a "role that is neither advisable nor necessary" in light of the FERC's enforcement authority. *Id*. at 308.

The supreme court also affirmed the district court's decision ordering Midland to produce avoided-cost date for the plaintiffs' examination, to be updated every two years. *Id*. at 309. The court concluded, contrary to Midland's assertion, that such an order was within a state court's authority to review a nonregulated utility's implementation of PURPA. *Id*. It did, however, modify the district court's decision, directing that the information may be made available at Midland's principal place of business rather than filed with the FERC. *Id*.

The matter was remanded to the district court for disposition of the remaining claims. Midland filed a motion for summary judgment, seeking dismissal of all claims in the petition. Following an October 2005 hearing, the court granted Midland's summary judgment request.

The court concluded, in relevant part, that in light of the supreme court's opinion in *Windway I*, the plaintiffs could not establish any claim for damages based on an allegation that Midland's refusal to provide net metering violated PURPA or Iowa law. The court also concluded that res judicata barred relitigation of the amount of Midland's avoided cost, as that figure had been preclusively determined by its prior decree and the subsequent appeal. While the district court recognized it might be appropriate to recalculate the avoided cost amount as it applied to plaintiffs' claims for ongoing damages, it determined the plaintiffs had failed to provide any evidence Midland's avoided costs had changed since entry of its prior decree.

The plaintiffs filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), raising a number of issues relating to the interpretation of the district court's prior decree, the supreme court's opinion in *Windway I*, and the summary judgment record. They also asserted the district court had ignored a June 2005 FERC enforcement order, entered after procedendo issued in *Windway I*, which required Midland to provide net metering to the Sweckers and other similarly situated QFs.[3] In ruling on the motion, the district court enlarged some of its

[3] The plaintiffs in fact pointed to a 2003 FERC order, as well as the 2005 FERC order. However, as the 2003 order predates the supreme court's decision in *Windway I*, we presume it was considered by the supreme court in reaching its determination that net metering was not required under federal law.

conclusions but declined to modify its judgment. The court stated it was aware of the FERC order, and the fact Midland had sought reconsideration of the order, but that it declined to give the order retroactive application.

The plaintiffs appeal. They assert the district court erred in concluding they could not state a cause of action based on either Midland's refusal to provide net metering, or its failure to pay full avoided costs.

II. Scope and Standards of Review.

Summary judgment rulings are reviewed for the correction of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman*, 557 N.W.2d 274, 276 (Iowa 1996). Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996). The court reviews the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *City of West Branch*, 546 N.W.2d at 600. All facts are viewed in the light most favorable to the party opposing summary judgment. *Bearshield v. John Morrell & Co*., 570 N.W.2d 915, 917 (Iowa 1997). However, a party resisting a properly supported summary judgment motion may not simply rely on the pleadings, but must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

III. Net Metering.

The plaintiffs assert that the crux of the supreme court's opinion in *Windway I* was that it was the role of the FERC to impose net metering, and

further that by the time of the summary judgment hearing the FERC had required Midland to provide net metering to the Sweckers and Welch. They point to the June 2005 FERC order entered pursuant to an enforcement petition filed by Gregory Swecker shortly after the supreme court rendered its opinion in *Windway I*. *See Swecker v. Midland Power Coop.*, 111 FERC P61,365 (2005). There, the FERC found that, although PURPA did not explicitly require net metering, providing net metering to small generators such as Swecker was consistent with PURPA and Midland must offer net metering to Swecker and other similarly situated QFs. *Id*. at 14. The plaintiffs assert the FERC order was entitled to retroactive application and the district court erred in concluding otherwise. They contend that, in light of the FERC order, their claims based on Midland's failure to provide net metering are viable.

Midland points out that in *Windway I* the supreme court expressly held net metering was not required under state or federal law and asserts that the district court did no more than properly apply the supreme court's holding. Midland contends the district court was correct in concluding that the FERC order operated prospectively only, and that the order could not support a claim for preexisting damages. Finally, Midland points out that in February 2006 the FERC entered an order granting Midland's request for reconsideration of the June 2005 order. *See Swecker v. Midland Power Coop*., 114 FERC P61,205 (2006).

In the February 2006 order, the FERC determined it would reconsider the June 2005 order and would not pursue enforcement as requested by Swecker, primarily because of a recent amendment to PURPA. *Id*. at 8. The FERC noted

that, under the amendment, Congress directed nonregulated utilities such as Midland to consider whether to adopt net metering, and to complete such consideration within three years. *Id*. at 9. The FERC determined that

> in light of this specific guidance from Congress . . . we should not further intrude. Our prior decision to seek enforcement on Mr. Swecker's behalf was made pursuant to the provision of PURPA that gives the Commission discretion to enforce PURPA generally. Accordingly, we do not believe it appropriate that we go to court to require Midland to provide net metering when Congress enacted a specific provision of law that directs Midland to consider whether or not to provide net metering on its own. In this case, the specific direction from Congress should prevail over the general.

Id. at 9-10.

We note the February 2006 FERC order was entered after the plaintiffs filed their notice of appeal. The plaintiffs do not, however, challenge consideration of the order by this court, and in fact have included the order in the appendix. Rather, the plaintiffs contend the February 2006 reconsideration order "did not mean that the prior enforcement order[ ] was incorrect," and that the prior order was in effect "at the time the district court ruling on the Motion for Summary Judgment and up until the time the [amendment to PURPA] took effect."

Upon reviewing the relevant sections of PURPA, we conclude that we need not consider whether to give effect to the February 2006 order or whether the June 2005 order was entitled to retroactive application. Significantly, the amendment discussed in the February 2006 order was in effect at the time of the summary judgment hearing. Pursuant to 16 U.S.C § 2621(a), a nonregulated utility, such as Midland, "shall consider each standard established by subsection (d) of this section and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this

chapter." Effective August 8, 2005, those standards included net metering. 16 U.S.C. § 2621(d)(11). Thus, at the time of the hearing and ruling, PURPA vested Midland, and not the FERC, with the discretion to determine whether net metering should be offered to its customers. We will not find that the district court committed reversible error by refusing to follow a FERC order that was not only pending reconsideration, but contrary to current federal law.

IV. Avoided Costs.

The Sweckers further contend the district court erred in two respects when it concluded they had no cause of action based on Midland's failure to pay its full avoided costs. First, they assert that even if Midland's full avoided costs were correctly established at 2.5394 cents per kilowatt hour, as reflected in both the district court's 2002 decree and a 2004 agreement between the Sweckers and Midland, they nevertheless have a claim for damages based on the difference between the foregoing avoided cost and that set in Midland's tariff. Second, they contend the district court erred in concluding they were not entitled to relitigate the issue of the Midland's avoided costs. We conclude neither claim has merit.

Regarding their first claim, the Sweckers note the tariff Midland attempted to impose in 1998, the year the Sweckers requested to connect their generator to Midland's electric distribution system, included an avoided cost of two cents per kilowatt hour. They assert that, accordingly,

> they have a claim for damages for the difference of .5394 cents per kwh over a six-year period between 1998 and 2004. There would be many kilowatt hours in a six-year period for which the Sweckers should be compensated.

Even if we assume the Sweckers would be entitled to claim damages upon execution of the 2004 agreement, they have not directed this court to any portion of the record that generates a disputed issue of material fact on the question of whether they would have in fact generated kilowatt hours for which they would have been entitled to compensation, much less any evidence that indicates what the amount of hours might be. *See* Iowa R. App. P. 6.14(7) (outlining appellants' obligation to cite to relevant portions of the record); *Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002) (noting that "[w]e are not bound to consider a party's position when the brief fails to comply with our rules of appellate procedure"). We decline to undertake the role of advocate and review this rather voluminous record to determine what evidence, if any, was presented on this issue. *See Hanson*, 652 N.W.2d at 842-43.

We accordingly turn to the Sweckers' claim that they were entitled to relitigate the issue of Midland's avoided cost for the Cipco area. In essence, the Sweckers assert that, by directing Midland to make avoided cost data available at least every two years, the district court intended that Midland's avoided costs would be subject to relitigation every two years, or any time avoided cost data was made available, so long as this matter was still pending. To the extent the Sweckers are contending a right to relitigate Midland's avoided cost amount for those damages allegedly incurred within the two years following entry of the district court's decree, such a contention is clearly precluded by the plain language of the decree, language that was left undisturbed in *Windway I*.

While we agree recalculation of the avoided cost amount might be appropriate in light of the Sweckers' claims for ongoing damages, as the district

court noted, "the Sweckers have failed to provide any evidence or suggestion that Midland's avoided costs have changed since entry of" the district court's 2002 decree. The Sweckers complain that new cost data was never provided and that a discovery request for the information went unanswered. However, it is clear that some form of avoided cost data was provided. Moreover, the record indicates, and the district court concluded, that the Sweckers did not assert additional time was required to complete necessary discovery as provided for in Iowa Rule of Civil Procedure 1.981(6).[4]

The Sweckers also point to a footnote in the June 2005 FERC order as evidence that Midland's avoid cost had increased since entry of the 2002 decree. There, the FERC found, in part, "Midland purchases virtually all of its power for more than 5 cents per kilowatt hour[ ] . . . ." *Midland Power Coop*., 111 FERC P61,365, at 15. However, in its rule 1.904(2) order, the district court stated it would not consider this evidence as it was not made part of the summary judgment record. Moreover, while the Sweckers allege a factual basis for the FERC's finding, they again fail to point this court to any portion of the record where supporting facts might appear. Without any context or support, we cannot agree the FERC finding, even if it were part of the summary judgment record, would be sufficient to generate a disputed issue of material fact as to Midland's avoided cost in the Cipco area.

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[4] Rule 1.981(6) provides,

> Should it appear from the affidavits of a party opposing the motion that the party for reasons stated cannot present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

V. Conclusion.

We have considered all of the plaintiffs' contentions, whether or not specifically discussed. We perceive no reversible error in the district court's summary judgment ruling. The dismissal of the plaintiffs' claims is accordingly affirmed.

AFFIRMED.