Case No. VEA-0013

October 26, 1999

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Withlacoochee River Electric Cooperative, Inc.

Date of Filing:August 12, 1999

Case Number: VEA-0013

This Decision and Order considers an Appeal filed Withlacoochee River Electric Cooperative, Inc. (WREC) from a determination issued on July 8, 1999, by the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its determination, EE denied a request filed by WREC for an exemption from the firm's 1999 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, WREC would be exempted from its 1999 MY purchase requirements, as initially requested by the firm. As set forth in this Decision and Order, we have concluded that WREC's Appeal should be denied.

I. Background

A. Alternative Fuel Transportation Program

The regulatory provisions of the Alternative Fuel Transportation Program, 10 C.F.R. Part 490, were promulgated by DOE effective April 15, 1996, 61 Fed. Reg. 10621 (March 14, 1996), in order to effectuate certain policy initiatives mandated by Congress under the Energy Policy Act of 1992 (EPACT), Pub. L. 102-486. In enacting EPACT, Congress established a comprehensive national energy policy for strengthening U.S. energy security by reducing dependence on foreign oil, promoting conservation and encouraging more efficient use of energy resources. Title V of EPACT specifies statutory requirements aimed at displacing substantial quantities of petroleum products consumed by motor vehicles with alternative fuels. The DOE's action in adopting 10 C.F.R. Part 490 implements sections 501 and 507(o) of EPACT in which Congress imposed on certain alternative fuel providers and most State governments the requirement to include AFVs in their light duty vehicle fleet acquisitions.

Thus, beginning with the 1997 model year ("MY", defined as September 1 of the previous year to August 31), covered alternative fuel providers and State governments are required under the Part 490 Program to meet a schedule of annual AFV purchases with respect to their total light duty vehicle fleet acquisitions. The regulations generally require covered alternative fuel providers to include at least 30 percent AFVs in their MY 1997 fleet acquisitions, 50 percent in their MY 1998 fleet acquisitions, 70 percent in MY 1999, and 90 percent in MY 2000 and thereafter. 10 C.F.R. § 490.302. However, the regulations provide a compliance option for covered alternative fuel providers whose principal business is generating, transmitting, importing, or selling electricity.(1) Section 490.307 provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles, the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998,(2) if that covered person notified the DOE (EE) of its election of such option by January 1, 1996. *See* EPACT, § 501(c).

In implementing Part 490, the DOE sets forth regulatory definitions to facilitate compliance by affected entities, as well as procedures for acquiring interpretations, exemptions and other administrative remedies. An exemption from the Part 490 acquisition requirements may generally be obtained where a covered person is able to demonstrate that either: "(1) Alternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available . . .," or "(2) Alternative fueled vehicles that meet the normal requirements and practices of the principal business of the covered person are not available for purchase or lease commercially on reasonable terms . . . ." 10 C.F.R. § 490.308(b). The regulations further provide for a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing the purchase of such credits by other covered persons to demonstrate compliance. 10 C.F.R. Part 490, Subpart F.

B. The Present Proceeding

(1) Initial Request

In a letter dated December 20, 1995, WREC elected the option provided in 10 C.F.R. § 490.307 to satisfy its AFV purchase

requirement by the acquisition of electric vehicles, and thereby delayed its scheduled 30 percent MY 1998 acquisition requirement until January 1, 1998. However, WREC has never purchased AFVs in compliance with the MY 1998 or MY 1999 regulatory requirements. Instead, on November 11, 1997, WREC submitted to EE a request for an exemption from the MY 1998 acquisition requirements. EE did not respond to this request. On November 25, 1998, WREC sent to EE a "request for exemption related to the 1999 alternate fueled vehicle purchases." WREC explained that

(1) it had only considered acquiring electric vehicles because it "is defined as an alternate fuel provider by nature of being an electric utility, and, it is our normal business practice to compete with gas companies, our position is to not consider other alternate fueled vehicles such as natural gas or propane."

(2) it accepted competitive bids from sellers of electric trucks, and the only bidder was a General Motors (GM) dealer in Kissimmee, Florida, who WREC contends "is unacceptable to our normal requirements and practices, due to the extreme distance from our service area." Further, WREC calculated that it would require trucks with a minimum charging range of 120 miles, and therefore the charging range of the GM truck (47 miles) was "unacceptable." Finally, WREC asserted that the bid submitted by the GM dealer ($28,495, excluding charger) was "an unreasonable purchase cost."

On July 8, 1999, EE issued a determination to WREC in which EE concluded that the firm's exemption request should be denied. EE noted that WREC had duly exercised its option to choose electric vehicles for Part 490 compliance under 10 C.F.R. § 490.307, and thereby delayed imposition of the AFV acquisition schedule until after December 31, 1997. EE stated, however, that selection of the electric vehicle option did not excuse AEP from considering other types of AFVs for compliance once the firm determined that suitable electric vehicles were unavailable. EE explained:

The Department's understanding throughout the development of the Alternative Fuel Transportation Program regulations has been that nothing in the Energy Policy Act restricts any covered party to only using one specific fuel for their fleet, and therefore it is your responsibility to review *all* original equipment manufacturer alternative fuel vehicles which are available for acquisition. The focus on electric vehicles was solely for the notification to request delay of requirements under Section 501(c). Thus, your exemption request was evaluated on whether *any fuel type* alternative fueled vehicles are available which meet the normal requirements and practices of WREC, and not just [electric vehicles].

EE further advised AEP, inter alia, that the firm might be able to satisfy its requirement through the purchase of credits from other electric utilities under 10 C.F.R. Part 490, Subpart F.

(2) Appeal

In its present Appeal, filed pursuant to 10 C.F.R. Part 1003, Subpart C, of the Office of Hearings and Appeals (OHA) procedural regulations, WREC contends the following:

(1) It is not a "covered person" subject to the requirements of EPACT because it does not, or may in the future not, control a "fleet" of vehicles. Alternatively, WREC argues that each of its three service areas falls outside the scope of EPACT for the same reason.

(2) Alternative fuels vehicles and alternative fuels that meet WREC's normal requirements and practices are not reasonably available for acquisition.

(3) It is "entitled to an exemption for the year 1999 as a result of the [DOE]'s failure to make a timely determination" on its exemption request.

II. Analysis

We have carefully considered the Appeal filed by WREC and have concluded that the relief sought by the firm must be denied. First, WREC's contention that it is not a "covered person" subject to the EPACT and Part 490, which argument WREC makes for the first time on appeal, is not a basis upon which it may request an exemption from the requirements of the statute and regulations. Second, WREC simply has not demonstrated that alternative fuels vehicles or alternative fuels are not available to it, as required by the EPACT and Part 490 to qualify for an exemption. Finally, we reject the notion that EE's delay in issuing a determination on WREC's exemption request should now entitle WREC to an exemption from the regulations.

A. The Basis Upon Which an Exemption to Part 490 May be Granted

The EPACT mandates that the Part 490 regulations provide a mechanism for issuing exemptions to "any covered person" from the AFV acquisition requirements of the Act,

if such person demonstrates to the satisfaction of the Secretary that--

(A) alternative fueled vehicles that meet the normal requirements and practices of the principal business of that person are not reasonably available for acquisition; or

(B) alternative fuels that meet the normal requirements and practices of the principal business of that person are not available in the area in which the vehicles are to be operated.

42 U.S.C.A. § 13251(a)(5) (1999). These are the only two grounds for exemption listed in the statute, and are the only two bases for granting an exemption listed in the Part 490 regulations. 10 C.F.R. § 490.308(b). Thus, WREC's argument that it (and/or its service areas) does not (or may in the future not) operate a "fleet" is clearly not a basis upon which the statute or regulations allows EE to grant an WREC an exemption. If WREC seeks a ruling from EE as to whether it is a "covered person" under Part 490, it may file with EE a "a request for an interpretive ruling on a question with regard to how the regulations apply to particular facts and circumstances." 10 C.F.R. § 490.5. We note that, unlike EE's determination on a request for exemption, which may be appealed to the OHA, interpretive rulings issued by EE are "final for DOE." Id. at § 490.5(h). Therefore, to the extent that WREC bases its Appeal on the grounds that it is not a "covered person," the Appeal will be dismissed.

B. Availability of Alternative Fuel Vehicles and Alternative Fuel

In support of WREC's argument that alternative fuel vehicles and alternative fuels that meet its normal requirements and practices are not reasonably available, the Appellant first contends that electric vehicles (EVs) "do not meet the normal requirements and practices of WREC . . . and are not available for purchase or lease commercially on reasonable terms and conditions." Appeal at 7, 8. Second, the Appellant asserts that "because it is an electric utility . . . it is the normal business practice of WREC to consider no alternative vehicles fueled by natural gas or propane." Id. at 8. WREC further states that ethanol-gasoline fuel and methanol-gasoline fuel "are not available from fueling sites that would permit central fueling of WREC's vehicles in the area in which the vehicles are to be operated, . . ." Id. at 9.

WREC's Appeal does not address the availability of any alternative fuels other than methanol or ethanol, or the reasonable availability of any vehicles that operate on alternative fuels other than electricity. Instead, the Appellant argues that, because it elected the option provided in 10 C.F.R. § 490.307 to satisfy its AFV purchase requirement by the acquisition of electric vehicles, and because it notified EE of its election on December 20, 1995,

WREC believed that its compliance was conditioned upon the acquisition of EV's upon reasonable terms and conditions. . . . Not until [EE's denial of its exemption request], was WREC informed of the requirements to seek other alternative fuels. . . . As a result, WREC planned to comply by purchasing EV's, and had no knowledge of other requirements, . . .

Appeal at 9. We do not see how WREC's purported ignorance of the requirements of Part 490 entitles it to an exemption from the regulations. Indeed, WREC does not argue in its Appeal that it is not subject to these "other requirements," only that it recently became aware of them. Thus, we find that EE properly evaluated WREC's exemption request under 10 C.F.R. § 490.308(b)(2) based "on whether any fuel type alternative fueled vehicles are available which meet the normal requirements and practices of WREC, and not just EVs." Similarly, in order to qualify for an exemption under 10 C.F.R. § 490.308(b)(1), WREC must demonstrate that there is no alternative fuel type available that meet its normal requirements and practices of the principal business.(3) Accordingly, WREC's contentions as to the unavailability of only some alternative fueled vehicles(4) and some alternative fuels(5) cannot entitle it to an exemption, and WREC's Appeal in this respect must be denied.

C. Effect of Delay in Ruling on WREC's Exemption Request

Finally, WREC relies as a basis for exemption on the requirement in Part 490 that EE provide a determination on an exemption request within 45 days of its receipt. 10 C.F.R. 490.308(f) (1999). According to WREC,

Not only did [EE] fail to meet the 45-day deadline, in provided no determination to WREC for a period of approximately 218 days. It is essential to note that WREC made its request during the time of requesting bids for new vehicles for the year 1999, thus it was important to receive a timely determination as to plan planning purposes. WREC relied on [EE] to make a timely determination in order to make its vehicle purchases. This failure by the Department created a situation where WREC did not have an opportunity to purchase any alternative fueled vehicles for the year 1999, because WREC needed to purchase its vehicles for use in the beginning of the year.

Appeal at 10-11. The Appellant concludes that "[a]fter such grossly inadequate notice and failure to comply with the mandatory time period set forth in 10 C.F.R. 490.308(f), the Department has simply waived its right to enforce the obligations of the Program upon WREC." Id. at 11.

The essential premise underlying this argument is that until WREC received EE's determination, WREC had no way of knowing that the firm was required to attempt acquisition of AFVs other than electric vehicles for purposes of Part 490 compliance. According to AEP, "Not until this point, was WREC informed of the requirements to seek other alternative fuels to comply with the Program." Appeal at 9. For the reasons set forth below, we are unable to accept WREC's assertion.

As noted above, section 490.307 of the regulations provides that if an electric utility intended to comply with the AFV purchase requirements of the regulations by acquiring electric vehicles, the covered person had the option of delaying the AFV acquisition schedule until January 1, 1998. In the preamble to the final Part 490 rulemaking, the agency considered the compliance impact of this option, in addressing comments filed by members and representatives of the electric utility industry:

Many of the electric utility commenters also urged DOE to categorically provide that an electric utility that chooses to comply with electric vehicles will never be required to purchase another type of alternative fueled vehicle to satisfy the acquisition mandate. They argued that Congress intended that the fuel of choice for covered fuel providers should be the fuel that fuel provider deals in or sells. They stated that inclusion of the electric utility option shows that Congress intended to allow electric utilities to comply with electric vehicles only. . . .

DOE is generally sympathetic to these arguments, but the utility commenters did not identify any statutory text or legislative history to support their suggestion for a categorical exemption. Nevertheless, in DOE's view, these arguments may be relevant to requests for exemption under § 490.308 from the acquisition requirements on the basis that non-electric alternative fueled vehicles do not meet the "normal requirements and practices" of their principal business.

61 Fed. Reg. 10622, 10641 (March 14, 1996). Thus, the agency put the electric utility industry on notice that designation of the electric utility option did not permit an electric utility to comply with electric vehicles only, to the exclusion of other AFVs if electric vehicles proved to be unsuitable or unavailable. The agency clarified that instead it might consider granting an exemption if an electric utility were able to show that it was unable to acquire non-electric AFVs that met the "normal requirements and practices" of its business.

The agency was consistent in giving this advice to the industry. In fact, on July 7, 1998, EE rejected an exemption request on the same basis that it rejected WREC's request one year later. EE's determination was appealed to this office, and on October 20, 1998, the determination was upheld in a final decision of the Department, made publicly available on the World Wide Web. American Electric Power Company, 27 DOE ¶ 80,166 at 80,663 (1998) (World Wide Web address http://www.oha.doe.gov/cases/ee/vea0009.htm). Thus, we find that despite WREC's purported ignorance prior to receiving EE's determination on its exemption request, WREC either knew or reasonably should have known that it was required to attempt acquisition of non-electric AFVs for purposes of Part 490 compliance.

Despite its actual or constuctive knowledge of the requirements of Part 490, there is no evidence in the record indicating that WREC ever made a good-faith effort to investigate the availability of the numerous types of alternative fuels specifically set forth in the regulations, 10 C.F.R. § 490.2 (1999) (definition of "Alternative Fuel"), or the availability of vehicles that operate on these fuels. This lack of evidence of good-faith efforts to acquire non-electric AFVs constituted sufficient basis to deny WREC's exemption request. 61 Fed. Reg. 10642 ("DOE may not grant an exemption if it determines that a fleet or covered person has not made a good faith effort to acquire alternative fueled vehicles for a model year.") On this basis, we further find as an equitable matter that the consequences of WREC's delay in attempting to secure other types of AFVs must be borne by the firm, and not laid at the feet of EE. If WREC had placed purchase orders for non-electric AFVs at the time the firm filed its exemption request, it would have been in a position to accept timely receipt of the required AFVs.

Accordingly, we have concluded that WREC's Appeal must be denied. As directed by EE, WREC may satisfy its 1999 MY requirement by acquisition of AFVs from sources other than Original Equipment Manufacturers (OEMs), or through purchase of credits under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F.

It Is Therefore Ordered That:

(1) The Appeal filed by Withlacoochee River Electric Cooperative, Inc., on August 12, 1999, from the determination issued on July 8, 1999, by the Assistant Secretary for Energy Efficiency and Renewable Energy of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which Withlacoochee River Electric Cooperative, Inc., may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: October 26, 1999

(1)Section 490.303(a) defines "covered person" as, *inter alia*, an entity: "(1) . . . whose principal business is producing, . . . or selling at wholesale or retail any alternative fuel other than electricity; or (2) . . . or selling, at wholesale or retail, electricity."

(2)The effect of choosing the electric utility option was to shift the AFV acquisition schedule back from beginning September 1, 1996 (MY 1997) until January 1, 1998. Thus, the 30 percent AFV acquisition requirement generally applicable to alternative fuel providers for MY 1997 was not applicable until January 1, 1998 to August 31, 1998 (referred to in this decision as "MY 1998") for electric utilities which chose the electric vehicle option under section 490.307. Similarly, the 50 percent AFV schedule mandate generally applicable to alternative fuel providers for MY 1998 (September 1, 1997 to August 31, 1998) was not applicable until MY 1999 (September 1, 1998 to August 31, 1999) for electric utilities which chose the electric vehicle option, and so on.

(3)The Part 490 regulations define "Alternative Fuel" as

methanol, denatured ethanol, and other alcohols; mixtures containing 85 percent or more by volume of methanol, denatured ethanol, and other alcohols with gasoline or other fuels; natural gas; liquefied petroleum gas; hydrogen; coal-derived liquid fuels; fuels (other than alcohol) derived from biological materials (including neat biodiesel); and electricity (including electricity from solar energy).

10 C.F.R. § 490.2 (1999).

(4)We have, in any event, previously rejected the argument advanced in WREC's Appeal that an electric utility may for "subjective reasons" choose not to consider other types of vehicles, such as natural gas or propane. American Electric Power Company, 27 DOE ¶ 80,166 at 80,663 (1998).

(5)Though it was not cited as a basis for the exemption request filed with EE, WREC requests on Appeal that it be granted an exemption specifically with respect to the use of methanol and ethanol fuels. While Part 490 allows for the granting of a partial exemption, 10 C.F.R. § 490.308(e), an exemption of the type requested by WREC would be meaningless since it would not in any manner affect WREC's obligation to fully comply with the regulations, subject to the availability of any other alternative fuel types.