

February 4, 2010

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Madison Gas and Electric Company

Date of Filing: October 21, 2009

Case Number: TEA-0013

This Decision and Order considers an Appeal filed by the Madison Gas and Electric Company (MGE) from a determination issued on September 17, 2009, on behalf of the Assistant Secretary for Energy Efficiency and Renewable Energy (EE) of the Department of Energy (DOE), under the provisions of 10 C.F.R. Part 490. In its determination, EE denied a request filed by MGE for one exemption from the firm's Model Year (MY) 2008 alternative fuel vehicle (AFV) purchase requirements under the Alternative Fuel Transportation Program. If the present Appeal were granted, MGE would receive the additional exemption it requested. As set forth in this Decision and Order, we have concluded that MGE'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.

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

On January 16, 2009, EE issued a letter to MGE transmitting MGE’s Transaction Summary Report (TSR) for model year 2008. The TSR indicated that MGE had purchased four covered light duty vehicles during MY 2008. None of the covered light duty vehicles purchased by MGE during MY 2008 were AFVs. However, the TSR indicated that MGE had earned two bio-diesel credits and had one banked AFV credit which could be applied to MY 2008. Accordingly, the TSR indicated that MGE had a deficiency of one AFV purchase for MY 2008.

On January 16, 2009, MGE filed a request for an exemption (the RFE) with EE. In this RFE, MGE requested that EE grant it one AFV credit for MY 2008. In support of its RFE, MGE contended that its use of 11,321 gallons of B-100 biodiesel fuel and its purchase of 7 hybrid vehicles in 2008, demonstrated its “commitment to reduce dependence on oil.” The RFE further noted that it had purchased three “exempt, supervisory take-home” vehicles during MY 2008. MGE also reported that it had converted one AFV to an electric plug-in hybrid, which it claimed operates solely on electric battery power for the first 35 to 40 miles of a trip.

On May 22, 2009, EE issued a letter in which it denied MGE’s RFE. In its May 22, 2009, letter, EE stated that alternative fuels were available to MGE that meet its normal requirements and practices. Specifically, EE cited the presence of two filling stations in Madison, Wisconsin that sold E-85, an alternative fuel. EE further cited the availability of sports utility vehicles (SUVs) and mid-sized automobiles that run on E-85.

On June 19, 2009, MGE wrote EE requesting that it reconsider its May 22, 2009, denial of MGE’s RFE. On September 17, 2009, EE wrote MGE informing it that the DOE’s Office of Hearing and Appeals (OHA) is the appropriate forum for any appeal of EE’s May 22, 2009, denial of MGE’s RFE. On October 21, 2009, MGE submitted the present appeal to OHA in accordance with the procedures set forth at 10 C.F.R. Part 1003, Subpart C.

MGE's Appeal requests one AFV exemption. MGE contends that, in order to take advantage of economies of scale in maintaining its vehicles, it has standardized its light vehicle fleet on vehicles produced by General Motors (GM). By standardizing its fleet upon GM vehicles, MGE has been able to minimize its expenditure on diagnostic equipment and mechanic training.

MGE asserts that GM did not produce any AFVs that were appropriately sized (less than 4,500 lbs.) and operated on available fuels during model year 2008. Accordingly, MGE contends that it would have to purchase a non-GM vehicle in order to meet the Alternative Fuel Transportation Program mandate. MGE also noted that, during MY 2008, it had purchased a Hybrid Electric Vehicle (HEV), a Toyota Prius. It then converted this HEV into a Plug-in HEV for research and marketing purposes. MGE contends that the Plug-in HEV should be counted as an AFV.

II. ANALYSIS

As a gas and electric utility company, MGE is a covered alternative fuel provider as defined in regulations contained in 10 C.F.R. Part 490, Subpart D,¹ and is therefore subject to the 90 percent AFV purchase requirement applicable to MY 2008. 10 C.F.R. § 490.302(a)(4).

In essence, MGE's appeal contends that (1) MGE should not be required to purchase one AFV or AFV credit because it has standardized its fleet upon a manufacturer, GM who did not sell an AFV that met its "normal requirements and practices," and (2) MGE's conversion of the HEV into a PHEV should be counted as the acquisition of an AFV.

10 C.F.R. Part 490's preamble states in pertinent part:

If a covered person normally acquires vehicles from one automotive dealer or from one automobile manufacturer, but is unable to acquire alternative fueled vehicles of the model type needed from these same sources, this is not sufficient to qualify for an exemption under subparagraph (b) (2), if appropriate alternative fueled vehicles are available from other dealers or manufacturers. Having to use another dealer or manufacturer will not be considered to be outside of the normal requirements and practices of the covered person.

61 Fed. Reg. 10643 (March 14, 1996). Moreover, even if standardization upon a single manufacturer were to be considered as a normal requirement and practice under the regulations, the record shows that MGE's normal requirements and practices during MY 2008 included the purchase of four Ford Escape SUVs, vehicles manufactured by a non-GM company.

MGE's contention that its purchase and conversion of a HEV to a Plug-in HEV should be counted as an acquisition of an AFV is similarly without merit. The regulations provide that electricity qualifies as an alternative fuel. The regulations further provide that a vehicle may be considered as

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."

an AFV if such vehicle is “primarily powered by an electric motor.” 10 C.F.R. § 490.2. Under EE’s interpretation of the regulations, Plug-in HEVs do not meet the requirement that they be primarily powered by an electric motor.² MGE conceded this fact in its January 16, 2009, RFE, when it specifically admitted that the Plug-in HEV it purchased and converted in MY 2008 did not qualify as a AFV. RFE at 1.

Based on the foregoing considerations, we have concluded that MGE’s Appeal must be denied. As directed by EE, the Madison Gas and Electric Company must purchase one credit under the Alternative Fueled Vehicle Credit Program, 10 C.F.R. Part 490, Subpart F, in order to satisfy its MY 2008 AFV-acquisition requirements.

It Is Therefore Ordered That:

- (1) The Appeal filed by the Madison Gas and Electric Company on October 21, 2009, from the determination issued on September 17, 2009, on behalf of 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 the Madison Gas and Electric Company may seek judicial review.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 4, 2010

² http://www.afdc.energy.gov/afdc/vehicles/plugin_hybrids_what_is.html