Case No. VEA-0008, 27 DOE ¶ 80,138

May 11, 1998

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: Cincinnati Gas & Electric Company

Date of Filing:January 5, 1998

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This Decision and Order considers an Appeal filed by Cincinnati Gas & Electric Company (CG&E) from a determination issued on December 8, 1997, by the Office of 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 partially denied a request filed by CG&E to receive credits under the Part 490 program for certain vehicles which the firm converted to alternative fuel vehicles (AFVs), but not within four months after acquisition as required under 10 C.F.R. § 490.305(c). If CG&E's present Appeal were granted, the firm would receive credits for such vehicles (30) converted by the firm during the period September through December 1997. As set forth in this Decision and Order, we have concluded that CG&E's Appeal should be granted in part.

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 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 oil 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. For instance, the regulations 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. In implementing these statutory requirements in Part 490, the DOE sets forth regulatory definitions necessary for affected entities to determine whether and to what extent the rules apply; procedures for acquiring interpretations, exemptions and other administrative remedies; and a program of marketable credits to reward those who voluntarily acquire AFVs in excess of mandated levels, allowing use of such credits to demonstrate compliance in subsequent years.

The regulations also provide for alternative means to satisfy the AFV purchase requirement. Central to the present case, Part 490 contains the following exception to the general AFV purchase rule for alternative fuel providers:

§ 490.305 Acquisitions satisfying the mandate.

The following actions within the model year qualify as acquisitions for the purpose of compliance with the requirements of section 490.302 of this part --

. . .

(c) The conversion of a newly purchased or leased light duty vehicle to operate on alternative fuels within four months after the vehicle is acquired by a covered person; . . .

10 C.F.R. § 490.305(c) (the "Four-Month Rule").

B. The Present Proceeding

(1) Initial Request

As a gas and electric utility company, CG&E is a covered alternative fuel provider as defined in regulations contained in 10 C.F.R. Part 490, Subpart D,(1) and therefore subject to the 30 percent AFV purchase requirement applicable to MY 1997. However, on August 4, 1997, less than one month before the end of MY 1997, CG&E filed a Request for an Interpretive Ruling(2) with EE in which the firm sought relief for certain MY 1997 vehicles that had been or would be converted to AFVs by the firm. Specifically, CG&E requested that EE "interpret the [Four-Month Rule] to permit the award of credits for use in Model Year 1998 or later for conversion of any vehicle identified on Table 1 [of its submission]." In its submission, CG&E states that in MY 1997, the firm purchased 156 light duty vehicles and had already converted 55 of these vehicles to AFVs, to operate on compressed natural gas (CNG), a number which is above the 47 AFV minimum necessary to meet the 30 percent (of 156) regulatory requirement. CG&E explained, however, that due to delays confronted by the firm particularly in receiving CNG conversion kits from the manufacturer, two of the 55 AFVs were converted beyond the four-month regulatory window prescribed by the Four-Month Rule. CG&E further stated that due to these difficulties, the firm would not be able to meet the four-month conversion after acquisition deadline for many of the 113 vehicles the firm intended to convert, which is 72 percent of the 156 vehicles acquired in MY 1997.

Thus, CG&E requested that EE grant CG&E credits for 1997 MY vehicles converted outside of the four-month period and the firm be allowed to carry these credits forward into MY 1998 and future model years. *See* 10 C.F.R. Part 490, Subpart F (Alternative Fueled Vehicle Credit Program). In making this request, CG&E further represented:

CG&E's conversion center is currently working overtime and is converting approximately one vehicle per day. CG&E will seek to complete conversion of Model Year 1997 vehicles as soon as practicable.

The requested interpretation that vehicles converted outside of the four month period following acquisition is consistent with the goals of the Act because CG&E has met its current Model Year obligation and the conversions will occur prior to the start of the 1998 Model Year.

CG&E Request for Interpretive Ruling at 2.

On December 8, 1997, EE issued a letter determination to CG&E granting relief as follows: "The Department has evaluated the information provided and finds that it can grant a one-time waiver to CG&E for those Model Year 1997 vehicles converted by August 31, 1997. . . . Thus, any vehicle newly acquired by CG&E during Model Year 1997, that is converted to operate on natural gas by August 31, 1997, will be treated as a Model Year 1997 alternative fueled vehicle acquisition by the Program." Letter from Kenneth R. Katz, Program Manager, Alternative Fuel Transportation Program (EE) to David T. Musselman, Senior Counsel, CG&E, December 8, 1997 (December 8 Letter).

(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, CG&E requests that the limited waiver of the Four-Month Rule granted by EE be extended to include MY 1997 vehicles, 30 in total, converted by the firm during the period September 1 through December 31, 1997. Reasserting the circumstances that impeded its AFV conversions, described in its initial request, CG&E maintains that EE "placed an arbitrary deadline of August 31, 1997 for Model Year 1997" in the December 8 Letter. Appeal at 2. Furthermore, citing 10 C.F.R. 490.308 (f), CG&E asserts that EE was required to respond to the firm's request within 45 days of receipt,(3) but "because [EE] delayed in responding to CG&E's request and CG&E continued to convert vehicles during this period, it is inequitable to deny CG&E credits for these vehicle conversions." *Id.* In summary, CG&E argues:

CG&E believes that the facts which supported the exemption granted in the December [8 Letter] warrant an exemption for the vehicles converted between September 1 and December 31, 1997. In addition, . . . many of these conversions occurred during the period between September 18 (when [EE] was obligated to respond) and December 8, when the letter was sent[.] CG&E was acting in good faith to achieve its aggressive goals. CG&E should be credited for its actions to achieve the goals of [EPACT]. The waiver should be granted.

Id. On February 6, 1998, following our preliminary review of CG&E's Appeal, we requested that the firm provide certain additional information in support of its requested relief. Letter from Fred L. Brown, Deputy Assistant Director, OHA, to David T. Musselman, Senior Counsel, CG&E, February 6, 1998. CG&E responded to that request by a supplemental submission received by OHA on April 2, 1998 (Supplemental Submission).

II. Analysis

A. Jurisdictional Issues

Prior to turning to the merits of CG&E's Appeal, it is necessary that we address certain jurisdictional matters raised in this proceeding. We find that CG&E's initial filing and the present action reveal certain procedural "loose ends," as are often associated with the start-up phase of new regulatory programs such as 10 C.F.R. Part 490.

As stated above, CG&E initially sought relief from the Four-Month Rule in the form of a Request for an Interpretative Ruling, 10

C.F.R. § 490.5. We believe that this was incorrect. Section 490.5(a) states that such requests are appropriate when there is "a question with regard to how the regulations apply to particular facts and circumstances." In the present case, we perceive no legitimate question as to how the Four-Month Rule applies to the circumstances presented by CG&E; section 490.305(c) is clear that in order to qualify as a converted AFV under the program, the conversion to operate on alternative fuels must occur "within four months after the vehicle is acquired.(4) Rather than actually seeking an interpretive ruling regarding this provision, CG&E sought to be excused from its clear dictate with respect to some of the firm's converted vehicles, for reasons described in its submission.

We believe that CG&E's request would have been more properly filed and considered as a Request for Exemption, under 10 C.F.R. § 490.308. In reaching this conclusion, we recognize that section 490.308 does not specifically authorize the granting of an exemption on the basis raised by CG&E. Section 490.308(b) provides that a covered person may obtain an exemption from its AFV acquisition mandate solely upon two alternative grounds: "(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 . . . on reasonable terms and conditions. . . ." (5) Nonetheless, we believe that CG&E's request for relief from the Four- Month Rule on the basis that the firm could not secure conversion units in a timely manner falls with in the purview of section 490.308(b)(2), authorizing exemptions based upon the reasonable unavailability of AFVs. The asserted grounds for relief are closely analogous. Moreover, the equitable considerations underlying this regulatory exemption persuade us that it should logically be interpreted to apply to address circumstances such as those claimed in the present case, where the reasonable unavailability of AFV conversion units forestalls the conversion process.(6)

Accordingly, we shall evaluate the merits of CG&E's Appeal as if it were a Request for Exemption under 10 C.F.R. § 490.308.(7) In this regard, we emphasize that the exemption provisions specify that a covered person seeking an exemption on the basis of AFV unavailability must provide, *inter alia*, "a listing of vehicles . . . and any other documentation that exhibits good faith efforts to acquire alternative fueled vehicles," 10 C.F.R. § 490.308(b)(3). Therefore, in assessing CG&E's present claim, we shall consider whether CG&E has demonstrated that the firm made a good faith effort to acquire and install the AFV conversion units for the vehicles concerned within the four- month window provided in section 490.305(c).

B. CG&E's Appeal

In its Appeal, CG&E argues that EE imposed "an arbitrary deadline" in granting a waiver of the Four-Month Rule with respect to only those 1997 MY vehicles converted by August 31, 1997. CG&E requests that the firm be granted credits for all vehicles converted to AFVs by December 31, 1997, and further argues that it would be "inequitable" to deny such relief since many of these vehicles were converted during the protracted interim in which EE delayed issuance of the December 8 Letter. In order to bring meaning to these assertions, it is necessary to examine the AFV conversions actually performed by CG&E with respect to its 1997 MY vehicles. On the basis of information presented in CG&E's Appeal and Supplemental Submission, it is readily evident that the pace and extent of its AFV conversions did not actually comport with representations made by the firm in its initial August 4, 1997 request.

The vehicle acquisition and conversion schedules submitted by CG&E show that of the 156 light duty vehicles acquired by the firm in MY 1997, a total of 98 (rather than 113 as initially projected) were ultimately converted to AFVs by installation of CNG fuel consumption equipment. Of these 98 converted vehicles, 62 were converted by CG&E within four months after the date the vehicle was acquired, in keeping with the Four- Month Rule. These 62 AFV conversions more than satisfy CG&E's Part 490 Program requirement that, as a covered alternative fuel provider, at least 47 (30 percent of 156) MY 1997 vehicle acquisitions by the firm constitute AFVs.

However, it is the remaining 36 vehicles, converted by CG&E outside the four-month period after acquisition that have precipitated the present Appeal. The record shows that of these 36 vehicles, only six (6) were converted to AFVs prior to August 31, 1997, while 30(8) were converted by CG&E during the period September 1 through December 31, 1997. Thus, the "one-time waiver" relief granted by EE shielded only six of 36 converted AFVs from the Four-Month Rule. We now turn to consider whether CG&E should be granted an exemption from the Four-Month Rule with respect to the 30 vehicles converted during September through December 1997. As discussed below, we must reject CG&E's claims that EE's ruling in the December 8 Letter was either arbitrary or inequitable. Notwithstanding, we have determined that CG&E's request for additional relief on Appeal, with respect to the 30 remaining converted AFVs, should be granted in part.

In view of CG&E's representations in its initial filing, we find untenable CG&E's assertions that the relief accorded by EE was arbitrary. In its request, CG&E claimed that although some conversions would not meet the Four-Month Rule, "the conversions will occur prior to the start of the 1998 Model Year." Request for an Interpretive Ruling at 2. The definitions section of Part 490 states that *"Model Year* means the period from September 1 of the previous calendar year through August 31." 10 C.F.R. § 490.2. Thus, it is apparent that EE's granting a waiver for conversions completed by August 31, 1997, was not an arbitrary date but based upon CG&E's stated intention to complete its intended conversions prior to the start of MY 1998, *viz*. by August 31, 1997.(9)

We are equally unmoved by CG&E's equitable claim, based upon EE's alleged improper delay in issuing the December 8 Letter. According to CG&E, the firm proceeded to complete many of its AFV conversions during the period following September 18, 1997, when EE was required to respond, and therefore is now entitled to relief on equitable grounds. We disagree. First, as a procedural matter, EE was not required to respond to CG&E's request within 45 days, based upon the form of CG&E's filing as a Request for an Interpretive Ruling. As noted above, the 45-day response requirement pertains only to Requests for Exemption. *See* note 7, *supra*.

Moreover, even assuming EE were required to respond within 45 days, CG&E's equitable claim rings hollow in view of other

evidence presented in the record of this proceeding. CG&E has again chosen to ignore its own earlier representations. In its August 4, 1997 submission, CG&E asserted that "CG&E's conversion center is currently working overtime and is converting approximately one vehicle per day." Request for an Interpretive Ruling at 2. However, the conversion schedules supplied by CG&E in the course of this appeal show that CG&E converted just nine vehicles during the entire month of August 1997, and just nine additional vehicles by September 18, 1997, the purported EE response due date. We have derived the following table from the schedules provided by CG&E in its Supplemental Submission, showing the incidence of AFV conversions performed by CG&E with respect to the firm's MY 1997 vehicles:

Month (1997) Conversions

April 5

May 18

June 22

July 14

August 9

September 16

October 8

November 2

December 4

total 98

See Supplemental Submission, Attachment A. Thus it is apparent that CG&E's rate of conversions actually slowed in August. We further observe that all of the 30 vehicles converted in September through December 1997, for which relief is sought on appeal, were acquired by CG&E on or before May 5, 1997, and the firm had received conversion kits for all of these vehicles by not later than June 6, 1997. *See id.*, Attachment B.(10) It is therefore evident that CG&E was less than completely candid in describing its rate of conversions and its efforts to meet the Four-Month Rule. We believe that CG&E's misstatements weaken its claim that it consistently made "good faith" efforts to comply with the four month window rule and undercut the firm's standing to raise an equitable claim for exemption relief at this time.

Nonetheless, we have concluded that CG&E should be granted some measure of exemption relief beyond that afforded by EE. Despite the inconsistencies described above, we commend CG&E on its undertaking to convert substantially greater than the minimum number of AFVs (30 percent of MY 1997 acquisitions) required under the Alternative Fuel Vehicle Program. The record indicates that these conversions were performed at a considerable expenditure of time and resources.(11) We further find that CG&E's AFV conversion efforts were seriously impeded by the late delivery of conversion kits from the producer, as documented by the firm. CG&E has submitted a letter received by the firm from its conversion kit vendor, Automotive Research Technologies, Inc. (ART), confirming that there were substantial delays in delivery of conversion kits ordered by CG&E due to "minor setbacks on research and development" and "high demand on the manufacturer with a rise in production." *See* Appeal, Exhibit 2. With respect to the 30 converted AFVs subject to this Appeal, the record shows that the conversion kits ordered for its Jeep Cherokees (6) on April 24, 1997, were received by the firm from ART on May 2, 1997. However, the conversion kits ordered by CG&E on December 2, 1996, for its Ford Rangers (7) and Chevrolet S-10s (17), were not received by the firm until May 22 and June 6, 1997, respectively. *See* Supplemental Submission, Attachment B. CG&E furthers states that some of its conversion kits were found to have missing or defective components even after delivery. Supplemental Submission at 2.

Thus, we are persuaded that CG&E has established that the firm made "good faith efforts" to perform qualifying AFV conversions under Part 490, that were stymied to some degree by its inability, through no fault of its own, to secure conversion units on a timely basis. Exemption relief authority was engrafted by Congress and the agency in the regulations since they recognized that these types of difficulties would inevitably arise, especially during the initial years of program implementation. At the same time, however, our review of the schedules submitted by CG&E, showing the incidence of conversions after receipt of conversion units, does not convince us that CG&E should be granted relief for all of the 30 vehicles converted from September through December 1997.

Accordingly, we have determined that CG&E should be granted exemption relief with respect to the Four-Month Rule, as follows. Rather than the four-month allowable conversion period running from the date of acquisition of the vehicle, CG&E shall be allowed credits for all vehicles converted within four months after the firm received the respective conversion kits from ART. We believe that this relief specifically and reasonably addresses the difficulties incurred by CG&E in acquiring the conversion units, while keeping with agency policy directives underlying the Four-Month Rule.

The net effect to this relief is that CG&E will receive credits for all (17) of the Chevrolet S-10s for which relief is sought on Appeal, since the record shows that all of these vehicles were converted before October 6, 1997, *i.e.* within four months after CG&E received conversion kits for these vehicles, on June 6, 1997. These 17 credits may be utilized by CG&E for purposes of

meeting its MY 1998 AFV acquisition requirement under the regulations. However, relief must be denied with respect to remaining thirteen MY 1997 vehicles concerned, Ford Rangers (7) and Jeep Cherokees (6), since conversions of these vehicles were not completed within four months of CG&E's receipt of the conversion kits. The record shows that the Ford Rangers were acquired on April 23, 1997, and the conversion kits were received by CG&E on May 22, 1997; however, CG&E did not convert these vehicles until October 1997. The Jeep Cherokees were acquired by CG&E on April 21, 1997 and the conversion kits received by the firm on May 2, 1997, but the vehicles were not converted until November and December 1997. Accordingly, exemption relief will be granted in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Cincinnati Gas & Electric Company on January 5, 1998, from the determination issued on December 8, 1997, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy, is hereby granted as set forth in this Decision and Order, and denied in all other respects.

(2) This is a final Order of the Department of Energy from which Cincinnati Gas & Electric Company may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: May 11, 1998

(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)Section 490.5(a) of the regulations provides that "[a]ny person who is or may be subject to this part shall have the right to file a request for an interpretive ruling on a question with regard to how the regulations apply to particular facts and circumstances." As discussed in section II.A. of this decision, we believe that CG&E improperly sought relief from the Four- Month Rule in the form of a Request for Interpretive Ruling. We believe that CG&E's request should have been more properly filed as a Request for Exemption under 10 C.F.R. § 490.308.

(3)Section 490.308(f) of the regulations, relating to Requests for Exemption, states: "The Assistant Secretary [EE] shall provide to the covered person within 45 days after receipt of a request that complies with this section, a written determination as to whether the [covered person's] request has been granted or denied."

(4)"Prior to adopting the four-month conversion requirement as a final rule in section 490.305(c), the agency considered comments received regarding the sufficiency of this time period. Indeed, one comment specifically raised the possibility of delays "because delivery schedules for [] conversion equipment are unpredictable." 61 Fed. Reg. at 10640. Notwithstanding, the agency stated:

After analyzing all these comments, DOE has determined that a four month time period after vehicle acquisition should provide sufficient time for a fleet to convert a vehicle to operate on alternative fuels. None of the comments contained information showing that four months is not an adequate time period for a general requirement. In addition, the Department's experience . . . shows that a four month period is more than sufficient to allow for the conversion of vehicles. All Federal vehicles that were converted in the program had their conversions completed within a three month time period.

Id.

(5)This exemption authority is specifically mandated by Congress in EPACT, § 501(a)(5), which reads:

(5) Regulations issued under paragraph (1) shall provide for the prompt exemption by the Secretary, through a simple and reasonable process, from the requirements of paragraph (1) of any covered person, in whole or in part, 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.

(6)In the preamble to the Part 490 final rule, the agency stated the following example with respect to the exemption authority of section 490.308(b)(2): "If a fleet operator has ordered alternative fueled vehicles during a model year with reasonable expectation that they would be delivered by the end of the model year, DOE will grant an exemption for that model year if the vehicles are not delivered in time to satisfy the requirement." 61 Fed. Reg. at 10642. Similarly, under appropriate circumstances, we believe that the late delivery of AFV conversion kits should be deemed to fall under the umbrella of this exemption authority.

(7)Although no authority is cited, it is apparent that EE relied upon this exemption authority in granting CG&E the limited "one-time waiver" in the December 8 Letter. No other basis in the Part 490 regulations exists upon which such relief could be afforded.

It is also apparent that in filing the present Appeal, CG&E wishes now to recast its initial Request for an Interpretive Ruling, 10 C.F.R. § 490.5, as a Request for Exemption, 10 C.F.R. § 490.308. With respect to the CG&E assertion that EE was required to respond to its request within 45 days, a 45-day response time is required only with respect to a Request for Exemption, under 10 C.F.R. § 490.308(f); no response time is specified in the regulations for a Request for an Interpretive Ruling. Further, the regulations provide no appeal from a denial of a Request for an Interpretive Ruling, *see* 10 C.F.R. § 490.5(j), while an appeal to OHA of a denial of a Request for Exemption, pursuant to 10 C.F.R. Part 1003, Subpart C, is authorized under section 490.308(g).

(8)In its Supplemental Submission, CG&E states that there were 29 vehicles converted during September through December 1997, for which the firm now seeks credits under the Part 490 Program. However, our review of the schedules supplied by CG&E reveals that there were 30 vehicles converted during that time frame, specifically 17 Chevrolet S-10s, 7 Ford Rangers and 6 Jeep Cherokees.

(9)We recognize that CG&E may have overlooked the definition of "Model Year" and equated Model Year 1997 with calendar year 1997. However, this apparent misinterpretation of the regulations on the part of CG&E should not be misconstrued to amount to arbitrary or inequitable treatment by EE, which merely took the firm at its word.

(10)Interestingly, four vehicles converted by CG&E were acquired by the firm at a later date, on July 11, 1997. However, CG&E converted all four of these vehicles in less than one month, by August 8, 1997. *See* Supplemental Submission, Attachment A at 2 (Vehicle Nos. 1725, 1729, 1732 and 1974).

(11)In its Supplemental Submission, CG&E states that cost of converting a vehicle is approximately $7,600, representing: conversion kit, $2,500; tank and brackets, $1,200; hardware costs, $300; and 72 man hours at $50/hr. per conversion. Regarding the conversion process, CG&E states that the vehicle must first be "set up and programmed" which may take up to two weeks; thereafter, a conversion takes one to three days, utilizing three mechanics.