

Case No. VEA-0012

January 24, 2000

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: American Electric Power Company, Inc.

Date of Filing: November 26, 1999

Case Number: VEA-0012

This Decision and Order considers an Appeal filed by American Electric Power Company, Inc. (AEP) from a determination issued on October 15, 1999, 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 granted in part a request filed by AEP for an exemption from the firm's 1998 and 1999 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, AEP would be granted exemptions from its 1998 MY purchase requirements, in addition to those approved by EE in its determination. As set forth in this Decision and Order, we have concluded that AEP'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 increasing quantities of 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) Exemption Request

AEP is a holding company whose constituent electric utility companies (3) are covered alternative fuel providers as defined in the regulations contained in 10 C.F.R. Part 490, Subpart D, and therefore subject to the AFV purchase requirements of Part 490. In its exemption request, AEP sought exemption relief for both MY 1998 and MY 1999, although at the time of filing the firm was only able to present final vehicle purchase data for MY 1998. The supplemental information ultimately supplied to EE showed that AEP purchased a total of 242 light duty vehicles in MY 1998, for which AEP sought 195 exemptions.(4) AEP claimed that this exemption relief is justified primarily due to the unavailability of AFVs corresponding to the firm's customary classes of vehicles, and thus able to meet its normal requirements and business practices. AEP further claimed, however, that exemption relief is justified in instances where suitable AFVs are available, since the alternative fuels required to operate the vehicles are not available on a 24-hour basis or the fueling sites are not in reasonable proximity to its fleet locations.

In its October 15, 1999 determination, EE concluded that AEP's exemption request should be granted in substantial part. More specifically, EE granted AEP a total of 141 exemptions for the following vehicles acquired by AEP in MY 1998: 1) all (109) compact 4x4 pickup trucks, finding that there is no corresponding AFV available; 2) all (20) compact 4x2 pickup trucks since the only AFVs available are designed to run on E85 (an ethanol/gasoline composite), a fuel unavailable in AEP's operating territory; 3) all (11) minivans again because the only available AFVs of this type run on E85; and 4) all (1) sport utility vehicles since there is no corresponding AFV available. However, EE denied AEP's exemption request with respect to 71 passenger cars and 14 pickup trucks (other than 4x4 and 4x2 compact pickups) acquired by the firm in MY 1998, for which AFVs are available in corresponding models designed to operate on compressed natural gas (CNG) and/or propane (LPG). Although AEP argued in its exemption application that these alternative fuels are not available on a 24-hour per day basis at a reasonable distance from AEP's fleet locations, EE found:

While some areas listed [by AEP] do not have stations with 24-hour per day refueling capabilities, DOE believes that sufficient bifuel and other vehicle options are now available and that 24-hour accessibility to alternative refueling sites is not required for a fleet to conduct its business. In addition, based upon discussions with fuel providers in AEP's market area, DOE found that in some cases fuel providers are willing to make special arrangements for refueling on a 24-hour basis by prior arrangement with the fleet. In other instances, DOE found fuel providers who are willing to supply fuel directly to a fleet's own locations.

EE October 15, 1999, Letter at 2. Thus, EE determined that in order for AEP to meet its MY 1998 AFV purchase requirements under Part 490, AEP must purchase 26 AFVs or credits, equivalent to 30 percent of the firm's purchase of 85 non-exempt vehicles (71 passenger cars and 14 pickup trucks). Since AEP did not provide EE with complete vehicle purchase information for MY 1999, EE was unable to compute the firm's AFV purchase requirement for MY 1999. EE noted, however, that "the calculations must work in the same manner -- counting the acquisitions of the non-exempt vehicles . . . and multiplying that amount by 50 percent -- the required percentage of AFV acquisitions for MY 1999 for AEP." *Id.* at 3.

(2) Appeal

In its present Appeal, AEP contends that the firm should be granted an additional 22 exemptions for passenger cars purchased by the firm during MY 1998. AEP maintains that due to lack of 24-hour refueling service and the distance to CNG and propane refueling sites from certain of its fleet locations,(5) exemption relief is appropriate under 10 C.F.R. § 490.308(b)(1). That provision specifies that an exemption may be warranted if "[a]lternative fuels that meet the normal requirements and practices of the principal business of the covered person are not available from fueling sites that would permit central fueling of that person's vehicles in the area in which the vehicles are to be operated." AEP argues that, in view of the refueling restrictions at the specified locations, EE's denial of these exemptions in its determination is arbitrary and capricious.

AEP has submitted two documents in support of its position. First, AEP presents a letter determination issued by EE on August 25, 1997, granting exemption relief to South Jersey Gas Company in part based upon its finding that "South Jersey Gas may be unable to provide emergency service to its customers due to the distances required for refueling and the unavailability of 24-hour service at the propane facilities." AEP Appeal, Exhibit B. AEP has also presented an excerpt from an undated article which purportedly appeared in *Utility Fleet Management* magazine, in which an EE official is quoted as stating that "[w]hen you have a 24-hour operation and the fuel isn't available 24 hours, it's a strong presumption for an exemption." *Id.*, Exhibit C. According to AEP, these documents "support AEP's position that exemptions should be granted upon a showing that the refueling sites are too far from fleet locations, refueling sites are not operational coincident with fleet operations, and/or refueling sites are not open to the public." AEP Appeal at 3.

For each of the six fleet locations identified in its appeal (*see* note 5, *supra*) AEP has provided internet map printouts showing the driving distances to the nearest CNG and propane fueling facilities. These printouts show that the nearest alternative fuel facilities range in a distance of 5.3 to 10.3 miles from the six fleet locations, while Exhibit E of AEP's appeal indicates that there is "limited access" at three of the refueling sites (Marion IN, Athens OH, and Gahanna, OH). AEP contests EE's finding in the October 15, 1999 determination that, based upon EE's contacts with alternative fuel providers in the areas concerned, the firm will be able to make arrangements for 24-hour refueling. According to AEP, "DOE should be required to document any such contacts specifically in order to identify those locations where the fuel provider was willing to arrange 24-hour access." AEP Appeal at 6. In conclusion, AEP argues that the firm should be granted exemptions "for those locations found to be a distance of 5 miles or more and/or more than 15 minutes,(6) refueling sites are not open 24 hours, and/or not open to the public." *Id.* at 7. Under this approach, AEP submits that the firm is entitled to the additional 22 exemptions requested in its appeal.

II. Analysis

We have carefully considered the Appeal filed by AEP and have concluded that the exemption relief sought by the firm in its appeal must be denied. Based upon the regulatory standards governing the approval of such relief, we find that AEP has failed to

establish an adequate basis for the additional exemptions it seeks.

A. Regulatory Standards

During the rulemaking, DOE provided guidance on the circumstances under which exemption relief might be approved on the basis of alternative fuel unavailability under section 490.308(b)(1). Initially, in the Notice of Proposed Rulemaking, the agency stated, in pertinent part:

[A]n alternative fuel provider must map out the operating area and base of operations for its fleet of vehicles. . . . Then, for each vehicle, it must determine whether any location providing alternative fuel is in the area in which the vehicle is to be operated. If there is any location providing alternative fuel within the vehicle's operating area, alternative fuel is available. If there are no locations providing alternative fuel, for any alternative fuel that meets the normal requirements and practices of the covered person's principal business, within the vehicle's operating area, then alternative fuel is "not available."

60 Fed. Reg. 10970, 10980 (February 25, 1995). In the final rulemaking, however, the agency stated that it would consider other factors in determining whether alternative fuel is not available, including: (1) it is not readily deliverable to motor vehicles because it is not of the proper composition for motor fuel, or there are no dispensers of the fuel; (2) it is not available at convenient locations and times, or the fueling facility does not provide the same range of services, or (3) fueling at an alternative fueling facility significantly increases the fueling time. 61 Fed. Reg. 10622, 10641-42 (March 14, 1996).

The agency further considered comments submitted in response to the Notice of Proposed Rulemaking. With regard to the alternative fuel unavailability exemption, these comments raised concerns that alternative fuel sites may be located "near the far edge of a vehicle's operating range," that mapping operating areas is difficult and that an alternative fuel facility might not be available that allows the fleet to maintain its "centrally fueled characteristics." *See id.* at 10642. In response to these comments, the agency revised section 490.308(b)(1) to provide that alternative fuel is not available if the covered person can show that it cannot be obtained from fueling sites that "permit central fueling" of that person's vehicles in the area in which the vehicles are to be operated. *Id.* The general definitions section of Part 490, 10 C.F.R. § 490.2, states: "*Centrally Fueled* means a vehicle is fueled at least 75 percent of the time at a location that is owned, operated, or controlled by the fleet or covered person, or is under contract with the fleet or covered person for refueling purposes." In the final notice, the agency stated in this regard that "[t]he method that DOE is requiring for determining central fueling capability is whether 75 percent of the vehicle's total annual miles traveled are derived from trips that are less than the operational range of the vehicle." 61 Fed. Reg. at 10628.(7)

B. AEP's Showing

In the present case, AEP has not attempted to address the specific issue of whether alternative fuel sites are accessible to the six fleet locations concerned that would "permit central fueling" of the vehicles in the area in which they are to be operated. 10 C.F.R. § 490.308(b)(1). Instead, AEP has focused merely on the driving distances to alternative fuel sites while claiming, without documentation, that 24-hour service is not available. Thus, it seeks to have us focus only on equitable factors. As indicated by the agency in the final rulemaking, these factors are appropriate for consideration in determining whether an exemption might be appropriate on the basis of alternative fuel unavailability. However, as discussed below, we find that the supporting evidence presented by AEP is insufficient to justify exemption relief in this case.

We note initially that the estimated driving distances to alternative fuel sites listed in AEP's appeal are apparently inconsistent with prior information submitted by the firm as well as other publicly available information. For example, the present data submitted by AEP indicates that the longest driving distance to an alternative fuel site, of the six fleet locations identified by AEP in its appeal, is 10.3 miles for South Charleston, WV. However, the information previously submitted to EE, attached to its present appeal as Exhibit E, indicates that there is a CNG refueling site within 2 miles of AEP's South Charleston, WV facility. Similarly, the second longest driving distance indicated in AEP's present data is 8.8 miles (Obetz, OH), while Exhibit E shows that there is actually a CNG fuel site within 7 miles of this fleet location. Furthermore, information maintained by DOE's Alternative Fuel Data Center indicates that with the exception of the Obetz, OH fleet location, there is either an LPG or CNG fuel site in the range of 1.4 to 5.6 miles from each of the fleet locations identified by AEP in its appeal.(8) Absent a showing of other exacerbating circumstances, we believe that these distances (ostensibly 7 miles or less) are sufficiently within the operating area of the vehicles at these fleet locations to "permit central refueling" as described in the Part 490 regulatory provisions.(9) In each instance, we find nothing that would prevent AEP from refueling its AFVs "at least 75 percent of the time at a location . . . under contract with [AEP] for refueling purposes." *See* 10 C.F.R. § 490.2 (definition of "*Centrally Fueled*").

AEP has failed to substantiate its claim that lack of 24-hour accessibility renders these alternative fuels sites infeasible to meet its business requirements. AEP's Exhibit E indicates that there is "limited access" at alternative fuel sites in closest proximity to three (Marion IN, Athens, OH, and Gahanna, OH) of the six fleet locations identified in its appeal. However, DOE's Alternative Fuel Data Center information indicates that there is "public access, no restrictions" at the LPG fuel site nearest AEP's Marion, IN fleet location (2.6 miles), and "public with restrictions, card key" at the CNG fuel site nearest the firm's Gahanna, OH location (5.8 miles). Current information from the Alternative Fuel Data Center indicates that fuel accessibility at the alternative fuel (LPG) site nearest AEP's Athens, OH location (4.4 miles) is "unknown." However, Athens, OH is among the areas identified by EE in the October 15, 1999, determination (Attachment 1), where 24-hour access and/or other workable accommodations can be arranged, based upon EE's contacts with alternative fuel providers in the vicinity.

AEP apparently seeks to discount and ignore EE's findings, asserting that "DOE should be required to document any such contacts specifically in order to identify those locations where the fuel provider was willing to arrange 24-hour access." AEP Appeal 6. AEP has missed the point. The regulations clearly place the burden on AEP to establish its entitlement to exemption relief, stating

specifically that “[a] covered person requesting an exemption must demonstrate” that alternative fuels are unavailable under the conditions prescribed in the exemption provisions. Thus, it is AEP’s obligation to document its efforts to arrange 24-hour fueling access or other workable accommodations with alternative fuel providers. In the absence of this showing, and in view of EE’s findings to the contrary about access, AEP has failed to convince us that central fueling is not possible at the fleet locations identified in its appeal.

Accordingly, we have concluded that AEP’s Appeal must be denied. AEP must compute its MY 1998 and MY 1999 AFV acquisition requirements as directed by EE in the October 15, 1999, determination. As further observed by EE, AEP may satisfy its Part 490 AFV acquisition requirements by purchase of AFVs from sources other than original manufacturers, *viz.* other fuel providers or state fleets, 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 American Electric Power Company, Inc. on November 26, 1999, from the determination issued on October 15, 1999, by the Office of Energy Efficiency and Renewable Energy (EE) of the Department of Energy, is hereby denied.

(2) This is a final Order of the Department of Energy from which American Electric Power Company, Inc. may seek judicial review.

George B. Breznay

Director

Office of Hearings and Appeals

Date: January 24, 2000

(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 required acquisition schedule forward from beginning on 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 companies operating in the AEP system and represented in the present Appeal are: American Electric Power Service Corporation, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company and Wheeling Power Company.

(4) AEP filed its Application for Exemption on December 14, 1998, but subsequently amended its exemption request on January 18, 1999. On June 29, 1999, EE issued a partial determination on AEP’s Application for Exemption, while requesting additional information to complete its evaluation of AEP’s exemption request. On July 29, 1999, AEP appealed EE’s partial determination to the Office of Hearings and Appeals (OHA), 10 C.F.R. Part 1003, Subpart C, but further requested that we stay our consideration of the appeal until EE issued a full determination on the firm’s Application for Exemption. EE ultimately issued its full determination on October 15, 1999, superseding its earlier determination, and AEP filed an amended appeal on November 26, 1999. As noted by AEP in its amended appeal, “[EE’s] Order dated October 15, 1999 has addressed AEP’s Exemption Request in total so that the appeal previously filed by AEP on July 29, 1999 with [the Office of Hearings and Appeals] can be disregarded.” Accordingly, the present determination considers only the issues raised by AEP in the amended appeal filed on November 26, 1999.

(5) The specific fleet locations and number of passenger cars (totaling 22) for which AEP seeks exemptions are: (1) Marion, Indiana; 1 vehicle; (2) Athens, Ohio; 2 vehicles; (3) Gahanna, Ohio; 11 vehicles; (4) Groveport, Ohio; 3 vehicles; (5) Obetz, Ohio; 2 vehicles; and (6) South Charleston, West Virginia; 3 vehicles. AEP Appeal at 5.

(6) AEP notes that in EE’s initial determination issued on June 29, 1999, EE accepted AEP’s position that refueling was inadequate in the case of the firm’s Kingsport, TN, fleet location, where the nearest alternative fuel (propane) provider is 15.6 miles away. AEP maintains that EE was conversely attempting to establish 15.6 miles as the distance within which it would consider alternative fuels to be reasonably available, although we find no such indication in EE’s determination.

(7) The “centrally fueled” criterion is generally used to determine whether a firm is a covered person under Part 490. Vehicles that do not meet the 75% centrally fueled criterion are excluded from the vehicles counted to determine whether a “fleet” exists, and they are excluded from the base used to calculate a covered fuel provider’s or State fleet’s AFV acquisition requirements. 10 C.F.R. § 490.2 (definition of “Covered Person”); *see* 61 Fed. Reg. at 10627.

(8) DOE’s Alternative Fuels Data Center lists and maps refueling site locations (stations) for compressed natural gas (CNG), 85% methanol and 15% gasoline (M85), 85% ethanol and 15% gasoline (E85), liquefied petroleum gas (LPG), liquefied natural gas

(LNG), as well as electric charging stations located throughout the United States. This information is gathered from retailers, trade organizations, and general literature. The Alternative Fuels Data Center can be accessed on the internet at: <http://www.afdc.doe.gov/refueling.html>.

(9) AEP maintains that “[i]n most cases there is only one alternative fueling station either CNG or propane, in the vicinity of any AEP fleet location, and by probability one could assume that in only 25% of the time would an employee be traveling in the general direction of the alternative fueling station. That would mean that the other 75% of the time, employees would need to travel out of their ways possibly an hour round trip to access alternative fuel.” AEP Appeal at 5. We must observe that the projected “hour round trip” appears to be exaggerated, in view of our findings regarding the distances to alternative fuel sites from the six AEP fleet locations that are all in rural areas. Moreover, AEP’s assertions ignore EE’s finding that the firm will likely be able to arrange contract delivery of alternative fuel to its fleet locations. In any event and most importantly, AEP’s supposition that refueling at an alternative fuel site will only be convenient 25% of the time does not convince us that “central refueling” is prohibitive.