

Case No. VEA-0009, 27 DOE ¶ 80,166

October 20, 1998

DECISION AND ORDER

OFFICE OF HEARINGS AND APPEALS

Appeal

Case Name: American Electric Power Company, Inc.

Date of Filing: August 6, 1998

Case Number: VEA-0009

This Decision and Order considers an Appeal filed by American Electric Power Company, Inc. (AEP) from a determination issued on July 7, 1998, 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 substantially denied a request filed by AEP for an exemption from the firm's 1998 Model Year (MY) alternative fuel vehicle (AFV) purchase requirements under the Part 490 program. If the present Appeal were granted, AEP would be exempted from its 1998 MY purchase requirements, as initially requested by the firm. 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 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

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 the Part 490 Program. In a letter dated December 15, 1995, AEP 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. AEP Appeal, Attachment D.

Subsequently, in a letter to EE dated February 21, 1997, AEP reasserted its commitment to satisfy its AFV purchase requirement by acquisition of electric vehicles but informed EE that “[i]n the initial stages of our compliance planning it has become obvious that Electric Vehicles may not be available that meet the normal requirements and practices of AEP on commercially reasonable terms” The letter went on to itemize circumstances which might impede AEP’s ability to acquire electric vehicles deemed suitable by the firm, and inquired whether an exemption (10 C.F.R. § 490.308) would be granted by EE under these varying circumstances. AEP Appeal, Attachment F. EE responded to AEP in a letter dated March 18, 1997, informing the firm that exemption requests would be considered on an individual basis, and directed AEP to the preamble of the Part 490 final rule, 61 Fed. Reg. 10622, 10642 (March 14, 1996), for additional guidance. AEP Appeal, Attachment G. EE further stated that with respect to any exemption request, “supporting documentation should provide as much detailed information as possible in support of the exemption request.” *Id.* at 1.

On March 16, 1998, AEP filed a request for exemption with EE, requesting that with only minor exception the firm be completely excused from its 1998 MY (30 percent AFV) acquisition requirement (4), based upon its contention that “alternative fueled vehicles that meet AEP’s normal business requirements are not available, as electric vehicles, for sale or lease on reasonable terms and conditions” AEP Exemption Request at 2. In support of its position, AEP states that it acquired six electric vehicle test models (five trucks and one car) but that its experience with these vehicles has been “dismal.” According to AEP, the limited mileage range before a necessary recharge of the lead acid type battery, installed in the five test trucks, renders this technology infeasible for AEP business utilization. AEP states that nickel metal- hydride battery technology, installed in the test car, offers the most promise and it would be AEP’s intention to purchase electric vehicles utilizing that type of technology. AEP asserts, however, that electric vehicles utilizing nickel metal-hydride technology are unavailable for purchase in AEP’s seven-state service area. AEP Exemption Request at 3. AEP has provided documentation from several automobile manufacturers in support of its assertion that electric vehicles utilizing nickel metal- hydride batteries are not commercially available in its service area for MY 1998. *See* AEP Exemption Request, Exhibit B. In concluding, AEP cites a number of initiatives taken by the firm to demonstrate its long-term commitment to electric vehicle technology, but maintains for the reasons stated that the firm should be exempted from its Part 490 AFV purchase requirements for MY 1998.

On July 7, 1998, EE issued a determination to AEP in which EE concluded that the firm’s exemption should be denied in substantial part. EE noted that AEP 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 MY 1998 AFV acquisition schedule until January 1, 1998. EE stated, however, that selection of the electric vehicle option did not excuse AEP from considering other types of AFVs for MY 1998 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 AEP, and not just [electric vehicles].

EE Determination at 1. EE found that, with the exception of four-wheel drive sport utility (4x4 SU) vehicles, AFVs were available for acquisition from major automobile manufacturers corresponding to AEP’s required vehicle classes. Thus, EE determined that AEP should be granted an exemption with respect to its requirement to purchase 7 AFVs, corresponding to 30 percent of 21 4x4 SU vehicles purchased by the firm in MY 1998. EE determined, however, that AEP’s exemption request should be denied in all other respects (for a total of 129 AFVs: $136 - 7 = 129$). In this regard, EE provided guidance concerning manufacturers that might supply AEP with suitable AFVs. EE further advised AEP, *inter alia*, that the firm might satisfy its MY 1998 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, AEP contests EE’s determination and contends that an exemption from its MY 1998 AFV purchase requirement must be granted as a matter of equity and a matter of law. First, AEP contends that EE’s failure to rule on AEP’s Exemption Request within 45 days, as required under the regulations (5), has worked an undue hardship on the firm. AEP asserts that based upon the March 16, 1996 submission date of its request, EE was required to respond by April 30, 1998, but instead delayed the issuance of its determination until July 7, 1998. AEP maintains that, as a result, the firm was past the deadline for ordering AFVs from the Original Equipment Manufacturers (OEMs) suggested by EE in its determination. In this regard, AEP has provided documentation showing that the latest OEM dates for ordering AFV’s other than electric vehicles (*i.e.* bi-fuel CNG, propane, methanol and/or ethanol vehicles) were June 11 and June 19, 1998. *See* AEP Appeal, Attachment C. Thus, AEP argues on equitable grounds that EE’s determination must be rescinded, and the firm granted the relief it seeks. AEP Appeal at 3.

Moreover, AEP objects to EE’s interpretation of the regulations to require electric utilities that chose the electric vehicle option, 10 C.F.R. § 490.307, to consider all types of AFVs for Part 490 compliance where, as here, electric vehicles are unavailable to meet AEP’s normal requirements and practices. AEP argues that this interpretation by EE is arbitrary and capricious since, according to AEP, there are no provisions in the regulations that support EE’s position. AEP maintains that based upon its review of the legislative intent of EPACT and the policies underlying the electric vehicle deferment option, “the only reasonable interpretation

for the inclusion of this provision in the regulations would be to allow the electric utilities that have chosen the electric vehicles option to comply only with electric vehicle acquisitions.” AEP Appeal at 4. In addition, AEP claims that by denying the firm’s exemption request in this manner, EE has arbitrarily sought to substitute its judgment for AEP’s judgment as to what constitutes the firm’s “normal requirements and practices,” within the meaning of the Part 490 exemption provision, 10 C.F.R. § 490.308(b).

On August 18, 1998, EE filed a Response to AEP’s Appeal in which EE reasserts its position that, notwithstanding AEP’s election of the electric vehicle option, the firm was required under the Part 490 regulations to consider all AFVs for purposes of compliance. Contrary to the position advanced by AEP in its Appeal, EE maintains that “nothing in [EPACT] restricts any covered party to using only one specific fuel for their fleet, or one specific type of alternative fueled vehicle. The focus on electric vehicles was solely for the notification to request delay of requirements under [Part 490].” EE Response at 1.

II. Analysis

We have carefully considered the Appeal filed by AEP and have concluded that the relief sought by the firm must be denied. In reaching this conclusion, we find that there is a sound, rational basis, consistent with the letter and spirit of EPACT, for EE’s ruling that AEP was required to attempt acquisition of AFVs other than electric vehicles for purposes of Part 490 compliance, notwithstanding the firm’s election of the electric vehicle option under section 490.307. We dispose of this matter first because it relates directly to AEP’s claim to equitable relief based upon EE’s delay in issuing its determination. As discussed below, we have determined that the agency provided adequate notice of its position on the scope of the AFV purchase requirement during the Part 490 rulemaking, and thus AEP must bear primary responsibility for its delay in attempting to acquire other types of AFVs, under the circumstances of this case.

A. Electric Utility Option

AEP argues that in engrafting the electric vehicle option for electric utilities in section 501(c) of EPACT (6), Congress intended “to allow the electric utilities that have chosen the electric utilities option to comply only with electric vehicle acquisitions.” AEP Appeal at 4. We cannot accept the AEP position. Our plain reading of this provision supports EE’s construction that Congress acted with a very limited purpose in mind. It intended only to grant electric utilities choosing this option a deferment, until after December 31, 1997, to comply with the general AFV acquisition mandate applicable to all covered alternative fuel providers.

Further, the legislative history makes clear that the overall intent of Congress was broad and not limited to promoting electric vehicles. In mandating acquisition of increasing levels of AFVs in Title V of EPACT it sought to “reduce our use of oil-based fuels in our motor vehicle sector.” House Report 102-474(I) at 132. Congress was clear, however, that it was not attempting to promote the use of one type of alternative fuel over another in spurring increasing levels of alternative fuel utilization. Indeed, one of the specified purposes of the EPACT is “to increase competition in the electricity, natural gas, coal, renewable energy, and oil markets in order to provide new energy options and more diverse supplies.” *Id.* Thus, Congress stated that “[a]ll alternative fuels, including at a minimum methanol, ethanol, ethers, natural gas, propane, and electricity, will compete on a level playing field,” but noted that in order to foster such competition the alternative fuel provisions must provide “incentives for fuel and vehicle production and purchase.” *Id.* at 136, 137. Sound reason dictates that the option accorded electric utilities be viewed in this context, merely as an added incentive to acquire electric vehicles (7), not as an “escape hatch” from the general AFV purchase requirements of EPACT.

The reading of the electric vehicle option advanced by AEP is so broad that it would almost completely vitiate the policy objectives of EPACT, Title V. Under AEP’s construction, selection of the electric vehicle option permits the firm to relegate its AFV acquisition compliance solely to electric vehicles and, correspondingly, to avoid any AFV purchase requirement whatsoever until such time as AEP determines that electric vehicles are available in sufficient quality and quantity to meet its business needs. This position is obviously untenable. It contravenes the EPACT goal of promoting competition among all of the varying types of AFVs, not favoring one over another. Moreover, allowing electric utilities to forestall purchases of any AFVs in this manner would frustrate Congress’ goal of ensuring increasing levels of alternative fuel use across the board in the economy; indeed, this was the primary purpose of the graduated AFV acquisition schedule set forth in EPACT, § 501(a).

We find equally untenable AEP’s corollary argument that by requiring the firm to consider other types of AFVs, EE wrongfully substituted its judgment for AEP’s judgment as to what constitutes the firm’s “normal requirements and practices,” as that term is used in the exemption provisions, 10 C.F.R. § 490.308(b). According to AEP, by choosing the electric vehicle option the firm has designated that only electric vehicles meet its “normal requirements and practices,” although none are technologically feasible or available at this time. This argument is specious. Clearly, the term “normal requirements and practices” contained in the exemption provisions relates to the business operating conditions of the conventional vehicles which the covered person seeks to replace with AFVs. (8) It does not describe a particular type of AFV that the covered person has selected for subjective reasons.

We therefore reject AEP’s contention that designation of the option for electric utilities provided in EPACT § 501(c), promulgated by the agency in section 490.307 of the regulations, allows the firm to meet its Part 490 AFV acquisition requirements solely through the purchase of electric vehicles. We now turn to AEP’s alternative argument that the firm is nonetheless entitled to exemption relief on grounds of equity.

B. Equitable Claim

AEP claims that the firm should be granted the exemption relief it seeks since it was unable to place timely orders for other AFVs as a result of EE’s undue delay in issuing its July 7, 1998 determination. The essential premise underlying this equitable claim is

that until AEP received EE's determination, AEP 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, until such time, "the DOE ha[d] not successfully communicated that understanding to AEP." AEP Appeal at 3-4. Again, we are unable to accept AEP's assertion.

In the preamble to the final Part 490 rulemaking, the agency considered the compliance impact of the electric utility 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 and to AEP, as indicated by correspondence in the record of this proceeding. AEP apparently became aware in February 1997 that the firm might not be able to acquire electric vehicles to satisfy 1998 MY acquisition requirement, stating in its letter to EE dated February 27, 1998, that: "In the initial stages of our compliance planning it has become obvious that Electric Vehicles may not be available that meet the normal requirements and practices of AEP on commercially reasonable terms . . ." AEP Appeal, Attachment F, at 1. In responding to this letter, on March 18, 1997, EE directed AEP to the final rule preamble cited above for guidance, quoting that portion pertaining to requests for exemption: "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." 61 Fed. Reg. 10642; AEP Appeal, Attachment G, at 1. EE further advised AEP in that letter that the firm "should provide as much detailed information as possible" in support of any exemption request. *Id.*

Thus, based upon the record of this matter, we find that despite AEP's purported ignorance prior to receiving EE's determination on its exemption request, AEP either knew or reasonably should have known that the firm was required to attempt acquisition of non-electric AFVs for purposes of Part 490 compliance. This actual or constructive knowledge of this requirement coupled with AEP's failure to provide evidence of "good faith efforts" to acquire other types of AFVs constituted sufficient basis to deny AEP's exemption request. On this basis, we further find as an equitable matter that the consequences of AEP'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 AEP had placed purchase orders for non-electric AFVs at the time the firm filed its deficient exemption request, it would have been in a position to accept timely receipt of the required AFVs.

Accordingly, we have concluded that AEP's Appeal must be denied. As directed by EE, AEP may satisfy its 1998 MY requirement by acquisition of AFVs from sources other than 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 American Electric Power Company, Inc. on August 6, 1998, 1998, from the determination issued on July 7, 1998, 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: October 20, 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)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 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)Exhibit A attached to the AEP Exemption Request shows that firm purchased a total of 454 light duty vehicles in MY 1998, and therefore was required to include 136 (30 percent of 454) AFVs in its MY 1998 fleet acquisitions under Part 490. As described in AEP's exemption request, however, the firm purchased only six electric vehicles.

(5)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."

(6)The general AFV purchase mandate and schedule with respect to all covered alternative fuel providers is set forth in section 501 (a) of EFACT. Section 501(c) of EFACT provides, however:

(c) Option for Electric Utilities.-- The Secretary [DOE] shall . . . issue regulations requiring that, in the case of a covered person whose principal business is generating, transmitting, importing, or selling at wholesale or retail electricity, the requirements of subsection (a)(1) shall not apply until after December 31, 1997, with respect to electric motor vehicles. Any covered person described in this subsection which plans to acquire electric motor vehicles to comply with the requirements of this section shall notify the Secretary before January 1, 1996.

(7)Congress provided that "[m]any other incentives and programs in the bill will encourage alternative fuels and alternative fueled vehicles," but observed that such incentives were particularly appropriate with respect to electric vehicles since there existed at that time an "initial price differential between electric vehicles and comparable conventionally fueled vehicles." House Report 102-474(I) at 137.

(8)For instance, in the July 7, 1998 determination, EE granted AEP a 1998 MY exemption from AEP's requirement to purchase AFVs corresponding to the firm's 4x4 SU vehicle class, based upon EE's finding that 4x4 SU AFVs were not available for acquisition.