

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of)
CONSUMERS ENERGY COMPANY for) Case No. U-14031
approval of a resource conservation plan.)
_____)

At the October 12, 2006 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER DENYING PETITION FOR REHEARING

On February 16, 2005, Ada Generation Limited Partnership, Cadillac Renewable Energy, L.L.C., Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, L.L.C., T.E.S. Filer City Station Limited Partnership, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc. (collectively, the qualifying facilities), filed a petition for rehearing of the January 25, 2005 order that approved an application filed by Consumers Energy Company (Consumers) for approval of a “resource conservation plan” (RCP). The approved RCP changed the cost recovery methodology by which Consumers pays for the electric power that it purchases from the Midland Cogeneration Venture Limited Partnership (MCV).

On March 9, 2005, responses in opposition to the petition for rehearing were filed by Consumers and Attorney General Michael A. Cox (Attorney General).

The qualifying facilities argue that the January 25, 2005 order contains a “palpably erroneous” finding. Specifically, the qualifying facilities maintain that there is no record evidence to support the Commission’s determination that “the harm alleged by the qualifying facilities is unlikely to materialize”¹ upon approval of the RCP. According to the qualifying facilities, because approval of the RCP will result in both (1) reduced generation from the MCV and (2) a need to replace that generation from another source, the Commission was wrong to conclude that the replacement power would not come from the qualifying facilities. They assert that Consumers admitted that it would purchase 71,536 megawatt-hours (MWhs) of additional power in 2005 from the dispatchable non-MCV qualifying facilities, as follows: Ada 9,006 MWh, Cadillac 20,066 MWh, Genesee 19,608 MWh, and Grayling 22,856 MWh. According to the qualifying facilities, one of Consumers’ witnesses, David F. Ronk, testified that such purchases would increase the capacity factor for those four qualifying facilities from 77.5% to 83.4%. Finally, arguing that (1) because the variable operating costs of the qualifying facilities exceed the variable energy payments that Consumers pays to the qualifying facilities, and (2) because Consumers will increase the dispatch of the qualifying facilities under the RCP, it is simply beyond dispute that the RCP will financially injure the qualifying facilities.

Secondly, the qualifying facilities insist that the hold harmless agreement, which is an integral part of the RCP, will adversely affect them because it forces non-MCV generators to subsidize Consumers and the MCV. According to them, under the RCP, the MCV is not obligated to make hold harmless payments to Consumers to the extent that Consumers replaces the lost MCV power with power from other sources at a cost that is equal to or less than the cost of the MCV power. Because the variable energy payment rate that Consumers pays to the MCV is the same as the

¹ January 25, 2005 order, p. 23.

variable energy payment rate that Consumers pays to the non-MCV qualifying facilities, the qualifying facilities maintain that, to the extent that the lost MCV generation is replaced from generation from the non-MCV qualifying facilities, the MCV will not be required to make hold harmless payments to Consumers. For that reason, the qualifying facilities contend that the Commission should now condition its approval of the RCP by requiring Consumers to (1) dispatch the dispatchable qualifying facilities' plants only after that point at which the MCV would have been fully dispatched under the MCV forced dispatch arrangement, and (2) replace the lost MCV power with generation from its own base-load facilities before it dispatches the non-MCV generation facilities.

The qualifying facilities argue that these proposals are not only workable, but also are fully supported by the record. They maintain that because Consumers needs to calculate the quantity of power that the MCV would have generated under the forced dispatch arrangement for purposes of performing the hold harmless calculation, it would be easy to utilize that information to delay dispatch of the dispatchable non-MCV qualifying facilities until that point when the MCV would have been fully dispatched under the forced dispatch arrangement, while relying on its own generation resources to the limits of their capability. The qualifying facilities further request that the Commission require the Independent Evaluator to determine whether Consumers is complying with these conditions. Finally, the qualifying facilities argue that the costs for the Independent Evaluator to perform such tasks should not be their responsibility.

In response, Consumers contends that the portion of the decision quoted by the qualifying facilities must be considered in context. According to Consumers, the statement referred to by the qualifying facilities was made in the context of a finding by the Commission that the qualifying facilities' allegation of a precise inverse relationship between the dispatch of the MCV and the

dispatch of the qualifying facilities' plants was not supported by the evidence. Consumers states that the Commission had noted that when the MCV returned to a forced dispatch at the beginning of 2004, the dispatch of the qualifying facilities' plants actually increased in 2004, which contradicted the qualifying facilities' theory. *See*, the January 25, 2005 order, p. 23. Consumers also argues that the Commission's conclusion is fully supported by the testimony of Mr. Ronk, its Director for Electric Transition Strategies. Consumers points out that Mr. Ronk testified that the actual level of dispatch of the qualifying facilities is subject to many different variables, including fuel costs, load, weather, economic activity, replacement power costs, and unit availabilities. Consumers also states that the qualifying facilities have exaggerated their claim of financial "harm." According to Consumers, "[b]eing compensated and dispatched in a manner consistent with the contract cannot fairly be characterized as 'harm;' it is simply the fulfillment of the contractual arrangement of the parties, as approved by the Commission." Consumers' response, p. 3.

In addition, Consumers insists that the qualifying facilities' two new proposals cannot form the basis for relief because they were not subjected to the hearing process. According to Consumers, it would be a due process violation for the Commission to adopt either of these proposals at this time. In any event, Consumers contends that both of the proposals are flawed and would subject Consumers' power supply cost recovery (PSCR) customers to increased cost.

In his response, the Attorney General contends that the relief requested by the qualifying facilities' petition for rehearing would result in additional harm to Consumers' PSCR customers. According to the Attorney General, because the qualifying facilities are seeking a change in their contractual relationship with Consumers in a way that would create additional, non-economic dispatching of power plants, the overall effect of granting the petition for rehearing would be to

increase Consumers' average PSCR costs. Moreover, the Attorney General stated that the problem faced by the qualifying facilities was a risk that they knowingly and voluntarily undertook:

It may be true that the QFs' variable operating costs significantly exceed the variable energy payments they will receive from CECo, but that fact results from the avoided cost nature of their power purchase agreements with CECo. They receive coal-based capacity and fixed energy payments and coal-based variable energy payments. Their capacity and fixed energy payments from CECo significantly exceed their capacity and fixed energy costs, while their variable energy payments are significantly less than their variable operating costs. This was known or at least the risk of potential differences was known at the time the MPSC set CECo's avoided costs for purposes of their power purchase agreements with CECo. In other words, if the QFs incur variable losses or even total losses, that was a risk of the contracts and avoided cost payments they agreed to accept. The MPSC should not establish a secondary, noneconomic dispatch method that will increase PSCR expenses.

Attorney General's response, p. 5.

While the Attorney General expressed sympathy for the plight of the qualifying facilities, he was not persuaded that granting them the relief proposed in the petition for rehearing would be in the best interests of Consumers' PSCR customers.

The Commission finds that the petition for rehearing should be rejected. The qualifying facilities' posture in this proceeding was not so much one of opposing approval of the RCP as it was of arguing that the qualifying facilities' proposed relief should be a precondition of approval of the RCP. They presented their position as an issue of discriminatory treatment. The Commission found that the qualifying facilities' claims of discrimination were not valid because several of the qualifying facilities could not be economically dispatched and because "the proposal proffered by the qualifying facilities, which would have the dispatch of the qualifying facilities reduced in return for a fixed payment from each qualifying facility to Consumers for the benefit of Consumers' customers, simply does not equate to the hold harmless arrangement proposed by

Consumers.” January 25 order, p. 22. In rejecting the qualifying facilities’ proposal, the Commission found that the increase in PSCR costs associated with a reduction in the dispatch of the qualifying facilities’ plants would not necessarily be offset by the payments from the qualifying facilities to Consumers. Indeed, the Commission stated that “whereas the qualifying facilities had offered to make payments totaling \$540,000, the cost to Consumers for power from other sources to replace the backed-down generation at the qualifying facilities’ plants would amount to \$2.8 million.” January 25 order, p. 22. The Commission concluded that the qualifying facilities’ proposal could not be equated to Consumers’ proposal, under which the hold harmless agreement would protect Consumers’ PSCR customers from increases in PSCR costs. After reaching the determination that the qualifying facilities’ proposal was not similar to Consumers’ proposal, the Commission stated:

In any event, the Commission finds that the harm alleged by the qualifying facilities is unlikely to materialize. Although the qualifying facilities contended that a decrease in the dispatch of the MCV will increase the dispatch of the non-MCV dispatchable qualifying facilities, the record does not substantiate such claims. During cross-examination of Mr. Pomerleau, Consumers brought forth evidence that the MCV’s dispatch was reduced during 2002 and 2003 and increased to a forced dispatch for 2004. 7 Tr. 635. Under the qualifying facilities’ theory, Consumers should have increased the dispatch of the qualifying facilities during 2002 and 2003 and decreased the dispatch of the qualifying facilities starting January 1, 2004. Just the opposite occurred. The Grayling facility had capacity factors of 67.3%, 73.9%, and 84.2% for the years 2002, 2003, and 2004, respectively. 7 Tr. 635-636. The Genesee facility had capacity factors of 72.5%, 65.8%, and 78.8% for the years 2002, 2003, and 2004, respectively. 7 Tr. 637.

Id., p. 23.

Conspicuous by its absence is any claim in the petition for rehearing regarding the validity of the Commission’s determination that the qualifying facilities’ proposal was not similar to Consumers’ proposal, which was the primary basis for the rejection of the qualifying facilities’ proposal. That deficiency alone is sufficient justification for rejection of the petition for rehearing.

Further, as demonstrated by the above-quoted portion of the January 25 order, the specific finding objected to by the qualifying facilities as unsupported by the record was indeed supported by a direct citation to record evidence. Therefore, the primary basis for the qualifying facilities' petition for rehearing has no merit and it should be rejected.

Rule 403 of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing. The qualifying facilities' petition raises the same arguments regarding discrimination that were raised and rejected in the original proceeding. The Commission finds that the qualifying facilities have failed to raise any new issues or arguments consistent with the standards of Rule 403.

Finally, the Commission agrees with Consumers that the Commission need not consider previously unannounced proposals that have been debuted in a petition for rehearing. This is particularly true in this proceeding. In the January 25 order, the Commission observed that rejection of the qualifying facilities' objections to approval of the RCP did not mean that the qualifying facilities were barred from pursuing another means for seeking relief. Specifically, the Commission encouraged Consumers and the qualifying facilities to mediate their differences. With the Commission Staff acting as mediator, these discussions have taken place, and Consumers filed a progress report with the Commission on April 1, 2005. The qualifying facilities are free to continue to seek Consumers' input on their new proposals during their mediation sessions.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The qualifying facilities' petition for rehearing should be rejected.

THEREFORE, IT IS ORDERED that the February 16, 2005 petition for rehearing filed by Ada Generation Limited Partnership, Cadillac Renewable Energy, L.L.C., Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, L.L.C., T.E.S. Filer City Station Limited Partnership, Viking Energy of Lincoln, Inc., and Viking Energy of McBain, Inc is rejected.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of October 12, 2006.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of October 12, 2006.

Its Executive Secretary