D.P.U. 92-208

Investigation by the Department into the qualifying facility power purchase rate P tariff M.D.P.U. No. 859, for the fourth quarter of 1992, filed by Massachusetts Electric Company on September 15, 1992, to become effective on October 1, 1992.

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INTERLOCUTORY ORDER ON MOTION TO DISMISS

I. INTRODUCTION

On September 15, 1992, Massachusetts Electric Company ("MECo or Company") filed with the Department of Public Utilities ("Department") an amendment to its P-Rate tariff, M.D.P.U. No. 711. The amendment was submitted in a proposed tariff, M.D.P.U. No. 859. The proceeding was docketed as D.P.U. 92-208. The Department established February 1, 1993 as the effective date for the proposed tariff.[1] By Order dated January 29, 1993, the Department suspended the effective date of the proposed tariff until May 1, 1993, to allow for further investigation of the Company's proposal.

The P-Rate is the rate that utilities pay qualifying facilities ("QFs")[2] for purchases of short-term, as-available power. It is calculated pursuant to the Department's regulations in 220 C.M.R. 8.00 et seq. ("Small Power Producers And Cogenerators Regulations"), which implement the provisions of Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and regulations promulgated by FERC in 18

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[1] In its filing, the Company proposed October 1, 1992 as the effective date of the new tariff. The Department moved that date back to allow for sufficient time to investigate fully the application.

[2] A QF is a small power producer or cogenerator that meets the criteria established by the Federal Energy Regulatory Commission ("FERC") in 18 C.F.R. § 292.203(a) and adopted by Massachusetts in 220 C.M.R. 8.02.

C.F.R. 292.[3] The Department's regulations require that utilities calculate their P-rates based on avoided energy (i.e., fuel, and operation and maintenance ("O&M")) costs. 220 C.M.R. 8.04(4)(d). Since MECo receives all of its power requirements from an affiliated supplier, New England Power Company ("NEP"), the Department's regulations require that MECo use the FERC-approved wholesale rate tariff under which it purchases power as the basis for the Company's avoided cost computation. 220 C.M.R. 8.04(4)(e).[4]

At a procedural conference on September 24, 1992, the Department granted the motions of General Electric Company ("GE") and L'Energia Limited Partnership ("L'Energia") to intervene in this proceeding.[5] On October 16, 1992, GE filed a motion to

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[3] The Department's regulations include provisions designed to encourage the development of cogeneration while recognizing the need for just and reasonable treatment of costs passed on to the purchasing utility's ratepayers. D.P.U. 84-276-B (1986); see also 220 C.M.R. 8.01(1); PURPA, Sec. 210. These regulations were promulgated under the Department's powers of superintendence granted under G.L. c. 164, sec. 76C.

[4] 220 C.M.R. 8.04(4)(e) states in part:

> Where a utility receives all of its requirements from an affiliated supplier, the utility will use the FERC-approved wholesale rate tariff under which it purchases power from its supplier.

[5] L'Energia is the developer of a cogeneration facility located in Lowell, Massachusetts. GE operates a 55 megawatt ("MW") cogenerating facility at its Aircraft Engines Plant in Lynn, Massachusetts. (This GE plant is unrelated to the Altresco-Lynn facility proposed for construction at the GE site in Lynn.) GE has been selling excess power to MECo under the current P-Rate since July 1, 1992 (GE Motion To

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dismiss MECo's proposed tariff (hereinafter "Motion"). On October 23, 1992, MECo filed a response to the Motion (hereinafter "MECo Response"). On November 4, 1992, GE submitted a reply to MECo's response (hereinafter "GE Reply"). Subsequently, the Department held an evidentiary hearing in this proceeding on December 8, 1992.

II. PROPOSED P-RATE

MECo proposes to implement a two-tiered P-rate (MECo Filing, Reilly Testimony, p. 11). For QFs with generating capacity of 1 MW or less, the Company will continue to base the P-rate on NEP's wholesale energy tariff, pursuant to 220 C.M.R. 8.04(4)(e) (id.). However, for QFs with a generating capacity of 1 MW or greater, the Company proposes to base the P-Rate on production cost modeling results that reflect NEP's avoided fuel and O&M costs, pursuant to 220 C.M.R. 8.04(4)(d)[6] (id.).

To implement the proposed P-rates, MECo is seeking an

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Intervene, p. 1). Independently, L'Energia and GE have applied to MECo to supply MECo with approximately 33,000 kilowatt-hours ("KWH") of energy per quarter, or 132 megawatt-hours ("MWH") per year, at an annual cost of $4.2 million (MECo Filing, Hachey Testimony, p. 6). The Company's proposed revisions to its P-rate tariff would result at present in lower rates paid by MECo to the Intervenors for energy purchases.

[6] This approach is followed by all other Massachusetts utilities except MECo and Eastern Edison Company ("EECo"), which is an all-requirements customer of Montaup Electric Company.

exception from 220 C.M.R. 8.04(4)(e), which stipulates that all-resource requirements utilities should calculate P-rates based on the FERC-approved tariff under which they purchase power (MECo Filing, Transmittal Letter, p. 2). MECo's proposal notes that NEP's wholesale energy tariff at FERC is based on its long-run marginal costs to reflect the long-term relationship between NEP and its customers, including MECo (MECo Filing, Reilly Testimony, pp. 8-10). The proposal states that the tariff, based as it is on long-term considerations, overstates the short-term marginal fuel and O&M costs (id., p. 3). As a result, according to MECo's proposal, its P-rates are significantly higher than P-rates offered by neighboring utilities, and its customers are significantly overpaying for short-term energy from large QFs (id.).

III. MOTION TO DISMISS

In support of its motion, GE argues that dismissal of MECo's proposed P-rate tariff is required as a matter of law, because the Department lacks the authority to allow MECo to use any basis to calculate its P-Rate other than NEP's wholesale tariff (Motion, p. 2). GE claims that use of the proposed tariff, which would base the P-rates on the avoided costs of NEP's integrated system, violates the Department's regulations in 220 C.M.R. 8.04(4)(e) (id.). GE also argues that the proposed tariff would

violate FERC Order No. 69 (hereinafter "Order No. 69"[7]) (id.). GE contends that Order No. 69 requires that MECo continue calculating its P-rates in accordance with the approach contained in 220 C.M.R. 8.04(4)(e) (id.). To support its contention, GE points to a claim made by MECo during a 1985 Department rulemaking proceeding regarding the possible amendment of the Department's Small Power Producers And Cogenerators Regulations (id.). GE notes that in that proceeding MECo stated that under Order No. 69, "the Department lacks authority to calculate MECo's avoided cost on a basis that does not relate to NEP's wholesale rate" (id., p. 2, citing MECo Comments on Interim Order, D.P.U. 84-276, pp. 19-21 (1985)). Therefore, GE argues, the Company is precluded from asserting the opposite position in this proceeding (id., pp. 2-3).

In its Response, MECo argues that in order for the Department to grant GE's motion, it must conclude as a matter of law that the Department has neither the authority nor the discretion to grant the relief requested by MECo (MECo Response, p. 2). With regard to state law, MECo argues that 220 C.M.R. 8.07(3) allows the Department to grant an exception from any provision of 220 C.M.R. 8.00, and that the Company is entitled to a hearing to demonstrate that an exception is appropriate (id.). With regard to federal law, MECo asserts that Order No. 69

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[7] In Order No. 69, FERC adopted the Final Rule implementing Section 210 of PURPA.

"expressly recognizes that some adjustments may be appropriate" and that such adjustments may be needed to "reflect the impact of lost revenues to the supplying utility above the costs actually avoided" (id., pp. 4-5). Thus, the Company concludes that neither the federal statute nor regulations requires exclusive reliance on the wholesale rate to determine the avoided cost of an all-requirements utility[8] (id., p. 7).

In its Reply, GE argues that the Department only can grant an exception to its regulations as long as the exception does not exceed the authority granted the Department under federal law (GE Reply, p. 1). Thus, GE claims that the Department only can grant MECo an exception to the provision in 220 C.M.R. 8.04(4)(e) if it is authorized by FERC (id.). GE reiterates that FERC only allows MECo to base avoided costs on NEP's wholesale tariff rate (id., pp. 1-2). GE further replies that MECo has quoted paragraphs out of context and provided a "confused reading" of Order No. 69

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[8] MECo offers two other arguments to counter GE's federal law claim. First, it argues that QF facilities, such as GE Lynn, with capacity of more than one megawatt have no federal entitlement to a P-Rate, since the FERC regulations at 18 C.F.R. 292.304(c)(1) require utilities to have standard rates for purchases only for facilities with design capacity of 100 kilowatts or less (MECo Response, p. 7, n 3). Second, MECo asserts that GE has no federal right to sell its output to MECo at avoided costs, since, it claims FERC's avoided cost standard applies only to "new capacity," defined as capacity from a QF where construction was commenced on or after November 9, 1978 (id.). MECo asserts that because a significant portion of GE's capacity was in place at the Lynn facility prior to that date, FERC allows for payment of less than avoided cost, if authorized by the state (id.).

(id., p. 2). In this regard, GE claims that rather than showing that Order No. 69 allows for adjustments to the wholesale rate, MECo has offered "simply an explanation by FERC of when it is more advantageous for a QF to sell to a non-generating all-requirements utility and when it is more advantageous to sell to the supplying utility" (id., p. 3).[9]

IV. STANDARD OF REVIEW

220 C.M.R. 1.06(6)(e) allows for a party to move for dismissal of "all issues or any issue in [a] case" at any time after the filing of an initial pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in Riverside Steam & Electric Company, D.P.U. 88-123, pp. 26-27 (1988).[10] In Riverside, we denied the respondent's motion to

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[9] In response to MECo's other federal law grounds, GE contends first that even though FERC only requires standard rates for facilities with a design capacity of 100 kilowatts or less, it allows states the discretion to set such rates for larger QFs (GE Reply, p. 3). GE argues that since the Department has established an as-available rate for all QFs regardless of size, any change to limit the P-Rate to QFs with a capacity of 100 KW or less would require the Department to amend its regulations (id.). Finally, GE asserts that MECo's "new capacity" argument is without merit since the Department's regulations have made no distinction between "new capacity" and "other capacity" (id.). For the Department to make that distinction, GE argues, the Department would have to amend its regulations (id.).

[10] It has been found that procedures for dismissal and summary judgment properly can be applied by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Mass. Outdoor Advertising Council v. Outdoor Advertising Board, 9

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dismiss, finding that it did not "appear[] beyond doubt that [the petitioner] could prove no set of facts in support of its petition," and, in so doing, adopted the traditional Rule 12(b)(6) civil standard. Id., see M. R. Civ. P. Rule 12(b)(6); see also Nader v. Citron, 372 Mass. 96, 98 (1977).

In making its determination on whether to grant a motion to dismiss, the Department in reviewing the filing and pleadings must take the facts included in the filing and pleadings as true and viewed most favorably to the non-moving party. Id. Dismissal will be granted by the Department if it appears to a certainty that the non-moving party is entitled to no relief under any state of facts that could be proven in support of its claim. Riverside, supra, pp. 26-27.

V. ANALYSIS AND FINDINGS

MECo has requested an exception to 220 C.M.R. 8.04(4)(e), which requires that all-requirements utilities must use the tariff rate of their wholesale suppliers to determine avoided costs. Such an exception is expressly provided for in 220 C.M.R. 8.07(3), which states that "[t]he Department may, where appropriate, grant an exception from any provision of these regulations." As GE correctly notes, though, such an exception must be consistent with federal law, as embodied in PURPA, its

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Mass. App. 775, 783-786, 405 N.E. 2d 151, 156-157 (1980); Hess and Clark, Division of Rhodia, Inc. v. Food and Drug Administration, 495 F. 2d 975, 985 (D.C. Cir. 1974).

regulations and Order No. 69. We conclude, based on the following analysis, that federal law does allow for an all-requirements utility, such as MECo, to petition the Department to allow it to calculate its P-Rates in a manner other than basing the P-Rates on the rates in the supplying utility's wholesale tariff.

Order No. 69 states that electric utilities are required to purchase energy and capacity made available from a QF either directly, or in the case of an all-requirements utility, indirectly by transmission to its supplying utility. Order No. 69, FERC Stat. & Reg., p. 30,870. Order No. 69 further states that in most cases, the transfer "would take the form of the displacement of energy or capacity that would have been provided under the all-requirements obligation...[T]he supplying utility is deemed to have made the purchase and, as a result, the all-requirements obligation is not affected."Id., p. 30,871. The transfer requires the consent of the QF.Id.[11] Thus, the QF can determine which "purchaser" -- the supplying utility or the all-requirements utility -- would offer the better terms.Id. When the supplying utility is in an excess capacity situation, as

[11] While, as GE notes on page 3 of its Reply, "the choice is that of the QF and not the non-generating utility," GE fails to point out that if the non-generating utility fails to obtain the consent of the QF, then it is allowed to adjust the rates it pays the QF so that "it [will] be in the same financial position it would have been had it not purchased the qualifying facility's output." Order No. 69, FERC Stat. & Reg., p. 30,871. The mechanics of this adjustment are discussed infra.

is currently the situation with NEP in the instant case (MECo Filing, Hachey Testimony, p. 2), the QF may want to sell its energy and capacity to the all-requirements utility. Id. Order No. 69 states:

> Since the supplying utility has excess capacity, its avoided costs would include only energy costs. On the other hand, if the avoided costs were based on the wholesale rate to the all-requirements utility, the avoided cost would include the demand charge in the wholesale rate, which would usually reflect an allocation of a portion of the fixed charges associated with excess capacity.

Id.

If the all-requirements utility can not obtain the QF's consent to transfer the energy to its supplying utility, it will have to make the purchase itself. Id. However, Order No. 69 recognizes that, when the all-requirements utility purchases the QF's energy directly rather than transferring it to the supplying utility to purchase, the supplying utility experiences reduced revenue since the all-requirements utility is having some of its energy needs met by the QF. Id. The loss in energy sales by the supplying utility will cause the supplying utility to increase fixed cost charges to its customers, since those fixed costs will be spread over a smaller number of units of output. Id.

Thus, if the all-requirements utility purchases QF power directly, it will have to pay the supplying utility a larger portion of the supplying utility's demand charges. "Under the definition of 'avoided costs' [in Order No. 69], the purchasing utility must be in the same financial position it would have been

had it not purchased the [QF's] output." Id. Therefore, to put the all-requirements utility in the same financial position, Order No. 69 envisions the supplying utility assigning all of its lost revenue (resulting from the all-requirements utility purchasing the QF output) to the all-requirements utility. Id. The all-requirements utility in turn should adjust downward the wholesale rate to be paid to the QF to reflect the increased demand charges it will be paying to the supplying utility. Id.

Thus, Order No. 69 recognizes that an all-requirements utility can make an adjustment, rather than basing the P-Rates strictly on the rates in the supplying utility's wholesale tariff. Since PURPA and the FERC regulations allow for an adjustment, we find that the Department has the authority, pursuant to 220 C.M.R. 8.07(3), to grant the Company the exception it requests.[12]

We also reject GE's assertion that MECo cannot rely on its position in this case because it has taken an opposite position in a prior proceeding before the Department. Whatever MECo has

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[12] We note that this avoided cost adjustment recognized by Order No. 69 is conceptually different than MECo's requested relief in this case of directly basing its P-Rates on the avoided costs of its supplying utility. However, since Order No. 69 allows for "direct" or "indirect" transmission of QF energy to the supplying utility at the supplying utility's avoided cost, we find that, based on federal law, MECo is entitled to a hearing to show that its proposal will produce a result consistent with federal and state law, and Department practice. Given this finding, we do not address MECo's other federal law grounds and GE's arguments in opposition.

argued to the Department in the past is not controlling.[13]

Therefore, we find that GE has not sustained its burden of affirmatively demonstrating that it appears to a certainty that MECo is entitled to no relief under any state of facts which could be proved in support of its claim.

VI. ORDER

Accordingly, after due consideration, it is

ORDERED: That the motion of General Electric Company filed with the Department on October 16, 1992 to dismiss the qualifying facility power purchase rate P tariff, M.D.P.U. No. 859, of Massachusetts Electric Company be and hereby is DENIED; and it is

FURTHER ORDERED: That the Department's investigation into the tariff of Massachusetts Electric Company, M.D.P.U. No. 859, filed with the Department on September 15, 1992 shall proceed.

By Order of the Department,

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[13] Moreover, we are not convinced by GE's argument that MECo's position in D.P.U. 84-276 (1986) is inconsistent with its position in the instant case. As MECo noted in its comments in the earlier proceeding, adjustments can be made to the "supplier's wholesale rate" in situations where the supplier "is in an excess capacity position." MECo Comments in D.P.U. 84-276, at 20.