

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

MidAmerican Energy Company :
 :
Verified Petition for Declaratory : **03-0496**
Ruling or in the Alternative, :
Application for Approval of Affiliated :
Interest Contract. :

Brief on Exceptions of MidAmerican Energy Company

Now comes MidAmerican Energy Company (“MidAmerican”), and files its Brief on Exceptions from the Proposed Interim Order (“Interim Order”) issued by the Administrative Law Judge (“ALJ”) of the Illinois Commerce Commission (“Commission”) in this Docket on November 18, 2003.

GENERAL

For the reasons set forth herein, MidAmerican takes exception to the following portions of the Interim Order:

- VI. Commission Conclusion
- VII. Findings and Ordering Paragraphs

MidAmerican disagrees with the conclusion of the Interim Order that its verified petition for a declaratory ruling should be denied and the matter should proceed as an application for an affiliated interest contract under Subsection 7-101(3) of the Public Utilities Act (“Act”). MidAmerican takes exception to the Interim Order for three principal reasons.

First, MidAmerican believes that Subsections 7-101(3) and 7-101(4) of the Act clearly provide exemption and waiver from the Act’s approval requirements for transactions with affiliated interests and that these provisions of the Act are not properly

applied in the Interim Order. Subsection 7-101(3) provides for certain affiliated interest transactions to be exempted from approval. Subsection 7-101(4) is a waiver provision which permits affiliated interest transactions to be made without Commission approval as long as such transactions are made in the ordinary course of business for services, supplies and other items of personal property at prices not exceeding the standard or prevailing market price. These provisions do *not* require each affiliated interest transaction to be subject to approval and a hearing process. Nor must an “ordinary course” affiliated interest transaction be specifically identified in a general affiliated interest transaction agreement on file with the Commission. The Interim Order seeks to create new standards for affiliate transactions that have no basis in the statutes and that have not been promulgated through the appropriate rulemaking processes. Subsection 7-101(4) of the Act waives the approval requirements of Subsection 7-101(3), and provides no support for the new conditions or approval requirements that the Interim Order would seek to apply to affiliated interest transactions.

Second, in evaluating the market price of the turbine generator, the Interim Order considers only a very few selective facts incident to its acquisition. The only information that the Interim Order finds probative of the market price of turbine generators in summer 2001 is the reports of independent experts Grieg and Suss. Even then, the Interim Order discounts that information because the task assigned to the independent experts was more specific than their general answers. The fact that the independent reports contained the information desired by Staff is ignored in the Interim Order, as is other factual information that has been provided, such as information regarding the turbine solicitation conducted by MidAmerican Holdings in 1999 and MidAmerican’s 2001 review, which

built upon the 1999 solicitation and also took into consideration timing issues and undisputed difficulties that had been experienced since 1999 with the other surveyed turbine generator models. The Interim Order also fails to acknowledge that no one has refuted the information regarding market price provided by MidAmerican; Staff has merely questioned it without providing a firm basis for such questions. It is clear that MidAmerican's request for a declaratory order should be granted and the turbine acquisition should be considered to have been made in the ordinary course of business at or below prevailing market price without further proceedings. Alternatively, if, despite the clear waiver and exemption provided by the Act for ordinary course transactions, the Commission should rule that a hearing on the Turbine Agreement is necessary, the Interim Order should specifically limit the scope of the hearing to the issue for which further information is sought. Since MidAmerican's evidence of turbine market price is unrefuted by any other evidence and since that evidence includes a review of turbine options other than the turbines selected, the only issue appears to be whether the turbines were acquired in the ordinary course of business.

ARGUMENT

I. The Turbine Agreement does not require Commission approval

The Interim Order at the second paragraph of Section VI would effectively end the current waiver from Commission approval afforded by Subsection 7-101(4) of the Act for transactions between utilities and their affiliated interests in the ordinary course of business at market prices. If the Interim Order becomes final action of the Commission, utilities will no longer be able to enter into "ordinary course transactions" with their affiliates knowing that they only need to document that they are paying standard or

prevailing market prices for the item. Instead, each potential “ordinary course” transaction will become the subject of a hearing to determine if the transaction meets new standards referenced in the Interim Order but otherwise not specified in the statute or rules. Certainly this is not efficient and it would make the statutory exemption and waiver totally meaningless.

The emphasized language in parenthetical below excerpted from the Commission Conclusion at Section VI includes the new standards created by the Interim Order.

- First, for each potential “ordinary course” transaction, a utility will have to consider whether it can be concluded “with certainty” that the transaction falls into the “ordinary course-prevailing market price” category. (“the Commission can not conclude with certainty that the manner in which MidAmerican acquired the turbines was in the ordinary course of business...”).
- Second, existing general affiliate transaction agreements approved by the Commission may need to be amended to attempt to specify in detail all potential transactions that can occur between affiliates, rather than listing categories of transactions as such agreements currently do. (“...nothing in the record suggests that it is ‘in the ordinary course of business’ for MEC to turn to its affiliate for goods and services outside of an existing affiliate agreement”). Since it is unlikely that all specific transactions can be anticipated in advance, the value of the general agreements is diminished, hearings will be more likely, and administrative efficiency will be undermined.

- Finally, a utility will in each instance have to determine whether a transaction is unquestionably in the ordinary course of business. (“...it does not unquestionably place MEC’s acquisition of the Turbine Agreement from MidAmerican Holdings within the ordinary course of business”).

These new standards are driven by the erroneous presumption contained in the second paragraph of Section VI. of the Interim Order that “..closer review is warranted...” of *all* affiliate transactions. This presumption suggests that all affiliate transactions are suspect and should be discouraged. This is an incorrect and administratively inefficient presumption, is not supported by statute or rule, and, in fact, is **contrary** to the plain language of the exemptions from approval granted by Subsections 7-101(3) and 7-101(4) of the Act. If the General Assembly had wanted the Commission to analyze each affiliated interest transaction, it would not have enacted these Subsections with the various exemptions and waivers or provided the Commission with the delegated authority to adopt rules to further define its waiver authority.

Another defect with the proposed Interim Order is that it incorrectly examines “ordinary course of business” in terms of the *process* rather than the result. Specifically, the proposed order in part concludes, “...the Commission can not conclude with certainty that the manner in which MEC acquired the turbines was in the ordinary course of business...[emphasis supplied] This portion of the proposed Interim Order goes beyond the statutory concern as to whether the product or service was one which the utility procures in the ordinary course of business at prevailing market prices, and instead focuses on the procurement process.

A simple illustration reveals this misplaced emphasis. Assume that a person normally buys milk at a grocery store. However, one day, the person sees that there is milk for sale at the gas station when buying gas. The person buys milk at the gas station that day because the price is comparable to milk prices at the grocery store and it will save a trip to the grocery store.

Under this illustration, the proposed Interim Order would focus on the mechanics of the purchase rather than solely upon whether the purchase was for a product obtained in the ordinary course of business at prevailing market prices. The latter, not the former, are the appropriate criteria under the statute and Commission rules.

II. The Commission should consider all factual information dispositive of the appropriate price of the turbine generator and not just the reports of the independent experts

The Interim Order states at the third paragraph of Section VI.:

...the Commission is not prepared to conclude that the purchase price under the Turbine Agreement does not necessarily exceed the standard or market price.

The only reason cited by the Interim Order for arriving at this conclusion is what it considers to have been an erroneous scope of assignment that MidAmerican gave to its two independent turbine pricing experts, Messrs. Grieg and Suss. The Interim Order states that MidAmerican did not specifically ask the experts to include in their analyses pricing information on *both* the high-efficiency 501F turbine generator (501F CTG) manufactured by Siemens Westinghouse Power Corporation *and* other turbine generator models. However, as the Interim Order acknowledges, both expert evaluations considered the price of other units, but concluded that for reasons of availability no unit but the Siemens Westinghouse would have met MidAmerican's desired time schedule.

Mr. Grieg's analysis states that he reviewed project and contract files that his company had related to F Class combustion turbine equipment (not just Siemens Westinghouse equipment) purchases and negotiations during the summer of 2001. He also reviewed "...purchase terms and pricing conditions for high-efficiency combustion turbine-generators including the SWPC 501F and a similar combustion turbine manufactured by General Electric (GE), the GE 7FA." [Emphasis supplied] Likewise, Mr. Suss concluded that the price for "larger gas-fired turbines such as the Westinghouse 501F" would have been in the range of the price that MidAmerican paid during the summer of 2001, or approximately \$35,000,000 and \$40,000,000.

Clearly, sufficient information on the availability and price of all potential turbine generators was developed by the independent experts in order to permit a conclusion that MidAmerican paid prevailing market prices. The focus of the Interim Order exclusively on the question posed instead of on the substance of the answers places form over substance. This focus is especially misplaced when it is considered that there is no Commission rule or case establishing a method to use to determine standard market price in an "ordinary course" transaction.

In addition to the independent expert analyses, MidAmerican and MidAmerican Holdings conducted their own market reviews. In the third quarter of 1999, MidAmerican Holdings conducted a turbine generator solicitation process involving three potential vendors – ABB, GE and Siemens Westinghouse. MidAmerican conducted a review of the market in 2001, when Iowa law changed and MidAmerican became enabled to meet its summer 2003 demands with a new power plant instead of by entering into likely more expensive power purchase agreements. Staff did not suggest that there were

any improprieties associated with these activities or that they were technically insufficient in any way. However, the Interim Order declined to consider them. The Interim Order again suggests that factual information must “unquestionably” place a transaction within the ordinary course of business for the exception to apply. [Sec. VI. paragraph 2]. The review conducted by MidAmerican and the solicitation conducted by MidAmerican Holdings are relevant and do “unquestionably” place the transaction within the ordinary course of business. Remember, Mid American was not able to build generators in Iowa in 1999 because of a law that discouraged investor-owned utilities from constructing and owning new generation. If the new law had been in place in 1999, it is reasonable to assume that MidAmerican would have conducted a similar solicitation during that time period in order to buy a turbine generator for delivery to a unit that was needed by the summer of 2003. Thus, the 1999 solicitation should be considered as if it were performed by MidAmerican. The applicability of the 1999 MidAmerican Holdings turbine acquisition to the 2001 acquisition is not simply “interesting” as the Interim Order suggests, but is instead “determinative” of the price that MidAmerican would have paid if it had not had the time constraints imposed by Iowa law.

Subsection 7-101(4) does not require any factual information to support a waiver for an ordinary course transaction made at a prevailing market price. This provision does not support the convoluted conclusion of the Interim Order that independent expert evaluations are the only reliable evidence to support a transaction as being in the ordinary course of business and then only when certain questions are posed, even if the questions are answered by the experts. The Commission should consider *all* of the factual information provided by MidAmerican - which includes information regarding a 1999

turbine solicitation made by MidAmerican Holdings, a 2001 review of the turbine market and two independent expert conclusions. All of these analyses support the same conclusion – that MidAmerican paid a price that was at or below the prevailing market price for the turbine generators when it entered into the Turbine Agreement.

III. If a Hearing is Ordered it should be Limited

The proposed Interim Order questions whether the *manner* in which the Turbine Agreement was entered into by MidAmerican and MidAmerican Holdings was in the ordinary course of business (i.e., the acquisition process). Not in question in the proposed order are that (1) the turbine was acquired at a standard or prevailing market price; (2) MidAmerican and MidAmerican Holdings have entered into a contract or arrangement; (3) both MidAmerican and MidAmerican Holdings acquire turbines from time to time in the ordinary course of their businesses; (4) the turbines were personal property at the time of acquisition and (5) MidAmerican reimbursed MidAmerican Holdings dollar for dollar for the turbines.

As noted in Section II hereof, the information provided with the Petition amply demonstrates that the price paid for the turbines was at standard or prevailing market prices, and no information has been presented that would refute that. Thus, if the Commission should determine to hold a hearing, the scope of the hearing should be strictly limited to the only issue possibly remaining. That is, was the transaction in the ordinary course of business? It would be inconsistent with the effort of the General Assembly to develop a clearly defined category of exempt affiliated interest transactions for all aspects of the Turbine Agreement to be subjected to review in a contested case hearing.

CONCLUSION

The Interim Order should be modified to reflect the concerns expressed in this Brief as reflected in MidAmerican's exceptions attached hereto.

DATED this 2nd day of December, 2003.

Respectfully submitted,

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