
STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

MidAmerican Energy Company :
 :
Verified petition for a declaratory ruling or : ICC Docket No. 03-0496
in the alternative, application for approval of :
affiliated interest contract. :

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***REPLY BRIEF ON EXCEPTIONS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION***
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NOW COMES the Staff of the Illinois Commerce Commission (“Staff”) and pursuant to Section 200.830 of the Illinois Commerce Commission Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits this Reply Brief on Exceptions.

I. INTRODUCTION

In addition to Staff, a brief on exceptions¹ (“BOE”) to the Administrative Law Judge’s Proposed Order (“ALJ” and “PO”) was filed by MidAmerican Energy Company (“MEC”). Staff will respond to certain arguments made by MEC. Staff’s silence as to other arguments raised by MEC should not be construed as acquiescence in or approval of said arguments by Staff. MEC in some of its arguments supporting its “limited exceptions” is unjustifiably critical of the Illinois Commerce Commission (“Commission”) and Staff. Rather than putting blame on others, MEC should take responsibility for its own actions. Despite MEC’s claims to the contrary, MEC’s interpretation of the Illinois Public Utilities Act (“PUA”) was not reasonable. MEC’s unreasonable interpretation ultimately leads MEC to fail to comply with the PUA. The Commission’s order in this proceeding must make MEC responsible for its own actions or inaction. If the Commission fails to take a strong stance against MEC, it will only provide an incentive for MEC to ignore the PUA in the future.

¹ MEC filed its proposed language in a separate document from its BOE entitled “Exceptions of MidAmerican Energy Company 02-24-06.” References to the language proposed by MEC contained in the second document will be cited as “MEC Exceptions”.

II. ARGUMENT

- A. MEC's acquisition of the combustion turbines was not in the ordinary course of business.

The ALJ after reviewing the evidence in the record correctly concluded that MEC should have filed a petition under 7-101(3) before acquiring the combustion turbines from MidAmerican Energy Holdings Company ("MidAmerican Holdings") or at least should have filed a more timely declaratory ruling before taking possession of the turbines. (PO, p. 13) Despite the fact that Staff, the ALJ and the Commission all found MEC's acquisition of the combustion turbines from its affiliate, MidAmerican Holdings, to not be in the ordinary course of business, MEC still argues to the contrary. (MEC BOE, pp. 2-4, 7, 9 and 11) To support its position in part, MEC brings up the subject of the vast assets of Berkshire Hathaway, in particular Coca-Cola and Wells Fargo. (MEC BOE, p. 10) MEC's Coca-Cola/Wells Fargo ordinary course of business argument is absurd. As Staff pointed out in its reply brief, the issue is what is in the ordinary course of business for MEC. The issue is not what is in the ordinary course of business for Coca-Cola, Wells Fargo or MidAmerican Holdings. There is no dispute that prior to the acquisition of the turbines from MidAmerican Holdings, MEC had not acquired a combustion turbine since 1993. More importantly Staff found no instance where MEC on any prior occasion had ever acquired combustion turbines from an affiliate. (Staff Ex. 1.0, p. 6). If acquiring turbines from an affiliate was in the ordinary course of business for MEC then there would be a history of such transactions. MEC offered no evidence in the record of a single other instance where such a transaction occurred. Instead, the

evidence in the record is that the only instance of such a transaction is the one which is the subject of this proceeding. (Staff Reply Brief, pp. 2-3) Given the above and all of Staff's previous arguments on this issue, the Commission should reject all of MEC's proposed language concerning the issue of "ordinary course of business."

- B. Its not a penalty for the Commission to simply hold MEC to a reasonable interpretation of the PUA.

According to MEC there is no clear definition of "ordinary course" and therefore MEC should not be penalized for its actions or lack thereof. (MEC BOE, p. 10) MEC portrays itself as a utility in a "conundrum." According to MEC it is subject to the jurisdictions of Illinois, Iowa, South Dakota, two cities in Nebraska and the Federal Energy Regulatory Commission. Also, according to MEC, one jurisdiction may seek that which another prohibits. (MEC BOE, p. 8) However, MEC's circumstance of operating an electric utility in multiple states is not unique. Another Iowa utility, Interstate Power and Light Company ("IPL") entered into a transaction similar in many respects to MEC's, yet IPL recognized that its transaction was not in the ordinary course of business and appropriately followed the requirements of the PUA. MEC in its exceptions ignores IPL, but the Commission cannot. If the Commission were to adopt MEC's interpretation of the PUA it would be giving MEC a free pass to do whatever it wants in Illinois because it's a "multi-jurisdictional utility". If MEC believed that there was an illegal conflict between jurisdictional requirements, then the appropriate course of action would have been for MEC to bring the issue to the appropriate jurisdictional body and not to "avoid Commission review." (PO, p. 13) Not until after the Commission

found MEC's transaction to not be in the ordinary course did MEC suggest that a jurisdictional conflict existed. MEC argued that Staff's interpretation of Section 7-101 was in violation of the Commerce Clause. (MEC IB, pp. 12-13) However, as Staff pointed out in its reply brief, Section 7-101 as interpreted by Staff does not interfere with interstate commerce. (Staff RB, pp. 7-11) Staff's analysis did not favor Illinois' economic interests over Iowa's economic interests. Staff never testified that MEC had to construct a plant in Illinois or purchase additional power from an Illinois supplier in order to serve Illinois ratepayers at the least cost. (Staff RB, p. 10)

In its BOE, MEC argues that it made a reasonable interpretation of the PUA. (MEC BOE, pp. 3, 4, 9, and 11) The Commission does not have to be reminded that MEC on the gas side of its "utility business," recently argued to the Commission that the PUA permitted MEC to engage in competitive gas sales. The Commission disagreed. (ICC Docket No. 03-0659, Order on Rehearing) Given MEC's past practice, the Commission should be cautious of any arguments made by MEC concerning what is legal or illegal under the PUA. Staff's interpretation of Section 7-101(3) is reasonable and is the same analysis that Staff used in evaluating IPL's affiliate transaction. Staff's Section 7-101(3) analysis is the only analysis presented which allows the Commission to objectively determine whether MEC entered into its affiliate transaction to relieve its affiliate of its own obligations and to cover the affiliate's expenses. MEC in its exceptions language brings up the issue of least cost and RFP. (MEC Exceptions, p. 11) However, Staff's analysis did not define least cost to mean that MEC had to conduct an RFP. As Staff pointed out in its reply brief, while an RFP would be the best

way to demonstrate the proposed capacity additions were least cost, it was not the only means. (Staff RB, p. 13)

C. MEC must accept responsibility for its own actions.

As discussed in the previous section, MEC argues that there is no clear definition of “ordinary course” and as a result there was no guidance for MEC to follow. (MEC BOE, p. 7) If there was no guidance for utilities like MEC to follow, the Commission should ask MEC how was IPL able to determine that its affiliate transaction was not in the ordinary course of business and therefore file a petition under Section 7-101(3). Staff would suggest that the guidance exists in prior Commission orders and the language of the statute itself. Staff would further suggest that MEC either did not look at the prior Commission orders and the statute or else did not want to consider them. Rather than admit fault on its part, MEC attempts to put the blame on the Commission and Staff. MEC argues that the Commission took too much time to determine that its transaction was not in the ordinary course in comparison to the time that the Iowa Board took to approve construction of the Greater Des Moines Energy Center (“GDMEC”) and include it in rates. (MEC BOE, p. 8) MEC ignores the fact that it was over two years from the time when MEC agreed to terms with its affiliate to the time when MEC filed its petition for declaratory ruling. (Staff IB, pp. 1-2)² The ALJ appropriately took MEC to task for its lack of diligence. (PO, p. 13) MEC then criticizes the Commission for never initiating a rule making during the past eleven years concerning “ordinary course” (MEC

² MEC agreed to terms with its affiliate, MidAmerican Holdings, some time during July 2001 but did not file its declaratory ruling until August 19, 2003. (Staff IB, pp. 1-2)

BOE, p. 10) If MEC was in such a conundrum and as helpless as it suggests, the Commission should ask MEC why didn't MEC petition the Commission for such a rule making. The Commission's rules of practice allow MEC to do so (83 Ill. Adm. Code Section 200.210) and on at least one occasion in the past MEC has in fact initiated a rulemaking. (See, ICC Docket No. 02-0290, First Notice Order Dated October 23, 2002) For these reasons, MEC's proposed language which attempts to put blame on the Commission and Staff (MEC Exceptions, p. 13) should be rejected.

- D. MEC's insistence on referring to other generating plants in Iowa should be disregarded.

In its exceptions language and its BOE, MEC seeks to insert language into the PO concerning the non GDMEC "New Generation." (MEC BOE, p. 9 and MEC Exceptions, pp. 3-4) The only "New Generation" relevant to this matter is the GDMEC which Staff witness Rockrohr addressed in his testimony. MEC has never indicated that the other "New Generation" was constructed using assets acquired by MEC from an affiliate, therefore the other "New Generation" is not relevant and the language proposed by MEC should be rejected. Furthermore, inclusion of the language proposed by MEC in the order for this docket could create some confusion as to how the Commission should address the non GDMEC "New Generation" in MEC's fuel adjustment clause ("FAC"). The fact that the Iowa Board has allowed MEC to allocate non GDMEC "New Generation" to Iowa ratepayers is not controlling with regard to those

specific assets for purposes of the FAC³. As set forth in Staff's BOE in the exception seeking clarification of Finding (4) "the mere exclusion of costs of a generating unit from ratepayer base rates, such as capital costs, is not in and of itself justification for excluding a generating unit from the mix of generation that serves Illinois ratepayers." (Staff BOE, pp. 13-14) Staff in order to clarify Finding (4) of the PO provided a new Finding (5). (Id. at 14) In order to avoid any similar confusion on this point and given that the non GDMEC "New Generation" was not constructed using assets acquired from an affiliate, MEC's language should be rejected.

E. MEC cannot carve out assets in the future to avoid Commission Review

In its exceptions language, MEC proposes the deletion of language from the PO which makes it clear that by simply removing any direct costs of a transaction from rates, MEC cannot avoid Commission review. (MEC Exceptions, p. 14) At no place in Section 7-101 does it state that Commission consent is only necessary where the affiliate contract costs would be recovered from ratepayers. (Staff RB, p. 14) The ALJ agreed with Staff's analysis and appropriately included the language which MEC now seeks to have removed⁴.

³ Staff does not dispute that the PO is clear that with respect to the GDMEC none of its costs can be imposed on Illinois ratepayers including through the FAC. (PO, p. 14)

⁴ Staff in its BOE had certain modifications to the language which MEC seeks to remove. Those modifications are discussed at page 8 of the Staff BOE.

III. CONCLUSION

WHEREFORE, for all the reasons set forth herein and those previously set forth in its briefs, the Staff of the Illinois Commerce Commission respectfully requests that MEC's exceptions be rejected and that Staff's exceptions be adopted.

Respectfully submitted,

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