



THE
RUNNING WISE
LAW FIRM

FORD • CONLON • GERBERDING • GRIER

November 19, 2021

Ms. Lisa Felice, Executive Secretary
Michigan Public Service Commission
7109 W. Saginaw Hwy.
Lansing, MI 48917

RE: MPSC Docket No. U-20220

Dear Ms. Felice:

Attached herewith for filing in the above-referenced matter, please find the **Answer of Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, Viking Energy Of Lincoln, Inc., and Viking Energy Of McBain, Inc. to The Petition for Rehearing of The Residential Customer Group** and Certificate of Service of same.

Thank you for your assistance in this matter.

Very truly yours,

Thomas J. Waters

TJW/ap
Attachments
cc: All parties of record

Kent E. Gerberding
Michael I. Conlon
Catherine D. Jasinski
Thomas A. Grier
Julie A. Gillum
Jeffrey R. Wingfield
Kathryn E. Glancy
Thomas J. Waters

Of Counsel:

Richard W. Ford
John W. Kline

Harry T. Running
(1911 – 1992)

William L. Wise
(1928 – 2014)

Miles C. Gerberding
(1930 – 2015)

Traverse City
1501 Cass Street, Suite D
PO Box 686
Traverse City, MI
49685-0686
Ph. 231.946.2700
Fax. 231.946.0857

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for reconciliation of its power supply cost)
recovery plan (Case No. U-20219) for)
the 12-months ended December 31, 2019.)
_____)

Case No. U-20220

**ANSWER OF
CADILLAC RENEWABLE ENERGY, LLC, GENESEE POWER STATION LIMITED
PARTNERSHIP, GRAYLING GENERATING STATION LIMITED PARTNERSHIP,
HILLMAN POWER COMPANY, LLC, TES FILER CITY STATION LIMITED
PARTNERSHIP, NATIONAL ENERGY OF LINCOLN, LLC, AND NATIONAL
ENERGY OF MCBAIN, LLC TO THE PETITION FOR REHEARING OF THE
RESIDENTIAL CUSTOMER GROUP**

NOW COME Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, National Energy of Lincoln, LLC, and National Energy of McBain, LLC, f/k/a/ Viking Energy of Lincoln and McBain, (“Petitioners”), by and through their attorneys, The Running Wise Law Firm, and pursuant to Rule 437(2) of the Commission’s Rules of Practice and Procedure, answer the RCG’s Rehearing Petition as follows:

1. Summary

In its Rehearing Petition, the Residential Customer Group (“RCG”) asks the Commission to rehear its decision to not inquire into the BMPs’ “overall earnings and common equity returns”¹ and “financial status”² in order to determine “whether the BMPs returns were reasonable, or excessive, which in turn may justify increased scrutiny and disallowance of said cost claims”³ and

¹ 2 Tr. 311.

² RCG’s Initial Brief, p.62.

³ RCG’s Initial Brief, p. 62.

to “subject [the BMPs] to the updated PURPA cases which the Commission is undertaking for CECO”⁴

The RCG’s Rehearing Petition fails because it simply reargues the RCG’s prior arguments made to the Administrative Law Judge and Commission. The RCG never identifies what finding of fact or conclusion of law is erroneous and why. MPSC Rule 792.10437 clearly states that “A petition for rehearing based on a claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the basis of the error.”

The RCG’s Rehearing Petition either misunderstands or disregards applicable law. The BMP’s energy and capacity payments under their MPSC approved Power Purchase Agreements are avoided cost payments under the Public Utilities Regulatory Policies Act, Pub.L. 95–617, 92 Stat. 3117, which are FERC jurisdictional wholesale electric rates. State utility commissions must allow utilities to recover such costs. *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986). Once a state commission determines the appropriate avoided cost rates in a Qualifying Facility’s contract, it cannot change those rates or deny recovery of those costs. Moreover, as discussed below, 18 C.F.R § 292.602(c) exempts PURPA qualifying facilities from state regulations with respect to their finances and organization. The RCG’s argument in its Rehearing Petition that the Commission erred in not requiring the BMPs to “provide facts or information concerning the overall rate of return the BMPs are experiencing from the revenues generated under its [sic] PURPA contracts. . . .”⁵ in order to then force a revision of those federally mandated rates simply and incredibly ignores all of the foregoing.

Turning to the Act 286 cost recovery payments, the RCG ignores the fact that those payments are strictly cost recovery of actual expenses. The BMPs did not request and are not

⁴ 2 Tr. 311 and RCG’s Initial Brief, p. 61.

⁵ Rehearing Petition, p. 9.

receiving any return whatsoever on those actual costs. In fact, the BMPs are not recovering all of their fuel and variable O&M costs. In 2019, the BMPs collectively incurred \$24,237,869 in actual fuel and variable O&M costs but only recovered \$14,300,040 of that amount, which left the BMPs with \$9,937,829 of unreimbursed fuel and variable O & M costs. That is a negative return on those actual costs. The RCG is apparently looking to impose an even greater negative return on the BMPs. The BMPs needed to prove that those fuel and variable O&M costs were reasonable and prudent, and did. Their proofs regarding the reasonableness and prudence of those costs were unrebutted. The RCG was permitted full discovery into those costs and the BMPs provided complete information regarding those costs.

The RCG's Rehearing Petition fails to accept the limited scope of this proceeding, improperly suggests that the BMPs did not produce all relevant and necessary cost data and documentation, incorrectly characterizes many of the underlying facts, and requests relief that would violate both state and federal law. Accordingly, the RCG's Rehearing Petition should be denied in its entirety.

2. The RCG's Rehearing Petition Is Replete With Factually Incorrect Statements

The RCG requests a rehearing of the complaint in its Initial Brief below that "the BMPs in this case have objected to RCG's discovery inquiry into the financial returns of the BMPs on the basis that they were exempt as QFs to such disclosure and reviews."⁶ The RCG made that argument without having offered into evidence the BMPs' response to the RCG's First Discovery Request. More importantly, the RCG mischaracterized the BMPs' discovery response.

The RCG's First Discovery Request to the BMPs was served on October 3, 2020. That discovery request asked the BMPs to produce "the audited financial statements, including a

⁶ RCG's Initial Brief, p. 61.

Balance Sheet and Income Statement, for each and all participating BMP projects represented by Counsel Waters for the years 2017, 2018, and 2019.” The BMPs’ response was as follows:

“The BMPs object to this request because it seeks information that is neither relevant to the subject matter of this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. The purpose of this proceeding is the reconciliation of Consumers’ 2019 power supply cost recovery (PSCR) costs and revenues, including the reconciliation of payments due to the BMPs under MCL 460.6a. Pursuant to MCL 460.6a and in accordance with the MPSC’s Order in Case No. U-16048, the BMPs filed testimony and exhibits in this proceeding in support of their actual fuel and variable operation and maintenance costs and the amounts they are paid under their PPAs for those costs. The BMPs’ financial statements, balance sheets and income statements are not relevant to this proceeding. Moreover, 18 C.F.R § 292.602(c) explicitly exempts qualifying facilities under PURPA from state regulations with respect to their finances and organization.”

The BMPs’ served the foregoing objection on the RCG on October 16, 2020. The RCG waited until the February 23, 2021 hearing in this matter to challenge the BMPs’ objection, rather than timely filing a motion to compel the same. The RCG did the same thing when it waited until Sunday, February 21, 2021 before the Tuesday, February 23 hearing in this matter to serve certain discovery requests on the BMPs. This strategic conduct is abusive.

The BMPs’ principal objection was not, and is not, that “the financial returns of the BMPs . . . were exempt as QFs to such disclosure and reviews,” as the RCG incorrectly claims. The BMPs’ principal objection is simply that the requested discovery was not relevant to the scope of this proceeding, which is to reconcile Consumers’ 2019 power supply cost recovery (PSCR) costs and revenues and to address the BMPs’ 2019 cost recovery under MCL 460.6a. It is not to address the overall earnings; common equity returns or financial status of the BMPs as the RCG wishes to do.

Consumers Energy presented testimony and evidence with regard to its costs, including the costs that it incurred under the MPSC approved BMP power purchase agreements. As required by federal law, Consumers must be allowed to recover those costs. The BMPs presented testimony and exhibits identifying: (i) their actual fuel and variable operation and maintenance costs (ii) the amounts they were paid by Consumers for those costs and (iii) the shortfall they incurred, all in accordance with MCL 460.6a(9)&(10) and the MPSC's Order in Case No. U-16048. The BMPs' financial statements, balance sheets and income statements are simply not relevant to this proceeding. If the RCG believed otherwise, it should have timely filed a motion to compel and not waited until the date for filing its Initial Brief 6 months later to raise this issue for the first time.

The RCG's Rehearing Petition improperly suggests that the BMPs' objections to the discovery in question resulted in a failure to produce the relevant "books and records" needed to "determine whether the BMP cost claims were reasonable and accurate."⁷ That is not true.

All cost data needed to substantiate Consumers Energy Company's recovery of all payments made to the BMPs was contained in its testimony and exhibits, which were not challenged. All relevant and necessary cost data to support the BMPs' cost recovery requests under MCL 460.6a(9)&(10) was contained in the BMPs' testimony and exhibits. Exhibits BMP-1 through BMP-9 fully document the megawatt hours of energy the BMPs delivered to Consumers Energy, the BMPs' fuel and variable O&M revenue under their contracts, the BMPs' fuel costs, the BMPs' water supply costs, the BMPs' sewer/wastewater disposal costs, the BMPs' ash handling costs, the BMPs' fuel handling costs, the BMPs' emission control costs, the BMPs' water treatment costs, the BMPs' maintenance and other variable O&M costs, the total fuel and variable O&M expenses, and the shortfall between those costs and the amounts that the BMPs were paid

⁷ RCG's Initial Brief, p. 62.

for those cost under their contracts. All of the aforementioned costs are supported by the testimony of the various BMP witnesses. All of the BMP cost data came from audited financial records⁸ and all of the BMPs submitted CPA or corporate officer statements certifying that all costs over \$25,000 had been properly characterized in accordance with Generally Accepted Accounting Standards, i.e. GAAP.⁹

To further rebut the RCG's inaccurate suggestion that the BMPs failed to disclose all relevant and necessary cost information, the BMPs repeat the following offer of proof they previously made which demonstrates that they did, in fact, fully disclose all relevant and necessary cost data & documentation and, in doing so, responded to multiple relevant discovery requests regarding that cost data including the following:

1. In response to Staff Audit Request DMP-1, the BMPs produced all twelve monthly consolidated BMP invoices that were sent to Consumers Energy Company in 2019, which identified the megawatt hours generated, fuel and variable O&M costs, fuel and variable O&M and payments, as well as the difference between those costs and payments.
2. In response to Staff Audit Request DMP-2, TES Filer City produced 19 page of general ledger expenses for March and April 2019, 8 pages of invoices for MATS compliance testing costs, 34 pages of DTE and CMS Energy Resource Management natural gas fuel invoices.
3. In response to the Attorney General's First Discovery Request (63 requests), the BMPS answered as follows:

Cadillac answered all questions asked regarding generation volumes, revenue and cost data for October through December 2019, a breakdown of fuel expenses showing the amount pertaining to each fuel type, the volume of each fuel burned, and the cost of each field burned on both an MMBtu and cost per ton basis. Cadillac also fully answered the Attorney General's questions regarding certain services performed by DP Brown and Reliable Fabrication in April and October 2019.

Genesee answered all questions regarding its expenses for each fuel type burned, the volume of each fuel burned, and the cost of each fuel burned on

⁸ Cadillac, 2 Tr. 334; Genesee, 2 Tr. 356; Grayling, 2 Tr. 381; Hillman, 2 Tr. 397; TES, 2 Tr. 2 Tr. 470; Viking of Lincoln & McBain, 2 Tr. 414.

⁹ Exhibits BMP-17,18, 19, 20, 21 22 & 23.

both an MMBtu and cost per ton basis (which included multiple pages of an Excel spreadsheet), boiler heating tube costs, and bulldozer costs.

Grayling answered all questions regarding its expenses for each fuel type burned, the volume of each fuel burned, and the cost of each fuel burned on both an MMBtu and cost per ton basis and questions regarding turbine generator maintenance expenses.

Hillman answered all questions regarding the cost differential between its tire derived fuel costs and wastes wood cost on a per ton basis, its expenses for each fuel type burned, the volume of each fuel burned, and the cost of each fuel burned on both an MMBtu and cost per ton basis, and expenses incurred for three contractors who worked on the Hillman Generating Facility in 2019.

Viking Energy answered all questions regarding its expenses for each fuel type burned, the volume of each fuel burned, and the cost of each fuel burned on both an MMBtu and cost per ton basis.

TES Filer City answered all questions regarding the amounts paid in 2019 to CMS ERM for natural gas, the costs for each fuel type, identifying the winning bidder and why that bidder was chosen, the cost of natural gas included within amount of capped costs (including a detailed Excel spreadsheet), a breakdown of its fuel expenses showing the amount pertaining to each fuel type burned, the volume of each fuel burned, and the cost of each fuel burned on both an MMBtu and cost per ton basis, as well as three pages of answers answering multiple questions regarding expenses for boiler tuning adjustments, refractory repair, and turbine inspection and repair costs.

4. The RCG's First Set of Discovery Requests to which the BMPs served answers and objections on October 16, 2020.
5. The Attorney General's Second Discovery Requests in which Viking Energy answered questions regarding Creosote treated railroad tie fuel.

TES Filer City answered questions regarding the costs that it incurred for natural gas transportation cost and natural gas fuel costs and provided an Excel worksheet, answered questions regarding the steam delivered to PCA, the Fuel Cost and Enthalpy Calculation used to exclude costs incurred for steam delivered to PCA from TES Filer City's cost recovery request, questions regarding the cost of the PCA wood fuel, a confidential spreadsheet showing the complete calculation of total fuel cost and the breakdown of those costs, and also produced a copy of the confidential contract with CMS Energy Resource Management Company for its natural gas costs.

6. The Staff Audit Request DMP-2 in which TES Filer City reconciled its invoices from DTE gas company to exhibits BMP-7.
7. The MPSC Staff's Second Discovery Request in which it provided a summary of its 2019 fuel costs as provided in MPSC Case No. U-20202 and the amount of gas the TES burned on startup and shutdown in 2019.

The RCG's assertions that the three BMPs which are partially owned by CMS are Consumers Energy affiliates and, therefore, controlled by it and subject to an "in-depth audit of the costs and returns of the BMP plants"¹⁰ is false. The un rebutted BMP ownership information set forth in Exhibits BMP-43, response 3, and BMP-51 establishes that neither Consumers Energy Company nor any other utility owns any interest in any of the BMPs. The fact that CMS Energy owns both Consumers Energy Company as well as other subsidiaries which own only a partial interest in TES Filer City, Genesee and Grayling does not prove that a utility owns and operates any of the BMPs, as the RCG has argued. In fact, it demonstrates that the BMPs are not owned and operated by a utility. CMS Generation Filer City, Inc., CMS Generation Genesee Company and CMS Grayling Holdings Co. only own a 50% interest in those three BMP projects. Consumers Energy holds no interest whatsoever in any BMP and does not control or operate any of the BMP projects.

3. The Relief That The RCG Ultimately Seeks Would Violate Both State and Federal Law

The RCG Rehearing Petition seeks to determine "the overall rate of return that the BMPs are experiencing from revenues generated under its [sic] PURPA contracts coupled with the revenues claimed under [the cost recovery provisions of Act 286]."¹¹ This is a rehash of argument number 2 on page 61 of the RCG's Initial Brief where it made clear that it wants to inquire into the BMPs' "overall earnings and common equity returns"¹² and then attempt to force a renegotiation of the BMP contracts prior to the contractual termination dates of those contracts.

¹⁰ Rehearing Petition, page 10.

¹¹ Rehearing Petition, page 9.

¹² 2 Tr. 311.

The RCG's argument simply ignores the fact that the avoided capacity and energy rates in the BMPs' contracts cannot be revised and the Commission cannot deny Consumers Energy recovery of those costs. *Nantahala Power & Light v. Thornburg*, 476 U.S. 953 (1986)

The relief that the RCG seeks in this case, an examination of the BMPs' "books and financial returns for purposes of setting Act 304 rates,"¹³ is virtually the same relief that the RCG sought in Consumers Energy Company's 2020 plan case, Case No. U-20525 in which the same RCG witness, Geoffery C. Crandall, argued that Consumers:

"should re-examine its fuel and purchase power, and other supplier contracts, and re-negotiate contracts and take what actions are necessary to downwardly adjust the costs for coal, fuel, purchase power, transportation and other costs which are proposed to be included in the [Consumers'] PSCR factor and 5-year PSCR forecast. [Consumers] should fully detail [the] efforts it has undertaken to seek cost reductions from its suppliers whose costs are subject to act 304 approval." April 8, 2021 Order, Case No. U-20525, p. 9.

As in Case No. U-20525, the RCG fails to recognize that there is no mechanism to require Consumers or the BMPs to renegotiate their power purchase agreements.¹⁴ As in Case No. U-20525, the RCG also fails to recognize that:

"If the Company attempted to alter or break an existing contract, it could have a negative financial impact amounting to a default on contractual obligations. Attempted renegotiation also poses a reputational risk that could have a negative financial impact in future bid solicitations in contract negotiations, such as where counterparties associate uncertainty with Consumers Energy contracts and account for potential future renegotiations by raising their prices." April 8, 2021 Order, Case No. U-20525, p. 9.

The RCG's requested relief would also violate state law inasmuch as the BMPs' contracts are all legally binding and enforceable contracts under the laws of the State of Michigan and the

¹³ RCG's Initial Brief, p. 61.

¹⁴ *Id.* And Exhibits BMP-44 through BMP-50.

RCG points to no provision in the BMPs' power purchase agreements which would allow Consumers or the Commission to force a re-negotiation of those contracts prior to their respective termination dates. The Commission correctly rejected the RCG's request in Case No. U-20525 and in its order in this case. The RCG offers no explanation why that decision was incorrect.

Another provision of federal law that the RCG simply fails to take into account is 18 CFR 292.602(c) which exempts Qualifying Facilities from certain State laws and regulations as follows:

“(1) Any qualifying facility described in paragraph (a) of this section shall be exempted (except as provided in paragraph (c)(2) of this section) from State laws or regulations respecting:

- (i) The rates of electric utilities; and
- (ii) The financial and organizational regulation of electric utilities.”

18 CFR 292.304(b)(5) reiterates the fact that subsequent changes in a utility's avoided costs is not a basis for revising the capacity and energy rates contained in previously approved power purchase agreements rates as follows:

“In the case in which the rates for purchases are based upon estimates of avoided costs over the specific term of the contract or other legally enforceable obligation, the rates for such purchases do not violate this subpart of the rates for such purchases differ from avoided costs at the time of delivery.”

Federal law makes clear that their previously approved power purchase agreements cannot be modified. The statutory exemption of cogeneration facilities from traditional utility-type regulation, together with FERC's avoided cost regulations, preclude state public service commissions from modifying previously approved rates in long term power purchase contracts to reconcile any decline in utility's avoided costs. *New York State Elec. & Gas Corp. v. Saranac Power Partners L.P.*, 117 F.Supp.2d 211 (N.D. New York, 2000). A state public utility commission is preempted from reconsidering its prior approval of agreements governing electric

utility's power purchases from QFs or rates under rates contained in those agreements. *West Penn Power Co. v. Pennsylvania Public Utility Com'n*, 659 A.2d 1055 (1995).

The RCG's citation to *Midland Cogeneration Venture Ltd. Partnership v. Public Service Comm.*, 199 Mich App 286 (1993) is equally misplaced. A cursory review of *Midland* makes clear that it does not stand for the proposition for which it is cited. *Midland* very straightforwardly holds that Consumers Energy Company, a regulated utility, was required to furnish to the MPSC "access to the books and records of its holding company, CMS Energy Corporation (CMS), and each of the utility's corporate affiliates and joint ventures...." *Id.* at 291. In contrast, here the RCG requested certain financial information from the non-regulated OFs who are exempt from such regulation.

The RCG's arguments in its Initial Brief are legally flawed and the relief the RCG seeks would violate state and federal law. Accordingly, the RCG's Rehearing Petition should be denied.

WHEREFORE, the Petitioners hereby respectfully request that this Honorable Commission deny the RCG's Rehearing Petition in its entirety.

Respectfully submitted,

THE RUNNING WISE LAW FIRM
ATTORNEYS FOR CADILLAC RENEWABLE ENERGY, LLC,
GENESEE POWER STATION LIMITED PARTNERSHIP, GRAYLING
GENERATING STATION LIMITED PARTNERSHIP, HILLMAN POWER
COMPANY, LLC, TES FILER CITY STATION LIMITED
PARTNERSHIP, VIKING ENERGY OF LINCOLN, INC., AND VIKING
ENERGY OF MCBAIN, INC.



Date: November 19, 2021

By: _____

Thomas J. Waters (P37829)

Business Address:

1501 Cass Street, Suite D

Traverse City, MI 49685

Telephone: (517) 402-8044

E-mail: tjw@runningwise.com

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of)
CONSUMERS ENERGY COMPANY)
for the Reconciliation of Power Supply)
Cost Recovery (PSCR) Costs and Revenues)
For the Calendar Year 2019.)
_____)

Case No. U-20220

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of November, 2021, a copy the **Answer of Cadillac Renewable Energy, LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company, LLC, TES Filer City Station Limited Partnership, Viking Energy Of Lincoln, Inc., and Viking Energy Of McBain, Inc. to The Petition for Rehearing of The Residential Customer Group** and this Certificate of Service were served on the attorneys for the parties hereto, referenced on the attached Service List, via electronic mailing to said attorneys at their appropriate email addresses.



Angela R. Patrick

U-20220
SERVICE LIST

Dennis Mack	ALJ – MPSC	mackd2@michigan.gov
Robert W. Beach	Consumers Energy Company	robert.beach@cmsenergy.com
Michael C. Rampe	Consumers Energy Company	michael.rampe@cmsenergy.com
Gary A. Gensch, Jr.	Consumers Energy Company	gary.genschjr@cmsenergy.com
		mpsc.filings@cmsenergy.com
Heather M.S. Durian	MPSC Staff	durianh@michigan.gov
Monica M. Stephens	MPSC Staff	Stephensm11@michigan.gov
Don L. Keskey	Residential Customer Group	donkeskey@publiclawresourcecenter.com
Brian W. Coyer	Residential Customer Group	bcoyer@publiclawresourcecenter.com
Celeste R. Gill	Attorney General	Gillc1@michigan.gov