

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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Application for <i>ex parte</i> approval of	)	
procedures for recovery of costs	)	
pursuant to Subsections 6a(7), (8), and (9)	)	Case No. U-16048
of 2008 PA 286, MCL 460.6a.	)	
_____	)	

At the February 23, 2023 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Daniel C. Scripps, Chair  
Hon. Tremaine L. Phillips, Commissioner  
Hon. Katherine L. Peretick, Commissioner

**ORDER**

On November 17, 2022, Cadillac Renewable Energy L.L.C.; Genesee Power Station Limited Partnership; Grayling Generating Station Limited Partnership; T.E.S. Filer City Station Limited Partnership; National Energy of Lincoln, LLC; and National Energy of McBain, LLC (collectively, the biomass merchant plants or BMPs) filed an application requesting *ex parte* approval of modifications to existing cost recovery procedures established by the August 11, 2009 order in this docket (August 11 order) and in accordance with MCL 460.6a(9), (10), and (11).<sup>1</sup> Specifically, the BMPs request modifications: (1) to provide that the monthly payments they receive from Consumers Energy Company (Consumers), above their contracts and as authorized pursuant to statute, be calculated based upon the most recent Commission-approved consumer

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<sup>1</sup> The language of MCL 460.6a(9), (10), and (11) was previously set forth in Section 6a(7), (8), and (9) of Public Act 286 of 2008 prior to amendment.

price index (CPI) adjusted monthly amount; (2) to increase the up-front monthly cost recovery payments for capped fuel and variable operations and maintenance expenses from Consumers to the BMPs from 80% to 100%; and (3) to provide for monthly payments for nitrogen oxides (NOx) allowance costs. BMPs' application, pp. 3-9. The BMPs contend that these modifications are consistent with the public interest, are appropriate pursuant to statute, will not result in an increase in the cost of service to customers, and will help to ensure the continued viability of renewable energy projects. *Id.*, p. 9. In addition to these requested cost recovery procedure changes, the BMPs also request that the Commission require Consumers to either discuss new or revise existing reduced dispatch agreements with the BMPs to limit the BMPs' operation during the ozone season (May 1 through September 30) and thereby reduce their NOx allowance costs. *Id.*, p. 10.

On December 13, 2022, the Commission issued a notice allowing interested persons to respond to the application by 5:00 p.m. (Eastern time) on December 27, 2022.

On December 27, 2022, Consumers filed a response asking that the Commission either deny the application or alternatively convert the case to a contested case to understand the full impact of the requests on the company and its customers. Consumers states that, although it does not oppose the BMPs' proposal to modify the company's monthly up-front payment procedure to account for a CPI adjustment, albeit with clarification needed from the Commission to reduce complexity, the company does not agree with the BMPs that their requested relief will have no impact on the company or its customers. Consumers' response, pp. 3, 6. Consumers asserts that there is no legal requirement that it pay the BMPs the excess costs provided by statute on an up-front, monthly basis and take on the risk of costs that are ultimately not eligible for recovery but states that the company voluntarily agreed to pay some of these costs up front in the BMPs' 2009 application approved by the August 11 order. Now, however, according to Consumers, "the BMPs are

seeking to force the Company to pay even more costs up front and, unlike the BMPs' 2009 Application filed in this matter, the Company is not in agreement with the BMPs' proposals" and will not voluntarily agree to pay these additional costs up front as it did previously. Consumers' response, p. 5. The company then sets forth further reasoning in support of its position on the BMPs' requests. *Id.*, pp. 6-11.

On December 29, 2022, the BMPs replied and contend that their requested relief will actually reduce customer costs by increasing contemporaneous cost reimbursement payments to which they are entitled pursuant to statute and thereby avoid interest charges on any unpaid balances. Per the BMPs, denying or delaying their requested relief will either reduce or altogether eliminate those cost savings. Further, according to the BMPs, "Consumers' suggestion that it voluntarily agreed to the current procedures and cannot be required to accept changes to those procedures is meritless." BMPs' reply, p. 1. The BMPs additionally ask for the Commission to "address each of their four requests separately and not subject those requests to an unnecessary and expensive contested case hearing," as "[t]he BMPs do not recover their legal costs" and thus requiring a contested case hearing "will force the BMPs to incur yet more unrecoverable costs." *Id.*, p. 2. Moreover, as previously stated in their application, "the costs which these procedures govern remain subject to a review for reasonableness and prudence in the annual cost recovery hearings." *Id.* The BMPs then reply with further detail as to each of their requests, including, in addition to explaining why Consumers' concerns over their requests simply ignore facts, further explaining their request to use the most recently approved CPI adjustment, to which they agree with Consumers' requested clarification except as applied in 2023. *Id.*, pp. 2-7. Per the BMPs:

Recognizing that the Commission is unlikely to address the BMPs' Application until after January 1, 2023, the BMPs request that the use of any revised procedures be used in 2023 as soon as the Commission issues an order in this matter. Consumers can retroactively correct any payments made in 2023 prior to the date of any Commission Order back to January 1, 2023. Doing so would be entirely consistent with Consumers' own past practices with the BMPs of retroactively adjusting payments to the BMPs.

*Id.*, pp. 2-3.

### Discussion

MCL 460.6a provides, in pertinent part:

(9) If, on or before January 1, 2008, a merchant plant entered into a contract with an initial term of 20 years or more to sell electricity to an electric utility whose rates are regulated by the commission with 1,000,000 or more retail customers in this state and if, before January 1, 2008, the merchant plant generated electricity under that contract, in whole or in part, from wood or solid wood wastes, then the merchant plant shall, upon petition by the merchant plant, and subject to the limitation set forth in subsection (10), recover the amount, if any, by which the merchant plant's reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that the merchant plant is paid under the contract for those costs. This subsection does not apply to landfill gas plants, hydro plants, municipal solid waste plants, or to merchant plants engaged in litigation against an electric utility seeking higher payments for power delivered pursuant to contract.

(10) The total aggregate additional amounts recoverable by merchant plants under subsection (9) in excess of the amounts paid under the contracts shall not exceed \$1,000,000.00 per month for each affected electric utility. The \$1,000,000.00 per month limit specified in this subsection shall be reviewed by the commission upon petition of the merchant plant filed no more than once per year and may be adjusted if the commission finds that the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that those merchant plants are paid under the contract by more than \$1,000,000.00 per month. The annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index. The commission shall not make an adjustment unless each affected merchant plant files a petition with the commission. If the total aggregate amount by which the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs determined by the commission exceed the amount that the merchant plants are paid under the contract by more than \$1,000,000.00 per month, the commission shall allocate the additional \$1,000,000.00 per month payment among the eligible merchant plants based upon the relationship of excess costs

among the eligible merchant plants. The \$1,000,000.00 limit specified in this subsection, as adjusted, does not apply to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after October 6, 2008. The \$1,000,000.00 per month payment limit under this subsection does not apply to merchant plants eligible under subsection (9) whose electricity is purchased by a utility that is using wood or wood waste or fuels derived from those materials for fuel in their power plants. As used in this subsection, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States Department of Labor, Bureau of Labor Statistics.

(11) The commission shall issue orders to permit the recovery authorized under subsections (9) and (10) upon petition of the merchant plant. The merchant plant is not required to alter or amend the existing contract with the electric utility in order to obtain the recovery under subsections (9) and (10). The commission shall permit or require the electric utility whose rates are regulated by the commission to recover from its ratepayers all fuel and variable operation and maintenance costs that the electric utility is required to pay to the merchant plant as reasonably and prudently incurred costs.

Here, the BMPs request *ex parte* approval of modifications to the procedures for the recovery of costs pursuant to statute to, in part, provide that the monthly up-front payments they receive from Consumers be calculated based upon the most recent Commission-approved CPI adjusted monthly amount. Consumers does not oppose this request but seeks clarification, which the BMPs agree with except as applied in 2023.

The Commission, having read the application, the response, the reply, the August 11 order, and the language of MCL 460.6a(9), (10), and (11), finds that the BMPs' CPI request in their November 17, 2022 application should be approved as allowed per statute and agreed upon but with the following guidance: (1) the CPI adjustment of 26.305% approved by the August 11, 2022 order in Case No. U-20526 shall be the CPI adjustment applied for all of 2023, beginning January 1, 2023, thus resulting in a monthly cost recovery payment cap from Consumers to the BMPs of \$1,263,050/month for all of 2023, and (2) for subsequent years beginning in 2024, and until otherwise provided by the Commission, the CPI adjustment for these payments provided by

statute shall be reset each January as necessary based on the company's power supply cost recovery (PSCR) reconciliation proceedings concluded during the prior year. The Commission further finds that *ex parte* review and approval of this issue is appropriate as approval of this CPI adjustment through this order will not result in an increase in the cost to customers; rather, the ratemaking effect of this CPI adjustment, and review of the same for reasonableness and prudence, will be addressed in the company's 2023 PSCR reconciliation, which will be conducted through notice and an opportunity for a hearing. *See*, MCL 460.6a(3).

That said, given that the remainder of the requests in the BMPs' application are contested, the Commission finds it appropriate for the BMPs' remaining requests in their November 17, 2022 application to be resolved via the contested case process. *See*, Mich Admin Code, R 792.10415(1).

THEREFORE, IT IS ORDERED that the November 17, 2022 application is approved in part, as set forth in the order, with the remainder of the application to be resolved via the contested case process. The matter shall thus be transferred to the administrative law judges to schedule a prehearing conference on the remaining issues in the case.

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. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel.

Electronic notifications should be sent to the Executive Secretary at [mpscedockets@michigan.gov](mailto:mpscedockets@michigan.gov) and to the Michigan Department of Attorney General – Public Service Division at [pungpl@michigan.gov](mailto:pungpl@michigan.gov). In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General – Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Daniel C. Scripps, Chair

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Tremaine L. Phillips, Commissioner

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Katherine L. Peretick, Commissioner

By its action of February 23, 2023.

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Lisa Felice, Executive Secretary


# PROOF OF SERVICE

STATE OF MICHIGAN )

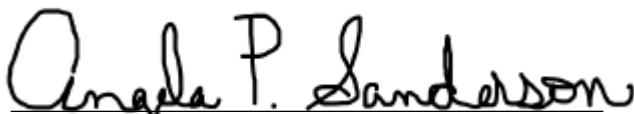
Case No. U-16048

County of Ingham )

Brianna Brown being duly sworn, deposes and says that on February 23, 2023 A.D. she electronically notified the attached list of this **Commission Order via e-mail transmission**, to the persons as shown on the attached service list (Listserv Distribution List).

  
Brianna Brown

Subscribed and sworn to before me  
this 23<sup>rd</sup> day of February 2023.

  
Angela P. Sanderson  
Notary Public, Shiawassee County, Michigan  
As acting in Eaton County  
My Commission Expires: May 21, 2024



**Service List for Case: U-16048**

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<b>Name</b>	<b>On Behalf of</b>	<b>Email Address</b>
Thomas J. Waters	Genesee Power Station LP	tjw@runningwise.com
Thomas J. Waters	Cadillac Renewable Energy LLC	tjw@runningwise.com
Thomas J. Waters	Grayling Generating Station	tjw@runningwise.com
Thomas J. Waters	TES Filer City Station LP	tjw@runningwise.com
Thomas J. Waters	National Energy of Lincoln Inc.	tjw@runningwise.com
Thomas J. Waters	National Energy of McBain Inc.	tjw@runningwise.com