If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

GREENWOOD SOLAR, LLC,

Petitioner-Appellant,

v

DTE ELECTRIC COMPANY,

Respondent-Appellee,

and

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

UNPUBLISHED
December 17, 2020

No. 351223
Public Service Commission
LC No. 00-020156

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

PER CURIAM.

Petitioner, Greenwood Solar, LLC (Greenwood), appeals as of right the Michigan Public Service Commission's (PSC) order to the extent that it denied Greenwood's request that it declare that respondent, DTE Electric Company (DTE), had a legally enforceable obligation to purchase capacity and energy from Greenwood under the federal Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC 2601 *et seq.* and MCL 460.6v. We affirm.

I. FACTUAL BACKGROUND

Greenwood, a wholly owned subsidiary of Geronimo Energy, is a qualifying facility (QF) registered with the Federal Energy Regulatory Commission (FERC), and a merchant plant located within the service territory of DTE. Greenwood filed a complaint with PSC stating that it attempted to interconnect its 20-megawatt project with DTE by submitting its interconnection application in September 2017. According to Greenwood, DTE notified Greenwood that it completed its review of the application, confirmed that it had received Greenwood's signed engineering agreement and $30,000 deposit, and that it would proceed with the review. DTE billed Greenwood an additional $68,763.84 to cover the costs of the engineering review, and partly

because of a misunderstanding between the parties, Greenwood did not pay the additional amount, and DTE did not deliver the engineering review.

In December 2017, Greenwood notified DTE by letter of its intent to enter into a contract with DTE for the sale of energy and capacity. DTE responded that the size of Greenwood's project called for a power purchase agreement (PPA) different from the standard offer contract, and also that DTE had no need for additional capacity over the next 10 years.

PSC summarized Greenwood's position below as follows:

> (1) DTE Electric failed to comply with its legally enforceable obligation (LEO) under state and federal law to interconnect with Greenwood and acted unreasonably and inequitably during the interconnection process, (2) DTE Electric refused to negotiate a PPA with Greenwood in violation of state and federal law, and (3) the Commission should require DTE Electric to pay Greenwood's costs and damages suffered as a result of the utility's compliance failures and to pay appropriate fines and penalties. . . . Because DTE Electric did not adequately communicate with Greenwood about the interconnection process and about the complexities resulting in higher costs, in particular, Greenwood insists that it should not be liable for the $68,763.84 it was billed for the engineering review.
>
> Greenwood further argues that DTE Electric's refusal to enter into PPA negotiations for both energy and capacity until an engineering review is completed and the project demonstrates viability is a violation of PURPA . . . .

PSC credited several of Greenwood's claims and described DTE's stated position concerning its future capacity needs as "disingenuous at best." PSC further found that DTE's "actions in this case related to the delays in the interconnection process, when combined with the posturing on the capacity position in the context of PPA negotiations frustrate both the letter and spirit of PURPA," adding that "the requirement of such studies to be complete prior to contract negotiations is inconsistent with PURPA," given that utilities might elect to "delay the facilities study" or "delay tendering an executable interconnection agreement." The PSC agreed with Greenwood that DTE "cannot use the absence of a template PPA to avoid negotiating a PPA." The PSC thus credited Greenwood's claims that DTE "failed to engage in substantive negotiations for an agreement for the purchase of capacity and energy," and concluded that DTE's "assertion that it had no capacity needs in the next 10 years, without first receiving any such determination from the Commission, was improper."

The PSC further concluded that DTE violated the requirement of Mich Admin Code, R 460.620(6)(d) that it complete an engineering review and notify Greenwood of the results within 45 days of receiving Greenwood's written notification to procced with the engineering review and applicable payment, explaining that "allowing DTE Electric to . . . seek updated information that it has not adequately justified needing to complete the engineering review would allow DTE Electric to surpass the . . . timelines by perpetually seeking updated information from outside parties . . . instead of using the information available." The PSC also recognized that this violation implicated DTE's duty under MCL 460.10e(1) to "take all necessary steps to ensure that merchant plants are connected to the transmission and distribution systems within their operational control,"

and triggered that subsection's direction that the PSC "order remedies designed to make whole the merchant plant" in response to an electric utility's having "prevented or unduly delayed the ability of the plant to connect to the facilities of the utility." The PSC additionally expressed concern that the intent behind the applicable rules "is to inform a developer of costs prior to those costs being incurred to the extent practicable," and that DTE's "actions in this instance did not conform with that intent." Accordingly, the PSC decreed that "Greenwood is not liable for the $68,763.84 in additional costs for the engineering review," and directed DTE to release the completed engineering review to Greenwood within five days of the issuance of its order.

The PSC granted Greenwood additional remedies as follows:

> (1) DTE Electric shall proceed to a distribution study, if necessary and upon consent by Greenwood, and complete and release the results of the distribution study in compliance with the [applicable] requirements and deadlines . . . ; and (2) DTE Electric shall notify Greenwood, in writing, of the costs associated with the distribution study in the engineering review findings, to the best of the company's knowledge at the time . . . . Should the costs of the distribution study change, DTE Electric shall notify Greenwood, in writing, of the itemized change in costs immediately before incurring costs beyond what the costs already communicated to and agreed to by Greenwood. Also, DTE Electric shall continue PPA negotiations with Greenwood in good faith.
>
> The Commission also finds that Greenwood is entitled to the reasonable attorney fees that are associated with the counts of its amended complaint that it has prevailed upon as described in this order.

The PSC additionally assessed against DTE a penalty of $307,500 for its violations of the deadlines set forth in the applicable rules. The PSC noted that DTE attributed some of its delays in the interconnection process to the complexities involved, and its having to await technical information from the Midcontinent Independent System Operator (MISO), but concluded that DTE "fail[ed] to reveal . . . why the data that was available was inadequate at the time that DTE Electric was within the allowable timeframe." The PSC explained that it imposed less than the maximum allowable penalty for DTE's delays because, "while the company failed to convince the Commission that waiting for information from MISO was reasonable, there is no evidence that the company was using this as a tactic to intentionally delay the interconnection process."

The PSC rejected Greenwood's claim that DTE generally failed to comply with the mandate of 18 CFR 292.303(c)(1), which calls for "any electric utility," but for an exception not applicable here, to "make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart," on the ground that the unreasonable delays it had identified had not "obstructed the process such that it rises to the level of violating the 18 CFR 292.303(c) mandate for electric providers to interconnect QFs."

The PSC further rejected Greenwood's claim that DTE's action had established an LEO between them. According to the PSC, "[a]s part of its argument that DTE Electric refused to engage in substantive negotiations for a PPA to purchase energy and capacity, Greenwood has taken the position that its December 12, 2017 letter to DTE Electric expressing its intent to sell

energy and capacity constitutes an LEO under PURPA," but "merely holding a position in the interconnection queue on its own does not establish the rights of a QF to sell energy and capacity to the utility." The latter aspect of the decision below forms the basis of Greenwood's instant appeal.

II. STANDARD OF REVIEW

In *In re Consumers Energy Co*, 322 Mich App 480, 486-487; 913 NW2d 406 (2017) (citations omitted), this Court summarized the standard applicable to review of PSC orders as follows:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. An order is unreasonable if it is not supported by the evidence.
>
> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28[.]
>
> We give due deference to the PSC's administrative expertise and will not substitute our judgment for that of the PSC. We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid in determining the legislative intent and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo.

III. ANALYSIS

PURPA encourages the development of alternative power sources in the form of cogeneration and small power production facilities and authorizes the promulgation of rules to require electric utilities to offer to purchase electricity from qualifying facilities (QFs). 16 USC 824a-3(a)(2). MCL 460.10e(1) requires "[a]n electric utility," such as DTE, to "take all necessary steps to ensure that merchant plants[1] are connected to the transmission and distribution systems

[1] MCL 460.10g(1)(e) defines "merchant plant" as "electric generating equipment and associated facilities with a capacity of more than 100 kilowatts located in this state that are not owned and

within their operational control." Subsection (2) authorizes a merchant plant to "sell its capacity to . . . electric utilities . . . ." Subsection (3) requires the PSC to "establish standards for the interconnection of merchant plants with the transmission and distribution systems of electric utilities." A QF may provide energy to a utility pursuant to a contract, or may provide energy or capacity pursuant to a "legally enforceable obligation" (LEO), under which a utility may be bound by operation of law if it has not satisfactorily responded to the QF's overtures. See 18 CFR 292.304(b)(5)(d) and (e)(2)(*iii*); *JD Wind 1, LLC*, 129 FERC 61,148, ¶ 25 (2009).

A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court should defer to the PSC's administrative expertise, and not substitute its judgment for that of the PSC. *Attorney General v Mich Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).

Greenwood first argues that the PSC's decision not to recognize the existence of an LEO between the parties violated MCL 460.6v. Greenwood relies on Subsection (1)'s requirement that the PSC,

> at least every 5 years, conduct a proceeding, as a contested case . . . , to reevaluate the procedures and rates schedules including avoided cost rates, as originally established by the commission . . . , to implement [] section 210, of [PURPA], as it relates to qualifying facilities from which utilities in this state have an obligation to purchase energy and capacity. Nothing in this section supersedes the provisions of PURPA or the Federal Energy Regulatory Commission's regulations and orders implementing PURPA.

Greenwood also quotes Subsection (2), which states that, "[i]n setting rates for avoided costs, the commission shall take into consideration the factors regarding avoided costs set forth in PURPA and the Federal Energy Regulatory Commission's regulations and orders implementing PURPA." However, these provisions concern procedures for implementation of PURPA and determination of avoided costs, neither of which is at issue in this case. Greenwood points out that MCL 460.6v(1) and (2) call for the PSC to "take into consideration the FERC's regulations and orders when implementing PURPA," but the need to harmonize the state's regulatory framework with the pertinent federal authorities is not itself in dispute, and this appeal concerns the interplay of substantive, not procedural, rules arising from state and federal authorities. Greenwood's invocation of the requirement in MCL 460.6v, therefore, lacks merit. Further, that the PSC must consult certain federal authorities in deciding matters confirms that those authorities leave the PSC some discretion over whether or when to recognize the existence of an LEO.

Greenwood emphasizes that PURPA requires utilities to avail themselves of the offerings of QFs, and posits that it is important that utilities not be allowed to take control of the extent to

---

operated by an electric utility." A proposed project need not be fully constructed and operational to qualify as a merchant plant. See Mich Admin Code, R 460.619 and R 460.620.

which such relationships come about. Greenwood cites authority for the propositions that federal regulations "provide a mechanism whereby a utility is . . . legally compelled under PURPA to purchase energy and capacity from the QF" when the utility "refuses to recognize its must-purchase obligation under PURPA and to negotiate a PPA with a QF for the purchase of energy and capacity voluntarily," and that state regulatory authorities do not have unfettered discretion over when to resort to that remedy. Greenwood, however, also cites authority that concededly leaves state authorities with some discretion in the matter. Greenwood cites no authority for the proposition that the remedy of imposing an LEO is mandatory regardless of the extent of the utility's shortcomings or of the QF's actual commitment to provide energy and capacity, and regardless of how far the interconnection process has progressed.

Greenwood also argues that the PSC's decision not to recognize an LEO is inconsistent with its determinations that DTE had unduly delayed and otherwise failed to cooperate with Greenwood's efforts to establish a PPA. We disagree.

It its reply brief, Greenwood states that this case raises the question, "can the MPSC lawfully require a QF to obtain a distribution study under the interconnection process in order to establish a right to a LEO consistent with FERC's rules?" We conclude that the PSC may not impose such a requirement generally as a condition for establishing an LEO, but that it may, in the course of its case-by-case analysis and decision-making, require such a study if it concludes that the information to be provided is needed for an accurate assessment and determination. We agree with the PSC that "[r]equiring certain studies, while making sure the utility adheres to moving those studies along, is one way to determine commercial and financial viability." Greenwood protests that such studies "are not achievable without the cooperation of the utility," but as this case illustrates, the PSC can compel such cooperation without resorting to prematurely declaring the existence of an LEO.

Greenwood does not challenge the PSC's conclusions that DTE had "relatively limited experience in interconnecting projects of this complexity[.]" Nor does Greenwood contest that, although DTE delayed the project excessively by awaiting information from MISO, "there is no evidence that the company was using this as a tactic to intentionally delay the interconnection process."

Under 18 CFR 292.304(d), "[e]ach qualifying facility shall have the option either," under (d)(1), "[t]o provide energy as the qualifying facility determines such energy to be available for such purchases," or, under (d)(2), "[t]o provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . . ." Greenwood acknowledges that "[t]he foundational principle of the FERC regulations at Section 304(d) is that by committing itself to sell, a QF commits the utility to purchase, pursuant either to a contract or to a LEO."

The PSC explained as follows:

> [I]nherent in the formation of an LEO is a binding commitment by both sides to the agreement or obligation—the obligation by the utility to purchase the power and the obligation by the QF to provide energy and capacity upon which the utility and its customers can rely. The Commission finds that merely sending a letter of intent

> or proposing a PPA to sell energy and/or capacity is akin to holding a position in the interconnection queue and does not, on its own, establish an unequivocal commitment from the QF that strikes the balance between QFs and utilities. While . . . the establishment of an LEO turns on the QF's commitment, and not the utility's actions, there are some additional steps necessary for a QF to fully understand *and commit to* its obligations. This is necessary to strike the right balance between access for QFs on the one hand and system reliability and certainty in utility planning and procurement to protect ratepayers on the other hand. Therefore, the Commission does not find that an LEO has been established in this case. [Emphasis in original.]
>
> * * *
>
> The Commission in the present case is not denying the existence of an LEO simply based on the lack of a signed document between Greenwood and DTE Electric, but on the present lack of a distribution study, and lack of commitment to pay costs for any distribution upgrades found by the study to be required. In other words, an LEO cannot yet be found to exist in this case because it remains unclear the extent of the obligations to which Greenwood would be agreeing. While the Commission notes its frustration with DTE Electric's conduct in this matter, the appropriate remedy for violations of MCL 460.10e(1) and the Commission's interconnection rules is not the creation of an agreement between Greenwood and DTE Electric where the conditions remain uncertain, but rather the fine imposed above.[2]

PSC extends its argument over the need "to protect ratepayers" by asserting in its appellee brief that "DTE has ratepayers that will be charged for the power that the Commission requires DTE to purchase from Greenwood, and if Greenwood's power is not made available to DTE because Greenwood's project is never interconnected to the system, it would be wrong to burden ratepayers with this expense." Greenwood objects that the PSC fails to explain "how or why ratepayers would be obligated to pay for energy from a nonexistent plant" (underscoring omitted), and ably points out that if its "power is not made available to DTE, there will not be any ratepayer expense, as DTE will not have purchased any power." Indeed, both Greenwood and the PSC acknowledge that federal regulations obligate a utility to purchase only energy or capacity actually provided. See 18 CFR 292.303(a) ("[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility"); 18 CFR 292.304(d)(2) (setting forth the bases for the rates a utility must pay where a QF has elected "[t]o provide energy or capacity pursuant to a legally enforceable obligation"). These federal rules clearly indicate that DTE's ratepayers would not be at risk of having to pay for electricity promised by an LEO but not actually delivered by way of a completed interconnection project. As explained earlier, however, PSC had other valid reasons for declining to impose an LEO at this time.

[2] Significantly, in a footnote the PSC anticipated that an LEO might yet be formed. It explained that, "[i]f and when Greenwood establishes an LEO, the applicable rates, terms, and capacity position will be based on those in effect at this time."

The PSC has articulated no general requirement conditioning an LEO on the offending utility's preparation of studies or taking other actions. To the extent that it has called for an engineering review in this case, it has interceded to compel its production on terms favorable to Greenwood while disciplining DTE. To the extent that it has called for a distribution study, the PSC has indicated its readiness to apply similar scrutiny and enforcement pressure should DTE fail to act as required. Nevertheless, because the pertinent authorities do not authorize an LEO as the exclusive and automatic immediate remedy for a utility's initial failure to cooperate with an interconnection project, and because the PSC expressly indicated that an LEO might still come about in the event of continued recalcitrance on DTE's part, we conclude that PSC's decision below was neither unlawful nor unreasonable for stopping short of declaring the existence of an LEO between the parties under the circumstances of this case.[3]

---

[3] Greenwood filed supplemental authority, the FERC's order, *Qualifying Facility Rates & Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, 172 FERC 61,041 (July 16, 2020). In its accompanying brief, Greenwood highlights the following provisions:

> Several commenters requested that the Commission require QFs to do more than just file an interconnection application; instead, for example, suggesting requiring completion of system impact study, interconnection or transmission feasibility study. We disagree. The approach taken here recognizes the need for a QF to demonstrate that its project is more than mere speculation, such that it is reasonable for a utility to consider the resource in its planning projections. A QF that has submitted an application for interconnection, as well as having taken meaningful steps to obtain site control and has applied for all relevant permits, while not a guarantee that the project will be completed, are all objective and reasonable indicators that the QF developer is seriously pursuing the project and has spent time and resources in developing the project to show a financial commitment.
>
> * * *
>
> Moreover, it bears remembering that the concept of a LEO was specifically adopted to prevent utilities from circumventing the mandatory purchase requirement under PURPA by refusing to enter into contracts. The Commission thus has found that requiring a QF to have a utility-executed contract or interconnection agreement, or requiring the completion of a utility-controlled study places too much control over the LEO in the hands of the utility and defeats the purpose of a LEO and is inconsistent with PURPA. When reviewing factors to demonstrate commercial viability and financial commitment, states thus should place emphasis on those factors that show that the QF has taken meaningful steps to develop the QF that are within the QF's control to complete, and not on those factors that a utility controls. [*Id.*, ¶¶ 694-695 (footnotes omitted).]

Affirmed.

/s/ Colleen A. O'Brien
/s/ Michael J. Kelly
/s/ James Robert Redford

This order thus underscores the principle that a regulatory agency should not condition recognition of a LEO on matters, including preparation of a study, entirely within the affected utility's discretion. This order, however, does not stand for the proposition that a regulatory agency may not insist on having at hand certain studies as part of its case-by-case decision-making where the agency has checked, or stands ready to check, the utility's discretion in the matter by taking coercive measures to compel production of the needed study. Nor does the order suggest that a regulatory agency may not initially respond to a utility's recalcitrance with admonishments and financial penalties while reserving the option of an LEO for continued recalcitrance. Accordingly, the supplemental authority Greenwood provided does not militate in favor of concluding that the PSC erred in responding to Greenwood's complaint by granting Greenwood relief, and imposing penalties on DTE, while expressly reserving for possible later necessity the option of declaring the existence of an LEO.

DTE also submitted supplemental authority, FERC Order No. 872 (effective December 31, 2020), which requires QFs to demonstrate commercial viability and financial commitment to be eligible for a LEO. In the order the FERC explained:

> In this final rule, we adopt the NOPR [Notice of Proposed Rulemaking] proposal to require QFs [qualifying facilities] to demonstrate that a proposed project is commercially viable and that the QF has a financial commitment to construct the proposed project, pursuant to objective, reasonable, state-determined criteria in order to be eligible for a LEO . . . . [This] will ensure that no electric utility obligation is triggered for those QF projects that are not sufficiently advanced in their development, and therefore, for which it would be unreasonable for a utility to include in its resource planning. . . .
>
> Establishing objective and reasonable factors is intended to limit the number of unviable QFs obtaining LEOs and unnecessarily burdening utilities that currently have to plan for QFs that obtain a LEO very early in the process but ultimately are never developed. In adopting this provision, the Commission is raising the bar to prevent speculative QFs from obtaining LEOs, and the associated burden on purchasing utilities, but is not establishing a barrier for financially committed developers seeking to develop commercially viable QFs. [Order, paragraphs 684, 688; footnotes omitted.]

This new rule clarifies that state-determined criteria, objective and reasonable factors, may be used to determine LEO eligibility. We conclude that the PSC did precisely that in this case.