

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on December 10, 2008

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.

CASE 08-M-0890 - Petition of Calverton Owners Association
Against M-GBC, LLC.

CASE 05-M-0073 - Petition of M-GBC, LLC, For (1) A Certificate
Of Public Convenience And Necessity To Own,
Operate and Maintain Existing Steam Plant,
Electric Substation and Sprinkler Water
Services Pursuant To The Public Service Law,
(2) A Declaratory Ruling That It Will Be
Subject Only To Lightened Regulation, (3)
Approval Of Tariff For Steam Service, And (4)
An Expedited Hearing.

CASE 05-S-0074 - New Tariff Schedule, PSC No. 1, for Steam
Service in Calverton Industrial Park, Filed By
M-GBC, LLC.

ORDER DENYING PETITION

(Issued and Effective December 11, 2008)

BY THE COMMISSION:

By Petition filed in June 2008, the Calverton Owners
Association (the Association) requests a Commission order
enjoining M-GBC, LLC (M-GBC) from closing on the sale of water
plant and the immediately surrounding land; requiring such plant
and land to be deeded to the Association; and determining the
proper rates that M-GBC should have charged for non-potable
water service and electric service. The petition is denied;
granting the requested relief would be unjustifiably inconsistent

with our prior order and the record in these proceedings concerning these disputes.

BACKGROUND

M-GBC is a limited liability company. The Calverton Industrial Park is a parcel of land located on Long Island. It was owned by the U.S. Navy prior to 1998, by the Town of Riverhead from 1998-October 2001, and by M-GBC since 2001. The Association is a group of property owners who purchased parcels of land in the Calverton Industrial Park from M-GBC.¹

On or about January 14, 2005, M-GBC filed a petition seeking a certificate of public convenience and necessity (CPCN) and requesting approval of a proposed steam tariff.² After an almost year-long process which included the active participation of the Association, we issued an order that established procedures designed to ensure that M-GBC ceased its provision of all utility services and abandoned, transferred or decommissioned any utility plant that might otherwise be subject to Commission jurisdiction.³ The order, which was not challenged, required M-GBC to make compliance filings confirming that it had ceased providing steam, electric and non-potable sprinkler water services. M-GBC completed the first of those filings in January 2007.⁴

¹ M-GBC continued to supply steam and electric service pursuant to a clause in the land purchase agreements. M-GBC also continued to provide non-potable sprinkler water service.

² M-GBC filed the petition because it had commenced a civil suit to recover unpaid steam charges and, in response thereto, the defense that M-GBC's recovery was barred by the Public Service Law was asserted.

³ Cases 05-M-0073 and 05-S-0074, Order Concerning Request for Certificate and Approval of a Steam Tariff (issued November 4, 2005) (2005 Order).

⁴ M-GBC confirmed its cessation of steam service in May 2006 and the decommissioning of the steam plant in January 2007. Case 05-M-0073 et al, January 17, 2007 Sworn Statement of Jan Burman. The portions of the filing pertaining to steam service cessation and steam plant decommissioning were not contested. Therefore, any issues concerning steam plant or service have been resolved since January 2007.

In response to subsequent filings by M-GBC which reported on steps that it had taken to cease its provision of electric and non-potable sprinkler water services, one of the Association members (Mivila Foods) noted its opposition to M-GBC's cessation of non-potable sprinkler water service, and stated that the Association was pursuing its dispute in Suffolk County Supreme Court.⁵

The instant petition filed by the Association requests a Commission order enjoining M-GBC from closing on the sale of the water plant and the land immediately surrounding such plant; requiring the water plant and immediately surrounding land to be deeded to the Association; and determining the rates that M-GBC should have charged for electric and non-potable sprinkler water service for an unspecified period of time. In the alternative, the Association asks that a hearing be held to determine the merits of its requests.

By letter dated September 25, 2008, counsel for M-GBC filed a sworn statement indicating that M-GBC's electric plant had been transferred to the Long Island Power Authority on June 13, 2007 and, thenceforth, M-GBC ceased supplying any of the property owners in the Calverton Industrial Park with electric service.⁶ M-GBC also requested that the Commission modify the 2005 Order to provide that M-GBC must cease all operation of any water service within six months of the date of the revised order.⁷ A Procedural Ruling issued October 6, 2008 requested additional information concerning issues raised by the petition; such information was timely filed by the Association, M-GBC and New York State Department of Public Service Staff (Staff).

⁵ Case 05-M-0073 et al, February 8, 2007 sworn statement of Ted Laoudis, President of Mivila Foods (a building owner in Calverton Industrial Park). The statement indicates that responsibility for fire suppression at Calverton Industrial Park is one of the disputed questions in C.A.P.S. Realty Holdings, LLC v. M-GBC LLC, Supreme Court, Suffolk County, Index Number 7216-2006.

⁶ September 25, 2008 Statement of Todd C. Steckler, filed in Cases 05-M-0073 and 05-S-0074.

⁷ Id.

No comments were received in response to the notice published in the September 24, 2008 State Register regarding the Association's petition.

DISCUSSION

The outcome envisioned by the 2005 order and desired by the Association at that time was, *inter alia*, that M-GBC (1) would transfer its electric plant and cease electric service and (2) would abandon its water service and plant, after the remaining users of the non-potable water service had installed individual fire suppression facilities.⁸ In September 2008, M-GBC completed its second compliance filing, confirming its cessation of electric service and its transfer of the electric plant to the Long Island Power Authority (LIPA). The Association does not contest the representations that M-GBC has ceased providing electric service and has transferred its electric plant to LIPA.

The ownership and operation of utility plant is what potentially subjected M-GBC to Commission jurisdiction.⁹ Since M-GBC no longer owns or operates electric plant, and since the transfer of such plant is exactly what was envisioned by the uncontested 2005 Order, there is no reasonable basis upon which to grant the Association's request that Commission now assert jurisdiction over M-GBC regarding its provision of electric service or the rates it charged for such service in the past.¹⁰

⁸ 2005 Order at 7-8; Tr. 91-94.

⁹ This was noted at the September 30, 2005 evidentiary hearing by one of the Administrative Law Judges (Tr. 92); see also PSL §§2(12), 2(13) and 68.

¹⁰ As a practical matter, issues concerning M-GBC's ownership and operation of electric plant and its provision of electric service have been moot since June 13, 2007, the date when the electric plant was transferred and electric service by M-GBC ceased.

The record clearly establishes that counsel for the Association initially objected to the electric and water rates charged by M-GBC.¹¹ However, the Association did not pursue its claims concerning the propriety of such rates despite sufficient opportunities to do so, as reflected in an on-the-record conference discussing the possible need for and effect of temporary or permanent rates¹² and the parties' need to discuss and propose a process for addressing such issues, including electric and water.¹³ The Association made no provision or request for temporary or permanent electric or water rates, even though several Association members and M-GBC did agree to a temporary steam rate.¹⁴ Thus, we find no basis for retroactive review of the electric and water rates charged by M-GBC.

In addition, the certification portion of these proceedings was kept open only for the limited purpose of ensuring that M-GBC exited the utility business. Notably, the proposal to keep the proceeding open for that limited purpose was approved by counsel for the Association and M-GBC.¹⁵ That proposal is precisely what is reflected in the 2005 Order, an order that was not challenged. Accordingly, we deny the Association's request that we now assert jurisdiction over an

¹¹ Case 05-M-0073/S-0074, Ex. 3, p. 2, Answer to Inquiry #4.

¹² Tr. 40-45.

¹³ Tr. 41, 49, 55. At one point, one of the Administrative Law Judges stated that if the customers intend to challenge the electric rates, "it might make sense to set temporary electric rates..." Tr. 41.

¹⁴ Tr. 68, 71, 75, 79.

¹⁵ Tr. 92-94. In fact, three Association members (Mivila Foods, Inc., Logi Enterprises, LLC and Kristen & Lindsey Holding, LLC) filed a stipulation consenting to M-GBC's withdrawal of its CPCN petition. See 2005 Order at 5, n. 12, and Record Exhibit 4.

entity solely to determine the rates it should have charged for services provided in the past.¹⁶

The remaining questions are whether to grant the Association's requests to enjoin the sale of the water plant and surrounding land and order M-GBC to transfer the property to the Association and whether to grant M-GBC's request that it be authorized to cease non-potable sprinkler water service even though several of the remaining users of such service have not yet installed individual fire suppression systems.

We find the petition fails to provide sufficient justification for the Association's requests. Neither the petition nor the brief filed by the Association cites to any provision of law that authorizes the Commission to require M-GBC to deed its property to the Association. And, while the Association seems to argue that an injunction may be authorized by PSL ¶89-h, this argument is inextricably intertwined with the Association's unsupported assertion that the remaining users of non-potable water service are not required to install individual fire suppression systems. To the extent that the Association relies on the purchase agreements between the Association members and M-GBC to support such an assertion, the determination of contractual rights and obligations is properly before and should be decided by the Court.¹⁷

Moreover, to the extent that the Association contends that the 2005 Order required M-GBC to install individual fire suppression facilities at the customers' premises,¹⁸ we clarify that it did not. The record before the Commission at the time

¹⁶ As a matter of law, agency orders affecting rates apply prospectively. The Association offers no supportable legal or equitable basis for deviating from this standard.

¹⁷ C.A.P.S. Realty Holdings, LLC v. M-GBC LLC, Supreme Court, Suffolk County, Index Number 7216-2006.

¹⁸ Petition ¶¶9.c and 14.

the 2005 Order was issued contains the unrefuted, record statement by M-GBC counsel that "... it will be a requirement that the individual property owners install their own stand-alone fire suppressant on their premises..."¹⁹ In addition, the 2005 Order includes the requirement that M-GBC make a compliance filing after, *inter alia*, "... all remaining users of the non-potable sprinkler water services have installed individual fire suppression facilities."²⁰ The Association did not challenge the record statement or the 2005 Order.

Though the 2005 Order does not require M-GBC to install the individual fire suppression systems, it does link M-GBC's cessation of non-potable sprinkler water service to the users' installation of individual fire suppression systems. Thus, we turn to the arguments concerning M-GBC's request to modify the 2005 Order to require the termination of non-potable sprinkler water without regard to whether the individual systems have been installed.²¹ Staff and M-GBC argue that the intended outcome of the 2005 Order should be advanced by requiring M-GBC to stop providing non-potable sprinkler water service. They both argue that regulated provision of such service is unnecessary and inconsistent with past Commission decisions, including the 2005 Order. We agree that regulated provision of this service is unnecessary and inconsistent with our past decisions.

First, the Association approved of the plan that M-GBC cease providing non-potable water service; that plan is precisely what is reflected in the 2005 Order and the Association did not register any timely objection thereto.

¹⁹ Tr. 91.

²⁰ 2005 Order at 8.

²¹ In its September submission, M-GBC requested that it be directed to cease all operation of any water service within six-months of the issuance of a new Commission order (September 25, 2008 Statement of Todd C. Steckler, ¶19). In its November 3, 2008 brief, it requested the Commission reject the Association's petition and find that M-GBC must cease all utility operations.

Second, the Association has alternative means of satisfying its fire suppression needs, including installing individual stand alone systems.²² Third, the Association fails to offer any persuasive argument for abandoning the ultimate goal of the 2005 Order, which is that M-GBC should cease providing all utility services. It has been more than three years since the 2005 Order was issued and, as the Court papers submitted by the Association indicate, the parties "have done little to obtain the necessary information on the manner of installing [stand alone fire suppression] systems."²³ Those same papers also indicate that the Court has granted a six month injunction to, *inter alia*, provide additional time for a substitute fire suppression service to be provided.²⁴ In light of all of the foregoing, we deny the Association's petition in its entirety. Furthermore, we authorize M-GBC to cease providing non-potable sprinkler water service upon the expiration of the preliminary injunction granted by the Suffolk County Supreme Court. In this way, the interests underlying the 2005 Order and the preliminary injunction issued by the Suffolk County Supreme Court can be advanced.

In our 2005 Order, we required M-GBC to make compliance filings with the Commission Secretary upon the completion of the following events: "...the installation of individual fire suppression facilities at the customers' premises; the abandonment of the water plant; and the cessation of ... sprinkler water service..." We also required a "final compliance filing" including a signed, sworn statement that M-GBC has ceased all utility services and has decommissioned,

²² This alternative, discussed in the record of these proceedings and referenced in the 2005 Order, appears to yet be a viable alternative; the only remaining dispute about this alternative, pending before the Court, is the contractual question of which party bears the responsibility of paying for it. Petitioners' brief, filed September 30, 2008, Exhibit E.

²³ Petitioners' Brief, filed September 30, 2008, Exhibit E, page 4 of 5.

²⁴ Id.

transferred or abandoned any plant that could be subject to PSC jurisdiction. We hereby waive these requirements because we have authorized M-GBC to cease providing non-potable sprinkler water service upon the expiration of the preliminary injunction granted by the Suffolk County Supreme Court.²⁵

Based on our finding that M-GBC has satisfied our compliance filing requirements regarding steam and electric plant and services, M-GBC is directed not to provide any steam or electric services and is directed not to own, operate or manage any steam or electric plant that could be subject to Commission jurisdiction without prior Commission authorization. Upon expiration of the Suffolk County Supreme Court preliminary injunction (Index Number 7216-2006, Short Order Form Dated October 7, 2008, issued by Justice Emily Pines), M-GBC is not authorized to provide water services. Effective June 1, 2009, M-GBC shall not own, operate, or manage any water plant that could be subject to Commission jurisdiction without prior Commission authorization.

The Commission orders:

1. M-GBC LLC shall cease providing any and all water service upon the expiration of the October 7, 2008 preliminary injunction granted by the Suffolk County Supreme Court.
2. Effective June 1, 2009, M-GBC LLC shall not own, operate or manage any water plant that could be subject to Commission jurisdiction without prior Commission authorization.
3. M-GBC LLC shall not provide any steam or electric services, and shall not own, operate, or manage any Commission-jurisdictional steam or electric utility plant without prior Commission authorization.
4. These proceedings are closed.

²⁵ It appears that the governing event with respect to the abandonment of service is now the expiration of the Suffolk County injunction. In light of that Suffolk County litigation, we have authorized M-GBC to abandon provision of water service, with such abandonment to occur on the date the injunction expires.

CASES 08-M-0890, 05-M-0073, 05-S-0074

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

DOCUMENTS CONSIDERED

1. November 3, 2008 Brief of M-GBC, LLC in response to Procedural Ruling issued October 6, 2008; filed in Case 08-M-0890.
2. Letter dated November 3, 2008 to Joseph Dowling from Andrew Campinelli, filed in Case 08-M-0890.
3. Initial Brief of the Department of Public Service Staff dated October 28, 2008 filed in Case 08-M-0890.
4. Petitioners' brief and exhibits dated October 30, 2008, filed in Case 08-M-0890.
5. September 25, 2008 letter to Secretary Brilling from Todd C. Steckler, filed in Cases 05-M-0073 and 05-S-0074, including Statement of Todd Steckler sworn to on September 25, 2008.
6. Petition of Calverton Owners Association against M-GBC, LLC docketed under Case 08-M-0890.
7. June 25, 2007 letter to Secretary Brilling from David A. Antwork filed in Cases 05-M-0073 and 05-S-0074, including a Statement of Ted Laoudis sworn to on January 7, 2007.
8. May 17, 2007 letter to Secretary Brilling from Leslie R. Bennett representing M-GBC, filed in Cases 05-M-0073 and 05-S-0074, including Statement of Jan Burman sworn to on May 11, 2007.
9. February 12, 2007 cover letter to Secretary Brilling from Eric B. Eubanks, including an affidavit of Ted Laoudis, sworn to on February 8, 2007.
10. January 18, 2007 cover letter to Secretary Brilling from Leslie R. Bennett on behalf of M-GBC, containing Statement of Jan Burman sworn to on January 17, 2007.
11. May 19, 2006 cover letter to Secretary Brilling from Leslie R. Bennett on behalf of M-GBC, including Statement of Jan Burman sworn to on May 18, 2006.
12. PSC Transcript and Exhibits in Cases 05-M-0073 et al.