

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Buffalo on July 20, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin
Patricia L. Acampora

CASE 05-E-0889 - Proceeding on Motion of the Commission to
Establish Policies and Procedures Regarding
Generation Unit Retirements.

ORDER INSTITUTING PROCEEDING AND
NOTICE SOLICITING COMMENTS

(Issued and Effective July 27, 2005)

BY THE COMMISSION:

BACKGROUND

As the electric industry proceeds with the transition to more competitive electric markets, it has become apparent that the unanticipated retirement of lightly-regulated generating facilities, owned by entities independent of traditionally-regulated utilities, could have implications for the reliability of electric service. Policies and procedures for obtaining adequate notice of generator retirements that

might affect reliability appear needed so that any adverse impacts attending a retirement can be prevented or mitigated.¹

When traditionally-regulated electric utilities were integrated, owning both generation and delivery plant, utilities were obligated to ensure their generation resources were adequate to meet their load.² Given that approach to generation reliability, it was not necessary to approve each individual generation unit retirement an integrated utility might propose. In Opinion No. 96-12, however, it was decided to promote competition in electricity markets by encouraging utilities to divest their generation facilities and concentrate on providing delivery service instead.³ The utilities responded by auctioning off nearly all of their generation units, most of which became exempt wholesale generators (EWGs) that participate in wholesale electric markets operated under federal law.⁴

Upon their purchase of the generation units from the integrated utilities, the independent owners sought lightened

¹ The term "retirements" refers collectively to shut-downs, abandonments, mothballing, and other circumstances where a generating unit is taken out of service for a substantial period of time, excluding scheduled maintenance and forced outages.

² This obligation was similar in concept to the Installed Capacity (ICAP) requirements now administered by the New York Independent System Operator, Inc. (NYISO), which mandate that utilities procure sufficient generation resources to meet a set percentage of their load.

³ Case 94-E-0952 et al., In the Matter of Competitive Opportunities Regarding Electric Service, Opinion No. 96-12 (issued May 20, 1996).

⁴ EWGs may sell the electricity they generate into wholesale markets at market-based rates under the provisions of the Federal Power Act. See Case 02-E-0222, NRG Northern Ohio Generating LLC, Order Making Exempt Wholesale Generator Findings (issued May 31, 2002).

regulation of their operations. It was determined that filing requirements should be minimized and that the level of scrutiny applied in reviewing those filings required should be reduced, to the extent appropriate for a generator's participation in competitive wholesale, but not retail, markets. Nonetheless, under lightened regulation, these owners and their generation units remained subject to PSL jurisdiction with respect to matters such as enforcement, investigation, safety, reliability, and system improvement.

The movement to competitive energy markets, however, raises the issue of maintaining adequate generation capacity, which the integrated utilities formerly supplied, needed to ensure reliability. If independent owners of lightly regulated generation units can shutdown their units without triggering any sort of regulatory oversight, it is possible that the level of generation supply might decline to a point that would threaten the reliability of electric service. Since no mechanisms for that type of regulatory oversight are currently in place, there is a need to explore appropriate policies and procedures for obtaining notice of generation retirements in order to prevent or mitigate any adverse impacts a retirement may have on system reliability.⁵ Accordingly, a proceeding is commenced to revisit the lightened regulation orders governing independent generators, and to examine whether to establish generator retirement policies and procedures.

⁵ It is envisioned that these procedures, which are primarily focused on reliability impacts at the local distribution level, could complement the Electric System Planning (ESP) process at the NYISO, which addresses reliability impacts at the bulk transmission level.

DISCUSSION

Establishing policies and procedural requirements governing the retirement of generators raises two categories of issues. The first threshold issue is the jurisdictional basis for establishing such requirements. The second category of issues involves the content and substance of the policies and procedures. These categories are addressed separately below.

Jurisdictional Issues

PSL Article 4 establishes the scope of our jurisdiction over electric generators,⁶ which, as discussed below, could be said to extend to jurisdiction over the abandonment of service by electric utilities. That jurisdiction arguably encompasses supervision of the retirement of generating units by EWGs, because a retirement that poses the potential for a significant adverse impact to system reliability can be analogized to an abandonment of service. If a retirement could deprive electric retail customers of acceptably-reliable electric service, that retirement could raise public interest considerations analogous to a franchised utility's abandonment of service to an identifiable group of customers.

Statutory authority for requiring our consent before an electric corporation may abandon service is found in PSL §70. That provision adheres to the transfer of utility property, and includes the power to regulate abandonments by requiring a

⁶ The electric corporations subject to Article 4 of the PSL are broadly defined at PSL §2(13).

utility company to seek the same consent for an abandonment that must be obtained before it transfers utility company property.⁷ This power over utility service abandonments has been exercised frequently in the past.⁸ Although EWGs are lightly regulated, PSL §70 may be interpreted as providing for jurisdiction over EWG abandonments of service, similar to the jurisdiction exercised over traditional utility abandonments.⁹

The issue of regulating a large-scale independent generator first arose in the 1994 Wallkill Order, where a regulatory regime was established for such a generation facility.¹⁰ That generator was exempted from provisions of the PSL where feasible, such as those provisions explicitly applicable only to retail service. It was also decided that

⁷ Springbrook Water Co. v. Village of Hudson Falls, 269 A.D. 515 (3rd Dep't. 1945), app. den. 269 A.D. 913 (3rd Dep't. 1945); see also Maltbie v. Long Beach Bus Co., 75 N.Y.S.2d 861 (Sup. Ct. 1947), aff'd 272 A.D. 1069 (2nd Dep't. 1947), aff'd 297 N.Y. 723 (1947).

⁸ See Case 27308, Lawrence Park Heat, Light & Power Co., Order Adopting Recommended Decision, 18 NYPSC 1365 (issued September 22, 1978); see also Case 28316 et al., Rochester Gas & Electric Corporation - Steam Service, Opinion No. 84-19 (issued July 11, 1984).

⁹ While the Federal Energy Regulatory Commission (FERC) regulates the rates for wholesale energy commodity, the interstate transmission of energy, and the NYISO (which administers the wholesale markets where EWGs sell their generation at market-based rates), these functions could be considered consistent with state steps to protect the safe and reliable operation of generators, particularly as that operation may affect reliability at the local distribution level.

¹⁰ See Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Order) and Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991).

some provisions of Article 4 would be flexibly applied to the generator, by reducing filing requirements and the level of scrutiny applied upon review of those filings. Flexible application of Article 4, however, did not carry with it a general exemption from all of the substantive provisions of that Article, leaving the generator subject to certain PSL Article 4 regulation of its activities.

Most of the EWGs created as a result of the utility divestitures sought regulatory treatment similar to that afforded under the Wallkill Order. In the AES and Carr Street Orders, the Wallkill regulatory regime was updated and applied to EWGs generally.¹¹ While those Orders continue to provide for lightened Article 4 regulation, they explicitly provide that EWGs remain subject to PSL jurisdiction with respect to matters like safety, reliability and system improvement.¹² All EWGs requesting lightened regulation have been held to similar requirements.

Recent orders similarly provide that EWGs remain subject to the PSL "with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4," to the extent not specifically exempted from those Articles elsewhere in the

¹¹ Case 99-E-0148, AES Eastern Energy, L.P., Declaratory Ruling on Lightened Regulation (issued March 23, 1999) and Order Providing for Lightened Regulation (issued April 23, 1999) (AES Order); Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999) (Carr Street Order).

¹² AES Order, p. 9; Carr Street Order, p. 10.

Orders.¹³ This jurisdiction may extend to EWG abandonment of service. Comments, however, are solicited on the above analysis, and on any limitations on PSL jurisdiction over EWG abandonments of service.

Policy and Procedural Issues

Developing policies and procedures for obtaining adequate notice of generator retirements that might affect reliability, and preventing or mitigating any adverse impacts attending such retirements, raises a number of issues. Comments are solicited on the following questions, and any other matters related to the retirement of generation units by EWGs:

1. Should notice be required of proposed generation retirements by independently owned generation suppliers that have been afforded lightened regulatory status? If so, what period of notice is adequate (i.e., how much time is needed to assess and address reliability implications)? Should a notice requirement only apply to some generators based on amount of real power capacity (in MW), megavolt ampere reactive (MVAR) capacity, location within load pockets, or other factors?
2. What process should be used to analyze the reliability implications associated with proposed retirements (e.g., preparation of independent reliability assessments, coordination with the NYISO and affected Transmission Owner assessments or studies, coordination with the NYISO's Electric System Planning process)? What process should be used if adequate notice is not practicable (e.g., emergency conditions)?
3. What criteria should be used in determining when a retirement adversely impacts reliability or constitutes an abandonment of service (e.g., amount of capacity being retired, impact on compliance with reliability criteria, or other criteria)?

¹³ See Case 04-E-0789, Orion Power Holdings, Inc., Order Approving Transfers and a Financing and Making Other Findings (issued September 22, 2004), p. 17; Case 04-E-0058, Astoria Energy LLC, Order Providing for Lightened Regulation (issued July 30, 2004), pp. 7-8.

4. Should potential remedies be identified that could be implemented if a retirement poses potential adverse impacts to system reliability (e.g., continuing operation of the generation unit temporarily; requiring maintenance or upgrades to a generation unit if the costs can be recovered; alternative transmission solutions, or other remedies)? What costs and priorities should be considered in selecting remedies (e.g., cost to the generator, solution requiring the least-cost investment, cost impacts on customers, or other cost impacts)? What roles will generators, Transmission Owners, the NYISO, and other entities play in implementing remedies?
5. What other types of information or data should be collected from generators to adequately monitor and plan for the reliable operation of the electric system?

Answering these questions will frame, at a minimum, an appropriate scope for adopting policies and procedures on generation unit retirements by EWGs. Interested parties, however, may raise such additional issues as are relevant to establishing the proper policies and procedures.

Interested parties may submit an original and five copies of their comments by September 9, 2005, to Jaclyn A. Brilling, Secretary, Public Service Commission, Three Empire State Plaza, Albany, New York 12223-1350. Reply comments may be filed by September 26, 2005. The Secretary may extend these deadlines for good cause shown.

Persons intending to file comments and/or wishing to receive copies of the comments of others should notify the Secretary in writing no later than August 19, 2005. The Department of Public Service will post a service list on the Web site prior to September 9, 2005. Any person filing comments should serve copies on all parties on the service list.

The Commission orders:

1. A proceeding is instituted to develop appropriate policies and procedures for addressing the retirement of generating units, as described in the body of this Order.

2. Parties are invited to submit comments consistent with the schedule and requirements set forth in the body of this Order. The Secretary is authorized, in her sole discretion, to extend the scheduled deadlines.

3. This proceeding is continued.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary