

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 27, 2005

COMMISSIONERS PRESENT:

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

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 CONCERNING REQUEST FOR CERTIFICATE
AND APPROVAL OF A STEAM TARIFF

(Issued and Effective November 4, 2005)

BY THE COMMISSION:

On January 14, 2005, M-GBC, LLC (M-GBC) filed a petition requesting a certificate of public convenience and necessity (CPCN) for existing steam plant, an electric substation, and sprinkler water services, and approval of a proposed steam tariff. Given that alternatives to the provision of utility service by M-GBC are anticipated, this order will establish procedures designed to confirm that M-GBC ceases its provision of all utility services and abandons, transfers or

decommissions any utility plant that might otherwise be subject to Commission jurisdiction.

PROCEDURAL HISTORY

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 Calverton Owners Association (Association) is a group of property owners who purchased parcels of land in the Calverton Industrial Park from M-GBC.

On or about January 14, 2005, M-GBC filed a petition seeking a CPCN and requesting approval of a proposed steam tariff. The petition indicates that the Calverton Industrial Park included a pre-existing, oil-fired steam generation facility,¹ an electric substation, and a water distribution system² when it was acquired by M-GBC in October 2001. After M-GBC acquired the property, several of the former tenants purchased the property upon which their buildings were located. 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.

A dispute as to the propriety of M-GBC's charges for steam ensued, and M-GBC commenced a civil suit to recover the unpaid charges. In answer, the customer (an Association member) asserted a defense that M-GBC's recovery was barred by the Public Service Law. M-GBC then filed the instant petition seeking the requested CPCN, approval of a proposed steam tariff, a ruling

¹ The steam plant has four boilers located at a central plant which provides steam to the other buildings on the property via underground piping. Two of the boilers have design capacities of 59.1 million Btu/hour, while the others have design capacities of 29.1 and 8.4 million Btu/hour, respectively. The smallest boiler was recently installed, while the others were installed in or about 1996. Petition at 3.

² The onsite wells are owned by the Town of Riverhead Water District which supplies potable water service to users in the Calverton Industrial Park. Petition at 5.

that it would be subject only to lightened regulation, and an expedited hearing.

By letter dated January 26, 2005, the Association opposed M-GBC's petition and requested that the Commission set a hearing date. The Association alleged that the steam plant at issue was the sole source of heat to its members' buildings, each of which lacked independent heating systems. The Association further claimed that the proposed tariff rate was excessive and violative of their purchase agreements, and that petitioner had been operating the plant illegally since 2001.

The tariff filing was suspended and these cases were established to examine the propriety of the petitioner's requests.³ The matter was further suspended through February 17, 2006.⁴

On February 11, 2005, a prehearing conference was noticed for March 1, 2005, and a procedural ruling was issued calling for preliminary responses to a set of specified questions and a preliminary identification of issues.⁵

On March 14, 2005, a prehearing conference and initial hearing was held at which counsel for DPS staff, M-GBC and the Association answered questions concerning the propriety of and need for a temporary steam rate. The record of that initial conference and hearing consists of 56 transcript pages and 3 exhibits.⁶

By Procedural Ruling issued March 15, 2005, the Administrative Law Judges reported that additional evidence would

³ Order Suspending Steam Tariff Schedule (issued April 13, 2005).

⁴ Further Suspension of Steam Tariff Schedule (issued June 21, 2005).

⁵ Procedural Ruling Regarding Preliminary Identification of Issues (issued February 11, 2005) and Notice of Hearing (issued February 11, 2005). On March 2, 2005, a notice rescheduling the prehearing conference and scheduling a hearing to establish a temporary steam rate was issued.

⁶ The exhibits consist of the February 25, 2005 preliminary responses from DPS staff, M-GBC and the Association to questions posed by the Administrative Law Judges in the February 11, 2005 Procedural Ruling.

be needed to adequately address the issues raised by the M-GBC petition and adopted a procedural schedule.

In a letter dated May 10, 2005, M-GBC requested a two-month extension of the service dates for prefiled testimony and a postponement of the evidentiary hearing date. M-GBC indicated that the requested extension would afford the parties additional time to reach a settlement that might resolve numerous issues in this proceeding. The requested extension was granted by ruling issued May 11, 2005.⁷

In July, based on continued reports of a potential settlement, the schedule was again postponed and a July 18, 2005 procedural conference was scheduled to receive either a joint scheduling proposal or a report of a settlement of the issues in this case.⁸ By letter dated July 21, 2005, M-GBC and the Association filed a stipulation to hold the electric and water issues in abeyance.

In a ruling issued July 25, 2005, a revised schedule was adopted. The schedule called for the submission of direct and responsive testimony and scheduled evidentiary hearings for September 26, 2005.⁹ Since the Administrative Law Judges opined that the prefiled testimony appeared to lack information that might be critical to addressing the steam issues at the hearings, briefs on specified issues were requested from counsel for M-GBC, the Association and DPS staff.¹⁰

On September 21, 2005, counsel for M-GBC arranged a telephone conference, during which M-GBC and the Association announced their intention to execute settlements on September 26, 2005. They asserted that the settlements might moot these proceedings and therefore requested a postponement of the briefing and hearing dates. After draft copies of the settlements were faxed to the Administrative Law Judges and the DPS Staff counsel, a procedural ruling was issued postponing the

⁷ Procedural Ruling on Revised Schedule (issued May 11, 2005).

⁸ Procedural Ruling (issued July 1, 2005).

⁹ Procedural Ruling (issued July 25, 2005).

¹⁰ Procedural Ruling (issued September 9, 2005).

evidentiary hearing date to Friday, September 30, 2005. The ruling further required either the filing of copies of the executed settlements with the Commission Secretary or, if the documents were not executed as anticipated, the submission of the aforementioned briefs, by September 28, 2005.¹¹ A copy of the partially executed settlements were received on September 28, 2005.

On September 30, 2005, evidentiary hearings were held. The hearing record consists of 39 additional transcript pages and 5 additional exhibits.¹²

No comments were received in response the notices published in the February 16, 2005 State Register regarding the M-GBC petition and tariff.

DISCUSSION

As noted above, copies of a stipulation consenting to the withdrawal of the M-GBC petition¹³ and partially executed agreements between M-GBC and its three remaining steam customers¹⁴ were made part of the record at the hearings held September 30, 2005. Two of the agreements provide, in relevant part, that upon the release of certain documents by the escrow agent, M-GBC shall have no further obligation to provide steam

¹¹ Procedural Ruling (issued September 22, 2005).

¹² The exhibits consist of a stipulation between attorneys for the petitioner and respondent consenting to the withdrawal of M-GBC's petition, copies of the agreements between the three remaining steam customers and M-GBC, and petitioners' prefiled exhibits. The petitioner's and respondents' prefiled testimony was copied into the record as though orally given, subject to the receipt of affidavits adopting the testimony under sworn oath as the sponsoring witnesses would have done had they appeared at the hearing. Those affidavits were received October 13 and October 20, 2005.

¹³ Exhibit 4.

¹⁴ Counsel for M-GBC indicated that counsel for the Association had possession of the fully executed copies of the agreements. The relevant parties were directed to file the fully executed copies of said agreements with the Commission Secretary as soon as possible, with a request that they replace the copies of the partially executed agreements that were marked as record exhibits (5-7).

service to the two steam customers covered by those agreements.¹⁵ The other agreement states that M-GBC shall have no further obligation to provide steam service to the remaining customer once an 8.4 million Btu/hour boiler is satisfactorily and properly installed at the customer's premises (and, if necessary, permitting of natural gas service from KeySpan Energy occurs).¹⁶ The agreement also provides that, in the event KeySpan Energy is unable to properly install and/or permit the installation of natural gas service at the premises, M-GBC shall provide steam service at the agreed upon rate of \$33/M-pound up to the earlier of (a) the time the appropriate governmental agency issues a certificate of compliance regarding the 5,000 gallon oil tank or (b) KeySpan Energy provides natural gas service to the premises.¹⁷

At the hearing, counsel for M-GBC and the Association confirmed that the escrow agent had released all relevant documents, thus eliminating any need for M-GBC to provide steam service to two of the remaining three customers. M-GBC affirmed its plans to cancel its proposed steam tariff and decommission the steam plant that remains after all of the agreements and contingencies have been satisfied. Counsel for M-GBC also confirmed that provision of utility services is no longer a part of M-GBC's sale/purchase contracts. Finally, in response to a query whether the stipulation would be formally filed, M-GBC requested that the stipulation consenting to the withdrawal of the M-GBC petition be treated as a submission by its signatories.

In short, the record establishes that M-GBC now has only one remaining steam customer and that customer will soon have an independent source of heat on premises. Moreover, should that one remaining customer have an interim need for steam service from M-GBC, a mutually-agreeable rate has been identified. The record includes M-GBC's plans to cancel its

¹⁵ See Exhibits 5 and 7.

¹⁶ Exhibit 6.

¹⁷ Id.

steam tariff¹⁸ and decommission its remaining steam plant, once the need for such service has been completely eliminated. Finally, the record contains evidence that M-GBC and its customers consent to the withdrawal of the instant petition. In light of all of the foregoing, we find no need to address the request for a CPCN for the existing steam plant at this time or to determine whether a steam rate should be set. Instead, we require M-GBC to make compliance filings with the Commission Secretary after each of the following is completed: the 8.4 million Btu/hour boiler has been satisfactorily and properly installed (and, if necessary, any permitting of natural gas service from KeySpan Energy has occurred); M-GBC is finally released from any and all obligations to provide steam service and actually ceases providing said service; and all of M-GBC's remaining steam plant has been finally and properly decommissioned. Each compliance filing shall include, but not be limited to, a signed, sworn statement by M-GBC (or one of its duly authorized officers) that the aforementioned actions have been performed in conformance with any and all relevant legal requirements.

With respect to electric service and plant, the record establishes that M-GBC intends, and the Association desires, that the electric facilities and responsibility for electric service be transferred to the Long Island Power Authority. The record also demonstrates that subdivision approvals must be granted by the Town before this transfer can occur, but that such approvals are expected within the next few weeks.

When questioned about the status of M-GBC's existing water plant and non-potable sprinkler water service, M-GBC counsel reported that individual, on-premises fire suppression facilities will be installed. M-GBC's counsel further reported that, once said service was no longer needed, M-GBC would abandon said service and any associated plant.

Since the record demonstrates that M-GBC intends to transfer its existing electric plant and abandon its water plant

¹⁸ The cancellation was received on October 5, 2005; it contains an effective date of February 17, 2006.

(after the need for the water plant has been eliminated), and that both relevant parties consent to the withdrawal of the underlying petition, we find no need to address the request for a CPCN for an electric substation and sprinkler water services at this time. Instead, we require M-GBC to make compliance filings with the Commission Secretary after each of the following events occurs: the necessary and relevant subdivision approvals have been granted; the existing electric facilities and responsibility for electric service at Calverton Industrial Park have been transferred to the Long Island Power Authority; and all remaining users of the non-potable sprinkler water services have installed individual fire suppression facilities. Each compliance filing shall include a signed, sworn statement by M-GBC (or one of its duly authorized officers) that the aforementioned actions have been performed in conformance with any and all relevant legal requirements. In addition, the final compliance filing shall also include a signed, sworn statement that M-GBC has ceased all utility services and has decommissioned, transferred or abandoned any plant that could be subject to PSC jurisdiction. Once the final compliance filing has been filed with the Commission Secretary, the Secretary is authorized to close these proceedings, and M-GBC is ordered as of that time not to provide any utility services and/or to own, operate or manage any utility plant that could be subject to Commission jurisdiction without the prior authorization of the Commission.

The Commission orders:

1. Tariff Supplement No. 3 canceling M-GBC, LLC's proposed Steam Tariff Schedule, P.S.C. No. 1, shall be authorized to become effective on February 17, 2006.

2. As discussed in the body of this order, M-GBC, LLC is directed to make compliance filings with the Commission Secretary upon the completion of each of the following events: proper and satisfactory installation of the 8.4 million Btu/hour boiler; the cessation of steam service; the decommissioning of the remaining steam plant; the transfer of electric plant and service to Long Island Power Authority; the installation of

individual fire suppression facilities at the customers' premises; the abandonment of the water plant; and the cessation of electric and sprinkler water service. Five copies of each compliance filing shall be filed with the Commission Secretary, with copies served on the Administrative Law Judges and each active party to this proceeding.

3. Effective upon receipt of the final compliance filing, as discussed in the body of this order, M-GBC is directed not to provide any utility services, or own, operate or manage any PSC-jurisdictional utility plant, for which it does not have the prior authorization of the Public Service Commission.

4. These proceedings are continued, but may be closed by the Commission Secretary after M-GBC, LLC has fully complied with the conditions set forth in this order.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary