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Approved as Recommended
and so Ordered
by the Commission

KATHLEEN BURGESS

Secretary

Issued & Effective February 20, 2014

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

January 29, 2014

TO: THE COMMISSION

FROM: OFFICE OF CONSUMER POLICY

SUBJECT: Case 13-G-0443 – In the Matter of The Enclave at Malta, LLC Request for an Extension to the Five Year Limit on a Letter of Credit to National Grid for the Construction of Underground Distribution, National Grid's Tariff 220, Section 16.6.3 and 16 NYCRR Section 100.3(b).

RECOMMENDATION: Staff recommends that the Commission grant a limited waiver of National Grid's requirements for retaining a letter of credit deposit on the costs of constructing utility facilities in the Enclave, a new residential subdivision.

SUMMARY

Mr. Frank Tate is the Managing Director of the Enclave at Malta (the Enclave or Petitioner), a residential subdivision in Malta, New York. In a Petition filed on August 30, 2013, the Enclave states that in February 2009, Niagara Mohawk Power Corporation d/b/a National Grid (National Grid or the Company) constructed electric and gas service to the Enclave. Pursuant to 16 NYCRR §100.3, which authorizes utilities to require from residential developers a deposit equal to the total estimated cost of construction for installing energy and/or gas service within residential subdivisions, the

Petitioner provided to National Grid a letter of credit (LOC) in the amount of \$124,000. The LOC is set to expire in February 2014.

Under the Commission's rules as cited above and National Grid's tariffs, as new customers take utility service within a subdivision, the amount of the LOC is reduced and, if all properties take service within five years, the LOC is adjusted to zero. However, if the developer fails to complete its subdivision within five years, the Company will draw on the LOC for the capital costs associated with the unenergized lots and credit the appropriate plant accounts.

Since 2009, the LOC for the Enclave has been reduced to \$90,606. The Petitioner requests a waiver of 16 NYCRR § 100.3(b) and National Grid's electric (P.S.C. No. 220 – Electricity) and gas service (P.S.C. No. 219 – Gas) tariffs (the Tariffs), for an additional three years to afford him additional time to sell the lots in the Enclave before National Grid draws on the LOC for the capital costs associated with the unenergized lots.

Pursuant to the State Administrative Procedure Act §202(1), a Notice of Proposed Rulemaking was published in the State Register on October 16, 2013. The public comment period provided for under SAPA expired December 2, 2013. National Grid filed comments on September 23, 2013. Staff has reviewed the Petition and National Grid's comments. Staff concludes that, under the facts presented here, a limited one year waiver of the LOC retention requirement should be granted.

BACKGROUND

In 2009, National Grid extended electric service to twenty-two building lots and gas service to fifty-six building lots at the Enclave. Prior to the Company's construction of gas and electric facilities to serve the subdivision, the Petitioner was required to provide a LOC in the amount of \$124,000. The LOC became effective in February 2009 and is set to expire in February 2014. The first unit in the subdivision was energized in September of 2009 but, as of September 2013, many of the lots in the subdivision have not been developed.

On August 7, 2012, National Grid obtained an easement from the Enclave to construct gas facilities to serve a nearby manufacturing facility. Construction of the gas service began in April 2013 and concluded approximately seven months later in October 2013. During that construction period, realtors offering properties in the Enclave ceased their sales operations. The Petitioner requested that National Grid extend the LOC by three years to compensate for sales he claims were lost during the construction period. National Grid opposes extending the time for it to retain the LOC, stating an extension is not permitted by 16 NYCRR §100.3(b) or the Company's Tariffs.

In Cases 10-E-0486 and 11-M-0486 (the Extension Orders),¹ the Commission determined that National Grid applied its Tariff inconsistently and, as a result, the Commission granted extensions for the retention of LOCs for the developers. The Extension Orders granted additional time for developers to energize lots before the Company could draw on the LOCs for the capital costs associated with the unenergized lots. However, to help ensure that ratepayers not be at risk, the Commission required that 1) any such extension must be contingent upon the bank agreeing to extend the LOC, and 2) the developer pay National Grid at the beginning of the extension the pre-tax rate of return on the amount owed for the unenergized lots prorated for the length of the extension period. Grid would defer this payment for the benefit of residential ratepayers.

THE COMMENTS

In its comments, National Grid states that the issue of extending the time for retention of LOCs was recently addressed in the Extension Orders. There, the Company recounts, it was decided that the Company's Tariffs do not provide for the extension practice. If, however, a waiver of the Tariffs is granted, National Grid recommends that any extension be limited to one year, which it claims is commensurate with the period actually needed to construct the gas facilities to the nearby manufacturing

¹ Case 11-M-0486 – Oot Bros., Inc., Untitled Order (issued December 21, 2011); Case 10-E-0486, Abbot's Landing Section 9, Untitled Order (issued December 16, 2010).

facility. The Company also proposes that any waiver be accompanied by the same conditions that attended the waivers previously granted in the Extension Orders, which it argues avoid placing its customers at risk of loss on the costs of constructing the facilities at the Enclave. Those conditions include obtaining agreement to the extension from the issuer of the LOC and payment by the developer, at the beginning of the extension, of interest at the Company's pre-tax rate of return on the amount owed which is attributable to lots that are not yet energized.

DISCUSSION AND RECOMMENDATION

The Commission's rules and the Company's Tariffs allow a residential subdivision developer, as an alternative to funding upfront the cost of constructing utility facilities for the subdivision, to instead post a LOC that guarantees that construction costs will be funded over a five year period as properties are developed and energized. As new customers take utility service within a subdivision, the amount of the LOC is reduced and, if all properties take service within five years, the LOC is adjusted to zero. However, if the developer fails to complete its subdivision within five years, the Commission's Rules and the Company's Tariffs require that the Company draw on the LOC for capital costs associated with the unenergized lots and credit the appropriate plant accounts.

The Enclave requests that National Grid extend the period for retaining the LOC by three years to compensate it for the property sales it claims were lost during the construction of the gas line to the nearby manufacturing facility. The construction of the gas service through the Enclave inhibited sales of lots in the residential subdivision which was demonstrated by the decision of the realtors to cease sales operations during the time the construction was ongoing. However, the Petitioner does not provide sufficient justification for requesting an extension of three years when National Grid's construction activities in the subdivision took place over a period of approximately seven months. Accordingly, the request to extend the LOC for an additional three years should be rejected.

National Grid premises its opposition to the waiver request on the Extension Orders, which the Company interprets as preventing the extension of the time period in which the Petitioner must either complete construction or surrender the LOC. National Grid believes that if a waiver is nonetheless granted, it should be limited to one year.

In the Extension Orders, waivers were granted because National Grid's prior implementation of its tariffs had created confusion on the application of those tariffs to developers making LOC deposits on the construction of utility facilities in new residential subdivisions. Here, the Petitioner does not dispute National Grid's application of its tariffs on those grounds, but asks for an extension to compensate for the adverse effect the Company's construction of its gas line through the Enclave had on the sales of residential properties in the subdivision.

Under these circumstances, Staff recommends that the Commission grant the Petitioner a one year extension of the LOC retention requirement to afford additional time for the completion of development at the Enclave. That period, rather than the three year period the Petitioner requests, is the appropriate length that compensates him for the delays in developing the Enclave caused by National Grid's construction of the gas line. While the period is somewhat longer than the actual seven month construction time frame, it is reasonable in light of the difficulties the Petitioner encountered when sales activities at the Enclave were suspended. In this case, the circumstances are different than the previous Extension Orders. There was no confusion by either the developer or National Grid about the application of tariffs as was the case in the previous Extension Orders; rather National Grid's construction through the Enclave caused a delay in the sales of building lots. As the delay is not the result of actions by the customer, the customer should not be responsible for the pre-tax rate of return on the amount owed for the unenergized lots. The extension, therefore, should only be contingent on the Enclave obtaining agreement to the extension from the issuer of the LOC.

This item has been reviewed by the Office of Electric, Gas and Water.

RECOMMENDATION

It is recommended that:

1. The Enclave at Malta, LLC's request to extend the letter of credit for an additional three year period be denied;
2. the Commission grant The Enclave at Malta, LLC a limited waiver of its rules and National Grid's tariffs permitting the extension of the letter of credit for a one year period from the date of this order;
3. any extension is contingent upon the bank agreeing to extend the letters of credit; and any such extension in recommendation No. 2 is contingent upon National Grid reducing the letter of credit, at the end of the extension period, for any lots energized. National Grid will draw on the letter of credit at the end of the extension period for unenergized lots and credit the appropriate plant accounts.

Respectfully submitted,

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