

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 21, 1999

COMMISSIONER PRESENT:

Maureen O. Helmer, Chairman

CASE 99-E-0974 - NRG Energy, Inc. and Oswego Harbor Power LLC -
Joint Petition for a Declaratory Ruling that
Lightened Regulation be Applied to their
Purchase of the Oswego Fossil Fuel Generating
Plant from Niagara Mohawk Power Corporation.

ORDER PROVIDING FOR LIGHTENED REGULATION

(Issued and Effective October 21, 1999)

BACKGROUND

On July 22, 1999, NRG Energy, Inc. (NRG), and its
Oswego Harbor Power LLC affiliate (collectively, "NRG"), filed a
petition requesting that they be lightly regulated under the
Public Service Law (PSL), as the purchasers of the Oswego
generating facility in Niagara Mohawk Power Corporation's
(Niagara Mohawk) auction. As the owner of the facility, NRG
intends to participate in the competitive wholesale market for
electricity.

THE PETITION

NRG notes that a lightened regulatory regime has been
established for wholesale generators.^{1/} NRG avers that it
qualifies for this sort of regulation.

NRG reports that it was the winning bidder for the
Oswego generating facility in Niagara Mohawk's auction, where

^{1/} Case 91-E-0350, Wallkill Generating Company, L.P. - Petition
On Regulation, Order Establishing Regulatory Regime (issued
April 11, 1994)(Wallkill Order).

that utility arranged for the sale of both its interest in the Oswego facility and the interest of Rochester Gas and Electric Corporation (RG&E).^{1/} On July 13, 1999, NRG adds, it, Niagara Mohawk and RG&E petitioned for approval, pursuant to PSL '70, of the transfer of the Oswego facility from the utilities to NRG. After the transaction closes, says NRG, Oswego will qualify as an eligible facility within the meaning of the Public Utility Holding Company Act of 1935 (PUHCA), and it will sell the Oswego electricity in the competitive wholesale market.

NRG points out that it and other of its affiliates are lightly regulated as the owners of the Huntley and Dunkirk generating stations, also acquired through Niagara Mohawk's auction process.^{2/} NRG asks that the same treatment be afforded it as the owner of the Oswego facility.

DISCUSSION AND CONCLUSION

The Public Service Law was realistically appraised in the AES and Carr Street Orders,^{3/} and it was concluded that new forms of electric service providers participating in wholesale markets would be lightly regulated. Under a realistic appraisal approach, PSL Article 1 adheres to NRG, because it meets the definition of an electric corporation under PSL '2(13), and is

^{1/} See Case 94-E-0098, et al., Niagara Mohawk Power Corporation - PowerChoice Rate and Restructuring Plan, Order Authorizing Process For the Auctioning of Generation Facilities (issued May 6, 1998); Case 94-E-0098, et al., supra, Order Granting Petitions For Clarification, Denying Petitions For Rehearing and Approving Joint Sale Agreement (issued July 30, 1998).

^{2/} Case 99-E-0616, NRG Energy, Inc., Huntley Power LLC and Dunkirk Power LLC - Joint Petition On Regulation, Order Providing For Lightened Regulation (issued June 7, 1999)(Huntley Order).

^{3/} Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P. - Petition On Regulation, Order Providing For Lightened Regulation (issued April 23, 1999); Case 98-E-1670, Carr Street Generating Station, L.P. - Petition On Regulation, Order Providing For Lightened Regulation (issued April 23, 1999).

engaged in the manufacture of electricity under PSL '5(1)(b). NRG is therefore subject to provisions, such as PSL ''11, 19, 24, 25 and 26, that prevent producers of electricity from taking actions that are contrary to the public interest.^{1/}

All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to wholesale generators like NRG. Certain provisions of Article 4 are also restricted to retail service.^{2/}

As decided in the Carr Street and AES Orders, however, other provisions of Article 4 pertain to wholesale generators. PSL '68 ensures that construction and operation of electric plant is in the public interest, whether the plant is intended to serve retail or wholesale customers.^{3/} Similarly, PSL ''69, 69-a and 70, which provide for the review of securities issuances, reorganizations, and transfers of securities or works or systems, require both that monopoly utilities not act adversely to their ratepayers' interests, and that other electric corporations do not engage in transactions contrary to the public interest.

Application of these provisions to wholesale generators remains necessary in light of obstacles to entry into the generation market. These statutory provisions, however, can be implemented in a fashion that limits the impact in a competitive

^{1/} The PSL '18-a assessment is applied against gross retail revenues; so long as NRG remains exclusively a wholesaler, there will be no retail revenues and so no assessment will be collected.

^{2/} See, e.g., PSL ''66(12), regarding the filing of tariffs (which are required at our option); 66(21) regarding storm plans (which are submitted by retail service electric corporations); 67, regarding inspection of meters; 72, regarding hearings and rate proceedings; 75, regarding excessive charges; and, 76, regarding rates charged religious bodies and others.

^{3/} PSL '68 certification pertains only to construction of new electric plant (unless such plant is reviewed pursuant to PSL Articles VII or X) or to electricity sales made via direct interconnection with retail customers.

market. At our discretion, the extent of scrutiny afforded a particular transaction can be reduced to the level the public interest requires. Moreover, NRG may fulfill its PSL '66(6) obligation to file an annual report by duplicating the report it is required to file under federal law.

Regarding '70, it was presumed in the AES Order that regulation would not "adhere to transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."^{1/} That presumption is continued for NRG, but it is advised that the potential for the exercise of market power arising out of an upstream transfer would be sufficient to defeat the presumption and trigger '70 review.^{2/}

Turning to PSL Article 6, several of its provisions that adhere to the rendition of retail service do not pertain to NRG, because it is engaged solely in the generation of electricity for wholesale.^{3/} Application of PSL '115, on requirements for the competitive bidding of utility purchases, is discretionary, and will not be imposed on wholesale generators. In contrast, PSL '119-b, on the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale generators.

Most of the remaining provisions of Article 6 need not

^{1/} AES Order, p. 7.

^{2/} In this context, under PSL "'66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid.

^{3/} See, e.g., PSL "'112, regarding enforcement of rate orders; 113, regarding reparations and refunds; 114, regarding temporary rates; 114-a, regarding exclusion of lobbying costs from rates; 116, regarding discontinuance of water service; 117, regarding consumer deposits; 118, regarding payment to an authorized agency; 119-a, regarding use of utility poles and conduits; and, 119-c, regarding recognition of tax reductions in rates.

be imposed generally on wholesale generators.^{1/} These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. So long as the wholesale generation market is effectively competitive, wholesale generators cannot raise prices even if their costs rise due to poor management. Moreover, imposing these requirements could interfere with wholesale generators' plans for structuring the financing and ownership of their facilities. This could discourage entry into the wholesale market, adversely affecting its fluid operation to the detriment of the public interest.

As it has done with the Huntley and Dunkirk facilities,^{2/} NRG will enter into an arrangement with an affiliate, NRG Power Marketing, Inc. (NRG Marketing), that will market generation from the Oswego facility along with electricity NRG Marketing would obtain from other sources. This relationship raises potential market power issues, because NRG could acquire market power through its affiliations. As discussed in the Carr Street Order, these issues may be addressed under PSL '110(1) and (2), which affords us jurisdiction over affiliated interests.^{3/} In the unlikely event such issues arise, PSL '110(1), on the reporting of stock ownership, and PSL '110(2), on access to books and records and the filing of reports, pertain to NRG and NRG Marketing. They are required to submit for review such books, records, and reports as our Staff from time to time may need for the purpose of resolving potential market power concerns.

Consequently, we will not impose the requirements of

^{1/} These requirements include approval of: loans under '106; the use of utility revenues for non-utility purposes under '107; corporate merger and dissolution certificates under '108; contracts between affiliated interests under '110(3); and, water, gas and electric purchase contracts under '110(4).

^{2/} Huntley Order, pp. 5-6.

^{3/} Carr Street Order, pp. 9-10.

Article 6 on NRG, except for '110(1), '110(2) and '119-b. NRG is reminded, however, that it remains subject to Public Service Law jurisdiction 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 discussed above.

It is ordered:

1. NRG Energy, Inc. and Oswego Harbor Power LLC shall make the filings required in the body of this Order and those filings shall be reviewed consistent with the reduced level of scrutiny described in the body of this Order.

2. NRG Energy, Inc. and Oswego Harbor Power LLC shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order.

3. This proceeding is continued.

Commissioner