

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on March 21, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman  
Maureen F. Harris  
Robert E. Curry, Jr.

CASE 06-G-1484 - Petition of Nornew Energy Supply, Inc. for an  
Order Providing for Lightened Regulation Under  
The Public Service Law with Respect to Matters  
Other Than its Rates, Services and Facilities.

ORDER PROVIDING FOR LIGHTENED REGULATION

(Issued and Effective March 27, 2007)

BY THE COMMISSION:

BACKGROUND

In 1999, the City of Jamestown Board of Public Utilities (BPU), after reviewing competing proposals submitted by Nornew Energy Supply, Inc. (Nornew) and National Fuel Gas Distribution Corporation (NFGD), accepted Nornew's proposal to provide gas transportation service to its Samuel A. Carlson Generating Plant (Carlson Plant). Nornew entered into a Gas Facilities Lease Agreement (Agreement) with Jamestown BPU, agreeing to provide unbundled transportation of natural gas. In 2000, Nornew was authorized to construct a gas transmission line to provide the gas transportation service contemplated in the Agreement; the Commission decided that, as a producer of indigenous natural gas, Nornew qualified for the statutory

exemption from much of its jurisdiction provided in §66-g(3) of the Public Service Law (PSL).<sup>1</sup>

Thereafter, the Federal Energy Regulatory Commission (FERC) asserted jurisdiction over Nornew and its affiliate, Norse Pipeline Company, LLC (Norse) under the Natural Gas Act (15 U.S.C. §717 *et seq.*).<sup>2</sup> Nornew and Norse, have restructured their operations to avoid FERC's jurisdiction; in 2003, FERC decided that Norse is now exempt from its jurisdiction because its activities are limited to the gathering of natural gas.<sup>3</sup> Because Nornew transferred ownership of all of its gas wells in New York to an affiliate, it is no longer a producer of indigenous natural gas.

In a petition filed December 7, 2006, Nornew seeks an order providing for lightened regulation, given that it is not entitled to the exemption from Commission jurisdiction provided in PSL §66-g(3). Nornew also requests that its long term agreement with Jamestown BPU, which was competitively negotiated, be accepted for filing as establishing the retail rates for the services to be provided to Jamestown BPU.

Notice of the petition was published in the *State Register* on December 27, 2006, in conformance with State Administrative Procedure Act (SAPA) §202(1). Responses to the notice were received from NFGD and the BPU within the SAPA §202(1)(a) comment period, which expired on February 12, 2007.

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<sup>1</sup> Case 99-T-0977, Nornew Energy Supply, Inc., Order Granting Certificate of Environmental Compatibility and Public Need (issued January 13, 2000).

<sup>2</sup> National Fuel Gas Distribution Corporation, 93 FERC ¶ 61,276 (2000).

<sup>3</sup> Nornew Energy Supply, Inc., 104 FERC ¶ 61,177 (2003).

POSITIONS OF THE PARTIES

Nornew states that it is not a producer of indigenous natural gas; rather it transports interstate natural gas, all of which is consumed at the BPU's Carlson Plant. In such circumstances, Nornew contends, §1(c) of the Natural Gas Act,<sup>4</sup> commonly known as the Hinshaw Amendment, requires FERC to cede exclusive jurisdiction to the Commission, so long as the Commission is authorized to and is in fact exercising jurisdiction over Nornew's rates, services and facilities.

Because it does not hold a franchise to serve all customers in a given geographic area on a monopoly basis but serves only the BPU on a competitive basis, Nornew claims that it may be lightly regulated. Nornew believes itself to be subject to PSL Article 1; however, Nornew asks that it be exempted from the PSL §18-a assessment (or that such assessment be substantially reduced). Nornew justifies its request on the grounds that the Commission's regulatory responsibilities under the lightened regulatory regime proposed are minimal, and that it would be inappropriate to either impose such charges on retail service to a municipal utility such as the BPU or require Nornew to absorb such costs without recovery. Nornew asserts that PSL Article 2 does not adhere to it since it does not provide service to residential customers.

While Nornew concedes it is subject to several provisions of PSL Article 4, it maintains that other provisions should not adhere to it, including §66(4) regarding uniform methods of accounting, §66(12) requiring the filing of tariffs, §66(21) regarding storm plans; §67 regarding the inspection of meters, §72 regarding hearings and rate proceedings, §75 regarding excessive charges and §76 regarding rates charged to

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<sup>4</sup> 15 U.S.C. § 717 (c).

religious bodies. According to Nornew, the Article 4 provisions that apply to it should be implemented in a fashion to limit their impact on its competitive operations.<sup>5</sup> Nornew would apply the "Wallkill presumption" to transfers of ownership interests in entities upstream from Nornew's parents unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override this presumption. It would limit financial reporting obligations to an annual report showing the cumulative volume of retail transportation services and overall revenues from retail service, by month, for each of the preceding 12 months.<sup>6</sup>

NFGD states its chief concern regarding Nornew's petition is that, while it has no present plans to provide service to any customers other than to the BPU, Nornew expressed its willingness to provide unbundled transportation services to a limited number of large, sophisticated customers. Citing the Commission's bypass policy statement,<sup>7</sup> NFGD contended the Commission needs to reserve for itself all of the legal tools

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<sup>5</sup> Citing as precedent Case 92-M-0322, North Country Gas Pipeline Corporation and Saranac Energy Company Inc. Declaratory Ruling and Order Granting Exemption (issued August 27, 1992), Nornew requests that its agreement with Jamestown BPU, as well as any subsequent amendments, be required to be filed pursuant to PSL §65, as evidence that it is providing safe and adequate service at just and reasonable rates and that the Commission is exercising jurisdiction over it pursuant to the Hinshaw Amendment.

<sup>6</sup> Case 06-E-0287, Niagara Mohawk Power Corporation, Griffiss Local Development Corporation and Griffiss Utility Services Corporation, Order Approving Economic Development Rate and Transfer of a Certificate, and Providing for Lightened Regulation (Issued July 20, 2006).

<sup>7</sup> Case 90-G-0379, Impact of Bypass by Gas Cogeneration Projects Statement of Policy Regarding By-Pass of Local Distribution Companies by Large Volume Users (issued March 6, 1991)

provided by the PSL to enable adequate regulatory oversight of Nornew's operations currently and in the future, especially if Nornew's retail operations are increased, as it suggests. According to NFGD, the Commission must maintain sufficient oversight of Nornew's operations to assure that it does not gain a competitive advantage by virtue of regulatory differences that favor it.

The BPU asserts that, if the Commission finds that Nornew is subject to its jurisdiction, it should require Nornew to continue to provide service to the BPU at the rates the parties agreed to, utilizing the facilities and receipt points included in the certificate issued by FERC for Nornew's service to the BPU under the Agreement between the BPU and Nornew.<sup>8</sup> Such requirement is necessary, according to the BPU, to avoid both any degradation in service and any potential for affiliate abuse as a result of the jurisdictional change. The BPU opines that Nornew should be prevented from interpreting its regulated transportation service in a manner that benefits its affiliated gathering line operator, Norse, or its affiliated gas marketing company, MidAmerican Natural Resources, Inc., which the BPU understands controls much of the gas supply connected to the Norse gathering system.

Concerning the scope of the lightened regulation sought by Nornew, the BPU expresses its concern that, if the Commission finds that Nornew is subject to the PSL §18-a assessment, it will seek to recover the charge from the BPU in addition to the payments under the Agreement. The BPU also opposes Nornew's request for a determination that PSL §66(4), which authorizes the Commission to proscribe uniform methods of

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<sup>8</sup> The BPU included its bid specifications, which were referenced in the agreement, as an attachment to its comments.

keeping accounts, does not adhere to it. The BPU claims that the availability of proper and adequate cost data is essential.<sup>9</sup>

#### DISCUSSION AND CONCLUSION

It has been decided that entities providing utility services on a competitive basis do not require the degree of regulatory scrutiny applied to monopoly suppliers.<sup>10</sup> Detailed regulatory oversight of the retail gas transportation contract Nornew has entered into with the BPU is therefore unnecessary. The contract was executed after the culmination of a competitive bidding process. Consequently, regulatory requirements applicable to Nornew as a gas service provider will be reduced.

In interpreting the degree of regulation appropriate under the Public Service Law, we have asked what reading best carries out the Legislature's intent and advances the public interest.<sup>11</sup> Applying this principle to Nornew, PSL Article 1 adheres, because Nornew meets the definition of a gas corporation under PSL §2(13) and is engaged in the transportation of gas under PSL §5(1)(b). Nornew is therefore subject to provisions, such as PSL §§11, 19, 24, 25 and 26, that prevent gas corporations from taking actions that are contrary

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<sup>9</sup> Nornew submitted reply comments, but they do not add anything material to the issues that are ripe for resolution, and so they will not be considered further.

<sup>10</sup> See, Case 06-E-0287, supra.

<sup>11</sup> Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P., Order Providing For Lightened Regulation (issued April 23, 1999); Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing For Lightened Regulation (issued April 23, 1999).

to the public interest.<sup>12</sup> Article 2, however, does not adhere, because it is applicable to residential customers. Nornew will serve only the BPU; if it desires to serve other business customers, it must request the Commission's permission to do so. Nornew remains subject to Article 4 generally,<sup>13</sup> but any required filings will be reviewed with the reduced level of scrutiny appropriately applied to this competitive entity.

Pursuant to PSL §§ 65(1) and 66(1), Nornew must file the rates and terms of service for the retail gas transportation service it provides (as it has already done by filing with us its contract with the BPU),<sup>14</sup> and those requirements will not be waived. To the extent that similar filings in the future would include proprietary information, Nornew may redact the names of the individual customers, and request trade secret protection for other information under the same rules that apply to any utility.<sup>15</sup> To satisfy Article 4 regarding reporting requirements, Nornew is directed to report annually, by January 31 of each year, the cumulative volume of gas delivered to its

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<sup>12</sup> The PSL §18-a assessment is a statutory requirement that cannot be waived. It will be applied against Nornew's gas retail revenues. Nornew shall file annually, by January 31 of each year, a statement setting forth the revenues received from its rendition of regulated retail gas service for the preceding year.

<sup>13</sup> Nornew is exempted from §66(12) regarding the filing of tariffs, which are required at our option; it is also exempt from §66(25), which is inapplicable because it is limited to cities having a population of one million or more, and other similar provisions that do not adhere because of their terms.

<sup>14</sup> We will also accept for filing the bid specifications submitted by the BPU.

<sup>15</sup> See, 16 NYCRR §6-1.3; Case 03-E-1641, Flexible Rate Policies, Order Approving Guidelines for Flexible Rate Service Contracts (issued April 14, 2005).

retail customer(s), and the overall revenues earned from that customer(s), for the prior calendar year, broken down by each month of that year. Nornew must also keep appropriate accounts and records, but we see no need to require it to keep accounts pursuant to the Uniform System of Accounts. Should the BPU have concerns about Nornew's accounting or other practices, it may file a complaint, pursuant to PSL §65, seeking appropriate relief.

At this time, we will not address the contract interpretation questions discussed in the pleadings; rather, we expect the parties to engage in good faith negotiations. If a dispute is brought to us, we will address it in conformance with appropriate complaint handling procedures.

Regarding PSL §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."<sup>16</sup> Under PSL §66(9) and (10), we may require access to records sufficient to ascertain whether the presumption remains valid. This analysis is applicable to Nornew.

Turning to PSL Article 6, application of PSL §115, on requirements for the competitive bidding of utility purchases, is discretionary and will not be imposed on Nornew's gas operations. In contrast, PSL §119-b, on the protection of underground facilities from damage by excavators, adheres to all persons, including Nornew. Article 6 provisions regarding

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<sup>16</sup> AES Order, p. 7.



retail service will also adhere to Nornew, again implemented with the reduced scrutiny appropriate to participants in competitive markets. Because Nornew has affiliates in the gas business, however, PSL §110(1), (2), (3) and (4) regarding the supervision of affiliated interests, contracts between affiliates and gas purchase contracts will adhere to it.

Most of the remaining provisions of Article 6 need not be imposed generally on Nornew.<sup>17</sup> These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates monopoly providers charged to captive retail customers. Since Nornew will furnish retail gas transportation service on a competitive basis to a sophisticated business customer(s) that can take advantage of competitive options, these remaining Article 6 provisions do not pertain to its operations.

Finally, Nornew is reminded that, notwithstanding lightened regulation, it remains subject to the PSL with respect to matters such as enforcement, investigation, the safety and reliability of facilities, system improvement, and the other requirements of PSL Articles 1 and 4 to the extent described above.

The Commission orders:

1. Nornew Energy Supply, Inc. shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order and shall make the filings required in the body of this Order, which shall be reviewed

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<sup>17</sup> These requirements include approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; and, corporate merger and dissolution certificates under §108.

consistent with the reduced level of scrutiny described in the body of this Order.

2. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING  
Secretary