

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on August 21, 1996

COMMISSIONERS PRESENT:

John F. O'Mara, Chairman
Eugene W. Zeltmann
Harold A. Jerry, Jr.
William D. Cotter
Thomas J. Dunleavy

CASE 95-E-0998 - Petition of Niagara Mohawk Power Corporation for a Declaratory Ruling that New York State Electric & Gas Corporation Provided Electric Service to a Customer on Premises Long Served by Niagara Mohawk in Violation of Public Service Law Section 68, the Certificate of Public Convenience and Necessity, and Established Commission Policy.

CASE 96-E-0459 - In the Matter of the Application of New York State Electric & Gas Corporation under Section 68 of the Public Service Law for Permission to Serve the Premier Center in the Town of Amherst, County of Erie.

ORDER ESTABLISHING EVIDENTIARY HEARINGS
AND DENYING INTERIM RELIEF

(Issued and Effective September 11, 1996)

BY THE COMMISSION:

INTRODUCTION

On May 16, 1996, New York State Electric & Gas Corporation (NYSEG or the company) filed the present petition seeking a certificate of Public Convenience and Necessity (Certificate) under Section 68 of the Public Service Law (PSL), to extend its electric facilities on private property beyond the 200-foot limit¹ stated in the franchise issued to NYSEG by the Town of Amherst, Erie County. The company's filing is in

¹ NYSEG's franchise authorizes it to place and maintain poles, wires, and ancillary facilities along Transit Road in the Town of Amherst and upon all roads intersecting Transit Road, running for a distance of 200 feet from Transit Road.

response to a Show Cause Order¹ directing the company to show why it should not be precluded from serving Premier Center, or alternatively, to file an application under §68 to serve Premier Center. Premier Center is a retail mall constructed on the private property of Benderson Development company (Benderson); the Benderson property lies partly within and partly outside the 200-foot limit in the company's franchise. Premier Center lies entirely beyond that limit. NYSEG states that Commission approval will allow it to serve a customer who requested service after Niagara Mohawk could not meet the customer's needs.

By motion filed July 5, 1996, Niagara Mohawk Power Corporation (Niagara Mohawk or NMPC) moved to dismiss NYSEG's petition for a certificate. Niagara Mohawk argued² that granting NYSEG's request for a certificate would violate our policy against the unnecessary construction of new facilities to serve customers already being served by another facility. According to Niagara Mohawk, it has served the retail complex for many years and remains ready willing and able to serve Premier Center now and into the future. Niagara Mohawk pointed out that Benderson never challenged any of NMPC's actions under our complaint procedures³. Accordingly, NMPC asserted that NYSEG's application should be summarily dismissed with prejudice and that

¹ Case 95-E-0098 - Niagara Mohawk Power Corporation for Declaratory Ruling Against New York State Electric & Gas Corporation, Order Granting Petition in Part and Requiring New York State Electric & Gas Corporation to Show Cause (Issued April 16, 1996).

² Niagara Mohawk also argued in its motion, inter alia, that: §68 does not permit retroactive approval of construction of an electric plant, the Commission cannot now approve the company's application for a Certificate since it already determined NYSEG violated §68, and, NYSEG is foreclosed from obtaining authorization to serve the mall because it failed to challenge the Commission determination that its franchise precludes the company from extending service to Premier Center.

³ 16 NYCRR §12.1.

the company be directed to remove the facilities constructed to serve Premier Center within 10 days of issuance of the order. Niagara Mohawk also requested that, if summary dismissal is unwarranted, the Commission direct evidentiary hearings on the company's application and that NYSEG be prohibited from serving Premier Center while the proceedings are pending, or, alternatively, that NYSEG be subjected to penalties for violating §68 of the Public Service Law.

On July 12, 1996, NYSEG filed its response to Niagara Mohawk's Motion to Dismiss. The company disputed NMPC's assertions that we are without authority to grant retroactive approval of a certificate under PSL §68, as well as Niagara Mohawk's contention that Premier Center was an existing customer of NMPC. NYSEG noted that the line extension was entirely on private property, to a single customer, in a shopping center where the company was already providing service.

DISCUSSION AND CONCLUSION

Public Service Law §68 requires that our approval be obtained before an electric utility constructs electric plant and commences service or exercises any rights or privileges granted under a franchise. Further, 16 NYCRR §21.1(a) provides that an electric utility must file with the Commission an application which satisfies the requirements of PSL §68 before beginning construction of an electric plant in a territory where it has not been previously authorized to do so.

NYSEG in response to the Order to Show Cause filed its application for a §68 certificate to serve Premier Center.

Niagara Mohawk maintains that granting NYSEG retroactive approval of a certificate would establish as precedent that a utility may extend service to the customers of another utility already receiving adequate service from another utility without regard to franchise boundaries and then seek Commission approval for its actions. Moreover, NMPC argues that the pre-existing retail buildings which comprise the largest area

of Premier Center were long term customers of Niagara Mohawk; that NMPC was able to install its electric plant and facilities at a far lower cost; that the granting of a certificate would create a dual franchise area in the town and, that NYSEG does not have the necessary municipal consents because the franchise issued by Amherst was conditioned upon NYSEG not extending facilities and serving beyond the 200-foot franchise boundary, regardless whether the extension is on public or private property.

The various factual and other issues raised by Niagara Mohawk and NYSEG in their respective pleadings can be best explored and addressed in a formal proceeding before an Administrative Law Judge. Pending the conclusion of such a proceeding, it is proper to maintain the status quo. Accordingly, Niagara Mohawk's request for interim relief is denied.

The Commission orders:

1. A proceeding before an Administrative Law Judge concerning New York State Electric & Gas Corporation's application for a certificate of public convenience and necessity is hereby initiated.
2. Niagara Mohawk Power Corporation's request for interim relief is denied.
3. These proceedings are continued.

By the Commission,

(SIGNED)

JOHN C. CRARY
Secretary