

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on April 14, 1999

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
James D. Bennett
Leonard A. Weiss

CASE 98-E-1670 - Carr Street Generating Station, L.P. - Petition
for an Original Certificate of Public
Convenience and Necessity and For a Declaratory
Ruling On Regulatory Regime.

ORDER PROVIDING FOR LIGHTENED REGULATION

(Issued and Effective April 23, 1999)

BY THE COMMISSION:

BACKGROUND

In a petition dated October 23, 1998, Carr Street
Generating Station, L.P. (Carr Street), seeks issuance of a
Certificate of Public Convenience and Necessity (Certificate)
pursuant to Public Service Law (PSL) §68 and a Declaratory Ruling
on the regulatory regime that will adhere to its operations.
Carr Street owns and operates the 101 MW natural gas-fired East
Syracuse cogeneration facility formerly owned by East Syracuse
Generating Company, L.P. The power purchase contract between the
former owner and Niagara Mohawk Power Corporation (Niagara
Mohawk) was terminated under the Master Restructuring Agreement
for Niagara Mohawk adopted in Opinion No. 98-8.^{1/}

As a qualifying cogeneration facility under the Public
Utility Regulatory Policies Act of 1978 (PURPA) and PSL §2(2-a),

^{1/} Case 94-E-0098 - Niagara Mohawk Power Corporation -
PowerChoice Rate and Restructuring Plan, Opinion No. 98-8
(issued March 20, 1998).

Carr Street's plant was formerly exempt from most Public Service Law regulation. Carr Street, however, reports that it does not intend to operate as a cogenerator in the future. As a result, it asks for a determination of the regulatory requirements it must satisfy under the Public Service Law, and for exemption from many of those requirements. In comments filed on January 8, 1999, Independent Power Producers of New York, Inc. (IPPNY) and Sithe Energies, Inc. (Sithe) support Carr Street's positions.

POSITIONS OF THE PARTIES

Carr Street's Petition

Describing its plans, Carr Street announces it would enter into an agreement with Constellation Power Source, Inc. (CPS), with CPS providing the fuel for generation and Carr Street making available to CPS all of the electric capacity, electric energy, and ancillary services produced at the facility, other than for station use. As Carr Street explains it, CPS would in turn sell the electricity products into the emerging wholesale market for competitive generation. Carr Street also relates that it does not expect to market significant portions of the facility's steam output. As a result, it will no longer qualify as a cogeneration facility under PSL §2(2-a), and would therefore become an electric corporation under PSL §2(13).

According to Carr Street, it qualifies for issuance of a Certificate under PSL §68, because its facility is already built, and it will participate in the emerging wholesale competitive market that will reduce electricity prices within New York. Following certification, Carr Street contends, it should be regulated less stringently than under the requirements that were imposed in the Wallkill Orders.^{1/}

^{1/} Case 91-E-0350, Wallkill Generating Company, L.P. - Lightened Regulation, Order Establishing Regulatory Regime (issued April 11, 1994)(Wallkill Regulatory Order); Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991).

Carr Street explains that further lightening of regulatory requirements is appropriate in view of the progress made in deregulating the market for electric generation. Since that market will dictate the price it can charge for electricity, Carr Street continues, its structuring of its financial transactions and its management of its operations will not affect the rates charged to consumers. Analyzing the regulatory requirements promulgated in PSL §§69, 70, 106, 107 and 110, Carr Street perceives a design intended to protect captive ratepayers from unfair practices by utility monopolies. It argues that imposing these requirements on its participation in the competitive wholesale generation market would serve no purpose and is not necessary to protect the public interest, but could hinder it in its quest to compete in the market. Carr Street maintains that the Wallkill Orders should be revisited, and it should be freed from those constraints adopted there.

IPPNY's Comment

IPPNY supports Carr Street's request to reconsider the Wallkill Orders, and maintains that Carr Street should be authorized to undertake the activities identified in PSL §§69, 70, 106, 107 and 110 without seeking further approvals. While conceding that waivers of regulatory requirements were denied in the Wallkill Orders, IPPNY argues that increasing competition in the wholesale electric market renders those requirements irrelevant to merchant plant operations like Carr Street's. Merchant plants, IPPNY maintains, are constrained in the price they may charge by market forces.

As a result, IPPNY declares, merchant plant financing and organizational structure, and their sales of assets, will not affect the prices consumers pay for electricity. Consequently, IPPNY continues, the statutory protections against utility monopoly abuses are no longer needed. Instead, IPPNY asserts, imposing these regulatory requirements would run counter to the trend of streamlining regulation and could disrupt the

development of the robust and diverse market now relied upon to control prices.

According to IPPNY, the Public Service Law should be interpreted by conducting a "realistic appraisal" of the particular circumstances attending an entity's operations, and then furthering the Legislature's fundamental intent in addressing those circumstances.^{1/} IPPNY believes this standard has been applied previously in finding that gas marketers and energy services companies are outside the scope of PSL Article II, and that the courts have upheld this approach.^{2/} A realistic appraisal of these circumstances, IPPNY contends, justifies a conclusion that the provisions of PSL §§69, 70, 106, 107 and 110 should not be applied to merchant plants.

Sithe's Comment

Sithe reports that its affiliate, Power City Partners, L.P., operates a 79 MW cogeneration facility that may be subject to the same lightened regulatory requirements adopted for Carr Street. Sithe supports Carr Street, noting that neither it nor Carr Street are subject to rate of return regulation, where application of the statutory requirements intended for utility monopolies would be appropriate. Sithe maintains that imposing those requirements on merchant plants would serve no purpose and would unnecessarily drive up transaction costs.

DISCUSSION AND CONCLUSION

A realistic appraisal is needed to ascertain the Public Service Law requirements that should be imposed on new forms of electric service providers that differ in character from traditional electric utility monopoly providers. A realistic

^{1/} Niagara Mohawk Power Corporation v. Public Service Commission, 69 N.Y.2d 365, 372 (1987).

^{2/} Public Utility Law Project, Inc. v. Public Service Commission, Index No. 4509-96 (Alb. Cty. Sup. Ct., April 29, 1997); aff'd on other grounds, ___ A.D.2d ___, 681 N.Y.S.2d 396 (3rd Dept. 1998).

appraisal yields different results depending upon the characteristics of the electric services provider. As a result, applying the Public Service Law to generating facilities that intend to operate as merchant plants in a wholesale market will result in a different outcome than applying the statute to energy services companies that do not own generating plant, but instead market electricity services to retail customers.

In conducting a realistic appraisal, the first consideration is whether a particular section of the Public Service Law is inapplicable on its face. If a provision is applicable, the next analysis is to determine if it is possible for an entity to comply with its requirements of a provision. In the Wallkill Orders, and subsequently, it has been determined that compliance with some of the provisions Carr Street identifies is feasible.^{1/} The inquiry, however, does not end at that point.

Even if an entity could theoretically comply with a statutory provision, a realistic appraisal requires an analysis of whether imposing the requirement is necessary to protect the public interest, or would instead adversely affect the public.^{2/} Inasmuch as the legislative purpose in enacting the Public Service Law was to ensure that the monopoly electric service providers charged only "just and reasonable" rates for electric services, and we have determined that those rates are now best achieved through market competition,^{3/} it is no longer necessary or appropriate to apply some of the provisions of the Public

^{1/} See also, Case 96-M-1108, Brooklyn Union Navy Yard Cogeneration Partners, L.P. - Lightened Regulation and Certification, Order Granting Certificates of Public Convenience and Necessity and Denying Requests For Declaratory Ruling (issued April 17, 1997).

^{2/} See, e.g., Case 94-E-0952, In the Matter of Competitive Opportunities For Electric Service, Opinion No. 97-17 (issued November 18, 1997), pp. 31-35.

^{3/} Case 99-E-0952, supra, Opinion No. 96-12 (issued May 20, 1996).

Service Law to merchant plants like Carr Street that operate exclusively in the wholesale market. To ensure that the market for electric retail services remains competitive, however, sufficient authority must be retained under the Public Service Law to protect that market from suppliers that might attempt to acquire or exercise market power. After considering these factors, we direct Carr Street to comply with the Public Service Law, consistent with the following.

As PSL Article 1 provides, Carr Street meets the definition of an electric corporation under PSL §2(13) even though it is structured as a limited partnership. It is further subject to our regulation as an entity engaged in the manufacture of electricity under PSL §5(1)(b). These provisions ensure that jurisdiction may be exercised, under PSL §§11, 19, 24, 25 and 26, to 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 customers, and so is inapplicable to wholesale generators like Carr Street. Certain provisions of Article 4 are similarly restricted to retail customers, and will not be applied to Carr Street.^{2/} As discussed in the Wallkill Orders and their progeny, however, the provisions set forth in Article 4 at PSL §§66(6), 68, 69, 69-a, and 70 pertain to wholesale generators participating in the competitive market. Carr Street and its supporters urge that these precedents be revisited, and that a Certificate be issued under PSL §68.

^{1/} The assessment provided for in PSL §18-a is applied against gross retail revenues; for a wholesaler like Carr Street, there are no retail revenues and so no assessment would 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.

Contrary to the parties' arguments, those provisions of Article 4 remain relevant in the emerging competitive market. Those statutes ensure that electric corporations -- including those that limit their activities to generating electricity and then selling it at wholesale -- provide safe and adequate service, facilities and instrumentalities, and otherwise act in the public interest. PSL §68 ensures that the construction of electric plant is in the public interest, whether that plant is intended to serve retail customers or wholesale customers. Similarly, PSL §§69, 69-a and 70, which provide for the review of securities issuances, reorganizations, and transfers of securities or works or systems, ensure 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 Article 4 provisions to wholesale generators remains necessary in light of obstacles to entry into the generation market. Given those obstacles, securities issuances, reorganizations, and property transfers might be manipulated to obtain undue control over generation assets or to exercise undue influence over the operation of the generation marketplace. The parties raise concerns about the burdens associated with the application of these requirements, but the statutory provisions can be implemented in a fashion that limits the impact in a competitive market. Authority over these matters has been exercised flexibly, at our discretion, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest requires.

As a result, those provisions of Article 4 as discussed above do adhere to Carr Street. As in the Wallkill Orders, however, Carr Street may fulfill its obligation to file an annual report, pursuant to §66(6), by submitting the information it is obliged to file with the Federal Energy Regulatory Commission. Moreover, the certification requirement under §68 pertains only to electric corporations that intend either to construct new electric plant (unless such plant is reviewed pursuant to PSL

Articles VII or X) or to sell electricity via direct interconnection to retail customers.^{1/} Given that Carr Street does not plan to construct new electric plant and does not intend to serve retail customers directly, it need not obtain a Certificate.

Moreover, in the Wallkill Orders, it was presumed that §70 regulation would not "adhere to transfer of ownership interests and entities from the parents of the 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."^{2/} That presumption is continued for Carr Street, 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.^{3/}

Turning to the provisions of PSL Article 6, these provisions were enacted largely to address potential abuses associated with large utility holding companies, or growing out of utility dealings with affiliates and subsidiaries, that might force retail rates upward. The Article 6 requirements that, on their face, adhere to the rendition of retail service do not pertain to Carr Street, because it is engaged solely in the

^{1/} Case 93-E-0999, Grumman Aerospace Corporation - Electric Corporation Regulation, Declaratory Ruling (issued January 26, 1994).

^{2/} Wallkill Regulation Order, pp. 9-10.

^{3/} In this context, under PSL §§66(9) and (10), and §110(2) as discussed below, we may require access to records sufficient to ascertain whether the presumption remains valid.

generation of electricity for wholesale.^{1/} PSL §108, on mergers and dissolutions of public utility corporations, does not apply because Carr Street is a limited partnership at this time, and, in any event, the public interest does not require §108 review of its involvement in those transactions. Application of PSL §115, on requirements for the competitive bidding of utility purchases, is discretionary. As decided in the Wallkill Orders, we will not impose it 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.

The remaining provisions of Article 6 need not be imposed generally on wholesale generators. These provisions were intended principally to prevent financial manipulation or unwise financial decisions that could adversely impact rates paid by customers of monopoly service providers. So long as there is an effectively competitive wholesale generation market, the public interest does not require that we investigate the financial manipulation or poor financial management of wholesale generators. We do not regulate the wholesale rates these providers charge, and the market will prevent them from charging higher electric rates even if their costs rise due to their poor management. Moreover, these Article 6 provisions bear only peripherally, if at all, on the regulation of generation plant and their application to revenues derived from the rendition of wholesale services is unnecessary.

Carr Street, however, reports that it has entered into an arrangement with CPS, an affiliated interest that will market

^{1/} See, e.g., PSL §§112, regarding judicial enforcement of rate fixing orders; 113, regarding reparations and refunds; 114, regarding temporary rates; 114-a, regarding rates not to include the cost of legislative lobbying; 116, regarding discontinuance of water service to multiple dwellings; 117, regarding consumer deposits; 118, regarding payment to an authorized payment agency; 119-a, regarding use of utility poles, ducts, trenches and conduits; and, 119-c, regarding tax reduction benefits to ratepayers.

Carr Street's electric production along with electric production CPS would obtain from other sources. This relationship raises potential market power issues beyond these present where a wholesaler is not so affiliated, because CPS could acquire market power through its affiliations.

These issues may be addressed through PSL §§110(1) and (2), which afford us jurisdiction over affiliated interests. In the unlikely event such issues arise, PSL §110(2), on access to books and records and the filing of reports, pertains to Carr Street and CPS under these circumstances. PSL §110(1), on reporting of stock ownership, is inapplicable to Carr Street so long as it is organized as a limited partnership. As a result, Carr Street and CPS 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.

Other Article 6 requirements include approval of: loans under §106; the use of utility revenues for non-utility purposes under §107; contracts between affiliated interests under §110(3); and, water, gas and electric purchase contracts under §110(4). Imposing these requirements could unnecessarily hinder competitive wholesale generators by interfering with their flexibility in structuring the financing and ownership of their facilities. For instance, subjecting these electric corporations to review of their operational and service contracts with affiliates under §110(3), and their gas purchase contracts under §110(4), might inject a significant degree of uncertainty into their decision-making, or discourage entry into the wholesale market. This could adversely affect the fluid operation of the market, to the detriment of the public interest.

Consequently, we will not impose the requirements of Article 6 on Carr Street, except for §110(2) and §119-b. Carr Street 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 to the other requirements of PSL Articles 1 and 4, to the extent discussed above.

The Commission orders:

1. Carr Street Generating Station, L.P. 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. Carr Street Generating Station, L.P. 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.

By the Commission,

(SIGNED)

DEBRA RENNER
Acting Secretary