

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on December 11, 2014

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman

CASE 14-E-0372 - Binghamton BOP LLC - Petition for an Original
Certificate of Public Convenience and Necessity
and Establishing a Lightened Regulatory Regime.

ORDER GRANTING A CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY AND PROVIDING FOR LIGHTENED REGULATION

(Issued and Effective December 11, 2014)

BY THE COMMISSION:

BACKGROUND

In a petition filed on August 22, 2014, Binghamton BOP LLC (Binghamton BOP or the Petitioner) requests issuance of a Certificate of Public Convenience and Necessary (CPCN) and application of a lightened regulatory regime to its operation of the 47.7 MW Binghamton Cogeneration Plant (Binghamton Plant), located in Binghamton, New York. The Binghamton Plant was retired in 2012 by its then-owner, Standard Binghamton, LLC; Binghamton BOP purchased it later that year. Binghamton BOP requests Commission authorizations to commence operations at the Binghamton Plant by the end of this year, 2014, for which it requires, pursuant to Public Service Law (PSL) §68, a CPCN.

On November 7, 2014, Binghamton BOP moved, pursuant to 16 NYCRR §21.10, to expedite the process for considering its request that a CPCN be issued. On November 14, 2014, pursuant

to 16 NYCRR §21.10(a)(3), Binghamton BOP filed proof that it made the requisite newspaper publication of notice of its motion on November 11, 2014. Comments on the motion were due 10 days following publication, on November 21, 2014. No comments were received.

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of Binghamton BOP's petition in this proceeding was published in the State Register on September 17, 2014. The SAPA §202(1)(a) period for submitting comments in response to the petition expired on November 1, 2014. No comments were received.

THE PETITION AND MOTION

Binghamton BOP begins by explaining that it owns the Binghamton Plant, which was retired in 2012 upon compliance with the Commission's generation unit retirement notice procedures.¹ At that time, the Binghamton Plant was owned by Standard Binghamton LLC, which subsequently sold the facility to Binghamton BOP later in 2012 after the retirement was effectuated. As described in the Petition, the land upon which the Binghamton Plant is located is owned by Binghamton Land LLC, an affiliate of Binghamton BOP. Both affiliates are limited liability companies authorized to do business in New York, and both are wholly-owned subsidiaries of Wellhead Equipment Leasing, LLC, which in turn is a wholly-owned subsidiary of Wellhead Electric Company, Inc. (Wellhead).

Describing its qualifications to operate the Binghamton Plant, Binghamton BOP states that its parent,

¹ Case 05-E-0889, Establishment of Policies and Procedures Regarding Generation Unit Retirements, Notice of Intent to Discontinue Operations and Retire filed by Standard Binghamton LLC (dated November 16, 2011).

Wellhead, has been in the electric generation business for over 20 years, and its management and employees collectively have hundreds of years of experience in the operation of electric generating facilities. It also states that Wellhead is developing a 624 MW gas-fired combined cycle generating facility in the San Francisco Bay region and currently owns and operates nine power plants in California and one in Oregon.

Describing the Binghamton Plant, the Petitioner states that it has a nameplate rating of 47.7 MW. Before it was retired, the Binghamton Plant was capable of operating on natural gas or fuel oil; upon commencing operations following re-commissioning, Binghamton BOP explains that it intends to operate the facility using natural gas, but will reserve the option to use fuel oil.

When Binghamton BOP purchased the Binghamton Plant, its parent, Wellhead, removed the gas turbine generator from the plant but retained the remainder of the equipment on site, where personnel performed weekly maintenance activities. Outside technical consultants conducted periodic inspections to assess ongoing equipment condition and viability. The turbine, the Petitioner elaborates, is an LM 5000 unit manufactured by General Electric, has been maintained in a similar status at a Wellhead-owned location in California. The Petitioner voices its intention to reinstall either the original turbine or an identical model. The Petitioner maintains that, once the Binghamton Plant is re-commissioned and restored to service, its heat input and power production ratings should be the same as they were prior to 2012.

Stating that it is currently registering the Binghamton Plant with the New York Independent System Operators, Inc. (NYISO) and intends to sell its output into the NYISO's wholesale energy, capacity, and ancillary services markets,

Binghamton BOP explains its plans to commence new operations by noting its evaluation of market conditions as justifying operation of additional electric generating facilities in New York. The Petitioner affirms that it has maintained the operating air omissions permit for the Binghamton Plant also assures the Commission that it is in the process of securing any new permits required to operate the Binghamton Plant or to replace any that have otherwise lapsed. It also asserts that all applicable fees and property taxes due to date have been paid. Binghamton BOP also reports that it has notified New York State Electric & Gas Corporation (NYSEG) of the intent to resume operations, and that it is coordinating the restoration of gas service to the Binghamton Plant with work on the electrical interconnection needed to reconnect the Plant to the bulk power system.

Binghamton BOP contends that it has satisfied the requirements for obtaining a CPCN set forth in PSL §68 and 16 NYCRR §§21.2 and 21.3 and that re-commissioning the Binghamton Plant is in the public interest. It also requests that its ownership and operation of the Binghamton Plant be lightly regulated as an electric corporation in the same manner as other companies that own and operate electric generating facilities.

DISCUSSION AND CONCLUSION

Environmental Quality Review

In accordance with the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, New York State agencies must determine whether the actions that they are requested to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional state or local permits or approvals are required, and so a coordinated review under SEQRA is not

needed. We will assume Lead Agency Status under SEQRA and conduct an environmental assessment.

SEQRA requires project sponsors of Type I actions, as defined in 6 NYCRR §617.4, to complete an Environmental Assessment Form, describing and disclosing the likely impacts of the proposed action. Type II actions, as defined by 6 NYCRR §617.5 and 16 NYCRR §7.2 are not subject to review. The grant of a CPCN to Binghamton BOP allows falls under neither Type I nor Type II classification and is thus an 'unlisted' action under SEQRA. As such, it requires only the preparation of a Short Environmental Assessment Form (Short EAF) to determine, pursuant to 6 NYCRR §617.6(3), if the action will cause any adverse environmental impacts.

Binghamton BOP submitted with its Petition a short-form EAF Part 1. Department of Public Service Staff has completed the short-form EAF Part 2, noting, inter alia, that the existing Title V Air Permit has been maintained throughout the duration of the Binghamton Plant's retirement. The site upon which the Binghamton Plant is located is an area of mixed commercial, industrial, and vacant land, the last of which is to be re-developed for commercial, industrial, and manufacturing uses. The restoration of the Binghamton Plant and commencement of operations there will not interfere with the intended use of the adjacent parcels, and the facility is not located near wetlands, floodplains, or streams; furthermore, no rare, threatened, or endangered species or unique habitats exist at this location. Installation of the gas turbine will not disturb wildlife or resources or commit the site to a new or different land use than that currently used at the Binghamton Plant's location.

Upon review of the EAF and the Petition, the Commission concludes, based on the criteria for determining

significance listed in 6 NYCRR §627.7(c), that the re-commissioning of the electric facility and the commencement of new operations there will not result in significant adverse environmental impacts. Thus, as lead agency, the Commission determines that the action proposed in the Petition will not have a significant impact on the environment and adopts a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no public Notice Requesting Comments is required or will be issued. A Notice of Determination of Non-Significance for this unlisted action is attached. The completed EAF will be retained in our files.

Certification

PSL §68 first provides that the Commission's approval and permission is necessary for initiating construction on electric plant. Second, this section prohibits the exercise, by an electric corporation, of any right or privilege -- such as the interconnection necessary to operation of electric plant -- without first having obtained the permission and approval of the Commission.² These circumstances, however, raise questions not previously considered, in that this is the first instance where the owner of a retired electric generation facility has requested that it be returned to service. Because the Binghamton Plant was retired, its equipment at present no longer

² Binghamton BOP has provided the requisite organizational documentation showing it can engage in the business of electric generation, and it notes no new municipal rights or privileges need be obtained before it commences new operations.

constitutes "electric plant" as defined in PSL §2(12).³ At the time new operations commence, however, the equipment will again become electric plant, and so PSL §68 permission in the form of a CPCN must be obtained before that operation can take place.

While the circumstances at hand are sui generis, and do not involve the initial construction of an entirely new generating facility, Binghamton BOP intends to restore and re-commission of the Binghamton Plant more than two years after it was decommissioned. As Binghamton BOP explains, certain re-commissioning activities, including work on restoring its gas service, on reconnecting to the bulk power system, and on the reinstallation of the gas turbine, are necessary before the Binghamton Plant can commence new operations. Because these activities involved in restoring and re-commissioning the Binghamton Plant marks its status as new electric plant, irrespective of its prior loss of electric plant status, those activities amount to the construction of electric plant for which §68 permission is required. The exercise of the rights and privileges necessary to own and operate the Binghamton Plant further trigger the requirement that the Commission's approval be obtained pursuant to §68.⁴

The PSL §68 review conducted in determining if a CPCN should be granted is essential to ensuring that an electric corporation proposing to commence the generation of electricity

³ Cf. Case 14-E-0117, Mercuria Energy America, Inc., Order Approving Transfer and Making Other Findings (issued June 27, 2014) (generation facility transferred to a new owner while in a forced outage state, but not retired, remains "electric plant" such that approval of a transfer pursuant to PSL §70, is required, while permission to commence operates under PSL §68 is not).

⁴ Matter of Penn-York Natural Gas Corporation v. Maltbie, 164 Misc. 569 (Sup. Ct. Alb. Co. 1937).

is satisfactorily positioned to do so in a safe and adequate manner. To obtain a CPCN under PSL §68, an electric corporation must describe the plant to be constructed; show, after stating the costs of financing, that the financing is economically feasible and it is able to obtain it; demonstrate that it can render safe and adequate service; and otherwise support a finding that certification is in the public interest.⁵

After delineating the restoration and re-commissioning work, Binghamton BOP states that it intends to sell the 47.7 MW output of the Binghamton Plant into the NYISO's energy, capacity, and ancillary services markets. Its parent, Wellhead, is described as an experienced operator of gas-fired generating facilities committed to complying with the relevant design, construction, and operating requirements of the National Electric Safety Code and other applicable engineering codes. Moreover, the Binghamton Plant has been maintained in a condition that allows for its re-commissioning without the need for a major overhaul or extensive capital investments, with the cost for reconnection work estimated between \$100,000 and \$125,000. This amount would be financed from internal funds. It thus appears re-commissioning of the Binghamton Plant is feasible and that Binghamton BOP can satisfactorily finance the improvements, adequately perform the re-commissioning work, and capably operate the Plant upon commencement of service.

In claiming that re-commissioning of the Binghamton Plant is in the public interest, the Petitioner notes that the facility will be low-emitting, in that it formerly had not been considered a major source of air emissions under the applicable Clean Air Act regulations. Re-use of the same equipment, the Petitioner maintains, will not alter the facility's emissions

⁵ See 16 NYCRR §21.3.

profile.⁶ It also asserts that the technology used in the Binghamton Plant generally has a long record of reliable performance; that its availability should improve grid stability and provide local voltage support, if needed; and, that re-commissioning the Plant will create jobs and stimulate economic development in the Binghamton region. Accordingly, the commencement of operations at the Binghamton Plant upon its re-commissioning would be in the public interest.

The Petitioner has moved, pursuant to 16 NYCRR §21.10, to expedite the process for considering their request that any relief necessary under PSL §68 be granted. Pursuant to 16 NYCRR §21.10(a), the Petitioner filed proof that it made the requisite newspaper publication of notice of its motion on November 11, 2014. The Petitioner believes that prompt action is necessary because its Capacity Resource Interconnection Service status with NYISO is scheduled to expire on December 22, 2014, unless the Binghamton Plant commences operations before that time, and that securing that status anew from NYISO is expensive and time-consuming.

The Petitioner's motion for an expedited proceeding is therefore granted. A hearing having been held in this proceeding before the Commission on the application and other information filed by the Petitioner, without oral testimony, the Commission finds, as required by PSL §68, that the operation of the Binghamton Plant as described in the Petitioner's filings is necessary and convenient for public service. Therefore, a CPCN shall issue to Binghamton BOP.

⁶ Because Binghamton BOP does not report any affiliations with any other New York electric wholesale, retail or delivery service provider, or any gas service provider, its petition does not raise any market power issues.

Regulation of the Binghamton Plant

Binghamton BOP qualifies for lightened regulation of its operation of the Binghamton Plant. Lightened regulation was first applied to a competitive provider of electricity in the Wallkill Ruling,⁷ and the requirements adhering upon lightened regulatory status were further expounded in subsequent orders and rulings.⁸ This status serves to exempt competitive electricity providers from those statutory and regulatory requirements otherwise adhering to electric corporations that are inapplicable or otherwise unnecessary due to the nature of competitive operations.

Under this approach, PSL Article 1 applies to Binghamton BOP because it meets the definition of an electric corporation under PSL §2(13) and is engaged in the manufacture of electricity under PSL §5(1)(b). It 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.⁹

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 Binghamton BOP.

⁷ Case 91-E-0350, Wallkill Generating Company L.P., Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991).

⁸ See, e.g., Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P. Order Providing for Lightened Regulation (issued April 23, 1999) (AES Order); Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999) (Carr Street Order).

⁹ The PSL §18-a assessment is imposed on PSL-jurisdictional gross intrastate revenues; so long as Binghamton BOP sells exclusively at wholesale, there are no PSL-jurisdictional revenues and no assessment is collected.

Certain provisions of Article 4 are also inapplicable because they are restricted to retail service.¹⁰

It was decided in the Carr Street and Wallkill Orders that the remaining provisions of Article 4 would pertain to wholesale generators.¹¹ Application of these provisions is deemed necessary to protect the public interest. The Article 4 provisions, however, are implemented in a fashion that limits their impact on the operation of competitive electric markets. Under PSL §66(6), wholesale generators satisfy Annual Report filing requirements through a format designed to accommodate their particular circumstances.¹² Filings required under other provisions of Article 4 are reviewed with the scrutiny commensurate to the level the public interest requires. This analysis of Article 4 adheres to Binghamton BOP.

Regarding PSL §69, prompt regulatory action is possible through reliance on representations concerning proposed financing transactions. Additional scrutiny is not required to protect captive New York ratepayers, who cannot be harmed by the terms arrived at for these financings because lightly-regulated

¹⁰ See, e.g., PSL §§66(12) (optional tariff filings); §66(21) (retail electric corporation storm plans); §67 (inspection of meters); §72 (hearings and rate proceedings); §72-a (reporting increased fuel costs); §75 (excessive charges); and, §76 (rates charged religious bodies).

¹¹ PSL §68 provides for certification of the construction of new plant or the retailing of electricity to customers via direct interconnections. PSL §69, §69-a and §70 provide for the review of securities issuances, reorganizations, and transfers of securities or works or systems.

¹² Case 11-M-0295, Annual Reporting Requirements, Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation (issued January 23, 2013).

participants in competitive markets bear the financial risk associated with their financial arrangements.¹³

Regarding PSL §70, it was presumed in the Carr Street and Wallkill Orders 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.”¹⁴ In those Orders, however, wholesale generators were also 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 PSL §70 review. Binghamton BOP may avail itself of this presumption. Under PSL §§66(9) and (10), the Commission may require access to records sufficient to ascertain whether the presumption remains valid.

Turning to PSL Article 6, several of its provisions adhere only to the rendition of retail service. These provisions do not pertain to Binghamton BOP because it is engaged solely in the generation of electricity for wholesale.¹⁵ Moreover, 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

¹³ See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

¹⁴ Carr Street Order, p. 8; Wallkill Order, p. 9.

¹⁵ See, e.g., PSL §112 (rate order enforcement); §113 (reparations and refunds); §114 (temporary rates); §114-a (lobbying costs in rates); §117 (consumer deposits); §118 (bill payments via an agency); §119-a (use of utility poles and conduits); and §119-c (tax benefits in rates).

by excavators, adheres to all persons, including wholesale generators.

The remaining provisions of Article 6 need not be imposed generally on wholesale generators.¹⁶ These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers. In comparison, so long as the wholesale generation market is effectively competitive, or market mitigation measures yield prices aligned with competitive outcomes, 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, or introduce inefficiencies into the operation of that market, to the detriment of the public interest.

As discussed in the Carr Street Order, however, market power issues may be addressed under PSL §§110(1) and (2), which afford us jurisdiction over affiliated interests. Binghamton BOP has not reported any affiliation with a power marketer, foreclosing that avenue to the exercise of market power. Consequently, the requirements of §§ 110(1) and (2) are imposed on Binghamton BOP only conditionally, to the extent a future inquiry into its relationships with an affiliate becomes necessary.

Finally, notwithstanding that it is lightly regulated, Binghamton BOP is reminded that it and any other entities that exercise control over the operations of the Binghamton Plant

¹⁶ 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).

remain subject to the PSL 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 and in previous Orders.¹⁷

Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,¹⁸ to give notice of generation unit retirements,¹⁹ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

The Commission orders:

1. The motion for an expedited proceeding on the non-contested application for certification made by Binghamton BOP LLC is granted.

2. A Certificate of Public Convenience and Necessity is granted to Binghamton BOP LLC, to permit the operation of the electric generating facility as described in the body of this Order.

3. Binghamton BOP LLC shall comply with the Public Service Law by conducting its operations of the Binghamton Cogeneration Plant in conformance with the requirements set forth in the body of this Order.

¹⁷ See, e.g., Case 10-E-0501, CPV Valley LLC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing (issued May 9, 2014).

¹⁸ Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

¹⁹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

4. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 14-E-0372 - Binghamton BOP LLC - Petition for an Original Certificate of Public Convenience and Necessity and Establishing a Lightened Regulatory Regime.

NOTICE OF DETERMINATION OF NON-SIGNIFICANCE

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission of a Certificate of Public Convenience and Necessity authorizing Binghamton BOP LLC to commence operations at the Binghamton Cogeneration Plant located in the City of Binghamton, New York (Binghamton Plant). This is based upon our determination, in accordance with Article 8 of the Environmental Conservation Law, that such action will not have a significant adverse effect on the environment. The approval of this action is an Unlisted Action as defined under 6 NYCRR §617.2.

Based upon our review of the record, the issuance of a Certificate of Public Convenience and Necessity, pursuant to §68 of the Public Service Law, to authorize electrical reconnection and re-commissioning at the Binghamton Plant will not result in significant adverse environmental impacts.

The address of the Public Service Commission, the lead agency for the purpose of the Environmental Quality Review of this project, is Three Empire State Plaza, Albany, New York, 12223-1350. Questions may be directed to Dean Long at (518) 474-9870 or to the address above.

KATHLEEN H. BURGESS
Secretary