



Agenda Date: 10/25/19
Agenda Item: 2G

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE PETITION OF BAYONNE)
ENERGY CENTER, LLC FOR A DETERMINATION)
THAT THE BOARD OF PUBLIC UTILITIES HAS)
AUTHORITY TO REGULATE THE RATES AND)
SERVICE ON AN INTRASTATE TRANSMISSION)
PIPELINE SERVICING THE BAYONNE ENERGY)
CENTER) DOCKET NO. GO19050553

Parties of Record:

John G. Valeri, Jr., Esq., Chiesa Shahinian & Giantomasi PC, Attorneys for the Petitioner,
Bayonne Energy Center, LLC
Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel

BY THE BOARD:

On April 30, 2019, Bayonne Energy Center, LLC ("Petitioner") filed a Petition seeking a determination from the Board of Public Utilities ("Board") that an existing high-pressure 7,500-foot, 16-inch diameter pipeline that transports natural gas from an interconnection with Texas Eastern Transmission Co. ("TETCO"), to a sole delivery point at the Bayonne Energy Center ("BEC Pipeline"), is subject to the Board's jurisdiction.¹

Concurrently, Petitioner is seeking a limited jurisdiction Hinshaw blanket certificate ("Hinshaw Certificate") from the Federal Energy Regulatory Commission ("FERC") to render a proposed 500-foot extension of the BEC Pipeline (the "Proposed Pipeline") exempt from FERC jurisdiction. To receive the Hinshaw Certificate, Petitioner must represent to the FERC, among other things, that the BEC Pipeline is subject to the Board's jurisdiction.

¹ Petitioner further seeks a determination that, notwithstanding this jurisdictional determination, the Board should not exercise rate and service regulation of the BEC Pipeline at this time.

BACKGROUND

Petitioner owns and operates the Bayonne Energy Center ("BEC"), a natural gas fired power plant located in Bayonne, New Jersey, interconnected to the transmission system owned by Consolidated Edison Company of New York, Inc. ("Con Edison"), and operated by the New York Independent System Operator ("NYISO").

In 2017, Petitioner constructed the BEC Pipeline under the jurisdiction of the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration. The sole use of the BEC Pipeline is to fuel BEC. The BEC Pipeline has no third party customers.

BEC obtains natural gas from two sources: (1) The TETCO interstate pipeline via the BEC Pipeline, and (2) The Transcontinental Gas Pipe Line Company ("Transco") via the Transco Bayonne Lateral Pipeline ("Transco Pipeline"). The Transco Pipeline and BEC Pipeline both terminate at BEC, offering redundant gas service to BEC. Currently, BEC has no ability to transfer gas from the BEC Pipeline to the Transco Pipeline.

Petitioner now intends to construct a 500 foot extension of the BEC Pipeline to interconnect the BEC Pipeline with the Transco Pipeline. The purpose of this Proposed Pipeline is to allow the Petitioner to "engage in non-discriminatory sales and transportation of natural gas in interstate commerce." See Petition at p. 3. Petitioner asserts that this pipeline will provide a redundant pathway for gas from the TETCO Pipeline to serve BEC. Additionally, Petitioner explains that it, from time to time, purchases gas from TETCO in quantities that exceed its expected gas burn at the power plant. Petitioner asserts that the Proposed Pipeline will allow BEC to sell this "excess gas" onto the Transco Pipeline, thereby maximizing its revenues and avoiding potential losses associated with the inevitable mismatch between gas purchases and gas burns. Petitioner notes that after construction of the Proposed Pipeline, the BEC Pipeline will continue to operate to provide natural gas to BEC. There will remain no prospect for third parties to use the BEC Pipeline, even via the Proposed Pipeline.

On May 1, 2019, the Petitioner filed an Application with the FERC for a Hinshaw Certificate which exempts pipelines that transport gas in interstate commerce from FERC jurisdiction if (1) they receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state, and (3) the pipeline is regulated by a state Commission. 15 U.S.C. § 717(c). See ANR Pipeline Co. v. FERC, 71 F.3d 897, 898-99 (D.C. Cir. 1995).

On April 30, 2019, almost concurrent with the filing at FERC, the Petitioner filed the current Petition with the Board for a declaratory judgment that the existing BEC Pipeline is a public utility subject to the Board's jurisdiction. Petitioner asserts that it can demonstrate the first two prongs of the Hinshaw Certificate requirements, and now seeks a Board determination to satisfy the third.

The Petition provides that N.J.S.A. 48:2-13(a) grants the Board authority to exercise jurisdiction over gas pipelines operated for "public use." Petitioner cites In re Petition of Global Utility Services, LLC, BPU Dkt. No. WO080870500 (February 3, 2009) and notes that the Board considers: "(1) the present and potential use of the system; (2) whether a significant number of customers are being served; and (3) whether there is an economic impact on the regulated market" when determining public use. See Petition at p. 5. Petitioner argues that the BEC Pipeline is a benefit to the general public because BEC generates electricity and serves the

wholesale electricity market and therefore indirectly serves a significant number of retail customers. Further, Petitioner asserts that allowing BEC to mitigate losses associated with excess gas will allow Petitioner to bid more efficiently into the marketplace, and that the BEC Pipeline serves the general public by helping BEC maintain a reliable fuel source.

Finally, after arguing in favor of Board jurisdiction, Petitioner argues that rate and service regulation is not necessary at this time because BEC is the single receipt point and single delivery point and BEC "does not use the BEC Pipeline to transport natural gas for, or sell natural gas to any third party, not do any other shippers use the BEC Pipeline." See Petition at p.6.

On September 12, 2019, the Division of Rate Counsel submitted a letter indicating that it takes no position on the Petition.

DISCUSSION AND FINDINGS

The regulatory and jurisdictional powers of the Board are provided in N.J.S.A. 48:2-13(a), which provides, in pertinent part, as follows:

The board shall have general supervision and regulation of and jurisdiction and control over all public utilities, as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for carrying out the provisions of this Title.

The term "public utility" shall include every individual, co partnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, that now or hereafter may own, operate, manage or control within this State any...pipeline, gas, electric light, heat, power, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

Id.

The Board determines public use on a case-by-case basis, considering present and potential use, based upon the following five factors:

- (1) Whether a significant number of retail customers are being served;
- (2) whether the facilities are located in public streets and/or whether other public resources are utilized;
- (3) whether the company provides meters and/or charges separately for its service;
- (4) whether and to what extent there is an economic impact on the regulated market; and
- (5) whether there is a potential for expansion.

See In The Matter Of The Request Of Princeton Bio-Technology Center Condominium For A Determination That Its Provision Of Sewerage Treatment Services Does Not Constitute Service Pursuant To N.J.S.A. 48:2-13, Dated November 9, 2004.

The Board applied the above five factors in Lewandowski v. Brookwood Musconetcong River Property Owners' Association, 37 N.J. 433 (1962) where the New Jersey Supreme Court upheld the Board's determination that the property owners' association ("Association"), which operated a water system supplying water service for a development of up to 1,000 single family homes, was a public utility. The Board found that the membership restrictions were so broad that the Association could not be construed as private, the streets above the mains had been dedicated to the public use, and municipal consents to operation of the system were implied in the agreements recognizing the use of the streets for that purpose. In upholding the Board's decision, the Court agreed that there was a public use, finding that there was a significant use of the State's natural resources for the ultimate use of a broad group of consumers.

Conversely, when applying the five factors in In Re General Motors Corp., BPU Docket No. EE95100486 (July 15, 1996), in response to a petition for a declaratory ruling, the Board determined that an on-site cogeneration project (known as "TES") developed by an independent subsidiary of a Texas public utility to supply the energy needs of a single General Motors plant, was not a public utility. The Board stated that the decision on public use must be made on a case-by-case basis, weighing the impact of the various factors to determine whether the overall public interest is best served by the exercise of the Board's regulatory authority. The Board concluded that since the size of the plant was limited, there would be no third party sales outside of possible incidental sales of excess electricity to an electric public utility subject to BPU jurisdiction, public resources were not diverted, no necessity of life was provided, and there was no public interest in providing protection to the industrial customers involved, subject to stated restrictions, the TES would not be a public utility.

In applying the five factors to the current Petition, the facts align more with In Re General Motors Corp. than Lewandowski.

First, similar to In Re General Motors, Corp., the only consumer is the plant itself, which is being served by an existing interstate pipeline. See In Re General Motors, Corp. Petitioner concedes as follows:

The sole purpose of the BEC Pipeline, at the time it was constructed and as currently configured, is to provide natural gas to fuel BEC. Hence the BEC Pipeline has no third-party customers. BEC is the BEC Pipeline's only beneficiary.

See Petition at p.2. The lack of third party sales will continue even after the Proposed Pipeline is constructed and placed into service. Id.

Petitioner attempts to address this issue by suggesting that "BEC serves directly the wholesale power markets and, indirectly thereby, a significant number of electric power customers." See Petition at p. 5. We find this unavailing. The electric "customers" BEC purports it is serving as a basis for arguing public use are New York customers in the NYISO region, not New Jersey customers, nor any utility customers within the PJM Interconnection region.²

Second, the Petition provides no facts demonstrating use of public streets or resources.

Third, the meters here only measure gas received from the TETCO or Transco interstate pipelines. Specifically, Petitioner "takes title to the natural gas at a meter station located where the BEC Pipeline interconnects with TETCO and maintains custody while transporting the natural gas from there, through the BEC Pipeline, to BEC." See Petition at p.6. These facts are further in favor of finding that the BEC Pipeline is not a public utility subject to Board regulation.

Fourth, regarding the impact on the regulated market, as provided above, Petitioner argues that "BEC serves directly the wholesale power markets and, indirectly thereby, a significant number of electric power customers." See Petition at p. 5. This argument turns the Electric Discount and Energy Competition Act, N.J.S.A. 48:3-39, et. seq. ("EDECA") on its head. Petitioner appears to argue that gas fired electric generators, which were de-regulated by EDECA, are gas utilities by virtue of the fact that they are used to generate electricity that eventually will serve a customer. Here, the gas is traveling from one interstate pipeline to another to be transported in interstate commerce outside of New Jersey. As such, BEC in addition to failing to demonstrate a public use, BEC has failed to demonstrate a public benefit to New Jersey.

Fifth, the Board must examine whether there is a potential for expansion. "[T]he as-built capacity of the BEC Pipeline can accommodate only BEC's requirement. Petitioner will continue to use the BEC Pipeline as it was designed originally, even if the Proposed Pipeline is constructed and placed into service," and there are no plans for third party sales from the BEC Pipeline. See Petition at p.4.

As previously provided by the Board, a decision on public use is made by weighing the impact of the various above five factors to determine whether the overall public interest is best served by the exercise of the Board's regulatory authority. Here the BEC Pipeline, is a lateral pipeline serving BEC from an interstate pipeline. Petitioner is the only customer served, there are no third party connections or customers, and the Proposed Pipeline (which will extend the BEC Pipeline) is being constructed to transport gas between two interstate pipelines, the TETCO Pipeline to the Transco Pipeline.

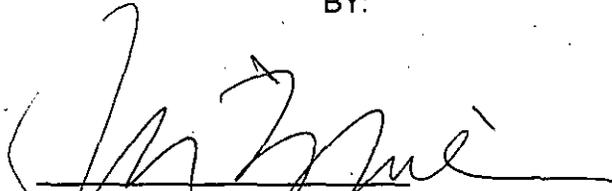
Therefore, based upon the foregoing and the record in this matter, the Board **HEREBY FINDS** that the BEC Pipeline is not subject to the Board's regulation as a public utility pursuant to N.J.S.A. 48:2-13(a). Accordingly, the request for a declaratory ruling that the BEC Pipeline be declared a public utility under the factual circumstances presented is **HEREBY DENIED**.

² While the Board recognizes the theoretical possibility that power could flow from the New York region back into New Jersey, we find such a connection too tenuous to satisfy the public use requirement.

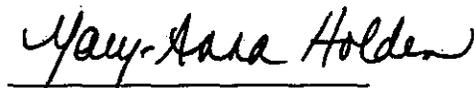
This Order shall be effective on November 4, 2019.

DATED: 10/25/19

BOARD OF PUBLIC UTILITIES
BY:



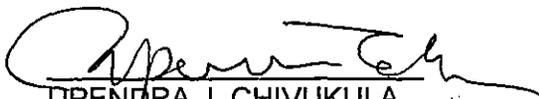
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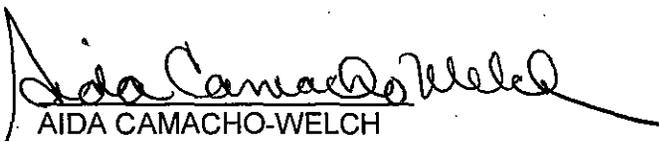
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ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

I HEREBY CERTIFY that the within
document is a true copy of the original
in the files of the Board of Public Utilities.

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DETERMINATION THAT THE BOARD OF PUBLIC UTILITIES HAS AUTHORITY TO
REGULATE THE RATES AND SERVICE ON AN INTRASTATE TRANSMISSION
PIPELINESERVICING THE BAYONNE ENERGY CENTER
DOCKET NO. GO19050553**

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