



Agenda Date: 1/28/09
Agenda Item: 2C

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE FILING OF A SPECIAL)
CONTRACT BY PIVOTAL UTILITY HOLDINGS, INC.)
d/b/a ELIZABETHTOWN GAS) DECISION AND ORDER
DOCKET NO. EO08090829

(SERVICE LIST ATTACHED)

BY THE BOARD:

On September 29, 2008, Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas ("Petitioner," "Elizabethtown," or "Company") filed a request, pursuant to *N.J.A.C. 14:3-1.3(e)* and (f), with the New Jersey Board of Public Utilities ("Board"), seeking approval of a "Peaking Gas and Gas Transportation Service Agreement" between Elizabethtown and Merck & Co., Inc. ("Merck") (hereinafter "Special Contract"), to avoid a bypass of the distribution system by Merck. The Petition also requested confidential treatment of certain commercially sensitive portions of both the proposed Special Contract and the supporting affidavits of Gary S. Marmo and Leonard J. Willey in accordance with *N.J.A.C. 14:1-12.1 et seq.* Support for the confidentiality agreement was provided in affidavits filed by David L. Brooks, on behalf of Merck, and Gary S. Marmo, on behalf of Elizabethtown.

Under the proposed Special Contract, Elizabethtown will provide natural gas transportation service at negotiated rates to Merck's pharmaceutical research and production plant (the "Plant") in Linden/Rahway, New Jersey. Under the proposed Special Contract, Elizabethtown will also purchase peaking service from Merck. For that reason, the Petition also contained a request for a determination that Merck's sales of gas under this Special Contract will not cause Merck to become, be, or be deemed to be, a "public utility" under *N.J.S.A. 48:2-13*.

BACKGROUND

Currently, Elizabethtown provides service to the Plant under its Interruptible Transportation Service/Large Volume Demand ("ITS/LVD") Service Classification. Elizabethtown indicates that the Plant is one of the Company's largest customers.

Elizabethtown states that in the fall of 2006, Merck approached Elizabethtown about the possibility of obtaining a special contract for gas service to the Plant. Merck explained that it was seeking to reduce its energy costs at the plant due to increasing global competition from other entities engaged in pharmaceutical research and manufacturing. Merck further explained that it was contemplating a complete bypass of Elizabethtown's distribution system through an interconnection of its facilities with one of two nearby interstate natural gas pipelines,

Transcontinental Gas Pipe Line Corporation or Texas Eastern Transmission System, LLC. Petitioner entered into negotiations with Merck for a Special Contract.

During the course of negotiations, Merck filed a complaint with the Board seeking a refund and reduction of claimed overcharges for an increase in the Distribution Charge for ITS/LVD service. This complaint is currently pending before the Office of Administrative Law under a separate docket.¹ Elizabethtown states that after protracted and difficult negotiations, the Company entered into the proposed Special Contract with Merck. Issues associated with the complaint are resolved by this Special Contract.

Petitioner notes that under the Special Contract, Merck will continue to be an ITS/LVD customer, with the exception of different rates and certain terms and conditions of service. Significant provisions of the Special Contract include: (1) a term of twenty years, subject to certain early termination rights; (2) the provision by Elizabethtown of transportation service to Merck under the ITS/LVD Service Classification at charges that will permit Elizabethtown to continue to serve Merck at rates that exceed the marginal cost of providing such service; (3) payment by Merck of the full volumetric SBC rate; and (4) the purchase by Elizabethtown of incremental peaking supplies during each winter season in which the contract remains in effect at a price that is reasonable and consistent with market conditions.

PROCEDURAL HISTORY

Representatives of the Company, Merck, Board's Staff, and the New Jersey Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") (hereinafter collectively "the Parties") met to review the proposed Special Contract. Comments were submitted by Rate Counsel on January 19, 2009. Staff recommends approval of the Contract. Rate Counsel filed a letter with the Board concerning the Special Contract stating that while it did not object to the Special Contract, it did believe that the Board should order customers such as Merck to pay any additional costs imposed by the Board on ratepayers in the future.

DISCUSSION AND FINDINGS

As an initial matter, the Board finds that the proposed relationship will not, in and of itself, cause Merck to become a public utility as the term is used by the Board.

The definition of a public utility is controlled by *N.J.S.A. 48:2-13*. The statute states, in pertinent part:

The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any ... pipeline ... system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof.

[*N.J.S.A. 48:2-13(a)*.]

¹ I/M/O Merck & Company Inc. vs. Elizabethtown Gas Company –Verified Complaint and Motion for Declaratory Ruling dated January 10, 2008 BPU Docket No. EO08010018.

The test of whether an operation should be classified as a public utility has two distinct elements: (1) for public use; and (2) under privileges granted by the State. Both elements must be satisfied before an entity will be classified, and thus regulated, as a public utility.

The privileges granted by the State element of the test do not simply include the issuance of a franchise. *Lewandoski v. Brookwood Musconetcong River Ass'n*, 37 N.J. 433, 447, (1962). Instead, these privileges can include a broad and encompassing listing of benefits, such as the privilege to carry on business in the State under the New Jersey Incorporation Act. *Ibid.* The "privileges granted by the State" element of the test is here clearly satisfied. Merck is incorporated in the State of New Jersey, and thus enjoy benefits flowing from the State. As such, the proposed Special Contract fits under the "privileges granted by the State" element of the Statute.

The second element of the test involves the question of public use. Whether a system is operated "for public use" depends on the character and nature of the use, and not on any particular structure of the operation. *Lewandoski v. Brookwood Musconetcong River Ass'n*, 37 N.J. 433, 445-46, (1962). Previous systems found to be engaged in public use have involved the distribution of fuel oil to residents of a housing complex, *I/M/O Petition of New Jersey Natural Gas Company to Have Rele, Inc. And/Or Redi-Flo Corporation of New Jersey, Adjudges A Public Utility*, 109 N.J. Super. 324 (App. Div. 1970), and a water distribution system designed to serve all purchasers of a development open to the public, *Lewandoski, supra*, 37 N.J. at 433. Unlike those situations, the Special Contract proposal is not setting up a system where the public will or can be served; instead it is limited to a single, non-public customer. As such, the proposed Special Contract fails to satisfy this second element of the test and therefore is not, as currently described, a public utility under the Board's N.J.S.A. 48:2013 jurisdiction.

Accordingly, the Board HEREBY FINDS that Merck shall not be classified as a public utility or subject to N.J.S.A. 48:2-13 jurisdiction, based upon the proposed Special Contract set forth in this petition. The Board FURTHER FINDS that nothing in this decision relieves Petitioners from jurisdiction of the Board in terms of the ownership, management or operation of pipelines or generation facilities; the only determination made herein is that the Board will not exert public utility regulation over the entities based upon the proposed project set forth by the Special Contract. Finally, the Board FURTHER FINDS that this determination applies only to these Petitioners and this Special Contract, and that any modification of the Special Contract shall constitute a change of circumstances such that the findings of this Order may be rendered null and void.

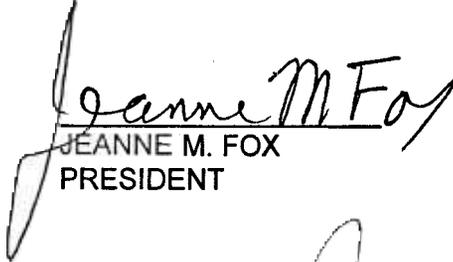
Furthermore, the Board HEREBY FINDS that the Special Contract appears to be just and reasonable, in the public interest, and in accordance with law. The Special Contract will enable Elizabethtown to avoid a bypass by Merck while preserving substantial benefits for Elizabethtown's other customers from continued contributions to distribution costs and from a valuable and necessary peaking service provided to Elizabethtown at fair and reasonable costs. Furthermore, the Special Contract will not have a negative impact upon rates paid by ratepayers in general and will have a positive benefit by requiring Merck to pay the Societal Benefits Charge.

On the basis of these findings, the Board HEREBY APPROVES the "Peaking Gas and Gas Transportation Service Agreement" between Elizabethtown and Merck & Co., Inc., predicated upon Merck withdrawing both its complaint against Elizabethtown and its Motion for Declaratory Ruling and HEREBY ORDERS the implementation of Elizabethtown's Special Contract with

Merck effective on the date of this Order. As to the request for confidentiality on the part of the Special Contract, the Board will follow its guidelines for confidentiality as set forth in N.J.A.C. 14:1-12.1 et seq., including the provision that confidentiality determinations shall be made following a request as set forth in N.J.A.C. 14:1-12.6(a), and therefore makes no determination of confidentiality at this time.

DATED: 1/28/09

BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

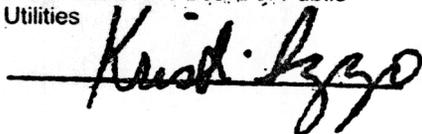

NICHOLAS ASSELTA
COMMISSIONER


ELIZABETH RANDALL
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

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



In the Matter of the Filing of a Special Contract by Pivotal
Utility Holdings, Inc. d/b/a Elizabethtown Gas

Docket No. EO08090829

Service List

Mary Patricia Keefe
Pivotal Utility Holdings Inc.
d./b/a Elizabethtown Gas
300 Connel Drive, Suite 300
Berkeley Heights, NJ 07922

Kenneth T. Maloney
Cullen and Dykman LLP
1101 Fourteenth St., N.W.
Suite 550
Washington, DC 20005

Alice Bator, Chief
Division of Energy
NJ Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Naji Ugoji
Division of Energy
NJ Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Alex Moreau, Esq.
Kenneth Sheehan, Esq.
Dept. of Law & Public Safety
Division of Law
124 Halsey Street
Newark, NJ 07102

Suzanne Patnaude, Esq.
Legal Specialist
NJ Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Judith Appel, Esq.
Division of Rate Counsel
31 Clinton Street -11th Floor
P.O. Box 46005
Newark, NJ 07101

Felicia Thomas-Friel, Esq.
Division of Rate Counsel
31 Clinton Street -11th Floor
P.O. Box 46005
Newark, NJ 07101

David Brooks
Merck & Co., Inc.
Two Merck Drive
PO Box 200, WS3W – 16B
Whitehouse Station, NJ 08889-0200

Martin C. Rothfelder
Rothfelder Stern, LLC
Law Offices
625 Central Ave.
Westfield,, NJ 07090