

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on April 24, 2014

COMMISSIONERS PRESENT:

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

CASE 14-E-0022 - MACH Gen LLC and New Athens Generating
Company LLC - Petition for a Declaratory
Ruling or, in the Alternative, Approval of the
Indirect Transfer of New Athens Generating
Company LLC Pursuant to Public Service Law
§70.

ORDER APPROVING TRANSFERS OF
OWNERSHIP INTERESTS AND MAKING OTHER FINDINGS

(Issued and Effective April 25, 2014)

BY THE COMMISSION:

BACKGROUND

In a petition filed on January 24, 2014, MACH Gen LLC
(MACH Gen) and New Athens Generating Company LLC (New Athens)
(collectively, the Petitioners) request approval of various
ownership transfer transactions under Public Service Law (PSL)
§70. New Athens is the owner of a 936 MW (summer rating) gas-
fired, combined cycle electric generating facility located in
the Town of Athens (the Athens facility), which sells its
electricity into wholesale markets administered by the New York
Independent System Operator, Inc. (NYISO).

In conformance with State Administrative Procedure Act
(SAPA) §202(1), notice of the Petition was published in the

State Register on February 12, 2014. The SAPA §202(1)(a) period for submitting comments in response to the notice expired on March 31, 2014. No comments were received.

THE PETITION

The Petitioners begin by describing MACH Gen, the parent of New Athens,¹ as a special purpose vehicle through which various investors hold all of the ownership interests in New Athens and its generating facility. MACH Gen and its owners, the Petitioners continue, intend to commence voluntary Chapter 11 bankruptcy proceedings, through filing a pre-packaged plan of reorganization. This reorganization, the Petitioners explain, will result in the full satisfaction of existing second lien claims, in the amount of about \$990 million. In return, the second lien holders will obtain 93.5% of the interests in MACH Gen, while existing equity holders will retain the remaining 6.5% of the interests. To facilitate these transactions, the Petitioners report, a new holding company, designated but not yet formally named as MACH Gen Holdings (MGH), may be formed.² MGH would be inserted into the holding company structure such that it becomes the direct owner of all the interests in New Athens and the wholly-owned subsidiary of MACH Gen.

Three of the second lien holders, the Petitioners relate, will take ownership interests of more than 10% in MACH Gen as a result of the bankruptcy and holding company

¹ MACH Gen, along with New Athens, is regulated lightly under the PSL. Case 03-E-0516, Athens Generating Company, L.P., Order Approving Transfer and Providing For Lightened Regulation (issued September 17, 2003) (Light Regulation Order).

² Following the exit from bankruptcy, the Petitioners explain, MGH could serve as the vehicle for the refinancing of the debt not extinguished by the bankruptcy.

transactions. Silver Oak LLC (Silver Oak) is expected to hold 34.2% of those interests; Deutsche Bank AG (Deutsche) will hold 11.5%; and, various affiliates and subsidiaries of Solus Alternative Asset Management, L.P. (Solus) will hold 10.5%.³ Neither Silver Oak nor Solus are affiliated with the owners of any other generation facilities located in New York. Deutsche, however, has entered into complex arrangements with affiliates of Energy Capital Partners LLC (ECP) that will, in effect, enable ECP to control Deutsche's interest in New Athens. Deutsche is also affiliated with a power marketer.

ECP, the Petitioners elaborate, is the indirect owner of Empire Generating Company LLC (Empire), the owner and operator of an approximately 672 MW (winter rating) gas-fired electric generating facility located in the City of Rensselaer (the Empire facility). ECP is also affiliated with the owners of generating capacity located in Independent System Operator - New England, Inc. (ISO NE) and PJM Interconnection LLC (PJM) markets adjacent to New York, amounting to, respectively, approximately 10.3% and 2.0% shares of those markets.⁴ MACH Gen itself, the Petitioners report, currently owns 335 MW (summer rating) of capacity sited in the ISO NE market.

The Petitioners assert that the transaction does not result in the potential for the exercise of horizontal market power within New York. Even if the New Athens and Empire generating facilities were deemed combined through the ownership

³ Previously, Silver Oak and Deutsche did not hold any ownership interests in MACH Gen, while Solus held a 14.5% interest.

⁴ These amounts are calculated by attributing to ECP its proportionate share of the capacity at facilities where ownership interests are distributed fractionally among the multiple owners. See Case 13-M-0004, EIF BNY LLC, et al., Declaratory Ruling on Review of an Acquisition and Stock Transaction (issued February 13, 2013).

interests Deutsche holds, the Petitioners maintain, their total capacity would amount to only a 4.2% share of the approximately 37,920 MW of capacity installed in NYISO markets. Moreover, while Deutsche is affiliated through ECP with the owners of approximately 10.3% and 2.0%, respectively, of the capacity installed in the ISO NE and PJM markets, the Petitioners maintain that this level of ownership in neighboring markets, even when combined with MACH Gen's 335 MW interest in the ISO NE market, is insufficient to create the potential for the exercise of market power within the NYISO market.

The transaction, the Petitioners assert, does not pose the potential for the exercise of vertical market power. Neither MACH Gen nor its new owners nor any of its affiliates holds or will hold any substantial interest in any monopoly electric transmission or delivery facilities or any substantial influence over inputs, like fuel or fuel transportation, into the production of generation supply within NYISO markets.

According to the Petitioners, the ownership transfer transactions will not affect the management of the Athens facility; current employees will be retained and the facility will continue to operate as it has in the past. The facility's generation will continue to be sold into NYISO markets through a power marketer that is not affiliated with any of the owners of MACH Gen. Moreover, the Petitioners assert, the transfer and reorganization transaction will substantially reduce the debt burden the Athens facility carries, improving the prospects for profitable operation of the facility in the future.

The Petitioners ask that lightened regulation of the owners of the Athens facility be continued. They also would retain the existing authorizations permitting financial entities to acquire up to 20% of the interests in MACH Gen so long as the entities are not primarily engaged in an energy business and do

not own an interest of 5% or greater in any generator other than New Athens located in NYISO markets.⁵

The Petitioners believe that they have satisfied the presumption established in the Wallkill Order.⁶ There, it was decided that PSL §70 regulation would not adhere to a transfer of ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generating facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. Consequently, they request that further review of the transactions be eschewed. In the alternative, they request approval of the transactions.

DISCUSSION AND CONCLUSION

Environmental Quality Review

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 NYCRR §617 and 16 NYCRR §7), we must determine whether the actions we are authorized 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 are required, so a coordinated review under SEQRA is not needed. We will assume Lead Agency status under SEQRA and conduct an environmental review.

SEQRA requires applicants to submit a complete EAF describing and disclosing the likely impacts of the actions they

⁵ Case 05-E-0834, MACH Gen LLC and New Athens Generating Company LLC, Declaratory Ruling on Review of Ownership Interest Transfers (issued September 6, 2005).

⁶ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

propose.⁷ The Petitioners submitted a narrative and short-form EAF Part 1 that substantially comply with this requirement.

The proposed action over which we have jurisdiction is the transfer of ownership interests in MACH Gen and New Athens to new owners. The proposed action does not meet the definition of Type 1 or Type 2 actions listed in 6 NYCRR §§617.4, 617.5 and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. After review of the petition we conclude, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes to the operation of the electric generating facilities underlying the proposed transfer that will result in adverse environmental impacts. Our Staff has completed the short-form EAF Part 2.

As Lead Agency, we determine that the proposed action will not have a significant impact on the environment and adopt 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 negative declaration concerning this unlisted action is attached. The completed EAF will be retained in our files.

The Transfers

Under PSL §70, our approval is required before an electric corporation may transfer ownership interests in electric plant. Contrary to the Petitioners' contention, however, further review of this transaction pursuant to §70 may not be eschewed under the Wallkill Presumption.⁸ One aspect of this transaction is the substitution of MGH for MACH Gen as the direct owner of New Athens. A change in the ownership of an entity that is the direct owner of a generation facility is

⁷ 6 NYCRR §617.6(a)(3).

⁸ The Presumption is described supra, at page 5.

outside the scope of the Wallkill Presumption.⁹ Given that there is an aspect of this complex transaction -- the change in the identity of the direct owner of New Athens -- that does not qualify for the Wallkill Presumption treatment, the entire transaction is deemed subject to review under PSL §70(1).¹⁰

In conducting a review under §70 that pertains to a lightly-regulated electric corporation operating in wholesale electric markets, we examine any affiliations with fully-regulated New York utilities or power marketers that might afford opportunities for the exercise of market power or pose the potential for other transactions detrimental to captive ratepayer interests. When reviewed with the reduced scrutiny applicable under lightened regulation, the ownership interest transfers the Petitioners propose are in the public interest.

The transaction does not pose the potential for the exercise of horizontal market power. Of the new owners acquiring more than a 10% interest in MACH Gen, Silver Oak is a new entrant into New York wholesale generation markets and is acquiring only interests in the existing Athens generation facility. Solus, already an existing owner of MACH Gen, holds no other interests in generation facilities in New York. Consequently, their participation in these transactions does not raise horizontal market power issues.

⁹ See Case 05-E-1217, Carr Street Generating Station, L.P., Order Approving Transfers and Making Other Findings (issued December 21, 2005); Case 11-E-0253, First Wind Holdings LLC, Order Approving Transfer, Imposing Reporting Requirements, and Making Other Findings (issued September 21, 2011).

¹⁰ PSL §70(4) does not adhere under these circumstances, because it applies only to stock transfers; since MACH is a limited liability company and not a stock corporation, the ownership interests in it are not stocks.

While Deutsche is also a new entrant into New York markets, due to the complex arrangements it and ECP have entered into, ECP will, in effect, exercise sufficient control over Deutsche's interest in New Athens such that ECP should be treated as if it were the owner of that interest. ECP is already an electric corporation in New York by virtue of its indirect ownership interest in Empire and its generation facility.

Nonetheless, the transaction should not enable ECP to exercise horizontal market power. As the Petitioners point out, ECP will hold only a 4.2% share of the NYSIO market after the transaction is consummated even if it is deemed to control both the Athens and Empire facilities (for the reasons discussed below, it will not be so deemed as to Athens). That share is insufficient for it to unduly influence or exercise control over NYISO markets. Moreover, the size of ECP's and MACH Gen's existing interests in generation operating in markets adjacent to New York is insufficient raise market power issues within New York.¹¹

Nor does the proposed transaction pose the potential for the exercise of vertical market power. Neither MACH Gen nor its new owners nor any of its affiliates can or will exercise control over electric delivery facilities (other than interconnections), or substantial influence over inputs, like fuel, into the production of generation supply within New York. As a result, those avenues to the undue exercise of vertical market power are foreclosed. Deutsche's affiliation with a power marketer does not pose the potential for the exercise of

¹¹ See Case 12-E-0359, NRG Energy, Inc., Order Approving a Merger and Acquisition Upon Conditions (issued December 14, 2012); Case 11-E-0245, Exelon Corporation, Declaratory Ruling as a Stock Transfer Transaction (issued December 10, 2011).

market power under these circumstances, because, as discussed below, Deutsche is unable to control or influence the operation of the Athens facility. Consequently, the proposed transaction does not raise market power concerns.

Moreover, the new owners are affiliated with the existing experienced operators of the Athens facility; appear sufficiently capitalized, especially since the transaction reduces substantially the debt burden these owners must carry; and, will continue the existing arrangements for operation of the Athens facility. The transfer transaction that the Petitioners propose is therefore approved.

The Petitioners ask for continuation of the existing authorization permitting financial entities to acquire up to 20% of the interests in MACH Gen without being deemed an electric corporation, so long as those entities are not primarily engaged in an energy business and do not own an interest of 5% or greater in any generator located in NYISO markets other than the Athens facility. That authorization is a presumption upon which reliance may remain in place.¹²

Under that presumption, Solus and Deutsche will not be treated as electric corporations because of their ownership interests in New Athens. They have demonstrated that they cannot exercise control over the operations of the Athens facility, and, in Deutsche's case, the ownership interest is actually controlled to a significant extent by ECP, which is already an electric corporation by virtue of its indirect ownership interests in the Empire facility. Therefore, Solus and Deutsche will be treated as passive investors rather than as

¹² See Case 08-M-0659, et al., Regulation of Ownership Interests in Electric Corporations, Order Establishing Presumption and Closing Proceedings Without Prejudice (issued September 21, 2010).

electric corporations. On the other hand, because Silver Oaks owns a substantial portion, at more than one-third, of the indirect interests in New Athens, and has not demonstrated that it is unable to control or influence operation of the facility, it will be treated as an electric corporation.

After the transaction is consummated,¹³ lightened regulation of Silver Oak, MACH Gen, MGH and New Athens as owners of the Athens facility will continue in accordance with the Light Regulation Order. They are reminded that, under light regulation, they and other entities that can control the operations of the Athens facility 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 in the Light Regulation Orders and other previous Orders.¹⁴ Included among those requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,¹⁵ to give notice of generation retirements,¹⁶ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

¹³ Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

¹⁴ See, e.g., Case 07-M-0906, Iberdrola, S.A., Order Approving Transfer, Providing For Lightened Ratemaking Regulation, Establishing Rate Treatment and Making Other Findings (issued October 18, 2013).

¹⁵ See Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005).

¹⁶ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements For Generation Unit Retirements (issued December 20, 2005).

The Commission orders:

1. The transfer of ownership interests in a generation facility, as described in the Petition filed in this proceeding and in the body of this Order, is approved.

2. This proceeding is closed.

By the Commission,

KATHLEEN H. BURGESS
Secretary