

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 12, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman
James S. Alesi

CASE 18-E-0501 - Joint Petition of Bayonne Energy Center, LLC,
MIC Thermal Power Holdings, LLC and NHIP II
Bayonne Holdings LLC for a Declaratory Ruling
Regarding Transfer of Upstream Ownership
Interests or, in the Alternative, an Order
Approving the Transfer Pursuant to Section 70
of the New York State Public Service Law.

DECLARATORY RULING ON TRANSFER AND MAKING OTHER FINDINGS

(Issued and Effective September 18, 2018)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on August 10, 2018 (Petition),
Bayonne Energy Center, LLC (BEC), MIC Thermal Power Holdings,
LLC (MIC Thermal) and NHIP II Bayonne Holdings LLC
(collectively, the Petitioners) requested issuance of a
declaratory ruling that the Public Service Commission's
(Commission) approval is not needed under Public Service Law
(PSL) §70 with respect to a proposed transfer of indirect,
upstream interests in BEC to Bayonne Holdings. BEC owns and
operates the Bayonne Energy Center Project (BEC Project), which
is located in Bayonne, New Jersey and comprises an approximately
776 MW electric generating facility and a 6.75-mile high-voltage
alternating current (AC) cable system that connects the

generating facility to Consolidated Edison Company of New York, Inc.'s (Con Edison) 345 kV substation in Brooklyn, New York. BEC operates the portion of the BEC Project located in New York under a lightened regulatory regime granted by the Commission.¹ The Petition also requests confirmation that the existing lightened regulatory regime will continue after the proposed transaction is consummated.

Responses to the Petition were due within the 21-day period prescribed under the Commission's Rules of Procedure, contained in 16 NYCRR §8.2(c). No comments were received by the deadline, which expired on August 31, 2018. In this ruling, the Commission determines that no further review under the PSL is warranted for the proposed transaction. The Commission also confirms that the existing lightened regulatory regime previously granted to the BEC Project owner will continue.

THE PETITION

BEC and MIC Thermal

Petitioners explain that BEC owns and operates the BEC Project. The BEC Project, Petitioners aver, includes eight dual-fuel generating units totaling approximately 512 MW (BEC I), two simple-cycle units totaling 132 MW (BEC II),² and a 6.75-mile AC transmission line that interconnects the BEC Project with Con Edison's system at its Gowanus 345 kV substation in Brooklyn, New York. According to Petitioners, this cable system enables the BEC Project to supply electricity into Zone J (i.e.,

¹ Case 10-E-1235, Bayonne Energy Center, LLC, Order Providing for Lightened Regulation (issued September 17, 2010) (Regulation Order). This is the only portion of the BEC Project that is subject to direct Commission regulation.

² BEC I and BEC II are located in Bayonne, New Jersey.

New York City) of the wholesale power market administered in New York by the New York Independent System Operator, Inc. (NYISO).

BEC, Petitioners continue, is an indirect, wholly-owned subsidiary of MIC Thermal which, in turn, is an indirect, wholly-owned subsidiary of Macquarie Infrastructure Corporation (MIC), which owns and operates infrastructure and related businesses in the United States. According to Petitioners, BEC sells energy, capacity, and ancillary services at market-based rates in New York City subject to four contracts and regulation by the Federal Energy Regulatory Commission (FERC). Petitioners aver that BEC and Direct Energy Business Marketing, LLC (Direct Energy) executed two long-term agreements which grant Direct Energy control over 62.5% of the capacity, energy, and ancillary services produced by BEC I. Direct Energy, Petitioners continue, also acts as agent for BEC to sell approximately 130 MW from BEC II into the wholesale market. Petitioners explain that Zone J Tolling Co., LLC (Zone J Tolling) sells the remaining BEC I capacity pursuant to two long-term agreements with BEC.

According to Petitioners, Zone J Tolling is a power marketer that sells energy, capacity, and ancillary services at market-based rates in the NYISO-administered wholesale markets. Petitioners aver that Zone J Tolling does not own or control any generation capacity other than the capacity that it controls through the BEC tolling agreements. Zone J Tolling, Petitioners continue, does not purchase energy or capacity from any unaffiliated third party pursuant to a long-term firm agreement.

Petitioners report that BEC and Zone J Tolling are indirect, wholly-owned subsidiaries of MIC Thermal which, in turn, is a wholly-owned indirect subsidiary of Macquarie Group Limited (MGL). According to Petitioners, MGL is a global

company that provides banking, financial, advisory, investment, and funds management services.

Bayonne Holdings and Its Affiliates

Petitioners aver that Bayonne Holdings is an indirect, wholly-owned subsidiary of North Haven Infrastructure Partners II US Investments L.P. (North Haven US) and other co-investment entities. North Haven US and the co-investment companies, Petitioners continue, are all under common control. Petitioners explain that Morgan Stanley Infrastructure II, Inc. (MSI II Inc.) is the North Haven US general partner and an indirect, wholly-owned subsidiary of Morgan Stanley. According to Petitioners, the limited partnership interests in North Haven US are owned by North Haven Infrastructure Partners II-AIV I LP (North Haven II) (approximately 60%) and North Haven Infrastructure Partners II L.P. (North Haven II) (approximately 40%). Petitioners explain that North Haven II and North Haven AIV share Morgan Stanley Infrastructure II GP LP (MSI II GP LP) as their sole general partner, and their limited partnership interests are held by passive investors. According to Petitioners, MSI II Inc. is also the general partner of MSI II GP LP, which has delegated its day-to-day management responsibilities and authority to Morgan Stanley Infrastructure, Inc. (MSI), a registered investment adviser under the Investment Advisers Act of 1940, as amended. Petitioners report that MSI II GP LP and MSI are both indirectly, wholly-owned subsidiaries of Morgan Stanley.

According to Petitioners, Morgan Stanley operates as a Financial Holding Company under the Bank Holding Company Act of 1956. Through its affiliates and subsidiaries, Petitioners continue, Morgan Stanley provides various products and services in Institutional Securities, Retail Brokerage, and Asset Management. Petitioners aver that Morgan Stanley indirectly

owns, through wholly-owned subsidiaries, various energy facilities located outside of the NYISO market and neighboring ISO New England Inc. (ISO-NE) and PJM Interconnection, L.L.C. (PJM) markets.

TigerGenCo, LLC

Petitioners aver that TigerGenCo, LLC (TigerGenCo) is owned indirectly by MSI and indirectly owns Red Oak Power LLC (Red Oak Power). Red Oak Power, Petitioners continue, owns and operates an approximately 766 MW electric generation facility located in Sayreville, New Jersey (Red Oak Facility), which operates within the markets administered by PJM. Petitioners explain that Red Oak Power and TAQA Gen X LLC (TGX) executed a tolling agreement that expires on September 30, 2022, pursuant to which TGX delivers natural gas to Red Oak Power, and Red Oak Power sells unforced capacity, ancillary services, and fuel conversion services to TGX. Petitioners aver that Red Oak Power and TGX are affiliates.

Morgan Stanley Capital Group Incorporated

Petitioners explain that Morgan Stanley Capital Group Inc. (MSCG) is a direct, wholly-owned subsidiary of Morgan Stanley that is authorized to make wholesale power sales at market-based rates. MSCG, Petitioners continue, participates in the NYISO, PJM, and ISO-NE markets, and facilitates customer transactions in wholesale natural gas and other physically- and financially-settled energy products. According to Petitioners, MSCG owns Power Contract Financing II, L.L.C., which operates as a wholesale power marketer, but MSCG does not own any electric transmission facilities. Petitioners aver that MSCG indirectly owns MS Solar Solutions Corp. (MS Solar), which finances behind-the-meter distribution solar projects but does not own electric generation or transmission facilities.

TGX

Petitioners aver that MSCG also owns MS TGX LLC, which is the general partner of TAQA Gen X, LP, which indirectly owns TGX. According to Petitioners, TGX is authorized to sell electricity at market-based rates in PJM, and it engages in physical transactions of electric energy, capacity, and ancillary services. TGX, Petitioners continue, also sells Reactive Supply and Voltage Control to PJM from the Red Oak Facility pursuant to a FERC-approved tariff.

Hornet Midstream, Pipeline, LLC

Petitioners report that MSI holds a 100% indirect equity interest in Hornet Midstream Pipeline, LLC, which owns a natural gas gathering pipeline system located in the PJM control area.

Eureka Midstream Holdings, LLC

According to Petitioners, MSI also holds a 60% indirect equity interest in Eureka Midstream Holdings, LLC. This company, Petitioners continue, owns a natural gas gathering pipeline system located within the PJM control area.

The Proposed Transaction

Petitioners explain that Bayonne Holdings and MIC Thermal executed a purchase and sale agreement on July 27, 2018. Pursuant to that agreement, MIC Thermal will transfer 100% of its direct ownership interests in Thermal Bayonne Holdings, LLC (Thermal Holdings), an indirect parent of BEC and Zone J Tolling, to Bayonne Holdings. The Proposed Transaction, Petitioners continue, will result in BEC becoming an indirect, wholly-owned subsidiary of MSI, and BEC will continue to manage the daily operations of the BEC Project after the transaction closes.

Petitioners maintain that they have satisfied the presumption established in the Wallkill Order.³ 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 and distribution facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. Petitioners note that the Commission has applied the Wallkill Presumption to transfers of indirect, upstream interests in jurisdictional transmission assets.

The proposed transaction, Petitioners continue, poses no risk of horizontal or vertical market power,⁴ or other harm to captive utility ratepayers. Petitioners explain that the proposed transaction will not create the opportunity to exercise either horizontal or vertical market power because neither Bayonne Holdings nor its affiliates hold any ownership interests in any electric generating facilities that are located in New York; any transmission or distribution facilities; entities that are scheduling or reliability coordinators, or balancing area authorities, in New York; energy service companies; electric or gas transmission or distribution providers; or entities that can exercise control over the provision of fuels used in generation in New York.

³ Case 91-E-0950, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

⁴ An entity's horizontal market power relates to its share of power plants (market share) in relation to the total size of power plants participating in the market. Vertical market power may arise where a single firm owns both generation and delivery assets, and the delivery assets can be used to give a preference to the affiliated generation assets.

To the extent that affiliates of Bayonne Holdings hold such ownership interests in the neighboring PJM and ISO-NE control areas, Petitioners continue, the interests are limited. Petitioners aver that Bayonne Holdings' affiliates currently hold approximately 766 MW of generation capacity in the PJM market. Petitioners aver that this constitutes less than 1% of the total PJM generation capacity of approximately 178,563 MW. Petitioners cite Commission precedent for the proposition that such de minimis ownership levels in neighboring markets would not affect competition in New York.⁵ Consequently, Petitioners continue, the proposed transaction will not create opportunities to leverage generation capacity owned in the adjacent PJM market to exercise horizontal market power in New York.

Petitioners assert that interests held in midstream natural gas gathering systems located in the PJM market similarly do not present any market power concerns in New York. According to Petitioners, the vast majority of natural gas carried through these systems is transported to delivery points in Eastern Ohio. Petitioners aver that the owners of these systems act solely as carriers transporting natural gas from well heads to delivery points, and never take title to the gas transported by their systems.

The proposed transaction, Petitioners continue, will not otherwise result in any adverse impacts in New York. Petitioners explain that the proposed transaction will not give rise to any change in daily operation of the BEC Project, nor will it alter BEC's role as the entity responsible for BEC

⁵ Citing, e.g., Case 11-E-0181, ReEnergy Black River, LLC et al., Order Approving Transfer and Making Other Findings (issued August 23, 2011); Cases 12-E-0211 et al., Alliance Energy, New York LLC et al., Order Approving Transfer Subject to Conditions Precedent and Approving Financings (issued September 17, 2012).

Project operation and maintenance. Petitioners note, however, that MIC Global Services LLC will no longer provide general, administrative, and other management services to BEC after the proposed transaction is consummated. Instead, Petitioners aver that BEC will execute a project asset management agreement with TigerGenCo to provide certain general, administrative, and other management services.

Petitioners thus request that further review of the proposed transaction be eschewed. In the event that the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transaction pursuant to PSL §70.

Finally, Petitioners request that the lightened ratemaking regulatory regime previously granted to BEC for its ownership and operation of the BEC Project be continued after the proposed transaction is consummated. Petitioners explain that the proposed transaction will not impact the Facility's operations as a wholesale power plant, or otherwise effectuate any change that might warrant a modification to its regulatory treatment.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support §70 transfer requests with a demonstration that the transaction will not present the purchaser with the opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully-

regulated utilities.⁶ The Commission has determined that full regulatory review is not needed for transfers of indirect, upstream ownership interests in lightly-regulated electric and gas corporations unless the proposed transfer presents a risk of market power or harm to captive ratepayers (i.e., the Wallkill Presumption).⁷

The Commission is authorized to issue a declaratory ruling with respect to: (i) the applicability of any rule or statute enforceable by it to any person, property, or state of facts; (ii) whether any action by it should be taken pursuant to a rule; (iii) and to decline to issue such a declaratory ruling. This authority is expressly established by State Administrative Procedure Act §204 and governed by the Commission's Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute. Declaratory rulings are not "actions" within the meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations (16 NYCRR §7.2) and, therefore, they may be issued without further SEQRA review.

DISCUSSION AND CONCLUSION

For purposes of the proposed transaction, Petitioners have satisfied the Wallkill Presumption. Under this presumption, transactions involving parent entities upstream from the facilities located in New York will be reviewed only if there is the potential for the exercise of market power or other harm to the interests of captive New York ratepayers. No such

⁶ See, e.g., Wallkill Order.

⁷ See, e.g., Case 17-M-0735, Sithe/Independence Power Partners, L.P. et al., Declaratory Ruling on Transfer and Making Other Findings (issued February 27, 2018); Case 17-E-0620, AP Cricket Valley Holdings I Inc. et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

potential is apparent here, based on the facts stated in the Petition.

The proposed transaction does not pose the potential for the exercise of horizontal market power. Bayonne Holdings' indirect acquisition of the BEC Project will constitute its first entry into the NYISO market and, therefore, it will not be able to manipulate BEC Project operations to exercise market power in the NYISO markets.

The proposed transaction similarly does not present an opportunity for Bayonne Holdings or its affiliates to leverage generation owned in the ISO-NE and PJM markets to manipulate prices in New York. Petitioners demonstrated that the proposed transaction, when consummated, would result in Bayonne Holdings and its affiliates owning a de minimis amount of the total installed capacity in the PJM market, and no capacity in the ISO-NE market.

Furthermore, the proposed transaction does not present a vertical market power risk. Neither Bayonne Holdings nor its affiliates exercise control over electric generation delivery facilities other than an immaterial amount of capacity in the PJM market, or have a substantial influence over inputs, like fuel, into the production of generation supply within New York.

Finally, the BEC Project will continue operating in wholesale competitive markets and will not have captive utility ratepayers. The proposed transaction, therefore, does not present a risk of harm to such ratepayers. Accordingly, based on the facts and circumstance presented in the Petition, the proposed transaction does not require further review under PSL §70.

Lightened Regulation

After the proposed transaction is consummated, lightened regulation of the BEC Project will continue, as

described in prior orders.⁸ Petitioners are reminded that, under lightened regulation, they will remain subject to the PSL with respect to matters such as annual reporting,⁹ enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders. Included among those requirements are the obligations to give notice of generation retirements,¹⁰ to report personal injury accidents pursuant to 16 NYCRR Part 125 and, where applicable, to conduct tests for stray voltage on all publicly accessible electric facilities.¹¹ PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will apply based on affiliations with power marketers.

The Commission finds and declares:

1. No further review will be conducted of the proposed transaction described in the petition filed in this proceeding and discussed in the body of this ruling.

2. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

⁸ Regulation Order.

⁹ 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.

¹⁰ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

¹¹ See 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).