

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Joint Petition of NRG Astoria Power LLC, NRG)
Berrians East Development LLC and Astoria Gas)
Turbine Power LLC to Amend a Certificate of)
Public Convenience and Necessity Pursuant to)
Section 68 of the Public Service Law, to Approve)
the Transfer of the Amended Certificate and Lease)
of Real Property Interests Pursuant to Section 70)
of the Public Service Law, to Approve a Financing)
Pursuant to Section 69 of the Public Service Law)
and for Determination of Lightened Regulation)

Case 20-E-_____

**JOINT PETITION OF NRG ASTORIA POWER LLC, NRG BERRIANS EAST
DEVELOPMENT LLC AND ASTORIA GAS TURBINE POWER LLC TO AMEND A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO
SECTION 68 OF THE PUBLIC SERVICE LAW, TO APPROVE THE TRANSFER OF
THE AMENDED CERTIFICATE AND LEASE OF REAL PROPERTY INTERESTS
PURSUANT TO SECTION 70 OF THE PUBLIC SERVICE LAW, TO APPROVE A
FINANCING PURSUANT TO SECTION 69 OF THE PUBLIC SERVICE LAW AND
FOR A DETERMINATION OF LIGHTENED REGULATION**

NRG Astoria Power LLC (“NRG Astoria”), NRG Berrians East Development LLC (“NRG Berrians”) and Astoria Gas Turbine Power LLC (“AGTP”) (each a “Petitioner”, and together, the “Petitioners”), pursuant to §§ 68(1), 69 and 70(1) of the Public Service Law (“PSL”) and §§ 17.1, 17.2, 21.2 and 21.3 of Title 16 of the New York State Public Service Commission (the “Commission”)’s Rules of Procedure, hereby request that the Commission: (1) approve an Amendment to the Certificate of Public Convenience and Necessity (“CPCN”) issued for the Astoria Replacement Project as further described herein; (2) approve the transfer of the amended CPCN from NRG Astoria to NRG Berrians, as well as approve the lease of certain real property

interests from AGTP to NRG Berrians; (3) grant financing approval to NRG Berrians for purposes of the Project; and (4) determine that NRG Berrians may receive lightened regulatory treatment.

INTRODUCTION AND SUMMARY OF POSITION

In 2007, AGTP (and subsequently, NRG Astoria) proposed an initial replacement project at the site of the existing Astoria Gas Turbine Generating Facility (the “Facility”), which would replace the now 50-year-old, existing natural gas and liquid fuel-fired simple cycle combustion turbines at the Facility, totaling 646 megawatts (MW) in nameplate capacity, with four new, state-of-the-art and more efficient combined cycle units, totaling 1,040 MW (the “Project” or “Replacement Project”). On January 24, 2011, the Commission issued a CPCN to NRG Astoria for the Project. The Commission also issued a State Environmental Quality Review Act (“SEQRA”) findings statement for the Project, after the New York State Department of Environmental Conservation (“NYSDEC”) had completed its environmental review under SEQRA, as lead agency in connection with the modified Title V air permit and modified State Pollution Discharge Elimination System (“SPDES”) permits that were also needed for the Project.¹ In the 2011 CPCN Order, the Commission also granted NRG Astoria lightened regulatory treatment.²

NRG Astoria seeks to amend the CPCN for the Project based on certain proposed modifications to the replacement project. After a shift in market conditions, but in a continuation of the efforts to modernize the existing Facility site, it has been proposed that the Project be

¹ Case 10-E-0197, *Petition of NRG Astoria Power LLC for an Order Granting an Original Certificate of Public Convenience and Necessity, Providing for Lightened Regulation, and Approving Financing*, Order Granting Certificate of Public Convenience and Necessity, Providing for Lightened Regulation, and Approving Financing (issued January 24, 2011) (the “Prior CPCN Order”). The Prior CPCN Order was later clarified based on a Petition for Clarification with respect to certain issues. *See* Case 10-E-0197, *supra*, Order Clarifying Prior Order (issued April 15, 2011) (the “Clarifying Order”).

² Prior CPCN Order at 15-19.

modified by replacing the existing turbines at the Facility with a single new, state-of-the-art simple cycle unit rather than the previously proposed four combined cycle units and to make other modifications, as described further below.

As set forth below, once the CPCN is amended to reflect the proposed modifications to the Project, the Petitioners further seek (1) approval, pursuant to PSL § 70(1), to transfer the amended CPCN from NRG Astoria to its affiliate, NRG Berrians, and to approve the lease of certain real property interests from AGTP to NRG Berrians, (2) for the Commission to grant financing approval to NRG Berrians in connection with the Project pursuant to PSL § 69, and (3) for the Commission to determine that NRG Berrians may be subject to a lightened regulatory regime.

BACKGROUND

1. Petitioners and Their Affiliates

NRG Astoria is an indirect, wholly-owned subsidiary of NRG Energy, Inc., (“NRG”). NRG Astoria was formed in 2008 as a limited liability company under the laws of the State of Delaware, and is authorized to do business in the State of New York. NRG Astoria was formed as a special purpose entity for purposes of owning and operating the Project.

AGTP is a direct, wholly-owned subsidiary of NRG, and is a limited liability company under the laws of the State of Delaware. AGTP is the owner and operator of the existing Facility, and was formed as a single purpose entity for such purposes when NRG acquired the Facility from Consolidated Edison Company of New York, Inc. (“Con Ed”) in 1999.³ AGTP also owns the approximately 15.7-acre site located in Astoria, Queens County, New York where the Facility is

³ At the same time this transfer was approved in 1999, AGTP was granted lightened regulatory treatment. Case 96-E-0897, *In the Matter of Consolidated Edison Company of New York, Inc.’s Plans for (1) Electric Rate/Restructuring Pursuant to Opinion No. 96-12; and (2) the Formation of a Holding Company Pursuant to PSL Sections 70, 108 and 110, and Certain Related Transactions*, Order Approving Transfers of Generating Facilities and Making Other Findings at 15, 18 (issued and effective June 8, 1999).

located, which is situated within a larger, approximate 300-acre complex known as the Astoria Con Ed Complex.

NRG Berrians is an indirect, wholly-owned subsidiary of NRG, and is a limited liability company under the laws of the State of Delaware. NRG Berrians was formed in 2017 for purposes of owning and operating the Project, as it is proposed to be modified herein. NRG Berrians submitted the interconnection request in connection with the modified Project, and as a result of such interconnection process, is a party to the executed Interconnection Agreement for the Project, along with Con Ed and the New York Independent System Operator (“NYISO”).

NRG is a corporation formed under the laws of the State of Delaware and a publicly traded company on the New York Stock Exchange [NYSE:NRG] and the Standard & Poor’s 500 Index. NRG’s adjusted Earnings Before Interest, Taxes, Depreciation and Amortization (“EBITDA”) was over \$2 billion in 2019.

Copies of the relevant Delaware certificates of formation and incorporation and certificates of authority to do business in the State of New York, as applicable, for each of these entities, as well as an updated company organizational chart, are attached hereto as Exhibit A.⁴

2. The Existing Facility at the Astoria Generating Facility Site

The Astoria Facility is located on the approximate 300-acre Astoria Con Ed Complex, which has hosted utility and power generating facilities since the 1890s. The area is heavily industrialized, isolated from residential communities, and properly zoned for operation of an electric generating station under Article IV of the New York City Zoning Resolution.

⁴ For informational purposes only, it should be noted that NRG is contemplating a potential future transfer of equity interests in an upstream holding company that would directly or indirectly own NRG Berrians and AGTP. When more is known about that potential transaction, NRG may file a petition for declaratory ruling with the Commission to confirm that such transaction is subject to the Wallkill presumption and does not require approval under PSL § 70, or alternatively, to seek approval under PSL § 70.

The 646 MW nameplate rated Facility is currently comprised of seven (7) Westinghouse simple cycle peaking units and twenty-four (24) Pratt & Whitney simple cycle peaking units. The Facility has a rated capacity of approximately 502 MW, not including the seven Westinghouse turbines that have been retired.

3. The Project as Previously Approved

As set forth above, in 2007, the Project was originally proposed in two phases. Phase I was to consist of the replacement of the seven (7) Westinghouse simple cycle peaking units with two state-of-the-art, combined cycle units capable of providing a total of 520 MW of electricity. Each new unit was to include a General Electric (“GE”) 7FA turbine and a heat recovery steam generator with duct burners to further increase output, along with emissions controls. The two new units were to be placed on the portion of the Facility site occupied by the Westinghouse units. Each unit was intended for intermediate duty operation (generally 5 days per week – 16 hours per day) and was also proposed to have fast ramping capability to meet fluctuating demand in the New York City market and to enhance system reliability and grid stability. The Phase I units were proposed to operate primarily on natural gas, with limited oil-firing capacity in the event of a natural gas curtailment and for system reliability.

In Phase II of the Project, as previously approved, the 24 Pratt & Whitney simple cycle peaking units were to be replaced with an additional two new units similar in all respects to the ones constructed in Phase I. Upon the completion of Phase II, the Project would have consisted of four new combined cycle units with an aggregate rated output capacity of 1,040 MW.

4. Prior SEQRA Review and Procedural History for the Project

The environmental review process for the Project originally commenced in late 2007 under SEQRA. NYSDEC assumed the role of lead agency for the SEQRA review as the primary

discretionary permits required for the Project were a modified Title V air permit and a modified SPDES permit. Throughout October 2008, AGTP engaged in numerous public outreach activities, including meetings with local government representatives and civic organizations to discuss the project and its potential impacts on the community. AGTP began preparation of a Draft Environmental Impact Statement (“DEIS”), and as part of that process, a draft scope was prepared. NYSDEC conducted two public informational sessions on the draft scope on November 12, 2008, and public comments on the draft scope were received through November 26, 2008. NYSDEC issued the final scope for the DEIS on December 24, 2008.

AGTP submitted the DEIS, along with its Title V air permit application to the NYSDEC in February of 2009, and its SPDES permit application to the NYSDEC in March of 2009. On February 5, 2010, AGTP submitted a revised and updated Title V air permit application to NYSDEC. As part of its application package, AGTP also submitted an Enhanced Public Participation Plan (“Enhanced PPP”) in order to inform the interested public with regard to the Project as the Facility is located in an area of northwest Queens that has been designated by NYSDEC as a Potential Environmental Justice Area (“PEJA”). A PEJA is a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies. The Enhanced PPP was approved by NYSDEC on February 27, 2009 and was updated on February 15, 2010.

In April 2010, AGTP filed a petition with the Commission requesting a CPCN under PSL § 68 to construct and operate the Project. Around the same time, on April 16, 2010, NYSDEC accepted the DEIS, deemed the SPDES and Title V air permits applications complete and issued a Notice of Complete Application and made the draft permits available for public comment as well

as scheduled public hearings. Two public hearings were held on May 20, 2010 to receive public comment on the DEIS, Title V air permit, and SPDES permit. AGTP filed, and NYSDEC accepted, the Project's Final Environmental Impact Statement ("FEIS") on September 22, 2010. NYSDEC issued the Title V air permit and SPDES permit, and its SEQRA Findings Statement, on October 4, 2010, concluding that the Project was designed, and where necessary revised, to avoid, minimize and mitigate adverse environmental impacts. On December 13, 2010, AGTP asked that it be substituted by NRG Astoria as the petitioner requesting issuance of the CPCN under PSL Section 68.⁵

Subsequently, in January 2011, the Commission issued an Order granting the CPCN for the Project (the "Prior CPCN Order"), concluding: "based upon a thorough review of the record developed here and as part of NYSDEC's SEQRA analysis, that the Astoria Repowering Project is necessary and convenient for the public service." The Commission also issued its SEQRA Findings Statement, concluding that the Project would avoid and minimize adverse environmental impacts to the maximum extent practicable, consistent with NYSDEC's SEQRA Findings and based on the comprehensive review that had been conducted by NYSDEC as lead agency.

In the Prior CPCN Order, the Commission granted NRG Astoria lightened regulatory treatment, based on the fact that it would provide electric service from the project facility on a wholesale basis, as a participant in the NYISO competitive wholesale electricity markets, and finding as such, only limited provisions of the PSL would apply to NRG Astoria as an electric corporation. The Commission also approved NRG Astoria's financing plans in connection with the Project in an amount up to \$1.4 billion, and found that as a lightly regulated entity, it would be

⁵ Although NRG Astoria was substituted for AGTP as petitioner for purposes of obtaining the CPCN from the Commission for the Project, AGTP holds the environmental permits for the existing Facility, and is the applicant seeking modifications to these permits, including the Title V air permit and SPDES permit.

afforded the flexibility to modify, without the Commission’s prior approval, the identity of the financing entities, payment terms and the amount financed so long as it does not exceed the maximum amount of \$1.4 billion.

On March 2, 2011, NRG Astoria filed a Petition for Clarification, with respect to “four small matters covered in the Order which are in need for clarification or correction:” (1) clarifying that it intended to pursue interconnection agreements with both Con Ed and the New York Power Authority (“NYPA”); (2) seeking to establish that NRG’s recent purchase of Green Mountain Energy Company (“Green Mountain”), a licensed competitive retailer of clean energy in New York, would have no effect on the findings in the Prior CPCN Order; (3) seeking to have the Commission acknowledge that its affiliation with NRG Power Marketing, LLC (“NRG Power Marketing”) and Green Mountain, as power marketers, would not raise any market power issues affecting its finding that NRG Astoria could be afforded lightened regulatory treatment; and (4) clarifying that the project-specific financing of up to \$1.4 billion should not affect NRG’s ability to finance the Project under its previously approved corporate financing of up to \$15 billion for the broader company.⁶ In an Order Clarifying Prior Order issued on April 15, 2011, the Commission accepted the clarifications and further found that the facts presented regarding the acquisition of Green Mountain, and NRG Astoria’s affiliation with both Green Mountain and NRG Power Marketing did not alter its findings in the Prior CPCN Order.⁷ The Commission further recognized that the Project could be financed in whole, or in part, through the \$15 billion approved corporate financing for NRG, as the corporate parent, but that \$1.4 billion was the maximum amount of financing established for the Project.⁸

⁶ Case 10-E-0197, *supra*, *Petition for Clarification* (filed March 2, 2011).

⁷ *See* Clarifying Order at 3-4.

⁸ *Id.* at 5.

Despite the receipt of these approvals and the completed SEQRA review, due to prevailing market conditions, the Project was not constructed at that time. Based on a further shift in market conditions, including flattening demand, higher intermittent renewable penetration in the electric generation market and recent legislation, including the Climate Leadership and Community Protection Act (“CLCPA”), NRG Astoria determined to modify the Project and in particular, the turbine configuration and type.

In connection with the intent to make such modifications, and given the passage of time since the original CPCN was issued for the Project, NRG Astoria sought a declaratory ruling from the State of New York Board on Electric Generation Siting and the Environment (the “Siting Board”) that the proposed modifications to the Project would be exempt from PSL Article 10 pursuant to PSL § 162(4)(d), based on the fact that NRG had filed applications for local permits and approvals, and commenced review under SEQRA, for the Project prior to the effective date of the Article 10 regulations.⁹ The Siting Board agreed that the Project is subject to the “SEQRA grandfathering exemption” under PSL § 162(4)(d) and therefore issued a Declaratory Ruling on June 12, 2019, stating that the Project:

“...is exempt from review under Article 10 of the Public Service Law and should instead continue to be subject to the State Environmental Quality Review Act (SEQRA)...[T]he SEQRA exemption does not preclude projects that have been subject to reasonable updating or revisions. The purpose of the exemption is to allow the previously engaged governmental entity to continue its review of the proposal first brought to it for review and to allow the applicant to continue permitting before the entity to whom it first filed applications. The Proposed Replacement Project is an extension, amendment or continuation of the originally

⁹ Case 17-F-0451, *Petition of NRG Astoria Power LLC for a Declaratory Ruling that its Proposed Replacement Project is Exempt from Article 10 of the New York State Public Service Law* (filed July 24, 2017). In that Petition, NRG Astoria described the modified project as installing replacement turbines consisting of three General Electric 7F dual-fuel, simple-cycle units rather than the four originally proposed General Electric 7F combined cycle units; now, based on technology updates and further changes in business and market conditions, Petitioners are proposing the installation of a single General Electric H-class 7HA.03 simple cycle, dual-fuel unit. As discussed in the Declaratory Ruling, the Siting Board’s conclusions regarding the applicability of the SEQRA grandfathering exemption remain the same regardless of this further change in the number and model of replacement units.

proposed project...DEC, as lead agency, may determine to continue its review under SEQRA for the proposed Replacement Project” (emphasis added).¹⁰

5. The Currently Proposed Modifications to the Replacement Project

The Project, as modified, will still replace the 50-year-old existing turbines at the Facility with new, state-of-the-art equipment, but now the Project will consist of a single turbine, rather than four turbines, and the new unit will be operated in simple cycle rather than combined cycle mode. The nameplate rating of the modified Project will be approximately 437 MW rather than the previously proposed 1,040 MW. The new turbine will be a GE H-Class 7HA.03 unit and will now be a highly efficient, fast-ramping and quick starting peaking facility. The new unit will fire natural gas as the primary fuel with limited¹¹ ultra-low sulfur distillate (“ULSD”) liquid fuel for back-up. The Project will also include a ULSD-fired emergency generator for safe shutdown and two ULSD-fired emergency fire water pump engines.

Also, as previously proposed, the replacement turbine will be equipped with emissions control systems, including selective catalytic reduction (“SCR”), a carbon monoxide catalyst, and while firing ULSD, water injection for nitrogen oxides (“NOx”) control.

As a peaking facility, the Project is now designed to backup intermittent renewable generation by providing Ten Minute Non-Synchronous Reserves to New York City in accordance with New York State Reliability Council requirements. This service requires the Project to be able to startup and reach full load within 10 minutes, shutdown after operating for no more than one hour and be prepared to immediately restart again within 10 minutes. Moreover, the Project

¹⁰ See Case 17-F-0451, *supra*, Declaratory Ruling Concerning Jurisdiction Over Proposed Generating Facilities at 3, 12 (issued June 12, 2019).

¹¹ Operation of the Project on ULSD will be limited to the gallon equivalent of 720 hours/year.

addresses a known reliability shortfall in the 138 kV Astoria East load pocket and contributes to addressing a similar shortfall in the 345 kV In-City Transmission Load Area.¹²

Finally, the Project is seeking to participate in Con Edison's system restoration plan with the capability to restore service to New York City's bulk power system in the event of a total system outage.

The Project is planned to be in service in 2023, following a construction period starting in 2021. The public need for and benefits, including the environmental and operational benefits, of the Project are summarized further below.

ANALYSIS

I. NRG ASTORIA REQUESTS THAT THE COMMISSION AMEND THE CPCN TO APPROVE THE MODIFICATIONS PROPOSED BY THE PROPOSED REPLACEMENT PROJECT

A. The Standard under PSL Section 68

PSL § 68(1) requires an electric corporation to obtain a CPCN prior to the construction of an electric plant. The Commission is authorized to grant a CPCN to such electric corporation pursuant to PSL § 68(1), after due hearing and upon a determination that construction of the electric plant is convenient and necessary for the public service. In order for the Commission to be able to make such a determination, the Commission's regulations require that a petitioner requesting a CPCN provide to the Commission, among other things: "a description of the plant to be constructed and of the manner in which the cost of such plant is to be financed, evidence that the proposed plant is in the public interest and economically feasible, and proof that the applicant is able to finance the project and render adequate service."¹³ On January 24, 2011, the Commission

¹² See 2020 RNA Con Edison Local System Base Case Assessment Results presented to the Electric System Planning Working Group (ESPWG) on June 19, 2020, available at: <https://www.nyiso.com/espwg> (see Meeting Materials for June 19, 2020 meeting).

¹³ See Case 07-E-1343, *Marble Hill LLC*, Order Granting Certificate of Public Convenience and Necessity, and

granted a CPCN for the Project.¹⁴ NRG Astoria now seeks an amendment to the CPCN, based on the modifications proposed as part of the Project.

B. The Petition Seeking the Requested Amendment Complies with PSL Section 68(1) and 16 NYCRR Sections 17.1, 21.2 and 21.3.

For the reasons set forth below, NRG Astoria's request for an amended CPCN satisfies all the applicable requirements of PSL § 68(1) and the Commission's regulations for such petition. As required by 16 NYCRR § 17.3, NRG Astoria sets forth in detail its compliance with applicable statutory and regulatory requirements below.

1. General Matters (16 NYCRR Part 17)

As required by 16 NYCRR § 17.1, an affidavit verifying the contents of this Petition accompanies this filing. The certified formation documents for NRG Astoria, NRG Berrians, NRG and AGTP are attached hereto as Exhibit A in accordance with 16 NYCRR § 17.2.

2. Requirements for all Petitions Under PSL § 68(1) (16 NYCRR Section 21.2)

In conformance with 16 NYCRR § 21.2(a), NRG Astoria provides that all the Project's energy, capacity, and ancillary services will be sold into the wholesale electricity markets administered by the NYISO. With respect to the existing Facility, AGTP currently sells all its energy, capacity and ancillary services into the wholesale electricity markets administered by NYISO and NRG Berrians will operate the Project in the same manner as a wholesale merchant generator once the amended CPCN is transferred to it.

Providing For Lightened Regulation (issued June 19, 2008) at 11; Case 07-E-0138, *Canandaigua Power Partners LLC*, Order Granting Certificates of Public Convenience and Necessity, Providing for Lightened Regulation and Approving Financing (issued August 16, 2007) at 13; Case 05-E-0098, *Caithness Long Island LLC*, Order Granting a Certificate of Public Convenience and Necessity, Providing for Lightened Regulation and Approving Financing (issued November 15, 2006) at 32; *see also* Case 09-E-0250, *Astoria Generating Company LP*, Order Granting a Certificate of Public Convenience and Necessity, Providing for Lightened Regulation, and Approving Financing (issued December 23, 2009) at 11-12. The amendment to PSL § 68(1) in 2013 essentially codifies the Commission's regulations.

¹⁴ *See* Prior CPCN Order; *see also* Clarifying Order.

The NYISO's interconnection approval process for the Project is governed by its Open Access Transmission Tariff ("OATT") approved by the Federal Energy Regulatory Commission ("FERC"). AGTP has an existing agreement with Con Ed containing electrical interconnection rights for the existing Astoria Facility to the Astoria East and Astoria West 138kV substations. The new unit is proposed to interconnect utilizing the three existing Astoria East 138kV feeders in accordance with a Large Generator Interconnection Agreement, Service Agreement 2535, executed among Con Ed, the NYISO and the NRG Berrians East Development LLC, dated June 4, 2020 and accepted by FERC, pursuant to 18 CFR §375.307, on August 14, 2020.¹⁵

Neither NRG Astoria nor NRG Berrians (as transferee of the CPCN) provides, or will provide, retail electric service. Instead, electricity produced by the Project will flow exclusively to wholesale markets throughout New York State and neighboring control areas.

Neither NRG Astoria nor NRG Berrians (as transferee of the CPCN) has previously received any authority from the Commission to exercise powers under any prior franchise or municipal consent within the meaning of 16 NYCRR § 21.2(c), and no franchise or municipal consents are needed or required for the Project.

In conformance with 16 NYCRR § 21.2(d), NRG Astoria states that neither it nor any affiliate has been granted any permit by any federal authority relative to the Project as modified. For the Project as previously approved, two Notices of Proposed Construction or Alteration were filed with the Federal Aviation Administration ("FAA") for the construction of exhaust stacks for the turbine replacement as originally proposed. A similar Notice of Proposed Construction was filed with the FAA in April 2020 for the Project as modified. If any federal permits, licenses or

¹⁵ See Delegated Letter Order, *New York Independent System Operator, Inc. and Consolidated Edison of New York, Inc.*, FERC Docket No. ER20-2090-000 (issued Aug. 14, 2020).

authorizations for the Project are received while this Petition is pending, Petitioners will supplement the petition as required by 16 NYCRR § 21.2(d).

3. Additional Information Required to be Presented

a. Territory and Construction Start and In-Service Dates (16 NYCRR Section 21.3(a))

The Facility is located on a 15.7-acre site in Astoria, Queens County, New York and is situated within the larger, approximately 300-acre Astoria Con Ed Complex, which is home to several power generating facilities, as well as barge delivery facilities, a liquefied natural gas plant, a decommissioned wastewater treatment plant, and other miscellaneous energy and utility scale operations. This area has been the site of energy and electricity generating, transmission, distribution and associated energy activities since the 1890s and remains exclusively a major electric generating and manufacturing complex. As it has been for over a century, the Facility site is mostly built-out with some boundary landscaping and no natural habitat remaining.

Since at least 1961, the entire Astoria Con Ed Complex has been Zoned M3-1, Heavy Manufacturing. The Project will be entirely constructed within the Facility site, within the same general footprint on the site of the existing Facility. The Facility site has no direct contact with the adjacent neighborhood as it is surrounded by other industrial and energy facilities and set back several thousand feet from the Astoria Con Ed Complex fence line. A map of the proposed Project location and site plan is included as Figure 2 to the Full Environmental Assessment Form (“FEAF”) which was filed with NYSDEC in connection with the Project’s Title V air permit and SPDES permit modification applications and enclosed as part of NYSDEC’s May 19, 2020 lead

agency letter.¹⁶ Construction of the Project is anticipated to begin in 2021 and end in 2023, when the Project is expected to be placed into service.

b. Plant and System to be Constructed and Estimated Cost (16 NYCRR Section 21.3(b))

As discussed above, the existing Facility currently consists of thirty-one (31) older, peaking-only gas and oil-fired combustion turbines including twenty-four (24) Pratt & Whitney turbines and seven (7) retired Westinghouse turbines, with a combined nameplate rating of 646 MW (502 MW not including the retired Westinghouse turbines). The Project, as modified, will replace the 50-year-old turbines at the Facility with a single new state-of-the-art simple cycle dual-fuel peaking generating unit. The replacement generating unit will be a highly efficient, quick start, fast-ramping, GE H-Class 7HA.03 unit with a nominal generator output rating of approximately 437 MW. The new unit will fire natural gas as the primary fuel with limited ULSD liquid fuel for back-up. The Project will also include a ULSD-fired emergency generator for safe shutdown, and two ULSD-fired emergency fire water pump engines. In addition, the Project will utilize the two existing tanks at the Facility to store ULSD for the new turbine. Each of these existing Facility tanks has a nominal capacity of 2,000,000 gallons. A new storage tank with a capacity of 20,000 gallons will be installed to store 19% aqueous ammonia (NH₃), the reagent for the selective catalytic reduction (“SCR”) system that will be installed downstream of the new turbine for control of nitrogen oxides (“NO_x”) emissions.

¹⁶ The Project’s FEAF is attached hereto as Exhibit B. All of the relevant SEQRA and Project documents that have been submitted to the NYSDEC are also publicly available here: www.cleanerpowerforastoria.com/.

The previously approved Project’s configuration included four combined cycle generating units intended to be used for intermediate duty with a permitted annual capacity factor in excess of 85%; ULSD firing in all four units was limited to a total of 400 hours/year. The Project, as modified, consists of one simple cycle unit and is designed to operate as a peaking facility seeking a permitted annual capacity factor of less than 30%;¹⁷ operation on ULSD will be limited to the ULSD-gallon equivalent of 720 hours/year. Below is a comparison chart of the proposed project modification compared to the Project as previously approved:

Parameter	Previously Approved Project Configuration	Proposed Project Modification
Number / type of CTs	4 / CCCT	1 / SCCT
CT fuels (primary / backup)	Natural Gas / ULSD	Natural Gas / ULSD
Electrical output (gross MWe)	1,040	437
Steam condensing system	Indirect Dry Cooling	None
Number / height (feet) of stacks	4 / 250	1 / 250

The Project consists of replacing the existing equipment with modern, state-of-the-art equipment within the same general footprint on the site of the existing Facility. Construction activities on the Facility site will include placement of pilings and clean fill for the new combustion turbine and support equipment. Excavation is limited to site preparation and installation of foundations for the new equipment.

All of the existing units, with the exception of one Pratt & Whitney Twin Pac (consisting of two combustion turbines feeding a single generator), will be permanently shut down once the new unit has achieved commercial operation. The remaining Pratt & Whitney Twin Pac will remain operational as a black start resource¹⁸ enabling the Project to restore electric service to New

¹⁷ As described in the Project’s Title V Air Permit Major Modification Application (Exhibit C), permitted annual capacity factor will be a function of fuel use, hours of operation and number of startup/shutdown events.

¹⁸ As the term is defined in NYSDEC’s applicable regulations at 6 NYCRR § 227-3.2(b)(1).

York City following a total system outage until replaced by an approximately 24 MW battery energy storage system. A new 7,500-gallon ultra-low sulfur kerosene (“ULSK”) tank will be used to fuel the Pratt & Whitney Twin Pac.

In accordance with 16 NYCRR § 21.3(b), the estimated cost to construct the Project, as modified, is approximately \$400 million.¹⁹

c. Manner of Financing and Ability to Finance the Project (PSL Section 68(1) and 16 NYCRR Section 21.3(c) and (f))

NRG Astoria (or NRG Berrians, as transferee) and its parent, NRG, currently expect to finance the Project through a combination of equity and debt, with limited or non-recourse financing.

NRG, a Fortune 500 company and the parent company of NRG Astoria, NRG Berrians and AGTP, has substantial experience in the project finance markets. For example, early in 2018, NRG raised over \$191 million in construction debt, letter of credit and working capital facilities for the Canal 3 power plant, a dual fuel peaking facility in Massachusetts using similar technology to the Project. Over the past two decades, NRG has raised in excess of \$10 billion in project level financing for numerous other large power projects reflecting various technologies and geographic locations.

NRG actively participates in competitive energy markets across the United States. As discussed above and as demonstrated in NRG’s 2019 Form 10-K submitted to the Securities and Exchange Commission, NRG had an adjusted EBITDA of approximately \$2.0 billion in 2019. NRG has one of the largest and most diversified power supply portfolios in the U.S., including fossil fuel, nuclear, solar, energy storage, and wind generation. NRG currently owns generating

¹⁹ While the capital construction cost for the Project is estimated to be approximately \$400 million, the total Project cost, including financing, transaction and other costs, is estimated to be approximately \$425 million.

facilities with a total capacity of approximately 23,000 MW. In addition, NRG's generation facilities are diversified by fuel type, dispatch level and region, which allows flexibility to meet fluctuations in fuel price and availability requirements.

NRG has previously sought, and obtained, multiple financing approvals from the Commission. In 2003, the Commission authorized NRG to incur corporate debt up to \$3.3 billion.²⁰ Authorization to further increase that ceiling up to a maximum of \$10 billion was granted to NRG in 2006.²¹ In 2010, NRG obtained approval from the Commission to increase the ceiling of its corporate debt up to \$15 billion.²² With respect to all such financing approvals, NRG was given financing flexibility, as a lightly regulated entity, to change the financing entities, payment terms and amounts to be financed up to the maximum amount authorized.

Specifically, with respect to the Project, in the Prior CPCN Order, the Commission authorized NRG Astoria to enter into a financing in an amount up to \$1.4 billion for the Project. The Commission indicated that this maximum financing amount was with recourse to the Project only. NRG Astoria sought clarification that the Project could be financed under the previously-approved corporate financing for NRG of up to \$15 billion, noting that in such a case, there would be recourse to NRG's other affiliated electric projects as well as to NRG Astoria, as owner and operator of the Project. On April 15, 2011, the Commission issued an Order clarifying that the Project could be financed in whole, or in part, through the \$15 billion approved for its corporate parent, and could also be financed in whole, or in part, through the financing of up to \$1.4 billion

²⁰ Case 03-E-1298, *NRG Energy, Inc. and NRG Northeast Generating LLC*, Order Approving Financing (issued Nov. 25, 2003).

²¹ Case 05-E-1528, *NRG Energy, Inc.*, Order Approving Financing (issued Feb. 10, 2006) ("2005 NRG Financing Order").

²² Case 10-E-0405, *NRG Energy, Inc.*, Order Approving Financing (issued Nov. 8, 2010) ("2010 NRG Financing Order").

by NRG Astoria.²³ The Commission confirmed, however, that the maximum amount of financing approved for the Project was \$1.4 billion.²⁴

As has been indicated, NRG Astoria (and NRG Berrians, as transferee of the amended CPCN and the entity seeking financing approval for the Project as modified, as set forth more fully below), along with NRG as the parent company, are well positioned, and have more than sufficient capability, to finance the Project.

d. Rates and Estimated Revenues and Expenses (PSL Section 68(1) and 16 NYCRR Sections 21.3(d) and (e))

The Project will operate on a merchant basis and will sell its power and other attributes in the NYISO wholesale electricity markets, and will not sell power directly to customers at the retail level (whether residential, commercial or industrial). Thus, the rates that NRG Astoria (or NRG Berrians, as transferee) intends to charge for energy, capacity and ancillary services provided by the Project will be established by NYISO in accordance with its applicable tariffs. As those rates are generally determined by competition and market mechanisms and vary from time to time depending on the supply and demand for the products in question, the precise amounts of those rates cannot be determined at this time, nor should they be required for purposes of this Petition. As the Commission has noted in granting lightened regulation to wholesale merchant generators in prior cases, there is no need for the Commission to review the financial decisions of merchant generators operating in such competitive markets.²⁵ NRG Astoria, therefore, respectfully requests that the Commission find that 16 NYCRR §§ 21.3(d) and (e) are inapplicable for purposes of this

²³ Case 10-E-1097, *supra*, Order Clarifying Prior Order at 3-4 (issued April 15, 2011).

²⁴ *Id.*

²⁵ *See, e.g.*, Case 98-E-1670, *Carr Street Generating Station, L.P.*, Order Providing for Lightened Regulation at 9 (issued April 23, 1999); *see also* Case 15-E-0516, *Greenidge Generation LLC*, Order Granting Certificates of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation (issued Sept. 16, 2016).

Petition, as competitive market forces will limit the prices the Project can charge for the generation-related services it will provide.

e. Economic Feasibility, Ability to Provide Safe, Adequate and Reliable Service, and Public Interest Considerations (PSL Section 68(1) and 16 NYCRR Section 21.3(f) and (g))

As specified in PSL § 68(1), “the [C]ommission shall consider the economic feasibility of the corporation, the corporation's ability to . . . render safe, adequate and reliable service, . . . and whether issuance of a certificate is in the public interest.” 16 NYCRR § 21.3(f) also requires a petitioner to demonstrate the facts upon which it relies to entitle it to exercise the rights and privileges petitioned for, including evidence of the economic feasibility of the enterprise, proof of the petitioner’s ability to render adequate service, and that the Project is in the public interest.²⁶ Each of these issues is addressed in this section.

(i) Economic Feasibility and Public Interest.

Upon completion, the Project will be better able to meet the demand for electricity and the need to maintain a reliable electric system in the State, and particularly the New York City area, than the existing Facility.

Furthermore, numerous legislative and regulatory changes have occurred since the initial replacement project was approved in 2011, all of which indicate there is still a significant public need for the Project, if not a greater need. NYSDEC has adopted regulations that lower the allowable NOx emissions from simple cycle and regenerative combustion turbines during the ozone season to help address Clean Air Act requirements and ozone nonattainment.²⁷ The

²⁶ 16 NYCRR § 21.3(f) also requires proof of a petitioner’s ability to finance the Project, but that matter is addressed above in Section I(3)(B)(c) of this Petition.

²⁷ See Title V Air Permit Major Modification Application, Appendix F (Navigant GHG Study) at 5-6 (2020). The Title V Air Permit Major Modification Application is attached hereto as Exhibit C and is also publicly available at: www.cleanerpowerforastoria.com/.

enactment of the Ozone Season NOx Emission Limits for Simple Cycle and Regenerative Combustion Turbines (6 NYCRR 227-3) phases in control requirements from 2023 to 2025.²⁸ It is anticipated that these requirements will result in the near-term retirement of 1,510 MW of capacity in New York City that is currently comprised of existing, aging combustion turbine peaking units, but which will need to be replaced in order to maintain system reliability.²⁹ Taking into consideration those thermal capacity retirements and the fact that peak load in New York City is forecasted to gradually rise from approximately 11.9 GW in 2020 to 14.6 GW by 2040, there will be challenges meeting New York City's and the State's reliability needs with necessary peaking capacity.³⁰ Overall reserve margins are also expected to drop significantly in 2021 and 2022, primarily due to the retirement of the Indian Point nuclear facility units (Unit 2 was retired in April of this year, and Unit 3 is scheduled to retire in April of 2021).³¹ While some of that capacity is anticipated to be replaced with renewable resources (solar and wind) and energy efficiency and demand-side resources, the overall need for generation capacity will remain.³²

Furthermore, the enactment of the State's recent climate change legislation, the CLCPA, puts in place not only significant requirements for the reduction of greenhouse gas emissions, but has also set aggressive goals for the addition of renewable generation into New York's resource mix by the target years of 2030 and 2040.³³ Due to the intermittent nature of renewable generation resources, namely wind and solar, the capacity value of these resources decreases as more of any single technology is added to the system.³⁴ As renewable resources continue to represent an increasingly larger portion of the New York City capacity mix, the Project will serve as a critical

²⁸ *Id.*

²⁹ *Id.* at 5-6; 9.

³⁰ *Id.* at 10-13.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 5.

³⁴ *Id.* at 15.

capacity resource to maintain locational capacity requirements.³⁵ Additionally, there will be a need for the Project's quick response capability to account for unexpected variations in renewable generation, as well as the Project's fast ramping capability to meet demand at times of the day when renewable resources are typically not available.³⁶ The Project will also be capable of starting up and reaching full load within 10-minutes in order to respond to sudden unplanned events such as the loss of another online generator or a transmission line.

Given the design of the new unit and its quick-start capability, the Project will be available to meet the needs of the electrical system, particularly in New York City, at peak load. The dual-fuel capability, although limited, also allows flexibility to address fuel price volatility and natural gas curtailment. The Project will have black start capability to support system restoration efforts by NYISO and Con Ed in the event of a total system outage. The Project will also dramatically improve system reliability and stability of the grid with its quick-start capabilities and allow additional intermittent renewable generation to reliably be added to the bulk power system.

Furthermore, the Project will provide significant operational benefits over the existing Facility: substantially improving the fuel efficiency, lowering heat rates from more than 14,000 Btu/kWh in connection with the existing Facility to less than 10,000 Btu/kWh with the new equipment; lower delivered kilowatt-hour costs; improved ability to ramp up and dispatch; and increased technological and fuel diversity.

As set forth in more detail below in Section I(C), the Project also results in significant environmental benefits as compared to the existing Facility, and as compared to the Project as previously approved, particularly with respect to significant emissions reductions and air quality benefits for the community and New York City as a whole. Compared to the existing Facility, the

³⁵ *Id.*

³⁶ *Id.*

Project provides a substantial decrease in key non-attainment and PSD pollutants coupled with a material reduction in greenhouse gas emission rates. As compared to new greenfield projects, the Project does not require any new, offsite improvements and will utilize existing electric interconnections, natural gas supply and other existing infrastructure on the Facility site, including the existing liquid fuel storage tanks.

Finally, the Project will also provide significant economic benefits. It will create well over 500 jobs during the construction period and retain high value operations phase jobs on the Facility site well into the future. In total, it is anticipated that the Project will result in over \$156 million in economic benefits to the State of New York during the construction period, and over \$170 million in economic benefits to the State during the operations and maintenance period through 2040.³⁷ The public benefits and need will be more fully described in the Draft Supplemental Environmental Impact Statement, which is underway, in qualitative and quantitative measures, as appropriate. Petitioners will supplement the Petition with a copy of the Draft Supplemental Environmental Impact Statement.

In view of the public need and substantial benefits outlined above, the Project is clearly economically feasible and in the public interest.

(ii) Ability to Render Safe, Adequate and Reliable Service

As set forth above and in the prior petition that resulted in the Prior CPCN Order, NRG, as the parent company to NRG Astoria, NRG Berrians and AGTP, is an experienced owner and operator of electric generating facilities. NRG subsidiaries currently own and operate two electric generating stations in New York City with a combined generating capacity of 1,465 MW,

³⁷ See *Economic Development Benefits of the Proposed Astoria Replacement Project*, prepared by Navigant, a Guidehouse Company, dated June 17, 2020, attached hereto as Exhibit D, and also publicly available here: www.cleanerpowerforastoria.com/.

including the existing Facility, which AGTP has owned and operated since 1999.³⁸ In the Prior CPCN Order, the Commission found that between NRG Astoria, and NRG, there was sufficient management expertise and experience to render safe, reliable and adequate service.³⁹

If the transfer of the CPCN, once amended, to NRG Berrians is approved as requested below, NRG Berrians will apply that same experience and competence toward the construction, operation and maintenance of the Project in order to ensure the provision of safe, adequate and reliable service. NRG Berrians intends to enter into one or more agreements for operations and maintenance, shared facilities, energy management, construction management and asset management services with the same NRG affiliates that currently provide the same operation and maintenance, energy management and asset management services and support for the existing Facility. Thus, NRG Berrians will utilize personnel who have the requisite expertise and experience to operate, manage and maintain the Project.

II. PETITIONERS REQUEST APPROVAL PURSUANT TO PSL SECTION 70 FOR THE TRANSFER OF THE AMENDED CPCN FROM NRG ASTORIA TO NRG BERRIANS AND FOR THE LEASE OF CERTAIN REAL PROPERTY INTERESTS FROM AGTP TO NRG BERRIANS

A. The Proposed Transfer and Lease

When the original CPCN was issued to NRG Astoria for the Project in 2011, NRG intended to have NRG Astoria own and operate the project facility as a special purpose entity. Indeed, the initially filed petition for the CPCN was originally filed in the name of AGTP, and it was only after a request by AGTP to substitute the petitioner, that the CPCN was issued in the name of NRG Astoria. After market conditions changed, and the Project was essentially put on hold, NRG also came to a different conclusion with respect to intercorporate ownership, and intends to have NRG

³⁸ See Prior CPCN Order at 14.

³⁹ *Id.*

Berrians own and operate the Project as a special purpose entity. As such, NRG Astoria requests that the CPCN, as amended per this Petition, be transferred to NRG Berrians, subject to the Commission's approval under PSL § 70.

As part of the construction and operation of the Project, NRG Berrians also seeks to lease certain portions of the Facility site from AGTP, and seeks approval of such lease pursuant to PSL § 70. The Project is planned to be constructed on a portion of the existing Facility site, as depicted in Figure 1, Site Location Map, and Figure 2, General Arrangement Drawing, to FEAF, attached hereto as Exhibit B. In order to finance and construct the Project, as well as operate and maintain it thereafter, it is necessary that NRG Berrians have the legal right to access, occupy and use those identified portions of the existing Facility site, which are currently owned by AGTP. AGTP intends to enter into a lease agreement with NRG Berrians, pursuant to which AGTP and NRG Berrians will share access to the existing Facility site and NRG Berrians will be provided with the lease rights necessary to occupy and use the area depicted in Figure 1 and Figure 2 to the FEAF, attached as Exhibit B.

In addition, in order to safely and effectively operate and maintain the Project, NRG Berrians plans to enter into a Shared Facilities Agreement with AGTP to use or receive the benefit of equipment owned by AGTP including, but not limited to, AGTP's existing administrative building, fuel storage tanks, high voltage feeders to interconnect into the Con Ed transmission system, the Pratt & Whitney Twin Pac being retained as a black start resource and associated support equipment on the Facility site.

B. Standard under Section 70

PSL §70(1) requires the approval of the Commission before an electric corporation may transfer or lease its assets. In determining whether a proposed transaction will be consistent with

the requirements of Section 70, the Commission examines the “potential for harm to ratepayer interests and any benefits inuring to them as a result of the transaction.”⁴⁰

Because NRG Berrians, as the proposed transferee of the amended CPCN and proposed lessee of the identified real property interests, proposes to operate the Project in the wholesale electricity markets and by this Petition is seeking a determination that it will be subject to lightened ratemaking regulatory treatment,⁴¹ the Commission should review this proposed transfer and lease with the reduced scrutiny applicable to lightly regulated entities. The Commission should also find, under such reduced scrutiny, that its regulations relating to the approval of property transfers found at 16 NYCRR Part 31 are not applicable here.

The Commission, in conducting a review under PSL § 70(1) that pertains to a lightly regulated electric corporation operating in wholesale electric markets, typically limits its review to an examination of any affiliations, including those 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 harms detrimental to captive ratepayer interests. In reviewing the transaction, the Commission also looks to see if the transfer is in the public interest.⁴²

C. Under a Reduced Scrutiny, the Transfer of the Amended CPCN and Lease of Real Property Interests Should Be Approved

NRG Berrians does not intend to serve captive retail customers in New York State with the operation of the Project (nor did NRG Astoria when it was granted the prior CPCN for the Project). Neither the transfer of the amended CPCN from NRG Astoria to its affiliate, NRG Berrians, nor the lease of the identified real property interests from AGTP to its affiliate, NRG Berrians, will

⁴⁰ See Case 13-E-1066, *New York State Electric and Gas Corporation*, Order Approving the Lease of Property at 4 (issued Aug. 20, 2013).

⁴¹ See Footnote 54, *infra*.

⁴² Case 11-E-0306, *Astoria Generating Company, L.P. and USPG DevCo Holdings, LLC*, Order Approving Transfer (issued Aug. 23, 2011).

lead to the exercise of horizontal market power. No change in concentration in the ownership share of NYISO-administered markets of energy, capacity or ancillary services would occur as a result of such transfer or lease. NRG will remain the indirect owner of the Project, through its indirect ownership of NRG Berrians, rather than NRG Astoria, and thus, its share of the New York wholesale generation market will remain the same.

The exercise of vertical market power is also not of concern because NRG Berrians does not, and will not, exercise any control over any electric delivery facilities in New York (other than interconnections necessary for the Project) nor does it, or will it, exert substantial influence over inputs (i.e., fuel) into the production of generation of supply in New York. Nor does NRG Berrians have an affiliation with any power marketer in New York other than those NRG affiliates that currently act as power marketers in New York State, with which NRG Astoria is also an affiliate. The Commission previously found that NRG Astoria's affiliations with power marketers NRG Power Marketing and Green Mountain did not raise any market power issues and can find similarly with respect to NRG Berrians.⁴³ Accordingly, there are no avenues for NRG Berrians to unduly exercise vertical market power, and thus, the proposed transfer and lease does not pose the potential for harm to captive ratepayers.

Finally, as an indirect, wholly owned subsidiary of NRG, NRG Berrians is also financially capable, as set forth above more fully in Section I(B)(3)(c) of this Petition, to develop, construct and own the Project. NRG Berrians intends to enter into one or more agreements for operations and maintenance, shared facilities, energy management, construction management and asset management services with the same NRG affiliates that currently provide similar operation and maintenance, energy management and asset management services and support for the existing

⁴³ See Clarifying Order at 4. Also, NRG has recently announced its proposed acquisition of Direct Energy, which operates in New York. The transaction is targeted to close by the end of 2020.

Facility. Thus, NRG Berrians will utilize personnel who have the requisite expertise and experience to operate, manage and maintain the Project.

For all of the above-stated reasons, it is respectfully requested that the Commission, applying a reduced scrutiny applicable to lightly regulated entities, find that the transfer of the amended CPCN from NRG Astoria to NRG Berrians, the lease of the identified real property interests from AGTP to NRG Berrians and the execution of the Shared Facilities Agreement (to the extent it could be construed as a transfer or lease of AGTP's assets), are in the public interest and therefore, approved pursuant to PSL § 70(1).

III. NRG BERRIANS REQUESTS THAT THE COMMISSION FIND THAT IT IS ENTITLED TO LIGHTENED REGULATION

Once the amended CPCN is transferred to NRG Berrians, and the Project is constructed in accordance with the amended CPCN and achieves commercial operation, the existing Facility units will be taken out of service,⁴⁴ and NRG Berrians will operate the Project as an exempt wholesale generator participating in the wholesale electricity markets administered by NYISO. As such, NRG Berrians would operate the Project as a wholesale merchant generator. NRG Berrians does not currently own or operate any other generating facilities or assets. Furthermore, as shown above in Section II of this Petition, NRG Berrians has demonstrated that its ownership and operation of the Project will not create the potential for the exercise of market power or other harm to captive ratepayers.

NRG Berrians thus requests that it be subject to lightened regulation consistent with the lightened regulatory treatment that has been accorded to AGTP with respect to the existing Facility and was granted to NRG Astoria with respect to the Project as set forth in the Prior CPCN Order,

⁴⁴ One Pratt & Whitney Twin Pac will remain operational as a black start resource enabling the Project to qualify for Con Edison's system restoration plan.

and consistent with Commission precedent with respect to other similarly situated wholesale merchant generators.⁴⁵

Specifically, NRG Berrians is requesting, consistent with the precedent governing the lightened regulation of wholesale generators, that only the following provisions of the PSL shall apply to it as a lightly regulated entity. PSL Article 1 would apply because it is an electric corporation under PSL § 2(13) and is engaged in the manufacture of electricity under PSL § 5(1)(b). Accordingly, NRG Berrians would be subject to PSL §§ 11, 19, 24, 25 and 26, which prevent producers of electricity from taking actions that are contrary to the public interest.

All of PSL Article 2 and most of the provisions of PSL Article 4⁴⁶ are directed toward the provision of service to retail residential customers, and therefore, are inapplicable to independent power producers operating in wholesale electricity markets such as NRG Berrians. Under PSL § 66(6), wholesale market participants can satisfy the annual report filing requirements through a format designed to accommodate their particular circumstances.⁴⁷ Some other sections of Article 4, including PSL §§ 68, 69, 69-a and 70, are potentially applicable to wholesale generators as reflected by the relief requested in this Petition. Those Article 4 provisions, however, are typically implemented in a fashion that limits their impact on the operation of competitive electric markets, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest requires.⁴⁸

⁴⁵ See Case 98-E-1670, *Carr Street Generating Station, L.P.*, Order Providing for Lightened Regulation (issued April 23, 1999); Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (issued April 11, 1994).

⁴⁶ See, e.g., PSL § 66(12), regarding the filing of tariffs required at our option; § 66(21), regarding the storm plans submitted by retail service electric corporations; § 67 regarding inspection of meters; § 72, regarding hearings and rate proceedings; § 75, regarding excessive charges; and, § 76, regarding rates charged religious bodies and others.

⁴⁷ Case 11-M-0295, *Lightened Ratemaking Regulation - Annual Reporting Requirements*, Order Adopting Annual Reporting Requirements under Lightened Ratemaking Regulation (issued Jan. 23, 2013).

⁴⁸ See Case 11-E-0593, *Cricket Valley Energy Center, LLC*, Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Ratemaking Regulation at 22 (issued Feb. 14, 2013) (hereinafter, the “Cricket Valley Order”).

Most of the provisions of Article 6 either adhere only to the rendition of retail service and are inapplicable to NRG Berrians,⁴⁹ or otherwise do not need to be imposed generally on wholesale market participants because they were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates charged by monopoly providers.⁵⁰ Specifically, application of Section 115 of Article 6 is discretionary and is not typically imposed on wholesale market participants.⁵¹ In contrast, PSL § 119-b, which pertains to the protection of underground facilities from damage by excavators, adheres to all persons, including wholesale market participants.⁵²

NRG Berrians would also remain subject to the PSL with respect to such matters of enforcement, investigation, safety, reliability and system improvement and other requirements of Article 1 and 4, to the extent discussed in previous Commission orders regarding lightened regulation.⁵³

Because the imposition of any further PSL provisions “could interfere with wholesale generators’ plans for structuring the financing and ownership of their facilities ... [and] discourage entry into the wholesale market, or overly constrain its fluid operation, to the detriment of the public interest,”⁵⁴ NRG Berrians respectfully requests that the Commission determine that it may be subject to a lightened regulatory regime as requested above.

⁴⁹ See, e.g., PSL § 112, regarding enforcement of rate orders; § 113, regarding reparations and refunds; § 114, regarding temporary rates; § 114-a, regarding exclusion of lobbying costs from rates; § 116, regarding discontinuance of water service; § 117, regarding consumer deposits; § 118, regarding payment to an authorized agency; § 119-a, regarding use of utility poles and conduits; and, § 119-c, regarding recognition of tax reductions in rates.

⁵⁰ These requirements include approval of: loans under PSL § 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).

⁵¹ See Cricket Valley Order at 23-24.

⁵² *Id.*

⁵³ See Cricket Valley Order at 25, and cases cited therein.

⁵⁴ Case 05-E-0098, *Caithness Long Island LLC*, Order Granting a Certificate of Public Convenience and Necessity, Providing for Lightened Regulation and Approving Financing at 36 (issued Nov. 15, 2006).

IV. NRG BERRIANS REQUESTS THAT IT BE GRANTED FINANCING APPROVAL IN CONNECTION WITH THE PROJECT PURSUANT TO PSL SECTION 69

A. Standard under PSL Section 69 and Reduced Scrutiny

Under PSL § 69, an electric corporation seeking a CPCN to construct or modify an electric plant, such as the Project, must seek approval from the Commission if it will incur indebtedness for a term that exceeds twelve months.⁵⁵ It is well-settled that the Commission “need not make an in-depth analysis” of a proposed financing transaction for an entity operating in the competitive wholesale market, but rather, that it may take “swift action” by relying on the representations made by the petitioner in its petition.⁵⁶ In other words, the scrutiny applicable to monopoly utilities may be reduced for a lightly regulated company that operates in a competitive environment.⁵⁷ Because the lightly regulated entity bears the financial risk associated with its financial arrangements, additional scrutiny is not required to protect captive New York ratepayers.⁵⁸ The Commission may also grant such lightly regulated entities financing flexibility so that such entity can modify, without prior Commission approval, the identity of the financing entities, payment terms, and the amount financed, so long as it does not exceed the maximum amount of financing approved. Granting such financing flexibility “avoids disruption of [such entity’s] financing arrangements and enables it to operate more effectively in competitive wholesale electric markets.”⁵⁹

⁵⁵ NY PSL § 69.

⁵⁶ 2005 NRG Financing Order, *supra*, at 3-4; *see also* 19-M-0071, *Greenidge Generation LLC, Greenidge Pipeline LLC and Greenidge Pipeline Properties Corporation*, Order Approving Financing and Making Findings at 4 (issued Aug. 9, 2019) (citing Case 17-D-0016, *TC Ravenswood et al.*, Order Approving Transfer Subject to Acceptance of Conditions and Making Other Findings (issued April 19, 2017)).

⁵⁷ 2005 NRG Financing Order, *supra*, at 4.

⁵⁸ Prior CPCN Order, *supra*, at 20.

⁵⁹ *Id.*

B. Under a Reduced Scrutiny, the Financing Approval under PSL Section 69 Should Be Granted to NRG Berrians

Similar to the prior request for financing approval made by NRG Astoria in connection with the Project, and which was approved in the Prior CPCN Order, NRG Berrians requests financing approval for the Project on a similar basis, under a reduced scrutiny applicable to lightly regulated entities, but in an amount up to \$425 million, given the reduced costs associated with the Project, as modified. The Commission should also find that, under such reduced scrutiny, its regulations with respect to financing approval found at 16 NYCRR Part 37 are not applicable here.

Once the amended CPCN is transferred, NRG Berrians and its parent, NRG, expect to finance the Project through a combination of equity and debt, with limited or non-recourse financing. As discussed in Section II(B)(3)(c) above, NRG has substantial experience in the project finance markets. In 2018, NRG closed on \$192 million of construction loans, letter of credit and working capital facilities for Canal 3, a 333 MW gas-fired peaking facility in Massachusetts. Prior to that, NRG has raised project financing for power projects in various markets around the country, including the northeast, Texas and California markets, among others.

NRG actively participates in competitive energy markets across the United States. NRG has one of the largest and most diversified power generation portfolios in the United States, including fossil fuel, nuclear, solar, and wind generation. NRG currently owns generating facilities with a total capacity of approximately 23,000 MW. NRG has previously sought, and obtained, multiple financing approvals from the Commission, including, most recently, an approval in 2010 to increase the ceiling of its corporate debt up to \$15 billion.⁶⁰ With respect to all such financing approvals, NRG was given financing flexibility, as a lightly regulated entity, to change the

⁶⁰ See 2010 NRG Financing Order, *supra*.

financing entities, payment terms and amounts to be financed up to the maximum amount authorized.

Specifically with respect to the Project, in the Prior CPCN Order, the Commission authorized NRG Astoria to enter into a financing in an amount up to \$1.4 billion for the Project, using a scrutiny applicable to lightly regulated companies.⁶¹ The Commission found that the proposed financing was for a statutory purpose and did not appear contrary to the public interest. The Commission indicated that this maximum financing amount was with recourse to the Project only. In its 2011 Clarifying Order, the Commission clarified that the Project could be financed in whole, or in part, through the \$15 billion approved for its corporate parent, but that the maximum amount of financing approved for the Project was \$1.4 billion.⁶²

Here, too, the Commission can find that the request for financing approval by NRG Berrians, which is being made for the same purposes as previously sought by NRG Astoria, is for a statutory purpose and can be found to be in the public interest. Here, however, because the estimated cost of the Project, as modified, is less than the estimated cost associated with the improvements as originally proposed, the request for financing need only be approved up to a maximum amount of \$425 million. The Commission should also find that, because NRG Berrians may be subject to lightened regulation, it is afforded the flexibility to modify, without Commission prior approval, the identity of its financing entities, payment terms and the amount financed, so long as it does not exceed the maximum amount of \$425 million.

⁶¹ See Prior CPCN Order at 19-20.

⁶² *Id.*

V. ENVIRONMENTAL REVIEW OF THE MODIFIED PROJECT UNDER SEQRA

As set forth above, extensive environmental review under SEQRA was undertaken for the Project as previously proposed, with NYSDEC serving as lead agency and the Commission as an involved agency. Consistent with the June 12, 2019 Siting Board Declaratory Ruling, AGTP⁶³ has commenced a process to supplement the prior SEQRA review that was undertaken by NYSDEC and has requested that NYSDEC again act as the lead agency for such review (with the Commission serving as an involved agency). The Project continues to be classified as a Type 1 Action.

AGTP is currently in the process of preparing a Draft Supplemental Environmental Impact Statement (“DSEIS”) to address the Project’s potential adverse environmental impacts based on the modifications to the Project and/or any change in circumstances that were not adequately considered in the 2010 FEIS and that need to be supplemented in the DSEIS. On April 27, 2020, AGTP submitted applications to NYSDEC for modification of the Facility’s existing Title V and Title IV air Permits and for modification of the Facility’s existing SPDES permit as well as a Supplemental Enhanced Public Participation Plan that supplemented the Project’s prior Enhanced PPP. AGTP also completed Part 1 of the FEAF to re-open the SEQRA process, supplement NYSDEC’s prior review of the Project and trigger a coordinated review.⁶⁴

On May 19, 2020, pursuant to SEQRA and its implementing regulations, NYSDEC issued a lead agency coordination letter expressing its intent to act as SEQRA lead agency to other

⁶³ While the prior CPCN for the Project was issued in the name of NRG Astoria, AGTP has remained the permit holder for the permits issued for the existing Facility, and the applicant for the modifications to the environmental permits needed for the Project, including the Title V air permit and SPDES permit.

⁶⁴ The FEAF is attached hereto as Exhibit B, the Title V Air Permit Major Modification application is attached hereto as Exhibit C, the SPDES Permit Modification application is attached hereto as Exhibit E and the Supplemental Enhanced Public Participation Plan is attached hereto as Exhibit F. All of these documents are also publicly available here: www.cleanerpowerforastoria.com/.

potentially involved agencies. While a scoping process is optional, on June 20, 2020, AGTP submitted a Draft Scoping Statement to NYSDEC and agreed to a public scoping process to narrow issues and ensure that the DSEIS will be a concise, accurate and complete document adequate for public review. As part of the scoping process, the public was given notice of, and an opportunity to comment on, the Draft Scoping Statement, with the public comment period closing as of July 31, 2020. As set forth below, and as will be set forth in the DSEIS, the Project, as modified, will not have any significant environmental impacts and will have many beneficial impacts.⁶⁵

As was previously done in connection with the Project, a new air quality analysis was also performed for the Project in support of the Title V air permit modification application. The air quality modeling study was conducted for criteria pollutants (NO_x, VOCs, CO, PM₁₀, SO₂, lead), greenhouse gas (“GHG”) emissions (as CO₂ equivalents, CO_{2e}) and air toxic compounds, using a modeling protocol approved by NYSDEC.⁶⁶ The results of the dispersion modeling analysis indicate that maximum modeled concentrations associated with Project sources operating at steady-state conditions and start-up/shut-down conditions are below the established thresholds, that the Project would result in ambient concentrations of criteria and air toxic compounds that are well below health and welfare-based ambient air quality standards and guidelines and will not create any adverse air quality impacts.⁶⁷

By proposing to use the highly efficient H-class combustion turbine, the Project will generate electricity using less fuel than many existing, older units, and because the NYISO dispatches the bulk power system based on the next lowest cost of resource, the Project will displace older, less efficient generation in New York City, resulting in a net reduction in GHG

⁶⁵ The SEQRA Draft Scoping Document is attached as Exhibit G, and is also publicly available here: www.cleanerpowerforastoria.com/.

⁶⁶ See Section 5.2.1 of the SEQRA Draft Scoping Document at 5-4 through 5-5.

⁶⁷ *Id.* at 5-5.

emissions.⁶⁸ Based on modeling of the projected Project's unit dispatch using future market conditions, the Project is forecasted to result in a direct reduction of GHG emissions of over 150,000 tons annually in 2023 and 2024 and as much as 72,000 tons annually in 2035, and cumulative direct GHG emission reductions of over 1 million tons by 2035.⁶⁹ As discussed above, in addition to these direct GHG emissions reductions, the Project results in further, indirect GHG emissions reductions of approximately 4 million tons due to its quick start and fast ramping capability and its ability to economically provide highly reliable capacity to Zone J thereby allowing additional renewable generation to reliably interconnect to the bulk power system minimizing the cost of reducing GHG emissions in New York City demonstrating the Project's consistency with the CLCPA.⁷⁰ In addition, the Project is capable of using emission-free hydrogen fuel in the future and will allow for the incorporation of energy storage at the site with a 24 MW battery energy storage systems for its black start capability, further demonstrating consistency with the limits, targets and goals of the CLCPA.

In addition to the air quality and climate change analysis and modeling, the other potential environmental impacts of the Project are being analyzed and evaluated, as set forth in the Draft Scoping Document.⁷¹ The Draft Scoping Document indicates those Project impacts that are not anticipated to change based on the Project modifications or change in circumstances and thus, also indicates that it is anticipated that the DSEIS will particularly focus on the potential for significant adverse impacts including air resources, climate change, environmental justice, health outcome

⁶⁸ *Id.* at 5-6; *see also* Title V Air Permit Major Modification Application at 6-2 and Appendix F (Navigant GHG Study) at 1, 16-17.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 4-1 through 4-7

data, coastal consistency review and local waterfront revitalization plans, and cumulative impacts.⁷²

It is anticipated that such analyses will conclude that the Project will have either insignificant or beneficial impacts to the environment, and that any impacts that cannot be avoided will be either minimized or mitigated to the maximum extent practicable.

Furthermore, the CLCPA requires all state agencies to consider whether the decision to issue permit(s) is inconsistent with or will interfere with the attainment of GHG emission limits established through the CLCPA (and as set forth in new Article 75 of the Environmental Conservation Law). As set forth above, the Project will result in significant GHG reductions, both directly, through the displacement of older, less efficient generating facilities in New York City, and indirectly, by providing quick start and fast ramping capacity to maintain reliability in New York City and avoiding the installation of very large amounts of marginal capacity from energy storage, the cost savings of which can be applied to accelerate procurement of additional renewable resources.⁷³

CONCLUSION

WHEREFORE, for the above-stated reasons, Petitioners respectfully request that the Commission issue an order:

1. granting the requested amendment to the CPCN for the Project, as modified, pursuant to PSL § 68(1);
2. approving the transfer of the amended CPCN to NRG Berrians East Development LLC pursuant to PSL § 70(1);
3. approving the lease of certain real property interests from Astoria Gas Turbine Power LLC to NRG Berrians East Development LLC pursuant to PSL § 70(1);

⁷² *Id.* at 5-1 through 5-10.

⁷³ *Id.* at 5-6; *see also* Title V Air Permit Major Modification Application at 6-2 and Appendix F (Navigant GHG Study) at 1, 16-17.

4. finding that NRG Berrians East Development LLC may be accorded lightened regulatory treatment;
5. granting financing approval to NRG Berrians East Development LLC for the Project pursuant to PSL § 69; and
6. granting such further relief as the Commission may deem appropriate.

Respectfully submitted,

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