

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on May 16, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
James L. Larocca
Gregg C. Sayre

CASE 12-G-0539 - Petition of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York for Approval of the Transfer of Certain Property Located at 809-873 Neptune Ave., Brooklyn, New York, to 809 Neptune Ave LLC d/b/a Storage Deluxe.

CASE 08-G-0071 - Petition of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York for Approval of the Transfer of Certain Property Located at 809-873 Neptune Avenue, Brooklyn, New York, to Steel Arrow, LLC.

ORDER APPROVING TRANSFER OF PROPERTY

(Issued and Effective May 20, 2013)

BY THE COMMISSION:

INTRODUCTION

On November 27, 2012, Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York (the Company, Brooklyn Union) submitted a petition for approval to transfer a 2.98 acre parcel of commercial property located at 809-873 Neptune Ave., Brooklyn, NY (Neptune Avenue property) to 809 Neptune Avenue LLC d/b/a Storage Deluxe (Storage Deluxe) for \$15 million. The property was formerly the site of a refueling station for Brooklyn Union's service vehicles that has since been retired and removed from the premises, and where buildings once used as a service and training center still stand in unusable condition.

The Commission formerly approved an earlier purchase contract for this property in Case 08-G-0071, by which Steel Arrow, LLC, agreed to purchase the same parcel for \$7.15 million.¹ Due to Staff concerns that the 2008 property transfer was never completed and the price renegotiated to \$5.25 million, the property was rebid, the result of which was Storage Deluxe's current purchase and sale contract.

Brooklyn Union's November 27, 2012 Petition was published in the New York State Register on December 19, 2012. The 45-day comment period ended on February 2, 2013. During that time, the Commission received many comments and submissions from one individual only, Toniann Zito. Ms. Zito's primary comment (her other comments being more fully described and addressed below) pertaining to this proposed sale is that Brooklyn Union should be required to show that the sale of the Neptune Avenue property to Storage Deluxe would provide jobs to the community.²

Upon review of the Petition and supporting documentation, the Commission approves the transfer of property to Storage Deluxe under the terms described in this order.

¹ See Case 08-G-0071 - Petition of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York for Approval of the Transfer of Certain Property Located at 809-873 Neptune Avenue, Brooklyn, NY to Steel Arrow, LLC, As So Recommended (issued and effective August 22, 2008) (2008 Order).

² During the pendency of Case 08-G-0071, and throughout the rebidding process, Ms. Zito submitted no fewer than 12 public comments and 20 letters of correspondence, which were addressed by the Secretary and other Staff.

BACKGROUND

Brooklyn Union's proposed sale of this property first came before the Commission in 2005. In that petition, Brooklyn Union sought permission pursuant to Public Service Law §70 to sell the property to Steel Arrow, LLC (Steel Arrow) for \$4.5 million.³ Given that the 2005 sale price had not been reached through the use of competitive bidding, Staff questioned whether the sale price was a reflection of the property's fair market value.

Brooklyn Union then conducted an open bidding process and submitted a new petition to sell the property to Steel Arrow, which had submitted the highest reliable offer. On August 22, 2008, the Commission approved a petition to transfer 809-873 Neptune Avenue to Steel Arrow for \$7.15 million. After Steel Arrow failed to close on that sale, Brooklyn Union and Steel Arrow renegotiated the sale price without notice to the Commission. The renegotiation resulted in an agreed-upon sale price of \$5.25 million. In an October 18, 2010 petition, Brooklyn Union sought Commission approval of the transfer at the lower price (October 18 Petition).

Upon learning that the renegotiated price had not been reached after an open bidding process, Staff discussed with the Company the need to rebid the property to ensure that ratepayers would receive fair market value for the land. Moreover, due to the process by which the reduced sale price had been reached, Staff informed Brooklyn Union's parent company, National Grid, that an internal audit of the Company's real estate practices for the disposition of utility property would be required before the Company could proceed with the sale of the Neptune Avenue parcel.

³ 2008 Order at 2.

By a letter to the Commission's Secretary, dated May 18, 2011, Brooklyn Union withdrew its petition for approval at the new sale price of \$5.25 million and committed to competitively rebid the property. Further, the letter outlined the steps the Company would take to perform an internal audit of the entire sales process that resulted in the contract for \$5.25 million between Brooklyn Union and Steel Arrow.

After the internal audit, the Company concluded that at least three internal processes needed improvement. Most notably, the Real Estate group at the Company identified the need to formalize an "overarching policy in the US to govern the various real estate transactions undertaken by Brooklyn Union;"⁴ that a formal, written, process for the Coney Island transaction did not exist; but that the process "generally complied" with a Company process written in 2010. The Company concluded that, when deviations from the 2010 written process occurred, "A reasonable alternative action was pursued in most instances."⁵

Between May 19, 2011 and November 27, 2012, the date of Brooklyn Union's present petition, Staff was briefed monthly on the bidding process for the Neptune Avenue property, meeting with Company representatives to receive updates and to ask questions. In April 2012, Brooklyn Union began an eight-week marketing campaign in which "there were 703 outgoing calls made to potentially interested buyers, 10,290 emails sent soliciting interest and 439 hits on the dedicated website for the sales process."⁶ In response, 11 developers submitted confidential

⁴ October 11, 2011, National Grid Final Audit Report (Audit Report).

⁵ Audit Report at 3.

⁶ November 27, 2012 Petition at 4.

bids.⁷ The three highest bidders submitted their bids with no contingencies and with non-refundable cash deposits. After conducting due diligence research on the three highest bidders, Brooklyn Union further negotiated with the two highest bidders and ultimately accepted the bid of Storage Deluxe. According to the Company, upon further negotiation, Storage Deluxe's original bid was increased to a final offer of \$15 million. On September 19, 2012, Brooklyn Union Gas signed the purchase and sale agreement with Storage Deluxe.

COMMENTS

Ms. Toniann Zito, who placed an unchosen bid on behalf of Citi Development in the 2008 sale, submitted at least 33 letters and requests in Case 08-G-0071 and at least 15 sets of comments and letters in Case 12-G-0539.⁸ Ms. Zito makes several arguments against the property's future use as a storage facility and claims alleged bidding malfeasance against Brooklyn Union. Generally, Ms. Zito believes her bids in both the 2006 bidding process and the 2012 process were treated unfairly. For instance, she claims that Brooklyn Union did not send her a bidding package, a claim later recanted and replaced with the claim that she received a "bidding procedure" in 2012, that,

⁷ National Grid evaluated the bids based upon five factors:

(i) the strength of the bidder's commercial proposal and purchase price, (ii) a bidder's demonstrated ability to close comparable transactions and experience developing similar properties, (iii) the results of reference checks, (iv) the bidder's interest in and plans for the Property, and (v) a bidder's risk rating, including whether a bid was contingent on financing and the bidder's access to capital. November 27, 2012 Petition at 4.

⁸ Citi Development and Ms. Zito placed two separate bids in the 2012 sale process.

presumably, was different from procedure she followed in 2006.⁹ Ms. Zito states she did not receive an "up to date" appraisal of the property that she states she was promised and when she submitted a higher bid than her original one, it was still not accepted. Among the other reasons Ms. Zito believes the purchase by Storage Deluxe should be denied is that it would not create local jobs or improve the economic development of the neighborhood; that Brooklyn Union has not met its "heavy burden" of showing a public need exists for a storage facility; and that Brooklyn Union failed to present the "pros and cons" of the sale. Acknowledging that Brooklyn Union has shown that ratepayers would benefit from the profits derived from the sale to Storage Deluxe, Ms. Zito asks how that profit will be reflected in rates. Finally, Ms. Zito alleges that Brooklyn Union did not follow appropriate bidding procedures by: (1) not providing appraisals or comparable properties; and (2) by receiving a higher bid from her after the bid closing date.¹⁰

Ms. Zito asks that the Commission deny the transfer petition, that the Commission requires Brooklyn Union to "re-review" its real estate transfer plan and, in at least some of her correspondence, seeks a Commission order requiring Brooklyn

⁹ In response to Ms. Zito's claims that she was treated unfairly during the bidding, Brooklyn Union detailed the steps it took to ensure that she fully participated in the bidding process. See April 17, 2013 Letter from National Grid at 1.

¹⁰ In response to questions posed by Ms. Zito, Brooklyn Union provided documentation of its process for reaching the highest bid. It included notifying all bidders of the final bid deadline; contacting Ms. Zito directly to remind her of the bid deadline and to let her know her bid fell far short of the highest bidder; when her next bid arrived one month later, the Company told Ms. Zito her final bid was too late. In any event, her final bid was still lower than the bid from Storage Deluxe. April 17, 2013 Letter from National Grid at 1.

Union to "transfer this property at no consideration to me [sic] developers/investors . . ." ¹¹

DISCUSSION

Public Service Law §70 requires that all utility property transfers valued above \$100,000 receive Commission approval before the transfer can be completed. A petitioner seeking approval for such transfer is obligated to show that the transaction results in positive benefits to ratepayers. While the sale of this property has taken longer than most, the current sales contract meets that test and is in the public interest. It achieves a sale price derived from a public bidding process; assigns to ratepayers the full profit of the sale (less certain operating costs); is more than twice the 2008 Commission-approved sale price; and almost three times the most recent request that the Commission approve the transfer to Steel Arrow for \$5.25 million. After Staff review of the Company's depreciation, operations and maintenance costs in the upkeep of this property, and other sale costs, Staff has determined that the net benefit to ratepayers will be approximately \$12 million.

Importantly, the current price is the result of an open, competitive, bidding process. The purpose of such a process is to place all bidders on comparable footing and to evaluate each bid based upon the same criteria. The steps the Company took to accomplish these goals meets these criteria. The Company's petition and subsequent correspondence reveals that the Company followed a sound and transparent bidding

¹¹ February 22, 2013 Zito correspondence at 2.

process leading up to Storage Deluxe's final bid and purchase and sale contract.¹²

The Commission reviews utility property transfers to ensure that the benefits of a fair purchase price will inure to all of the Company's ratepayers and that it not provide benefits only to ratepayers in the local community where the property is located. The cost accounting associated with this property has shown us that Brooklyn Union has a plan to accurately credit ratepayers with the sale proceeds.

Moreover, the proposed purchase price is reasonable. This property is two blocks from New York City's recently purchased Coney Island Amusement Park property, for which the City has been making future development plans. The delay since 2005 in selling this property may have contributed to the much higher sales price due in part to the City's intervening redevelopment plans.

In addition, Storage Deluxe has promised the Company an easement to allow Brooklyn Union to install a gas heater station on the far corner of what is currently a parking lot.

¹² In any event, no one bidder has a right to have their bid chosen. The remedy Staff provided in this case for what appeared to have been an unfair process that led to the Company's October 18 Petition to sell Neptune Avenue for millions less than what the Commission approved in 2008, was to re-bid the property in an open, competitive bidding process. During that process, the Company provided monthly marketing updates to Staff and fully cooperated with all Staff requests for additional updates when necessary. The Company implemented changes to bidding processes when Staff advised it to do so and, in so doing, avoided, to the extent possible, additional overhead costs that would have been needed to secure the now-abandoned building on the site. In particular, Ms. Zito's participation was not foreclosed during the bidding process. The record shows she was provided the same sales materials as all other potential buyers. She was told her original bid was too low and was asked to submit a higher bid, which was also too low.

The new gas heater will improve heating supply throughout Brooklyn Union's service territory. The addition of this utility facility on the site will not impact the planned use of the property as a storage facility. At the same time, Brooklyn Union is seeking permission from New York City to subdivide the parcel, in which case the Company will be able to retain ownership of the corner for the gas heater. The easement the purchaser has agreed to provide the Company will accomplish the same result if the City fails to approve a subdivision by the time the Commission approves this Section 70 petition. Either way, the sale price remains at \$15 million, ratepayer service in the area will be improved, and all ratepayers will benefit.

Accounting Treatment

As per the sales agreement, Storage Deluxe will purchase a 45,000 square foot multi-story building located on approximately 2.98 acres of land, as described in the Company's petition.¹³ Under the terms of the agreement, Brooklyn Union will sell 3.21 acres of land subject to the easement described above if the Company is unable to secure approval from the City of New York to subdivide the parcel to retain .23 acres to accommodate the Company's anticipated operational needs. The sales agreement includes the Storage Deluxe's commitment that, in the event the Company is not able to subdivide the property on or before the Commission's approval of this sale, Brooklyn Union will receive the .23 acre parcel at the time of closing, without any adjustment in the purchase price.

Staff has reviewed the Company's filing and the calculation of the net gain on this sale. In addition, Staff made several formal and informal information requests for

¹³ November 27, 2012 Petition Exhibit 1 at 1.

detailed backup and explanation supporting this transaction. In the Company's initial filing, it stated that the net gain on sale of this property is almost \$11 million. This net gain amount was derived by offsetting the \$15 million of sale proceeds less sale costs of \$1.4 million and the \$2.6 million net book value of the property. The Company seeks to adjust the net gain at the closing date for any ongoing, additional maintenance and security expenses. Brooklyn Union proposed to record the net proceeds of \$11 million from the sale as a credit to Account 254 - Other Regulatory Liabilities for the benefit of ratepayers.

The Company's stated \$1.4 million cost for the sale of the property includes security expenses of \$141,189, which was later updated by the Company to \$172,673. Staff's review indicates that these security costs were neither a component of the Neptune Avenue capitalized property costs, nor were they integral to transacting the sale of property. In fact, Brooklyn Union's annual operating expenses in 2011 and 2012 calendar years already reflected these security costs. Therefore, the inclusion of these costs within the cost of the sale would constitute a double recovery for the Company.

Similarly, Staff asked the Company to provide documentation supporting the computation of the net book value of the property of \$2.6 million, which was later updated to \$2.9 million. The Company stated that the computation includes a depreciation expense reversal adjustment beginning in March 2005 because at that time the final group of employees from the former training and service center located on the property were moved to other Company locations. Subsequently, it was determined that the property was still being used for utility purposes until March 2012, and the net value of the property was revised to \$1.8 million.

Based on Staff's further requests, the Company updated the net gain on the sale to \$11.9 million. This increase in the net gain on the sale was due to elimination of the security expense of \$141,189 and due to revising the net book value of the property to \$1.8 million.

Similarly, at closing, the net gain on the sale of the property shall not be adjusted for any additional or other expenses. In response to a Staff information request, the Company also stated that because this property was categorized as not used and useful beginning March 2012, upon the sale of the property, property taxes associated with this property will be removed from the deferral calculation as of March 2012, and will be borne by the Company.

We adopt Staff's recommendation that the \$11.9 million net gain on the sale of the property be recorded as a credit to Account 254 - Other Regulatory Liabilities to be retained for the future benefit of ratepayers and as a debit to Account 131. The debit to Account 131 is necessary to recognize that the cash proceeds represent interest-free funds made available to the Company. To compensate ratepayers, a carrying charge shall be accrued on the regulatory liability balance less the associated deferred income taxes using the Company's Allowance for Funds Used During Construction rate.

Since the property is no longer used or useful for any utility-related purposes, Staff believes that the sale will not adversely affect the operations of the Company or its service to customers. Also, ratepayers would further benefit from the sale by avoiding annual operating expenses associated with this property. This conclusion further bolsters the determination that the transfer is in the public interest and should be approved.

Brooklyn Union's customers will benefit from the gain on the sale, as well as a decrease in rate base and annual expenses associated with the property. Accordingly, the Commission directs Brooklyn Union to record a regulatory liability of \$11.9 million to reflect the gain on sale of this property.

ENVIRONMENTAL QUALITY REVIEW

Under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law, and its implementing regulations, (6 NYCRR Part 617 and 16 NYCRR Part 7), all State agencies must determine whether the actions they are requested to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional State or local permits or approvals for the sale of the building are required, and so a coordinated review under SEQRA is not needed. We will assume Lead Agency Status under SEQRA and conduct an environmental assessment.

SEQRA (6 NYCRR § 617.6(a)(3)) requires applicants to submit a completed environmental assessment form (EAF) describing and disclosing the likely impacts of the proposed actions. Petitioner submitted a full Part I EAF long-form.

Our 2008 Order found that various environmental site assessments and due diligence reports associated with this property confirmed the existence of contaminants in the subsurface of the property, which resulted in the opening of an Open Spill Number (No. 96007457) with the New York State Department of Environmental Conservation (DEC). Remediation activities were conducted in 2006-2007. As a result, 1,363 tons of non-hazardous petroleum soils and 20 cubic yards of hazardous waste soil were excavated and removed from the properties. Additionally, 111,000 gallons of non-hazardous contaminated

water were removed and disposed. The site was then restored upon completion of the remediation activities. A detailed report on the remediation was submitted to the DEC when the Company requested closure of the Spill Number. On December 13, 2007, the DEC issued a letter approving the closure of the Spill Number, as well as the groundwater monitoring wells which had been required as part of this original Open Spill investigation and remediation.

The proposed action is the approval of the transfer of ownership of an approximate 3.21 acre parcel of land at 809-873 Neptune Avenue, Brooklyn, NY from The Brooklyn Union Gas Company d/b/a National Grid NY to 809-873 Neptune Avenue LLC d/b/a Storage Deluxe. The proposed action does not meet the definition of either Type 1 or Type 2 actions that are contained in 6 NYCRR §§ 617.4, 617.5, and 16 NYCRR § 7.2, so it is classified as an "unlisted" action requiring SEQRA review. After review of the EAF and the petition, we conclude, based upon the criteria for determining significance listed in 6 NYCRR § 617.7(c), that there will be no changes due to the sale of the property interests that will result in significant adverse environmental impacts. Staff has completed Part 2 of the EAF long-form.

As lead agency, we determine that the action proposed in the petition will not have a significant impact on the environment and adopt a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no Public Notice Requesting Comments is required or will be issued. A Notice of Determination of Non-Significance for this unlisted action is attached. The completed EAF will be retained in our files.

In light of the environmental issues associated with the property, the Purchase and Sale Agreement between Brooklyn

Union and Storage Deluxe states that Storage Deluxe is purchasing the property "as is," and that Brooklyn Union is released from any future liability concerning environmental damage to the property. Storage Deluxe also agrees to bear responsibility for any future environmental remediation associated with the property. While it is permissible for Storage Deluxe, as the prospective owner of the property, to assume all environmental liability associated with the property and release Brooklyn Union from any future environmental liability as a contractual matter, Staff has determined that, in the event that Storage Deluxe fails to remediate any environmental damage as required by law, both the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the New York State Environmental Conservation Law (ECL) will hold Brooklyn Union liable for any required remediation, regardless of the liability release contained in the Purchase and Sale Agreement. In such a situation, the "as is" provision negotiated for and contracted by Brooklyn Union does not insulate the Company from liability.

CONCLUSION

For the reasons stated herein, Brooklyn Union's request for approval of the sale of property at 809-873 Neptune Avenue in Brooklyn, New York to Storage deluxe, LLC is approved.

The Commission orders:

1. The sale of property located at 809-873 Neptune Avenue, Brooklyn, New York to Storage Deluxe, is approved.
2. The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York shall record the net gain realized on the sale and retirement of the property with the associated deferred income tax effects as a credit to Account 254 - Other

Regulatory Liabilities, and as a debit to Account 131 - Cash. A carrying charge should accrue on the regulatory liability balance less the associated deferred income taxes utilizing the Company's Allowance for Funds Used During Construction Rate;

3. Within 60 days of closing, The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York should file a detailed accounting showing the changes to Account 254 - Other Regulatory Liability and all offsets and the appropriate journal entries;

4. The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York shall record the sale's proceeds as described in this order.

5. Case 08-G-0071 is closed.

6. Case 12-G-0539 is continued pending the real estate closing and transfer of title between Brooklyn Union Gas and Storage Deluxe, LLC at which time it is closed.

By the Commission,

(SIGNED)

JEFFREY C. COHEN
Acting Secretary