

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on May 14, 2020

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Diane X. Burman
James S. Alesi
Tracey A. Edwards
John B. Howard

CASE 20-E-0083 - Joint Petition of Astoria Energy LLC, Astoria Energy II LLC and Astoria Power Partners Holding, LLC for a Declaratory Ruling Invoking the Wallkill Presumption or for Approval Pursuant to Section 70 of the Public Service Law.

DECLARATORY RULING ON REVIEW
OF TRANSFER TRANSACTIONS

(Issued and Effective May 19, 2020)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on February 14, 2020, several entities with current and prospective ownership interests in Astoria Energy LLC (Astoria I) and Astoria Energy II LLC (Astoria II), which own electric generation facilities located in Queens, New York, sought a declaratory ruling that the proposed transfers of indirect ownership interests associated with Astoria I and Astoria II do not require further review under Section 70 of the Public Service Law (PSL) (the Petition). Responses to the Petition were due within the 21-day period prescribed under the Public Service Commission's (Commission) Rules of Procedure, 16 NYCRR §8.2(c). No comments were received

by the deadline, which expired on March 6, 2020. As discussed below, the Commission finds that the information provided in the Petition satisfies the presumption established in the Wallkill Order, and accordingly declares that no further review of the proposed transfer transactions is warranted.¹

THE PETITION

The Petitioners

A. Astoria I

The Petition describes Astoria I as the sole owner of the Astoria I Facility, which is an approximately 615 megawatt (MW) dual fuel (natural gas and low sulfur No. 2 fuel oil) combined cycle electric generation facility located in Queens, New York. The output from the Astoria I Facility is sold on a merchant basis into the Zone J wholesale power market operated by New York Independent System Operator Inc. (NYISO). Astoria I was organized for the purpose of developing, owning, and operating the Astoria I Facility. Astoria I makes no sales outside of and is not interconnected outside of the NYISO Zone J submarket. Astoria I is wholly owned by Astoria Project Partners LLC (APP I).

B. APP I

As the Petition reports, APP I is a Delaware limited liability company established for the purpose of owning all of the direct interests in Astoria I. APP I is the sole member of Astoria I. APP I does not directly own any generation or transmission assets, and is a parent company of only Astoria I. Neither Astoria I, APP I, nor their affiliates have a franchised retail service territory, any captive customers, or is engaged

¹ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Order).

in the state-regulated sale of electricity at retail. In addition, neither Astoria I, APP I, nor their affiliates own, operate, or control electric transmission rights or electric transmission facilities, other than limited facilities used solely for the interconnection of generating facilities to the transmission grid.

C. The Astoria I Sellers

The Petition indicates that APP I is directly held by East River Fundco LLC, East River Energy Investments LLC, Suez Energy Astoria LLC, MIT Astoria LLC, and Steinway Creek Electric Generating Company LLC (collectively, the Astoria I Sellers), which plan to sell their direct interests in APP I.

D. Astoria II

As noted in the Petition, Astoria II is the sole owner of the Astoria II Facility, which is an approximately 615 MW dual fuel (natural gas and low sulfur No. 2 fuel oil) combined cycle generation facility co-located with the Astoria I Facility. The output of the Astoria II Facility is fully committed to the New York Power Authority (NYPA) under a bilateral long-term power purchase agreement that expires in June of 2031. Under the terms of the power purchase agreement, NYPA procures and schedules all fuel necessary to operate the Astoria II Facility, performs all of the day-ahead and real-time bidding of the Astoria II Facility in the NYISO administered wholesale power market, and directly settles the sales of all products from the Astoria II facility with the NYISO. Astoria II does not own or control any other generating facility.

Astoria II was organized solely for the purpose of developing, owning, and operating the Astoria II Facility. Astoria II makes no sales outside of, and is not interconnected outside of, the NYISO Zone J submarket. Astoria II does not make, and cannot make or contemplate making, any retail sales of

power to any electric customer in New York or otherwise. Astoria II is wholly owned by Astoria Project Partners II LLC (APP II).

E. APP II

The Petition further explains that APP II is a Delaware limited liability company established for the purpose of owning all direct interests in Astoria II. APP II is the sole member of Astoria II. APP II does not directly own any generation or transmission assets and is a parent company of only one public utility company, Astoria II. Neither Astoria II, APP II, nor any of their affiliates has a franchised retail service territory, any captive customers, or is engaged in the state-regulated sale of electricity at retail. Further, neither Astoria II, APP II, or their affiliates own, operate, or control electric transmission rights or electric transmission facilities, other than limited facilities used solely for the interconnection of generating facilities to the transmission grid.

F. The Astoria II Sellers

The Petition indicates that APP II is directly held, in part, by Charles R. McCall, AE Investor II LLC, JEMB Astoria II LLC, NM Harbert Astoria LLC, and Suez Energy Astoria II, LLC, which plan to sell their direct interests in APP II.

G. The Purchaser

As reported in the Petition, Astoria Power Partners Holding, LLC (APPH or Purchaser) is a Delaware limited liability company formed solely as a holding company for the purpose of investing in the upstream owners of the Astoria Facilities. APPH holds no interests, including any interest in any jurisdictional facilities in NYISO or any adjoining Balancing Area Authority. APPH is directly owned 5.5% by Clal Astoria Blocker LP, 20.0% by MR Gotham LP, and 74.5% by Gotham Power

Investors LLC. APPH is managed by a Board of Managers comprised of up to ten (10) managers, with each member of APPH having the ability to appoint one (1) manager for each 10% equity interest that such member owns.

1. Clal Astoria Blocker LP

Clal Astoria Blocker LP is a Delaware limited partnership of which Canaf-Clal Financial Management, Ltd. is the general partner. Both Clal Astoria Blocker LP and Canaf-Clal Financial Management, Ltd. are indirectly owned by Clal Insurance Enterprises Holding Ltd. (Clal Holding), which is a publicly traded company, listed on the Tel Aviv Stock Exchange, and the parent company of Clal Insurance Company Ltd. (Clal). Clal is an insurance and long-term savings company incorporated and based in Israel. Neither Clal Holding nor Clal nor Clal Astoria Blocker LP or any of their affiliates has a franchised retail service territory, any captive customers, or is engaged in the state-regulated sale of electricity at retail. Moreover, neither Clal Holding nor Clal nor Clal Astoria Blocker LP or any of their affiliates owns, operates or controls electric transmission rights or electric transmission facilities (other than limited facilities used solely for the interconnection of generating facilities to the transmission grid). Additionally, neither Clal Holding nor Clal nor Clal Astoria Blocker LP or any of their affiliates owns or controls any electric generating facilities or essential inputs to electric generation anywhere in NYISO or an adjacent Balancing Authority Area.

2. MR Gotham LP

MR Gotham LP is a Delaware limited partnership. MR Gotham LP is a wholly owned indirect subsidiary of Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft in München (Munich Re). Munich RE is a global provider of reinsurance, primary insurance, and insurance-related risk solutions.

Neither MR Gotham LP nor Munich RE or any of their affiliates has a franchised retail service territory, has any captive customers, or is engaged in the state-regulated sale of electricity at retail. Also, neither MR Gotham LP nor Munich RE or any of their affiliates owns, operates, or controls electric transmission rights or electric transmission facilities (other than limited facilities used solely for the interconnection of generating facilities to the transmission grid). Similarly, neither MR Gotham LP nor Munich RE or any of their affiliates owns or controls any electric generating facilities or essential inputs to electric generation anywhere in NYISO or an adjacent Balancing Authority Area.

3. Gotham Power Investors LLC

Gotham Power Investors LLC is a Delaware limited liability company. As of the date of consummation of the Proposed Transactions, Gotham Power Investors LLC will be directly owned 46.32% by Golden Inferno LLC, 53.18% by Pomarina LLC and 0.5% by Harbert GPI MM, LLC (Harbert).

a. Golden Inferno LLC

Golden Inferno LLC is a Delaware limited liability company and is wholly owned by the California State Teachers Retirement System (CalSTRS). CalSTRS is a California state agency and retirement fund formed for the purpose of funding retirement, disability, and survivor benefits for California pre-kindergarten through community college educators and their families. CalSTRS is a passive equity investor and was established by California law to provide retirement, disability and survivor benefits to California's public-school educators from prekindergarten through to community college.

b. Pomarina LLC

Pomarina LLC is a Delaware limited liability company wholly owned by Pomarina Investments Holdings B.V., which in-

turn is wholly owned by APG Infrastructure Pool 2017 II (the Pool). The Pool is managed by APG Asset Management N.V. (APG). The Pool is owned by two pension plans formed under the laws of the Netherlands: Stichting Pensioenfondsen ABP (ABP), which owns 99.8%, and Stichting Personeelspensioenfonds APG (PPF) which owns the remaining 0.2%. ABP, which is the pension fund for the Dutch civil servants and education workers, indirectly controls and has majority ownership of APG. APG Asset Management US Inc., which is the manager of Pomarina, LLC, is a wholly owned subsidiary of APG.

Both CalSTRS and APG hold indirect, passive, non-controlling interests in two transmission lines, which include the Cross-Sound Cable (CSC) and the Hudson Transmission Project (HTP). As the holders of indirect passive, non-controlling interests, neither CalSTRS nor APG manage the operations of these facilities nor do they control rates charged or availability of the facilities. CalSTRS and APG also hold indirect, passive, non-controlling interests in Duquesne Light Company (Duquesne Light), a large regulated electric transmission and distribution utility serving over a half million customers in southwestern Pennsylvania.²

c. Harbert

The Amended and Restated Limited Liability Company Agreement for Gotham Power Investors LLC appoints Harbert as the Managing Member and Harbert will provide management and administrative services to Gotham Power Investors LLC. Harbert will not have voting rights or representation on the Board of

² Duquesne Light does not presently own generation resources. Its transmission facilities are under the operational control of PJM pursuant to an open access transmission tariff regulated by the Federal Energy Regulatory Commission.

Directors, or the ability to direct certain strategic decisions, such as business plans, budgets, or major investments, without the unanimous approval by Gotham Power Investors LLC's members.

Harbert, a Delaware limited liability company, is a wholly owned subsidiary of Harbert Power, LLC (Harbert Power), an Alabama limited liability company. Harbert Power is majority owned and controlled by Harbert Management Corporation (HMC), an Alabama corporation. No other entity owns 10% or more of the outstanding voting securities of Harbert Power. HMC and certain affiliates of Harbert already hold, in the aggregate, an ownership interest of greater than 10% in APP through its current owner Harbert Power Fund V, LLC and JEMB/Harbert Astoria Holdings LLC. HMC and affiliates of Harbert already have an ownership interest in APP II through current owner GPP Astoria II, LLC, GPP New York, LLC, NM Harbert Astoria LLC and JEMB Astoria II LLC.

Harbert, through HMC, is affiliated with Waterside Power, LLC (Waterside Power), which owns and operates a 69.6 MW liquid fuel-fired electric generating facility located in Stamford, Connecticut (the Waterside Facility) and interconnected to the transmission system operated by ISO-New England Inc. (ISO-NE). All of the output of the Waterside Facility is currently sold in the wholesale markets administered by ISO-NE. Harbert also is affiliated with the Colver power project (Colver), a 110 MW waste coal-fired qualifying facility in Colver, Pennsylvania, interconnected with Pennsylvania Electric Company in the PJM Interconnection, LLC (PJM) balancing authority area. The Colver project is fully committed under a long-term power purchase agreement to Pennsylvania Electric Company under the Public Utilities Regulatory Policy Act.

Except for Waterside Power, the Colver power project, Astoria I and Astoria II, neither Harbert nor its affiliates own

or control any electric generation or transmission facilities in NYISO, or markets first tier to NYISO. In addition, neither Harbert nor its affiliates own or control any essential inputs to electric power production or is affiliated with a franchised public utility.

The Proposed Transactions

Turning to the proposed transfers, the Petitioners (collectively, Astoria I, APP I, Astoria I Sellers, Astoria II, APP II, Astoria II Sellers, and the Purchaser) explain that on January 16, 2020, the Purchaser and the Astoria I Sellers executed a Purchase and Sale Agreement providing for the purchase and sale of equity interests in APP I, while Purchaser and the Astoria II Sellers also executed a Purchase and Sale Agreement providing for the purchase and sale of equity interests in APP II. Upon closing, Purchaser would directly acquire 100% of the interests in APP I from the Astoria I Sellers. To effectuate Purchaser's acquisition of interests in APP II, immediately prior to the closing, the Astoria II Sellers would complete a conversion transaction pursuant to which the Class A and Class B equity interests in APP II would be converted into a single class of equity interests. Upon closing, the Purchaser would directly acquire 54.9451% of the equity interest in APP II from the Astoria II Sellers.

Post-closing, both APP I and APP II would remain the direct and sole owners of Astoria I and Astoria II, respectively. APP I would become wholly owned by APPH. APP II would be jointly owned by APPH (54.9451%), GPP New York, LLC (12.0879%) and GPP Astoria II, LLC (32.9670%).³ Post-closing, APPH would remain under its current ownership structure, which

³ GPP New York, LLC and GPP Astoria II, LLC currently hold equity interests in APP II, which would remain unchanged after closing.

consists of Cal Astoria Blocker LP (5.50%), MR Gotham LP (20.00%) and Gotham Power Investors LLC (74.50%).⁴

Request for Declaratory Ruling

The Petitioners maintain that the proposed transfers satisfy the presumption established in the Wallkill Order, whereby the Commission decided that under a lightened regulatory regime PSL §70 regulation would not adhere to a transfer of ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generation facilities unless there was a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption. Petitioners maintain that the proposed transactions not create any potential for harm to the interests of captive utility ratepayers because the Petitioners operate in a competitive market and have no captive ratepayers.

Furthermore, Petitioners asserts that the Proposed Transactions will not result in the potential to exercise either vertical or horizontal market power. As noted in the Petition, the only New York energy related assets that any of Purchaser's investors' affiliates have is the indirect, passive and non-controlling financial interests held by affiliates of Golden Inferno LLC and Pomarina LLC in the CSC and HTP transmission lines. Moreover, Petitioners argue that the investor affiliates of Purchaser that hold ownership interests in the markets surrounding New York are limited. Accordingly, Petitioners request a declaratory ruling from the Commission finding that no further review of the proposed transaction is necessary pursuant to PSL §70.

⁴ Exhibit B of the Petition depicts the results of the proposed transfers, including organizational charts depicting the upstream ownership of Astoria I and Astoria II before and after the proposed transactions.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support PSL §70 transfer requests with a demonstration that the transaction would not present the purchaser with the opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully-regulated utilities.⁵ The Commission has determined that full regulatory review is not needed for transfers of indirect, upstream ownership interests in lightly-regulated electric and gas corporations unless the proposed transfer presents a risk of market power or harm to captive ratepayers (i.e., the Wallkill Presumption).⁶

The Commission is authorized to issue a declaratory ruling with respect to: (i) the applicability of any rule or statute enforceable by it to any person, property, or state of facts; and (ii) whether any action by it should be taken pursuant to a rule. The Commission also may decline to issue such a declaratory ruling. This authority is expressly established by State Administrative Procedure Act §204 and governed by the Commission's Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute. Declaratory rulings involving interpretations of existing statutes, rules, or regulation are not "actions" within meaning of the State

⁵ See, e.g., Wallkill Order.

⁶ See, e.g., Case 17-E-0620, AP Cricket Valley Holdings I Inc., et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

Environmental Quality Review Act (SEQRA) and its implementing regulations and, therefore, they may be issued without further SEQRA review.⁷ The declaratory relief requested in the Petition falls within the ambit of the statute and regulations authorizing issuance of a declaratory ruling.

DISCUSSION AND CONCLUSION

The Commission has recognized that Astoria I and Astoria II operate in wholesale competitive markets and accordingly authorized the application of a lightened ratemaking regulatory regime with respect to their ownership and operation of their respective generating facilities.⁸ Accordingly, Astoria I and Astoria II may avail themselves of the Wallkill Presumption upon a sufficient demonstration. For the purposes of the Proposed Transactions, Petitioners have satisfied this presumption established in the Wallkill Order, under which transactions involving entities upstream from the entities owning wholesale electric generation facilities located in New York will be reviewed only if there is the potential for the exercise of market power or other harm to the interests of captive New York ratepayers.

The Proposed Transactions involving transfers from Astoria I Sellers and Astoria II Sellers to the Purchaser involve ownership interests in entities upstream from the direct generation owners, which own and operate electric generation

⁷ 6 NYCRR §617.5(c)(37) (defining "interpretation[s] of an existing code, rule or regulation," as Type II actions not subject to review under SEQRA).

⁸ See, Case 04-E-0058, Astoria Energy, LLC, Order Providing for Lightened Regulation (issued July 30, 2004), see also, Case 08-E-1111, Astoria Energy II LLC and Astoria Energy LLC, Order Approving Transfers and Financings and Making Other Findings (issued December 15, 2008).

facilities participating in the competitive wholesale markets. Because the generating facilities are operated as merchant facilities by Astoria I and Astoria II, which have no captive ratepayers, all of the financial obligations of the facilities are borne by its owners, not captive ratepayers.

With respect to the potential exercise of market power, the Purchaser, APPH, is directly owned by Clal Astoria Blocker LP, MR Gotham LP, and Gotham Power Investors LLC. Affiliates of these owners of APPH currently own de minimis generating assets in PJM and ISO-NE. Waterside Power's 69.6 MW of generating capacity represents 0.2% of the total 31,242 MW of installed capacity in the ISO-NE market and would not enable the exercise of horizontal market power in either ISO-NE or NYISO. Similarly, the Colver project would not enable the exercise of horizontal market power in PJM or NYISO given that it is fully committed under a long-term power purchase agreement to Pennsylvania Electric Company. The only generating assets owned by affiliates of the Purchaser in the NYISO market are existing interests in the Astoria I and Astoria II generating units. Further, Duquesne Light Company is a distribution and transmission utility with no generating assets. Accordingly, the Proposed Transactions do not pose the potential for the exercise of horizontal market power.

In addition, the Proposed Transactions do not pose the potential for the exercise of vertical market power since the ownership interests in the CSC and HTP transmission lines are indirect, passive, and non-controlling. As Petitioners report, CSC is a 24-mile high voltage direct current transmission line with bi-directional transfer capacity of approximately 330 MW between New Haven, Connecticut and Shoreham, New York. The CSC Project is under the operational control of ISO-NE pursuant to an open access transmission tariff.

The Petition further notes that HTP is an approximately 7.1-mile high voltage direct current electric transmission cable with bi-directional transfer capacity of 660 MW between Public Service Electric and Gas Company's Bergen Substation in Ridgefield, New Jersey to the Consolidated Edison Company of New York, Inc.'s W. 49th Street Substation in New York City. HTP and NYPA have entered into a long-term Firm Transmission Capacity Purchase Agreement, pursuant to which 87.12% (575 MW) of HTP's capacity is sold to NYPA. In addition, the remaining 85 MW of HTP's transmission capacity (12.88%) is sold in accordance with HTP's market-based rate authority granted by FERC.

The HTP Project is wholly owned by Hudson Transmission Partners, LLC (Hudson Partners). Hudson Partners is an indirectly owned subsidiary of CalSTRS, ABP, and PPF via indirect ownership of non-voting, passive Class C interests in Hudson Partners. The Class C interests are passive economic interests that entitle their owners to a share of the distributions but do not convey any authority to influence the daily operations or management of either Hudson Partners or HTP. Hudson Power Ventures, LLC, sole owner of the Class A interests in Hudson Partners, and unaffiliated with CalSTRS, ABP, and PPF, controls all of its day-to-day management and operations of Hudson Partners and HTP. Therefore, there is no ability to leverage the CSC and HTP transmission assets to advantage the Astoria generating assets, thereby foreclosing those avenues to exercise vertical market power.

Furthermore, Purchaser and its investors' respective affiliates do not have ownership interests in any: (i) electric generating or distribution facilities in New York; (ii) entities that are scheduling coordinators, reliability coordinators, or balancing area authorities in New York; (iii) energy services

companies or electric or gas transmission or distribution providers in New York; or (iv) entities that can exercise control over the provision of fuels used in generation in New York. Notably, the Proposed Transactions will not result in any changes in the day-to-day operations of the Astoria generating facilities. Following closing, Astoria I and Astoria II will remain the entities responsible for the operation and maintenance of the Astoria facilities.

The Commission concludes that Petitioners have made the requisite demonstrations required under the Wallkill Order that the proposed transfer will not pose potential market power concerns or other potential harm to the interests of captive ratepayers. Consequently, no further review of the transaction, as described in the Petition, is needed under PSL §70.

The Commission finds and declares:

1. No further review will be conducted of the proposed transfer transactions described in the Petition filed in this proceeding on February 14, 2020, and discussed in the body of this Declaratory Ruling.

2. This proceeding is closed.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary