

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
New York on November 16, 2023

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
Diane X. Burman, concurring
James S. Alesi
John B. Howard
David J. Valesky
John B. Maggiore, dissenting

CASE 23-G-0222 - Petition of National Fuel Gas Distribution Corporation for a Declaratory Ruling Regarding the Transfer of Facilities or, in the Alternative, Approval of the Transfer Pursuant to Section 70 of the New York Public Service Law.

ORDER AUTHORIZING TRANSFER OF ASSETS

(Issued and Effective November 20, 2023)

BY THE COMMISSION:

INTRODUCTION

On April 25, 2023, National Fuel Gas Distribution Corporation (National Fuel or the Company) filed a petition (Petition) requesting a declaratory ruling from the New York Public Service Commission (Commission), finding that a proposed transfer is not subject to Commission review and approval under Public Service Law (PSL) §70, or in the alternative, to authorize the transfer pursuant to PSL §70, without modification. The Company seeks to transfer a portion of the

Company's distribution facilities,¹ located within the territory of the Seneca Nation of Indians (Seneca Nation or the Nation) to the Seneca Nation to allow the Nation to operate the system and serve its members within the Nation's Cattaraugus Territory. By this Order, the Commission finds that the proposed transfer requires the Commission's authorization pursuant to PSL §70, and authorizes National Fuel to proceed with the transaction.

BACKGROUND

The Seneca Nation is a federally recognized sovereign Indian Nation, which holds several territories in western New York State. National Fuel provides natural gas service to parts of the Nation's territories, including the Cattaraugus Territory in which the Facilities are located. According to the Petition, the Nation desires to acquire the Facilities and take over distribution and service of natural gas to its members. The agreement among National Fuel, the Nation, National Fuel Gas Supply Corporation, and National Fuel Gas Company (the Agreement) would settle disputed matters among the parties to the Agreement. The Agreement provides that, after the transfer, National Fuel will supply gas to the Nation through six meters just outside the Cattaraugus Territory for the Seneca Nation to provide natural gas service to its customers within its lands as the sole owner and operator of the Facilities. The Petition states that the Nation already owns and operates a natural gas production gathering and distribution system in the Cattaraugus Territory, and recently further developed a base system to expand its natural gas delivery capability there. The Agreement requires National Fuel to provide training, operational support,

¹ The facilities to be transferred include 54,371 feet of gas mains, 234 gas services, 217 gas meters, and other appurtenant facilities (the Facilities). See NFG's response to DPS-3.

and maintenance for the Facilities for a one-year transitional period, to be extended by either one or two additional 12-month periods, up to a total of three years, should the Nation so elect.

PETITION

The Petition requests the Commission issue a declaratory ruling abstaining from review of the proposed transfer of assets to the Seneca Nation, or alternatively, requesting the Commission authorize the transaction pursuant to PSL §70.

National Fuel argues in its petition that the Commission lacks jurisdiction over sovereign Indian Nations, and thus requests that the Commission issue a declaratory ruling stating that it lacks jurisdiction over the Indian Nations and that the proposed transfer is not subject to Commission review and approval under PSL §70. National Fuel cites to a previous Commission declaratory ruling finding the Commission lacks jurisdiction over Indian Nations, and other similar issuances.² The Company notes in the Petition that in Case 98-E-1155, the Commission issued a declaratory ruling declining to approve a pole attachment agreement between Niagara Mohawk Power Corporation and the Oneida Indian Nation, reasoning that the

² Specifically, National Fuel cites to the following rulings and cases: Case 93-E-0947, Petition of Niagara Mohawk Power Corporation for a Declaratory Ruling, Declaratory Ruling (issued April 19, 1995); Case 94-E-0953, Petition of Niagara Mohawk Power Corporation to Exercise and Electric Franchise on the Lands of the Oneida Indian Nation, Oneida County, Pursuant to Section 68 of the Public Service Law, Approved as Recommended and So Ordered by the Commission (issued April 1, 1996); Case 98-E-1155, Petition of the St. Regis Mohawk Indian Tribe and its Akwesasne Power Authority Plan for a Declaratory Ruling Concerning the Commission's Jurisdiction Over Indian Reservations, Declaratory Ruling (issued December 28, 1998).

Commission lack jurisdiction over Indian Nations absent congressional consent.³ The Company asserts that the Commission should similarly declare in the instant matter that the transfer of assets to the Nation is outside Commission jurisdiction.

Alternatively, the Company states the Commission should authorize the transfer pursuant to PSL §70 because it is in the public interest and will not impact safety and reliability of service to any of its customers outside the Seneca Nation. According to National Fuel, the Seneca Nation wants to take over responsibility of provision of natural gas utility service to its customers on its own lands, and should be able to exercise its right to do so as a sovereign nation. The Nation will be solely responsible for the operation and maintenance of the Facilities and provision of service to its customers after a limited transition period. Additionally, the Company asserts that the transfer will not affect, positively or negatively, the safety or reliability of the gas service NFG provides outside the Nation, and will be of minimal financial impact, if any, to ratepayers. The Company contends that the difference between the amount of revenue currently generated through provision of service directly to customers in the Cattaraugus Territory compared to the revenue that will be generated from the Nation as a single customer will be de minimis compared to the total revenue of the Company. The Company proposes to retire the assets by crediting its distribution plant account and debiting its reserve accounts.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in

³ Case 93-E-1155, supra, p. 2.

the State Register on May 31, 2023 [SAPA No. {23-G-0222SP1}]. The time for submission of comments pursuant to the Notice expired on July 31, 2023. No comments were received.

STATE ENVIRONMENTAL QUALITY REVIEW

Together with its Petition, National Fuel provided Part 1 of a Short Environmental Assessment Form (EAF) in conformance with the State Environmental Quality Review Act (SEQRA) requirements found in 6 NYCRR §617.6(a)(3). The proposed sale is an Unlisted action, as defined in 6 NYCRR §617.2(al). The action does not rise to the level of a Type I action and is not listed on the Commission's Type II list of activities in 16 NYCRR §7.2(b) or those found in 6 NYCRR §617.5. National Fuel states that the action will have no significant adverse environmental effects. No other agency exercises jurisdiction relating to the proposed action. Accordingly, the Commission assumed Lead Agency responsibilities for the environmental review under SEQRA and has determined that a coordinated review is not necessary.

The Commission determines that the proposed sale of the Facilities to the Nation will not result in any significant adverse effects to land and water uses or natural resources in the City and associated area. No construction, disturbance, excavation, or demolition will be undertaken as part of the proposed action.

After review of the Petition, the Commission concludes, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no change to the operation of the existing Facilities that will result in adverse environmental impacts. Department of Public Service Staff has completed Parts 2 and 3 of the Short EAF.

As Lead Agency, the Commission determines that the proposed action will not have a significant impact on the environment and adopts a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no public notice requesting comments is required. A negative declaration concerning this unlisted action is attached to this Order. The completed Short EAF will be retained in the Commission's files with a copy made publicly available.

Moreover, the Climate Leadership and Community Protection Act (CLCPA) §7(2) requires that the Commission consider whether its decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emission limits established in Environmental Conservation Law (ECL) Article 75. Additionally, CLCPA §7(3) requires that the Commission ensure that its decisions do not disproportionately burden disadvantaged communities and requires that the Commission prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities. The proposed transfer of distribution assets before us does not result in any change in use or resulting greenhouse gas emissions. Customers within the Nation will continue to be served via the distribution assets, despite the ownership transferring to the Nation. Accordingly, it has no impact on achieving the statewide greenhouse gas emission limits established in ECL Article 75 and will not create any burden on the local community.

DISCUSSION AND CONCLUSION

The Commission declines to issue the requested declaratory ruling, and instead finds that the proposed transaction does require Commission authorization pursuant to PSL §70. Additionally, the Commission determines the proposed

transaction is in the public interest and authorizes National Fuel to proceed with the transaction.

National Fuel asserts that other declaratory rulings and Commission precedent provide that sovereign Indian Nations are outside Commission control and review of its business dealings. However, the cited cases do not address whether a transferor-utility is subject to PSL §70 when it proposes to transfer assets to a sovereign Indian Nation. PSL §70(1) states, in relevant part, "[n]o gas corporation or electric corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation or contract for the operation of its works and system, without the written consent of the commission."

While the Seneca Nation is sovereign and not subject to the PSL or its requirements, National Fuel is a gas corporation within the meaning of PSL §70(1) as the transferor of property. In analogous situations applying the PSL §70 equivalent for the transfer of water utility assets, PSL §89-h, in which private water utilities proposed to transfer water system assets to municipalities, which are outside Commission jurisdiction, we similarly require Commission authorization since the water utility as the transferor falls under our

purview.⁴ Accordingly, jurisdiction over the transaction follows from National Fuel, as transferor, requiring the Commission's authorization before it can proceed with the proposed transfer.

PSL §70 provides protection against a utility transferring assets or ownership to another entity in a manner that could harm customers or result in undesired changes to the utility's operations. Therefore, we assess whether the transaction is in the public interest. As explained below, we find the proposed transaction in the instant case will not result in significant impacts or undesirable changes to the utility's operations for its New York customers outside of the Seneca Nation's bounds. The Seneca Nation, however, is responsible for ensuring service within the Nation's territory meets its standards. The Commission thus does not impose conditions upon the Seneca Nation regarding its operation of the assets within its territory following the transfer. The Commission notes that National Fuel will continue to operate the assets for a transition period of one to three years. During the Company's tenure as operator, the Company as a regulated utility shall continue to be subject to Commission pipeline safety regulations. Therefore, the Company's actions and records, related to the system National Fuel operates, including that portion transferred to the Seneca Nation, will continue to

⁴ See Case 95-W-1176, Petition of Jamaica Water Supply Company for a Declaratory Ruling, Order Approving Transfer (issued May 15, 1996) (declining to issue declaratory ruling that transfer to municipality is outside Commission jurisdiction and instead approving transaction); Spring Brook Water Co. v. Village of Hudson Falls, 269 A.D. 515 (3 Dept. 1945) (finding that a private water company required the Commission's authorization pursuant to PSL §89-h before it could proceed with a proposed transfer to a municipality, notwithstanding that the Commission would not have jurisdiction over the municipality once the transfer occurred).

be subject to the Department's auditing of safety compliance during this transition period.

We find the proposed transfer is in the public interest because it will not present a significant impact to ratepayers given it will not create any changes in the provision of service to customers outside of the Seneca Nation, and furthers the Company and the Nation's desire to provide service to the members of its sovereign nation. Additionally, we find that the transfer will not impact the reliability, safety, operation, or maintenance of National Fuel's gas distribution system. Finally, within the specific context of this transaction, the Company's proposal to retire the assets by crediting its distribution plant account and debiting its reserve accounts is reasonable. Accordingly, we authorize National Fuel to proceed with the transfer to the Seneca Nation. Following the closing of the transaction, National Fuel shall file a copy of the actual journal entries to ensure compliance with the accounting treatment as described in the body of this Order.

The Commission orders and finds:

1. National Fuel Gas Distribution Corporation requires the Commission's authorization, pursuant to Public Service Law §70, before it can proceed with the proposed transfer of assets from National Fuel Gas Distribution Corporation to the Seneca Nation of Indians.

2. National Fuel Gas Distribution Corporation is authorized to transfer the distribution facilities within the Seneca Nation of Indians to the Seneca Nation of Indians, consistent with the discussion in the body of this Order. The authority is granted for one year from the issuance of this

Order and shall expire if the transaction is not completed within the one-year period.

3. National Fuel Gas Distribution Corporation shall file with the Secretary, within 60 days of the expiration of the authority granted pursuant to Ordering Clause 2, an explanation of why the transaction did not occur, if the sale of the Property is not completed within one year of the date of this Order.

4. National Fuel Gas Distribution Corporation shall file with the Secretary, within 60 days of the transfer of the distribution facilities to the Seneca Nation of Indians, a copy of the actual journal entries recorded to account for this transaction, together with the related workpapers.

5. In the Secretary's sole discretion, the deadlines set forth in this Order may be extended. Any request for an extension must be in writing, must include a justification for the extension, and must be filed at least three days prior to the affected deadline.

6. This proceeding is closed pending compliance with Ordering Clauses 3 and 4 or written notification by National Fuel Gas Distribution Corporation that the transfer was not completed within one year of the date of the issuance of this Order.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

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NOTICE OF DETERMINATION OF SIGNIFICANCE
(NEGATIVE DECLARATION)

NOTICE is hereby given that an Environmental Impact Statement will not be prepared in connection with the approval by the Public Service Commission (the Commission) of the transfer of certain facilities to the Seneca Nation based on the Commission's determination, in accordance with Article 8 of the Environmental Conservation Law, that such action will not have a significant adverse effect on the environment. The exercise of this approval constitutes an Unlisted action, as is defined in 6 NYCRR §617.2(a1).

Based on the Commission's review of the record, the Commission finds that the proposed action, which grants authority to National Fuel Gas Distribution Corporation to sell certain gas facilities to the Seneca Nation of Indians will not have a significant adverse environmental impact.

The address of the Public Service Commission, the Lead Agency for the purposes of the environmental quality review of this project, is Three Empire State Plaza, Albany, New York 12223-1350. Questions may be directed to Andrew Timbrook

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(Andrew.Timbrook@dps.ny.gov) at (518) 486-2463 or by writing to the address above.

MICHELLE L. PHILLIPS
Secretary