STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on February 17, 2022

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
Diane X. Burman
James S. Alesi
Tracey A. Edwards
John B. Howard
David J. Valesky
John B. Maggiore

CASE 21-E-0485 – Joint Petition of Generation Bridge II, LLC and PSEG Power, LLC for a Declaratory Ruling Eschewing Further Review of Transaction or, in the Alternative, an Order Approving Transaction Pursuant to Section 70 of the New York Public Service Law and Consent to Assignment and Release of the Bethlehem Facility Guaranty, and Petition of Generation Bridge II, LLC for an Order Authorizing Financing Pursuant to Section 69 of the New York Public Service Law.

ORDER APPROVING FINANCING AND TRANSFER, WITH CONDITIONS, AND MAKING OTHER FINDINGS

(Issued and Effective February 18, 2022)

BY THE COMMISSION:

INTRODUCTION

In a joint petition filed on September 13, 2021 (Petition), as supplemented on January 4, 2022 (Supplement), Generation Bridge II, LLC (Buyer) and PSEG Power, LLC (PSEG, or Seller) (collectively, the Petitioners) requested a declaratory ruling that the proposed transfer of Seller's upstream ownership interests in an 835 megawatt (MW) combined-cycle facility located in Bethlehem, New York (Bethlehem Facility) to Buyer (the Proposed Transaction) does not require further review under Section 70 of the Public Service Law (PSL). In the alternative, the Petitioners sought an order under PSL §70 approving the Proposed Transaction. The Petitioners also requested that the Public Service Commission (Commission) (1) authorize Buyer, pursuant to PSL §69, to enter into indebtedness of up to $455 million to fund the transfer, pay certain transaction expenses, and support the working capital needs of the business following the Proposed Transaction, along with flexibility to unilaterally modify the financing entities, payment terms, and amount financed up to the requested limit; (2) authorize Seller to assign to Buyer an existing guaranty associated with post-retirement decommissioning costs for the Bethlehem Facility, and release Seller from the obligations, guarantees, covenants, and warranties set forth in the guaranty; and (3) confirm that lightened regulation will continue to apply to the direct owner of the Bethlehem Facility.

In this Order, the Commission finds that the Proposed Transaction raises horizontal market power issues that require a full review pursuant to PSL §70. Upon review, the Commission approves the Proposed Transaction, subject to conditions designed to mitigate the potential exercise of market power. The Commission further authorizes the use of the Bethlehem Facility to incur indebtedness, up to $455 million, with flexibility in the financing arrangements. The Seller is also authorized to assign the decommissioning guaranty to Buyer. Finally, the Commission confirms that lightened regulation will continue following the closing of the Proposed Transaction.

THE PETITION

Buyer

The Petition indicates that Buyer is a wholly owned subsidiary of ArcLight Energy Partners Fund VII, L.P. (ArcLight Fund VII), which in turn is managed by Arclight Capital Partners, LLC (ArcLight), a specialized private equity firm in the United States focused on energy infrastructure investments, and has managed a series of funds, including funds making substantial investments in New York infrastructure. According to the Petition, since its inception, ArcLight has successfully raised over $20 billion dollars dedicated to support energy infrastructure investments, and ArcLight's various subsidiaries have owned and managed over 23,000 MW of generation throughout North America and Europe since 2001.

The Petition explains that a different subsidiary of ArcLight Fund VII, Parkway Generation, LLC (Parkway), has executed a separate equity purchase agreement with Seller for the purchase by Parkway of Seller's upstream interests in fossil-fueled facilities located in New Jersey and Maryland that participate in the wholesale electric markets administered by PJM Interconnection, LLC (PJM) (the PJM Transaction). The Petition notes that the PJM Transaction is not cross-conditioned with the Proposed Transaction and will be financed separately. The Petition further indicates that another ArcLight Fund VII subsidiary, Generation Bridge Acquisition, LLC (GenBridge Acquisition), filed a separate petition seeking Commission authorization to purchase membership interests from NRG Energy, Inc. (NRG) in two project companies that own the approximately 865 MW Arthur Kill steam generation facility on Staten Island

(Arthur Kill Facility),[1] and the approximately 1,617 MW Oswego Harbor Power Station, an oil-fired generator in Oswego, New York (Oswego Facility) (the NRG Transaction).[2] Subsequent to the filing of the Petition, the Commission reviewed the NRG Transaction and found that it did not require PSL §70 approval.[3]

The Petition further explains that ArcLight Energy Partners Fund VI, LLC (ArcLight Fund VI), a separate subsidiary of ArcLight, holds membership interests in entities that own approximately 5,000 MW of facilities in the PJM market, and 575 MW of facilities the ISO New England, Inc. (ISO-NE) market. Relevant to New York, the Petition explains that ArcLight Fund VI currently holds 50.4% of the membership interests in Eastern Generation, LLC (Eastern Gen), which wholly owns Astoria Generating Company, L.P. (AGC). According to the Petition, AGC owns and operates several generating assets in New York City, including the Astoria Steam Station, a dual-fuel steam station (Astoria Facility), as well as the Narrows and Gowanus Generating Stations, which are multi-unit, dual-fuel peaking facilities situated on barges in the East River. The Petition explains that, with a total summer rating capacity of

[1] According to the Petition, the Arthur Kill Facility is subject to a tolling agreement pursuant to which NRG will continue to control the facility's bidding and economic dispatch, and will receive energy and capacity payments resulting from this dispatch in the NYISO markets, through at least April 2025.

[2] The body of the Petition describes the Arthur Kill Facility as an 865 MW (summer rating) facility, but the attached affidavit states that it has an approximately 892 MW capacity (summer rating). Likewise, the Petition refers to the Oswego Facility as a 1,617 MW facility, while the affidavit describes it as a 1,685 MW facility (summer rating).

[3] See Case 21-E-0196, Generation Bridge Acquisition, LLC and NRG Energy, Inc., Order Approving Financing and Ruling on Transfer (issued November 22, 2021).

approximately 1,800 MW, AGC is deemed a "Pivotal Supplier" and is required to comply with the New York Independent System Operator, Inc.'s (NYISO) supplier side market power mitigation rules.[4]

According to the Petition, since ArcLight acquired it in 2015, Eastern Gen has managed a 5,000 MW generation portfolio that includes the AGC portfolio, facilities in PJM, and a 3,000 MW generation portfolio in ISO-NE.

Seller

Petitioners state that Seller is a direct subsidiary of Public Service Enterprise Group Incorporated (Enterprise), a publicly traded company. The Petition explains that Enterprise is a public utility holding company engaged in, among other things, the generation of electricity and the transmission, distribution, and sale of electricity and natural gas through its subsidiaries.

According to the Petition, Seller is the direct owner of PSEG Fossil, LLC (PSEG Fossil) which, in turn, holds all of the membership interests in PSEG Power New York, LLC (PSEG Power NY), which is lightly regulated as the owner and operator of the Bethlehem Facility.[5] Petitioners assert that PSEG Power NY does not own or control any electric transmission facilities other

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[4] Section 23.2.1 of Attachment H to the NYISO's Market Administration and Control Area Services tariff defines a Pivotal Supplier, in relevant part, as "a Market Party that, together with any of its Affiliated Entities, (a) Controls 500 MW or more of Unforced Capacity, and (b) Controls Unforced Capacity some of which is necessary to meet the New York City Locality Locational Minimum Installed Capacity Requirements in an ICAP Spot Market Auction."

[5] Case 99-E-1693, PSEG Power New York, Inc., Order Providing for Lightened Regulation (issued April 26, 2000) (Lightened Regulation Order).

than the limited interconnection facilities required to connect the Bethlehem Facility to the New York transmission grid.

Petitioners assert that PSEG Power NY is an exempt wholesale generator under Federal Energy Regulatory Commission (FERC) rules. Petitioners explain that the output of the Bethlehem Facility is currently sold pursuant to a power purchase agreement (PPA) between PSEG Power NY and another PSEG affiliate, PSEG Energy Resources & Trade LLC, but the PPA is expected to terminate upon consummation of the Proposed Transaction. Petitioners further assert that, to permit continuous participation in the NYISO wholesale markets following consummation of the Proposed Transaction, PSEG Power NY will file a market-based rate tariff with FERC to obtain market-based rate authority to be effective prior to consummation of the Proposed Transaction.

The Bethlehem Facility

According to the Petition, the Bethlehem Facility is an 835 MW (summer rating) combined cycle facility located in Bethlehem, New York (NYISO Zone F). The Petition explains that, following the Commission's implementation of retail competitive electric markets in New York and divestiture by the State's investor-owned utilities of their generation assets, PSEG purchased the Albany Steam Station (the predecessor facility at the Bethlehem site) from Niagara Mohawk Power Corporation (the Bethlehem Acquisition).[6] The Petition further explains that, following the Bethlehem Acquisition, Seller completed a repowering project that transformed the steam plant into the more-efficient combined cycle Bethlehem Facility.

[6] See Case 94-E-0098 et al., Niagara Mohawk Power Corporation – Transfer of Albany Generating Facility, Order Approving Transfer of the Albany Generating Facility and Making Other Findings (issued April 26, 2000).

The Proposed Transaction

The Petition explains that Buyer and Seller have entered into an equity purchase agreement (the Transaction Agreement) for the purchase by Buyer and its affiliates of Seller's upstream interests in a broad range of generation facilities, including, in relevant part, the Bethlehem Facility.[7] According to the Petition, following consummation of the Proposed Transaction, Buyer will be the direct owner of PSEG Power NY, which is the direct owner of the Bethlehem Facility.

Petitioners maintain that the Proposed Transaction satisfies the presumption established in the Wallkill Order, where 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 is a potential for the exercise of vertical or horizontal market power, or a potential for harm to the interests of captive utility ratepayers of fully regulated utilities sufficient to override the presumption (the Wallkill Presumption).[8] According to Petitioners, the Proposed Transaction satisfies the Wallkill Presumption because it does not create the potential for the exercise of horizontal or vertical market power, or the potential for harm to the interests of captive utility ratepayers.

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[7] The Petition notes that, pursuant to the Transaction Agreement, Buyer also is purchasing Seller's interests in several generating facilities in Connecticut.

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

In support of their position that the Proposed Transaction would not create market power issues, the Petition included, as Attachment A, the affidavit of Julie Solomon, a Partner at Guidehouse Inc. (the Affidavit). The Affidavit contains an analysis of the competitive market impacts in New York associated with the Proposed Transaction.[9] Regarding horizontal market power, the Affidavit states that, following the Proposed Transaction, ArcLight and its affiliates will control approximately 11.4% of the installed capacity in NYISO, or a change of only 39 points in the Herfindahl-Hirschman Index (HHI) used to measure impacts of mergers on competitive markets. According to the Affidavit, the Proposed Transaction raises no competitive concerns in either the NYISO energy, installed capacity (ICAP), or ancillary services markets. Regarding the ICAP markets, the Affidavit notes that there is a separate market for New York City (Zone J) and for the Zone G-J locality, but claims that neither are relevant in the context of the Proposed Transaction. The Affidavit further states that, following the Proposed Transaction, ArcLight and its affiliates would have interests in approximately 8% of the generation capacity across all three of NYISO, ISO-NE, and PJM administered markets. Finally, the Affidavit points to the market monitoring and mitigation measures in place at the NYISO.

Regarding vertical market power, the Affidavit states that ArcLight and its affiliates do not own any transmission in New York other than limited facilities needed to interconnect their associated generation interests, and the Proposed

[9] The Affidavit conservatively assumes that all generation affiliated with any ArcLight investment fund are 100 attributable to ArcLight, even though some of those generation interests are only owned in part by ArcLight. The Affidavit also assumes that the NRG Transaction has closed.

Transaction also does not involve any transmission facilities aside from limited facilities necessary to interconnect the Bethlehem Facility to the grid. The Affidavit further states that Buyer and its affiliates do not own or control any essential inputs to electricity products or electric power production in New York, and have limited interstate and intrastate natural gas transportation facilities in PJM. Finally, the Affidavit asserts that there are no other barriers to entry that raise concerns.

Based on the analysis and conclusions in the Affidavit, Petitioners seek a declaratory ruling from the Commission finding that no further review of the Proposed Transaction is necessary pursuant to PSL §70. Petitioners argue in the alternative that, even if the Wallkill Presumption does not apply, the Commission should nonetheless approve the Proposed Transaction under PSL §70 for all of the previously stated reasons.

Petitioners also argue that no further environmental review of the Proposed Transaction is needed under the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law and its implementing regulations (6 NYCRR §617 and 16 NYCRR §7). In the event that a SEQRA review is triggered, the Petition includes, as Attachment B, a completed Environmental Assessment Form (EAF) to facilitate the environmental assessment of the proposed action here (i.e., authorizing the Proposed Transaction), and seeks a negative declaration under SEQRA confirming that an environmental review of the Proposed Transaction is not required.

Finally, Petitioners request that the Commission reaffirm that lightened regulation of PSEG Power NY will continue following the completion of the Proposed Transaction. Petitioners note that prior Commission orders have made similar findings and that the requested relief would be consistent with those orders.

Internal Reorganization

The Petition notes that, in order to facilitate the PJM Transaction prior to consummation of the Proposed Transaction, an internal reorganization related to Seller's upstream interests may need to be completed (Internal Reorganization). According to the Supplement, the Internal Reorganization would involve the transfer of all membership interests in PSEG Power NY from PSEG Fossil to Seller, to be held by Seller subject to the consummation of the Proposed Transaction. The Supplement notes that the Internal Reorganization would make Seller the direct owner of PSEG Power NY, instead of an indirect owner, and would occur only if the PJM Transaction occurs prior to the Proposed Transaction. Petitioners assert that the Internal Reorganization would have no impact on the ultimate owner of the Bethlehem Facility. As such, Petitioners assert that the Internal Reorganization does not constitute a transfer under PSL §70. However, if the Commission asserts jurisdiction, Petitioners request that the Commission issue a declaratory ruling finding that no further review of the Internal Reorganization is required, or issue an order approving the Internal Reorganization.

Financing

In connection with the Proposed Transaction, the Buyer seeks Commission authorization to issue total debt of up to $455 million, which will be jointly and severally secured by the interests in entities held by Buyer, which would include the Bethlehem Facility. The Petition states that the debt will be used to fund the acquisition by Buyer, pay certain transaction expenses, and support the working capital needs of the business post-transaction. The Petition asserts that the Commission has routinely authorized financing requests made by merchant entities for such purposes, including structures where instruments encumbered assets both in and outside of New York. Related to Petitioners' request that the Commission reaffirm lightened regulation status for the owner of the Bethlehem Facility, Buyer also seeks Commission authorization to unilaterally modify the financing entities, payment terms, and amount financed up to the $455 million limit. The Petition claims that access to capital on flexible terms is important to support Buyer's ability to operate the Bethlehem Facility efficiently, address plant needs in a timely manner, and provide cost-effective, safe, and reliable service. The Petition asserts that granting these requests is consistent with prior Commission determinations, and is in the public interest.

Guaranty

According to the Petition, the order granting Seller a Certificate of Environmental Compatibility and Public Need (Certificate) to repower the predecessor steam plant into the Bethlehem Facility, issued by the New York State Board on Electric Generation Siting and the Environment, established a Certificate Condition requiring Seller to file evidence of sufficient funds for decommissioning costs at the end of facility life.[10] Petitioners state that, in accordance with this Certificate Condition, Seller provided to the Commission a Guaranty, dated October 19, 2005, given by PSEG to the New York

[10] Case 97-F-2162, Bethlehem Facility – Certificate of Environmental Compatibility and Public Need, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued February 28, 2002), Appendix A, p. 3.

State Department of Public Service.[11] According to the Petition, by its express terms, the Guaranty sets forth certain obligations, guarantees, covenants and warranties, and specifies that PSEG, as guarantor, cannot assign this obligation to another entity without Commission consent.

Petitioners explain that, in the Transaction Agreement, Buyer has agreed to accept an assignment of PSEG's obligations under the Guaranty, while PSEG has agreed to retain responsibility for certain environmental matters as set forth in the Transaction Agreement. As such, Petitioners request that the Commission consent to PSEG assigning the Guaranty to Buyer on its existing terms, and release PSEG from such obligations, guarantees, covenants, and warranties expressly set forth in the Guaranty. Petitioners assert that PSEG's environmental obligations are separate from, and not narrowed by, the request for Commission consent to the Guaranty's assignment.

PUBLIC NOTICE

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking (Notice) with respect to the Petition was published in the State Register on October 13, 2021 [SAPA No. 21-E-0485SP1]. The SAPA §202(1)(a) period for submitting comments in response to the Notice expired on December 13, 2021. No comments were received.

[11] The Petition states that, at the time, the Commission was charged with monitoring, enforcing, and administering the Bethlehem Certificate pursuant to the then-existing PSL §168(2), but PSL Article X governing the siting of large generating facilities in New York expired and was deemed repealed on January 1, 2003.

LEGAL AUTHORITY

The Commission is authorized, pursuant to PSL §69, to approve certain financings, such as the type proposed in the Petition. Financings proposed under PSL §69 by lightly regulated companies operating in a competitive environment may be addressed on the basis of representations made in the petition, and do not require an in-depth analysis.[12] Provided that the proceeds of a financing are for a statutory purpose and in the public interest, petitioners typically are afforded broad latitude to determine the amount and type of debt that is needed to support corporate operations.

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. The Commission applies a public interest standard when reviewing such a transfer.[13] Various factors are relevant to this determination, including the financial strength of the transferee, the transferee's ability to safely own, maintain, operate, or decommission the assets, and "any other matters that may implicate the public interest."[14]

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[12] Case 17-E-0016, TC Ravenswood *et al.*, Order Approving Transfer Subject to Acceptance of Conditions and Making Other Findings (issued April 19, 2017).

[13] Case 19-E-0730, Entergy Nuclear Indian Point 2, LLC et al. - Transfer Proceeding, Order Asserting Jurisdiction and Approving and Adopting Joint Proposal (issued May 19, 2021), p. 21; Case 20-E-0371, Exelon Generation Co. et al. - Transfer Proceeding, Order Approving Transfer and Making Other Findings (issued April 15, 2021), p. 4; Case 17-E-0452, Exelon Generation Co., LLC et al. - Transfer Proceeding, Order Approving Transfer (issued November 17, 2017), p. 5.

[14] Case 19-E-0730, supra, Order Asserting Jurisdiction and Approving and Adopting Joint Proposal, p. 21; Case 20-E-0371, supra, Order Approving Transfer and Making Other Findings, p. 4.

DISCUSSION

Proposed Transaction

The Petitioners request that the Proposed Transaction be reviewed under the Wallkill Presumption. However, the Wallkill Presumption adheres only when a petitioner can demonstrate that a proposed transfer does not pose a potential for impacts adverse to the public interest. In this case, the Proposed Transaction raises market power issues sufficient to rebut the Wallkill Presumption. As a result, a complete review of the Proposed Transaction pursuant to PSL §70 is warranted.

In conducting a review pursuant to PSL §70 that pertains to lightly regulated electric corporations operating in wholesale electric markets, the Commission examines any affiliations that might afford opportunities for the exercise of market power, or any other circumstances that might pose the potential for other transactions detrimental to captive ratepayer interests. Here, the Proposed Transaction enhances the potential for the exercise of horizontal market power. First, following the Proposed Transaction, ArcLight and its affiliates would control approximately 11.4% (summer 2022) and 11.7% (winter 2021-2022) of the capacity in the NYISO market.[15] A comparable level of market concentration has previously been found to raise market power concerns.[16] Second, consummation of the Proposed Transaction provides ArcLight with an additional 835 MW of capacity that could enable ArcLight to potentially benefit from anti-competitive behavior in the capacity markets.

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[15] Petition, Attachment A, p. 15.

[16] Case 12-E-0359, NRG Energy, Inc., Order Approving a Merger and Acquisition Upon Conditions (issued December 14, 2012) (finding that an 11.5% capacity market share raises market power concerns).

Preliminarily, Petitioners' assertion that there are no horizontal market power concerns because statewide HHIs are low and the Bethlehem Facility is in an electrically non-constrained area neglects to consider the fact that capacity offerings in one zone can affect capacity pricing elsewhere in other zones across New York. Contrary to the assertion in the Petition that the NYISO'S ICAP markets for New York City (Zone J) and the lower Hudson Valley (Zones G through J) are not "relevant" in the context of the Proposed Transaction involving the Bethlehem Facility in Zone F,[17] the NYISO's ICAP manual indicates that Rest of State (ROS) prices, which include Zone F, will set the market clearing price when those prices are higher than the price at which a locality (e.g., New York City - Zone J) would otherwise clear.[18] In fact, recent prices identified by the NYISO have triggered this rule and demonstrated a direct correlation between these different markets. Specifically, the NYISO's "ICAP Market Report - January 2022" indicates that the New York Control Area spot market clearing prices, which include Zone F, for May 2021 through August 2021 and November 2021 through January 2022, were setting the prices for Zone J.[19] Accordingly, we find that the analysis proffered by Petitioners

[17] Petition, Attachment A, p. 14.

[18] The NYISO's ICAP Manual states that in the ICAP Spot Market Auctions, the "Market-Clearing Price for a Locality will be the price at which the supply curve for that Locality intersects the Demand Curve for that Locality unless the Market-Clearing Price determined for Rest of State is higher in which case the Market-Clearing Price for that Locality will be set at the Market-Clearing Price for Rest of State." See NYISO, Installed Capacity Manual (issued December 2021), p. 180, available at https://www.nyiso.com/documents/20142/2923301/icap_mnl.pdf/234db95c-9a91-66fe-7306-2900ef905338.

[19] The NYISO's January 2022 ICAP Market Report is publicly available at https://www.nyiso.com/installed-capacity-market.

fails to account for the highly relevant capacity market connection between Zone F/ROS and Zone J.[20]

Given the correlation between NYISO capacity markets, there is a potential for the Proposed Transaction to affect prices for Zone J, in which Arclight and its affiliates now control approximately 1,826 MW of capacity and would control an additional approximately 892 MW as soon as April 2025 when the tolling agreement for the Arthur Kill facility is currently scheduled to end, as well as impact capacity prices in other ICAP Zones. To evaluate this potential, the Proposed Transaction must be reviewed to determine how it could affect the incentive to withhold, from the NYISO capacity markets, various generation assets that would fall under the ArcLight corporate umbrella following consummation of the Bethlehem Facility transfer.

To execute a withholding strategy generally, the owner of multiple generation facilities must withdraw sufficient capacity from the market to raise the price for capacity enough so that it will earn additional profits from operations at its remaining generation units sufficient to offset the lost profit at its withheld unit. Simply refraining to offer existing capacity into the market or offering capacity at excessively high prices are strategies that are comparatively easy to detect, and likely could be counteracted by NYISO mitigation measures designed to prevent such occurrences. However, if a generation facility’s capacity is withheld through retirement, mothballing, or an outage, such a strategy would be more difficult to detect, especially with facilities that already are performing at low profit margins.

[20] The Commission agrees with Petitioners’ analysis that the Proposed Transaction does not raise competitive issues with respect to the energy market.

Retirement and mothballing decisions are complex because they depend upon many factors, but are made in particular based upon forecasts of future profitability. Absent a withholding scheme, a generation facility owner might decide to continue operation of a facility that is either earning little profit or is operating at a loss because the owner believes that it will return to profitability in the future. If the owner forecasts that capacity or other prices will not increase sufficiently to result in a return to profitability, it may properly retire or mothball the facility. The potential for the exercise of horizontal market power arises if an entity with interests in multiple generating facilities believes it can, through retiring or mothballing a facility, raise prices sufficient for it to earn substantially enhanced profits at its remaining facilities, especially if it can mothball one facility to the benefit of others.[21] A retirement or mothballing implemented for the purpose of exercising this type of market power would raise prices to the disadvantage of consumers. Likewise, a facility may also effectively be withheld through a prolonged outage, while it would be difficult to tell whether the outage occurred as a result of anti-competitive behavior, or due to operations and maintenance issues.

In sum, exercising horizontal market power requires two elements: (1) the ability to manipulate market price, usually by withholding a supply source, and (2) enough supply remaining in the market to receive the manipulated higher price, such that the revenues for the supply remaining in the market is greater than the revenues foregone by the withheld supply. Under the circumstances presented, the acquisition of the

[21] If capacity prices do rise in the future, the owner may return the mothballed facility to service while retaining the excess profits it earned during the time the facility was mothballed.

Bethlehem Facility has the potential to significantly increase the ICAP profits to ArcLight and its subsidiaries as a result of withholding the Oswego Facility. Recognizing that withholding the Oswego Facility is capable of increasing capacity prices in ROS, as well as Zone J, the Commission estimates that the annual profits from withholding the Oswego Facility could increase by approximately $29 million in 2026 as a result of the additional ICAP revenues earned by the Bethlehem Facility.[22] In other words, purchasing the Bethlehem Facility makes an Oswego Facility withholding strategy profitable, and the transaction enhances the incentive for ArcLight and its subsidiaries to actually engage in such anti-competitive behavior. Indeed, this potential benefit that could be realized from executing such a withholding strategy is at least an order of magnitude higher than in prior circumstances where the Commission determined that a transfer transaction presented minimal risks that an entity might pursue withholding.[23]

In addition, ArcLight and its affiliates likely could also realize additional ICAP market revenues by withholding the Bethlehem Facility itself. The Commission estimates that withholding the Bethlehem Facility in 2025 (i.e., following the anticipated end of the tolling agreement) would cause substantial increases to both Zone J and ROS ICAP prices, and would increase the total ICAP revenues of ArcLight and its

[22] The incentive to withhold capacity prior to 2026 is substantially mitigated by the existence of the Arthur Kill tolling agreement, under which any energy and capacity revenues associated with the facility would go to NRG.

[23] See Case 07-E-1385 et al., Calpine Corporation, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (issued January 22, 2008) ($36,000 a month that could be realized from executing a withholding strategy is a minimal amount to earn on 2,618 MW of generation).

subsidiaries by approximately $22 million, versus a baseline where the Bethlehem Facility is not withheld. While this strategy might be profitable if it were accomplished without also sacrificing margins from energy sales (for example, by simply increasing its capacity price bid above clearing levels), such an attempt should be detectable by the NYISO. The potential losses in energy sales margins from withholding the Bethlehem Facility altogether, such as through retirement or mothballing, could be greater than the potential increases in ICAP revenues, thus likely rendering it uneconomical to engage in anti-competitive physical withholding of both capacity and energy from the Bethlehem Facility itself. This difference highlights why the Oswego facility is an ideal candidate for anti-competitive withholding, due to its lack of energy sales and the fact that withholding the Oswego Facility would avoid sacrificing profits in other, non-capacity wholesale markets.

Based on these considerations, the Commission concludes that the Proposed Transaction enhances the potential for the exercise of horizontal market power, especially after the expiration of the Arthur Kill tolling agreement. Notwithstanding the foregoing, the potential for the exercise of horizontal market power can be mitigated so that the transaction may proceed upon certain conditions. These conditions, discussed in more detail below, will act as a check on the ability of Buyer’s affiliates to exercise market power through withholding their respective generating facilities, and protect the public interest. In this case, the Proposed Transaction presents an opportunity and incentive for Buyer’s affiliates to engage in anti-competitive behavior - precisely the type of horizontal market power concern against which the Commission’s regulatory processes are designed to mitigate. Thus, it is reasonable and appropriate for the Commission to require that both the Buyer affiliate owning the Oswego Facility, as well as their shared parent entity ArcLight Fund VII, unequivocally accept the following conditions, as a prerequisite for the Commission's consent to the Proposed Transaction.

First, to prevent the pursuit of an uneconomic retirement at the Oswego Facility for the purpose of exercising market power, the Commission requires that, before such retirement may occur, the Oswego Facility must be offered for sale at auction pursuant to a request for proposals (RFP) process, while continuing operations during the time the RFP process is pending. The Oswego Facility must be sold to the qualified buyer that submits the best bid in response to the RFP, an outcome that would prevent the retirement option from being exercised for market power purposes. On the other hand, if no qualified buyer could be found through the RFP, that would demonstrate that selection of the retirement option is founded upon market conditions, and Buyer could then proceed with its retirement.

Second, regarding mothballing of the Oswego Facility, requiring the owner to first offer the facility for sale would deprive it of the normal business opportunity to return the facility to service at a later time, especially if the mothballing was implemented for economic reasons instead of for the purpose of exercising market power. To avoid imposing a mitigation measure that would interfere with a normal business practice, and because another remedy can adequately protect ratepayers from the potential for the exercise of market power, the RFP mitigation measure will not be imposed upon a proposal to mothball the Oswego Facility. Instead, the Commission will require the owner of the Oswego Facility to provide at least twelve months' notice prior to mothballing, which is consistent with the NYISO's notice period requirements for generation retirements and mothballing, pursuant to the NYISO's Open Access Transmission Tariff (OATT).[24] During that time period, the Commission will examine any effects on reliability that would result if the facility were mothballed, and devise any measures needed to mitigate reliability impacts. The owner of the Oswego Facility would be required to file with its mothballing notice a detailed justification demonstrating, with it bearing the burden of proof, that the mothballing was undertaken for economic purposes. This filing would then be reviewed by the Commission within the twelve-month time period. If the submitted filing is found inadequate by the Commission to show mothballing is justified for economic reasons, additional relief is needed. Upon such a finding, the owner of the Oswego Facility may reverse the proposed mothballing, withdraw its mothballing notice, and continue the facility's participation in capacity markets. It may also proceed with mothballing notwithstanding such a finding, but only if no qualified bidder can be found after it offers the Oswego Facility for sale through an RFP process upon the same conditions, including sale to a qualified winning bidder, as are imposed if an Oswego Facility retirement were proposed.[25]

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[24] OATT §38.3. While the Commission previously required a six-month notice period, those rulings were issued prior to the NYISO promulgating its own notice rules regarding retirements and mothballs. See Case 05-E-0889, Policies and Procedures Regarding Generation Unit Retirements, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

[25] If the Oswego Facility's owner either temporarily or permanently removes the facility from operation in a manner that is the equivalent to retirement or mothballing, but it is not identified as such, we reserve the right to classify such an action as a retirement or mothballing and impose the appropriate relief.

Third, to mitigate the concern that the Oswego Facility might experience a prolonged outage, the Commission requires that, within 60 days following the closing of the Proposed Transaction, a detailed Operation and Maintenance Plan for the Oswego Facility is developed and filed with the Commission. The Operation and Maintenance Plan shall contain, at a minimum, details regarding routine maintenance activities for the Oswego Facility, a complete documentation of emergency procedures, and a list of emergency contacts. Any modifications to such Operation and Maintenance Plan or emergency procedures or emergency contacts shall be documented and filed with the Secretary within 14 days of such modifications.

In order to demonstrate acceptance with the above conditions, the Commission shall require that GenBridge Acquisition, the direct owner of the Oswego Facility, as well as ArcLight Fund VII, the parent of both GenBridge Acquisition and Buyer, each submit a verified written statement signed by a duly authorized officer unequivocally accepting the terms of this Order. Such verified written statements shall be filed with the Secretary within 30 days of issuance of this Order. Failure by either GenBridge Acquisition or ArcLight Fund VII to submit the required verified written statement within that timeframe shall invalidate the Commission’s consent to the Proposed Transaction under PSL §70.

With respect to vertical market power issues, the Petition notes that neither Buyer nor any other ArcLight affiliate owns transmission or distribution facilities, other than the limited assets required to interconnect their generation facilities, and do now own or control any inputs of electricity products in New York. Accordingly, the Commission finds that the Proposed Transaction does not pose the potential for the exercise of vertical market power.

Other than the potential for the exercise of horizontal market power that can be mitigated through the conditions discussed above, the Proposed Transaction does not otherwise pose the potential for risks adverse to captive ratepayer interests. Buyer and its affiliates are experienced owners and operators of generation facilities, and Buyer appears sufficiently capitalized, through its upstream parents, to own and operate the Bethlehem Facility. Moreover, as stated in the Petition, Buyer will be adopting best operating practices developed by Eastern Gen and CAMs.

For all the reasons stated above, the Proposed Transaction is approved, subject to ArcLight Fund VII and GenBridge Acquisition unequivocally accepting the conditions discussed herein.

Lightened Regulation

After the Proposed Transaction is consummated, lightened regulation of PSEG Power NY will continue, as described in prior orders.[26] The Petitioners are reminded that, under lightened regulation, the owner of the Bethlehem Facility will remain subject to the PSL with respect to the issues discussed in this Order and such other matters as annual reporting, enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in the Lightened Regulation Order.

Internal Reorganization

The Commission previously has determined that, in reviewing inter-corporate reorganizations, certain restructurings do not require review because they are not transfers under PSL §70. In so ruling, the Commission has

[26] Lightened Regulation Order.

explained that such restructurings would not create the potential for the exercise of market power, as the mere shuffling of entities under the umbrella of a corporate parent would not enhance the ability of petitioners or their subsidiaries to exercise either horizontal or vertical market power, or create a risk of harm to captive ratepayers.[27] The Commission has applied this standard to review, for example, to wholly intra-corporate transfers involving direct interests in companies that own and operate jurisdictional facilities.[28]

Here, the Internal Reorganization (if it occurs) would involve the transfer of membership interests in PSEG Power NY from PSEG Fossil to PSEG, until consummation of the Proposed Transaction. Reshuffling the layers of a corporate structure where all entities remain wholly owned by an existing owner in that structure does not amount to a transfer under PSL §70, because there is no change in the identity of the ultimate ownership. Accordingly, the Internal Organization would fall outside of the scope of PSL §70, rendering it unnecessary to review or approve it in connection with the Proposed Transaction.

Financing

Approval of the financing plan is appropriate under lightened regulation. The scrutiny applicable to monopoly utilities may be reduced for lightly regulated companies that operate in competitive markets. The Commission previously determined that PSEG Power NY, as the direct owner of the

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[27] Case 18-M-0147, National Grid USA and KeySpan Corporation, Declaratory Ruling on Review of Intra-Corporate Reorganization (issued April 23, 2018).

[28] See Case 06-E-1106, et al., PPM Energy Inc., et al., Declaratory Ruling on Regulation of Intra-Corporate and other Transactions (issued October 19, 2006).

Bethlehem Facility, would be subject to lightened regulation.[29] The Bethlehem Facility operates in the competitive wholesale electric market and PSEG Power NY does not have captive ratepayers. Based on these circumstances, the Commission finds that an in-depth analysis of the proposed financing is not needed. Instead, by relying on the representations of the Petitioners made in their filing, prompt regulatory action is possible.

The Petition notes that the purpose of the indebtedness is to fund the acquisition by Buyer, pay certain transaction expenses, and support the working capital needs of the business post-transaction. Because the proposed financing relates to a statutory purpose and is intended to support the management and operation of their facility, the Commission finds that it is within the public interest. Accordingly, we approve the request to incur indebtedness, along with the requested flexibility to modify, without our prior approval, the identity of the financing entities, payment terms, and amount financed under the Proposed Transaction, up to the $455 million limit. This flexibility will avoid disrupting the financing arrangements and enable the entities to operate more effectively in competitive wholesale electric markets, thereby promoting the efficient development of these markets. Captive New York ratepayers cannot be harmed by the terms of this financing because the entities will bear the financial risk associated with this financial arrangement.

Guaranty

The Commission finds it reasonable for PSEG, in connection with the Proposed Transaction, to assign the Guaranty to Buyer on its existing terms and to release PSEG from such

[29] See Lightened Regulation Order.

obligations, guarantees, covenants, and warranties expressly set forth in the Guaranty. The Guaranty unconditionally guarantees the full, faithful, and prompt performance and discharge of all decommissioning obligations associated with the Bethlehem Facility up to a prescribed maximum cost, and Buyer would be responsible for those obligations following assignment of the Guaranty. As such, the Commission hereby consents to such assignment, in accordance with the terms of the Guaranty.

Environmental Quality Review

Under SEQRA, the Commission must determine whether the actions we are authorized to approve may have a significant adverse impact on the environmental. Other than Commission approval of the action proposed here, no additional state or local permits are required, so a coordinated review under SEQRA is not needed. The Commission assumed Lead Agency status under SEQRA and conducted an environmental review.

SEQRA requires applicants to submit a complete EAF describing and disclosing the likely impacts of the actions they propose.[30] Petitioners submitted a narrative and short-form EAF Part 1 that substantially comply with this requirement.

The proposed action over which the Commission has jurisdiction is the transfer of the Bethlehem Facility from Seller to Buyer. The proposed action does not meet the definition of Type 1 or Type 2 actions listed in 6 NYCRR §§617.4 and 617.5, and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. After reviewing the Petition, the Commission concludes, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes to the operation of the Bethlehem Facility

[30] 6 NYCRR §617.6(a)(3).

that will result in significant adverse environmental impacts. Staff has completed the short-form EAF Parts 2 and 3.

As Lead Agency, the Commission determines that the proposed action will not have a significant adverse 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 or will be issued and no coordinated review was undertaken. A Notice of Determination of Significance concerning the unlisted action is attached. The completed EAF will be retained in our files.

CONCLUSION

Pursuant to PSL §70, the Commission approves the Proposed Transaction, subject to conditions necessary to mitigate against the identified market power risks. The Commission further authorizes the financing arrangement in connection with the Proposed Transaction, and authorizes Seller to assign the Guaranty to Buyer on its existing terms. Finally, the Commission confirms that lightened regulation will continue to apply to PSEG Power New York, LLC, the direct owner of the Bethlehem Facility, following the Proposed Transaction.

The Commission orders:

1. The transfer of upstream ownership interests in the Bethlehem Facility, as described in the Petition and Supplement filed in this proceeding and in the body of this Order, is approved in accordance with PSL §70, subject to the terms and conditions set forth in this Order.

2. Generation Bridge II, LLC is authorized to enter into the proposed financing arrangement, including financing flexibility, up to a maximum amount of $455 million, as

described in the petition filed in this proceeding on September 13, 2021, and as discussed in the body of this Order.

3. This Order is conditioned on Generation Bridge Acquisition, LLC, within 30 days of the date of issuance of this Order, filing with the Secretary to the Commission a verified written statement signed by a duly authorized officer indicating Generation Bridge Acquisition, LLC's complete and unconditional acceptance of this Order and its terms and conditions. Failure to comply with this condition shall invalidate this Order.

4. This Order is conditioned on ArcLight Energy Partners Fund VII, L.P., within 30 days of the date of issuance of this Order, filing with the Secretary to the Commission a verified written statement signed by a duly authorized officer indicating ArcLight Energy Partners Fund VII, L.P.'s complete and unconditional acceptance of this Order and its terms and conditions. Failure to comply with this condition shall invalidate this Order.

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, absent extraordinary circumstances.

6. This proceeding is continued.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 21-E-0485 – Joint Petition of Generation Bridge II, LLC and PSEG Power, LLC for a Declaratory Ruling Eschewing Further Review of Transaction or, in the Alternative, an Order Approving Transaction Pursuant to Section 70 of the New York Public Service Law and Consent to Assignment and Release of the Bethlehem Facility Guaranty, and Petition of Generation Bridge II, LLC for an Order Authorizing Financing Pursuant to Section 69 of the New York Public Service Law.

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 of the transfer of upstream ownership interests in PSEG Power New York, LLC, which is the direct owner of the 835 MW Bethlehem generation facility located in Bethlehem , N.Y., based on our determination, in accordance with Article VIII 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(ak).

Based on our review of the record, we find that the transfer of upstream ownership interests in the Bethlehem generation facility will not have a significant adverse environmental impact. A change in the identity of the owner of the upstream interests will not cause any physical alterations to the Bethlehem generation facility, or to the facility’s surroundings.

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 Justin Fung at (518) 473-4953 or at the address above.

MICHELLE L. PHILLIPS
Secretary