STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on May 16, 2024

COMMISSIONERS PRESENT:

Rory M. Christian, Chair
James S. Alesi
David J. Valesky
John B. Maggiore
Uchenna S. Bright
Denise M. Sheehan

CASE 23-E-0731 - Joint Petition of New Athens Generating Co., LLC, NorthEast Gas Generation, LLC, and Gate City Power - NE Generation LLC for Approval of a Proposed Transfer Pursuant to PSL Section 70 Under Lightened Regulation.

ORDER APPROVING TRANSFER AND MAKING OTHER FINDINGS

(Issued and Effective May 17, 2024)

BY THE COMMISSION:

INTRODUCTION

By joint petition filed on December 26, 2023, and supplemented on April 16, 2024 (the Petition), New Athens Generating Company, LLC (New Athens), NorthEast Gas Generation, LLC (NorthEast Gas or Seller), and Gate City Power – NE Generation LLC (Gate City or Buyer)(collectively, Petitioners) seek approval from the Public Service Commission (Commission) under Section 70 of the Public Service Law (PSL) for a proposed transaction involving Gate City's purchase of all of the outstanding equity interests in New Athens, which is the direct owner of a natural gas-fired combined cycle generation facility (the Proposed Transaction). By this Order, the Commission approves the Proposed Transaction pursuant to PSL §70, subject to the conditions stated in this Order.

THE PETITION

New Athens and Seller

The Petition indicates that New Athens is a Texas limited liability company that owns and operates an approximately 990 megawatt (MW) natural gas-fired combined-cycle generation facility (the Facility) in Athens, New York. The Petition explains that the Facility is within the New York Independent System Operator, Inc.'s (NYISO) balancing authority area (BAA) and that New Athens is an exempt wholesale generator with market-based rate authority granted by the Federal Energy Regulatory Commission (FERC). New Athens is subject to a lightened regulatory regime by the Commission.[1]

New Athens is a wholly owned subsidiary of NorthEast Gas. The Petition indicates that NorthEast Gas is wholly owned by CXA NGG Power Holdco, LLC (CXA NGG). CXA NGG is owned in part by BRE-2, which is wholly owned by LPP Mortgage, Inc., which is wholly owned by Beal Bank. CXA NGA is also owned by LNV Corporation, which is wholly owned by Beal Bank USA (BBUSA). Beal Financial Corporation (Beal) wholly owns both Beal Bank and BBUSA, which are federal Deposit Insurance Corporation-insured banking institutions; neither Beal nor its subsidiaries are engaged primarily in energy-related business activities. Beal

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[1] Case 03-E-0516, Athens Generating Company, L.P., Order Approving Transfer and Providing for Lightened Regulation (issued September 17, 2003), Case 14-E-0022, New Athens Generating Company, LLC, Order Approving Transfers of Ownership Interests and Making Other Findings (issued April 25, 2014), and Case 20-E-0472, New Athens Generating Company, LLC, et al., Declaratory Ruling on Review of Transfer Transaction (issued November 24, 2020)(together, Lightened Regulation Orders).

is majority-owned by D. Andrew Beal, an individual and resident of Texas, who is also the Chairman and Chief Executive Officer of Beal. Other than his indirect ownership of the entities described below, Mr. Beal does not (1) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any other entity engaged in the generation, transmission, distribution, or sale of electricity in the United States, or otherwise own or control any such entity, or (2) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any entity that owns or controls inputs into the electric generating process, or otherwise own or control any such entity; or (3) directly or indirectly own or control any input to power production in New York State or any adjacent BAA, or own or control sites for new generation development capacity in New York State.

In addition to New Athens, the Petition indicates that NorthEast Gas is affiliated with three electric-generation facilities in the United States, including:

1) New Harquahala Generating Company LLC, which owns an approximately 1,043 MW natural gas-fired combined-cycle generation facility in Maricopa County, Arizona;
2) CXA La Paloma, LLC, which owns an approximately 1,010 MW natural gas-fired combined-cycle generation facility in McKittrick, California; and
3) Millenium Power Company, LLC (Millenium), which owns an approximately 330 MW natural gas-fired, combined-cycle generation facility in Charlton, Massachusetts.[2]

[2] NorthEast Gas is also seeking approval from FERC for the sale of its interests in Millenium. Petitioners indicate that because that facility is within the ISO New England territory, they do not seek Commission consideration or approval under the PSL.

Buyer and Affiliates

The Petition describes Gate City as a limited liability company incorporated in Delaware, wholly owned by Gate City Power Holdings LLC (GCP Holdings). The Petition explains that the ownership shares of GCP Holdings would be based on the final purchase price for the Proposed Transaction. Petitioners anticipate that 93.6 percent of the interest in GCP Holdings would be owned by GCE SPV 1 LLC (GCE SPV), and 6.4 percent of the interest in GCP Holdings would be owned by GCP Investments 1 LLC (GCP Investments).

As stated in the Petition, GCE SPV is a wholly owned, direct subsidiary of Gate City Energy, LLC (GCE), which in turn is a wholly owned, direct subsidiary of Gate City Energy Holdings, LLC (GCE Holdings). GCE is an investment fund headquartered in Knoxville, Tennessee. The Petition states that GCE Holdings is owned in 47.5 percent increments by James Haslam III and Bill Haslam. The Haslams do not (1) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any other entity engaged in the generation, transmission, distribution or sale of electricity in the United States, or otherwise own or control any such entity, (2) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any entity that owns or controls inputs into the electric generating process, or otherwise own or control any such entity, or (3) directly or indirectly own or control any input to power production in New York State or any adjacent BAA, or own or control sites for new generation development capacity in New York State.

The Petition states that GCP Investments 1 LLC is an investment vehicle of which an 83.3 percent interest would be owned by JNS Investment Holdings LLC (JNS Investment). The

Petition describes the corporate structure of JNS Investment as being owned 79.39 percent by Paul Tudor Jones, II, an individual, and 21.61 percent by The Paul Tudor Jones II, 2011 Family Trust (Trust). The trustee for the Trust is James I. Black III. As described in the Petition, the remaining 16.7 percent interest in GCP Investments would be owned by investment vehicles for four individuals, Mikael Andren (5.3 percent), Brad Romine (5.3 percent), Steve Culliton (5.3 percent) and John Vivenzio (0.7 percent). These individuals do not (1) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any other entity engaged in the generation, transmission, distribution, or sale of electric energy in the United States, or otherwise own or control any such entity, (2) directly or indirectly own, control, or hold with power to vote, ten percent or more of the outstanding voting securities of any entity that owns or controls inputs into the electric generating process, or otherwise own or control any such entity, or (3) directly or indirectly own or control any input to power production in New York State or any adjacent BAA, or own or control sites for new generation development capacity in New York State.[3]

The Proposed Transaction

The Petition states that following the close of the Proposed Transaction, Buyer would own 100 percent of the issued and outstanding equity interests in New Athens and therefore would directly own the Facility. Following consummation of the Proposed Transaction, neither Seller nor any of its affiliates

[3] The Petition notes that an investment fund founded by Messrs. Jones, Andren, Romine, Culliton, and Vivenzio is an investor and the managing member of Ampliform LLC, a joint venture that is developing utility-scale solar projects. The first project is located in the PJM Interconnection LLC (PJM) service territory and is expected to be operational in 2024.

would own any interest in New Athens and, in turn, would hold no ownership or control interest in the Facility.

Petitioners aver that the Proposed Transaction does not raise either horizontal or vertical market power. The Petition states that the Proposed Transaction does not raise horizontal market issues because neither Gate City nor its affiliates own or control, directly or indirectly, any facilities for the generation, transmission, distribution, or sale of electric energy, or have substantial influence over inputs, like fuel or fuel transportation, into the production of generations supply in New York State. Additionally, the New Athens and Millenium facilities are already under common ownership and control and therefore the Proposed Transaction would not result in any increase in market concentration. The potential combined MW of the facilities is approximately 1,320 MW.

Similarly, Petitioners state that the Proposed Transaction does not raise any vertical market power concerns. The Petition states that the Proposed Transaction does not involve any electric transmission facilities of the Seller, other than the limited interconnection facilities associated with the New Athens and Millenium facilities. Moreover, neither Buyer nor its affiliates own or control any electrical transmission facilities, or own or control any input to power production or own or control sites for new generation development capacity in the United States. Further, the Petition asserts that the Proposed Transaction would have no effects on any other potential means for exercising any other form of market power within New York, and does not otherwise pose the potential for harm to captive New York ratepayers.

Additionally, the Petitioners aver that the Proposed Transaction would not result in any potential for harm to any captive customers as it does not result to any physical change to the Facility. The Facility would continue to operate in the manner it operates today and subject to the same Commission regulation as prior to the Proposed Transaction. Petitioners also indicate that Buyer has both the financial wherewithal and the technical operating capability to own and operate the facility.

The supplement to the Petition, filed on April 16, 2024, explains that, following the Proposed Transaction, management of the Facility would be provided by the Gates City Power management team, which was previously involved with the ownership and operation of the Roseton Generating Station, Rensselaer Cogeneration Plant, and Danskammer Generating Station within the NYISO control region. The supplement also notes this teams experience in owning and operating generation assets within the PJM region as well as other regional interconnections. As indicated, this teams' collective experience includes bringing generating assets out of bankruptcy, resolving ongoing labor disputes, and increasing the productivity of under-utilized and under-capitalized assets. In addition, day-to-day operations and maintenance responsibilities would continue to be handled by North American Energy Services (NAES), which has been the responsible contractor for the past 20 years.

The Petition states that the Proposed Transaction would have no significant environmental impact under the New York State Environmental Quality Review Act (SEQRA). Petitioners assert that as the Facility's operations would continue in the same manner as it does currently, and there is no chance for any adverse environmental effect as a result of the Proposed Transaction.

Regarding continued lightened regulation, the Petition states that the Facility would continue to be operated as a wholesale power plant and that following the Proposed Transaction, there would be no changes in the day-to-day operations. Based on these factors, Petitioners seek approval from the Commission pursuant to PSL §70. Petitioners also request confirmation that, following the Proposed Transaction, New Athens would continue to be subject to a lightened regulatory regime.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking regarding the Petition was published in the State Register on January 31, 2024 [SAPA No. 23-E-0731SP1]. The time for submission of comments pursuant to that notice expired on April 1, 2024. No comments were received.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission has the authority to review the proposed transfer of property and to determine whether to grant, deny, or modify Petitioners' request for authorization to transfer the Facility. The Commission applies a public interest standard when reviewing the transfer.[4] Various factors are relevant to this determination, including the financial strength of the transferee, the transferee's ability

[4] 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); Case 20-E-0731, Exelon Generation Co. et al. – Transfer Proceeding, Order Approving Transfer and Making Other Findings (issued April 15, 2021); Case 22-E-0372, Flint Mine Solar LLC, et al. – Transfer Proceeding, Order Approving Transfer (issued November 21, 2022).

to safely own, maintain, operate, or decommission the assets, and "any other matters that may implicate the public interest." Pursuant to PSL §§5, 65, and 66, the Commission has the legal authority to review, as well as modify, reject, or approve filings.

DISCUSSION AND CONCLUSION

Environmental Quality Review

Under SEQRA, the Commission must determine whether the actions it is authorized to approve, here the Proposed Transaction, may have a significant adverse impact on the environment. 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 thus assumes Lead Agency status under SEQRA for purposes of conducting an environmental review.

Next, the Commission must determine whether the Proposed Transaction is classified as a Type I, Type II, or Unlisted action. If an action does not meet the criteria of Type I or Type II actions, it is an Unlisted action. The proposed action over which the Commission has jurisdiction is the transfer to Seller of a gas-fired electric generation plant, which will be operated in the same manner post-transfer. The proposed action does not meet the definition of a Type 1 or Type 2 actions, which are enumerated in 6 NYCRR §§617.4 and 617.5, respectively, as well as in 16 NYCRR §7.2. Therefore, the Proposed Transaction is classified as an Unlisted action requiring SEQRA review.

For an Unlisted action, SEQRA requires the completion of a short-form environmental assessment form (EAF).[5] Department

[5] Six NYCRR §617.6(3).

of Public Service Staff has completed the short-form EAF, which will be retained in our files. In this case, the proposed action does not raise the potential for environmental impacts because there will not be any modifications to the use and operation of the Facility following the closing of the Proposed Transaction. As Petitioners note, the Proposed Transaction would not result in any changes in the day-to-day operations. Further, approval of the Proposed Transaction will not cause any physical alterations to the Facility or its surroundings. Accordingly, upon reviewing the Petition and the EAF, the Commission concludes, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that approval of the Proposed Transaction will not result in a significant adverse impact on the environmental.

Having determined, as Lead Agency, that the Proposed Transaction will not have a significant adverse impact on the environment, the Commission 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 a coordinated review will not be undertaken. A Notice of Determination of Significance (Negative Declaration) concerning this Unlisted action is attached.

Climate Leadership and Community Protection Act

As the Commission is exercising jurisdiction and approving the Proposed Transaction under PSL §70, we address compliance with the Climate Leadership and Community Protection Act (CLCPA). CLCPA §7(2) provides that:

> [i]n considering and issuing permits, licenses, and other administrative approvals and decisions, ... all state agencies ... shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75 of the environmental conservation law.

In this case, Petitioners have stated that there will be no modification to the use and operation of the Facility following the close of the Proposed Transaction. The transfer of the Facility to a new owner does not affect the air permits issued by the New York State Department of Environmental Conservation, which govern the Facility's air emissions and ensure the Facility is operated in a manner that is protective of the environment. Therefore, the Commission finds that approval of the Proposed Transaction is not inconsistent with, nor will it interfere with, the attainment of the statewide greenhouse gas emissions limits enacted by the CLCPA.

Moreover, CLCPA §7(3) provides that, "[i]n considering and issuing permits, licenses, and other administrative approvals and decisions, ... all state agencies ... shall not disproportionally burden disadvantaged communities ..." CLCPA §7(3) further requires that all state agencies "prioritize reductions of greenhouse gas emissions and co-pollutants in disadvantaged communities ..." The areas designated as disadvantaged communities by the Climate Justice Working Group can be identified in an interactive map.[6] Referencing this map, the Facility is located within a disadvantaged community. However, as previously discussed, the transfer in ownership of the Facility will not result in a change to the use and operation of the Facility, or affect the validly-issued air permit.[7] Therefore, the Commission finds that authorizing

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[6] NYSERDA, Disadvantaged Communities, https://www.nyserda.ny.gov/ny/Disadvantaged-Communities.

[7] Air Title V Facility Permit, https://extapps.dec.ny.gov/data/dar/afs/permits/419220005500005_r2.pdf.

the Proposed Transaction to proceed, as described herein, will not disproportionately burden a disadvantaged community.

Proposed Transaction

As noted in the Petition and described above, the Proposed Transaction involves Gate City purchasing all of the outstanding equity interests in New Athens, thereby acquiring a direct ownership interest in the Facility. The Commission utilizes a public interest standard in its review of proposed transfers under PSL §70.[8] When this review pertains to a wholesale generator, the level of scrutiny applied may be "reduced to the level that the public interest requires" with concern to their competitive operations.[9]

In this case, the Commission determines that the Proposed Transaction, based on the facts and circumstances presented in the Petition, is appropriate and within the public interest. Following the consummation of the Proposed Transaction, Gate City will have an interest in a combined 1,320 MW of generation capacity, of which 990 MW is within the NYISO region. While the output of Millenium is sold into the NE-ISO market, even assuming the combined 1,320 MW were sold into the NYISO, it would only represent approximately 3.5% of the NYISO

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[8] See, e.g., Case 10-M-0186 et al., Alliance Energy Renewables, LLC, et al., Order Approving Transfers Upon Conditions and Making Other Findings (issued July 23, 2010), p. 17; Case 17-E-0016, TC Ravenswood, LLC, Order Approving Transfer Subject to Acceptance of Conditions and Making Other Findings (issued April 19, 2017), pp. 3-4; Case 16-E-0574, Energy Capital Partners I, LP, Order Approving Transfers and Making Other Findings (issued February 23, 2017), p. 12; and Case 22-E-0372, Flint Mine Solar LLC, et al., Order Approving Transfer (issued November 21, 2022), p. 9.

[9] Case 11-E-0253, First Wind Holdings LLC, et al., Order Approving Transfer, Imposing Reporting Requirements, and Making Other Findings (issued September 21, 2010).

market and be below levels previously found to raise market power concerns.[10] The Commission therefore finds that this amount of capacity does not raise horizontal market power concerns. The Commission also finds that there are no vertical market power concerns given that neither Gate City nor its affiliates exercise control over any electric delivery infrastructure, other than those used for interconnection of the Facility, or own or control fuel inputs for the generation of electricity. Furthermore, as the Facility will continue to operate in the wholesale market on a merchant basis, the Proposed Transaction will not present a potential harm to captive ratepayers. The Buyer has also demonstrated its ability to provide safe and reliable service by retaining the services of NAES for daily operations and maintenance.

Finally, approval of the Proposed Transaction will not cause or require any physical alterations to the operations of the Facility or its surroundings and will not result in any significant adverse environmental impacts. For the foregoing reasons, the Commission finds that the Proposed Transaction is in the public interest and shall be approved under PSL §70.

Lightened Regulation

After the Proposed Transaction is consummated, lightened regulation of New Athens, as the owner of the Facility, will continue in accordance with the Lightened Regulation Orders. New Athens is also reminded that, under lightened regulation, the Facility and the entities controlling their operations remain subject to the PSL with respect to matters such as annual reporting, enforcement, investigation, safety, reliability, system improvement, and the other

[10] Case 07-E-1385, et al., Calpine Corporation, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (issued January 22, 2008).

requirements of PSL Articles 1 and 4, to the extent discussed in the Lightened Regulation Orders.[11] Included among those requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities, and to report personal injury accidents pursuant to 16 NYCRR Part 125.[12] PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will apply based on any affiliations with power marketers that may arise in the future.

The Commission orders:

1. The proposed transfer of the New Athens generating facility from NorthEast Gas Generation, LLC to Gate City Power – NE Generation LLC, as described in the Petition and discussed in the body of this Order, is approved in accordance with Public Service Law §70.

2. Gate City Power – NE Generation LLC shall file with the Secretary, within five days after closing on the proposed transfer described in the Petition and discussed in the body of this Order, a written notice thereof.

3. This proceeding is closed.

By the Commission,

(SIGNED) MICHELLE L. PHILLIPS
Secretary

[11] Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation issued January 23, 2013, in Case 11-M-0294, the owners of lightly regulated generation facilities are required to file Annual Reports.

[12] Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 23-E-0731 - Joint Petition of New Athens Generating Co., LLC, NorthEast Gas Generation, LLC, and Gate City Power - NE Generation LLC for Approval of a Proposed Transfer Pursuant to PSL Section 70 Under Lightened Regulation.

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 (Commission), pursuant to Public Service Law §70, of the transfer of ownership interests from NorthEast Gas Generation, LLC to Gate City Power – NE Generation LLC related to a 990 megawatt gas-fired electric generation facility located in the Town of Athens, New York (the Facility). The Commission's finding is based on its determination, in accordance with Article 8 of the Environmental Conservation Law and the implementing regulation under in 6 NYCRR Part 617, that such action will not have a significant adverse impact on the environment. The exercise of this approval constitutes and Unlisted action, as defined in 6 NYCRR §617.2(al).

The action will not result in a significant impact on the environment since there will not be any modifications to the use and operation of the Facility following the transfer of ownership interests. Approval of the transfer will not cause any physical alterations to the Facility or its surroundings or alter the day-to-day operations of the Facility.

The address of the Commission, the Lead Agency for the purposes of environmental quality review of this action, is Three Empire State Plaza, Albany, New York 12223-1350. Any further questions may be directed to Stephanie McDermott at Stephanie.McDermott@dps.ny.gov or by mail to the address above.

MICHELLE L. PHILLIPS
Secretary