

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on November 19, 2020

COMMISSIONERS PRESENT:

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

CASE 20-E-0472 - Verified Petition of New Athens Generating
Company, LLC, Beal Bank, SSB and Beal Bank USA
for a Declaratory Ruling Regarding Transfer of
Ownership, or, in the Alternative, an Approval
Pursuant to Section 70 of the Public Service Law

DECLARATORY RULING ON REVIEW
OF TRANSFER TRANSACTION

(Issued and Effective November 24, 2020)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on September 18, 2020, New Athens
Generating Company, LLC (New Athens), Beal Bank USA (BBUSA), and
Beal Bank, SSB (BBSSB) (collectively, the Petitioners) requested
a declaratory ruling that the proposed transfer of indirect
ownership interests in New Athens does not require further
review under New York State Public Service Law (PSL) §70 (the
Petition). New Athens is the owner and operator of a natural
gas-fired, combined cycle generation facility located in Athens,
New York. As discussed below, the Public Service Commission
(Commission) finds and declares that no further review will be
conducted of the proposed transfer transaction.

THE PETITION

The Petitioners report that New Athens owns and operates an approximately 989 MW natural gas-fired combined cycle generating facility located in in Athens, New York. New Athens is directly wholly owned by NorthEast Gas Generation, LLC (NE Gas). NE Gas also owns, directly and indirectly (i.e., through its wholly owned subsidiary, NorthEast Gas Generation GP, LLC (NE Gas GP)), all of the equity interests in Millennium Power Partners, L.P. (Millennium), which is the owner of an approximately 335 MW natural gas-fired, combined cycle generation facility in Charlton, Massachusetts, within the ISO New England Inc. market. All of the membership interests of NE Gas are held by NorthEast Gas Generation Holdings, LLC (NE Gas Holdings), while all of the membership interests of NE Gas Holdings are held by Talen NE LLC, which is in-turn owned by Talen Energy Supply, LLC (Talen Energy Supply).

Talen Energy Supply is described by Petitioners as a wholly owned subsidiary of Talen Energy Corporation (Talen Energy), which is indirectly and wholly controlled by Riverstone Holdings LLC (Riverstone), a private asset management firm. Including New Athens and Millennium, Talen Energy Supply owns various public utility subsidiaries that are engaged in the ownership and operation of generating facilities in the New York Independent System Operator, Inc., ISO New England Inc., and PJM Interconnection, L.L.C. markets.

BBUSA and BBSSB are banking institutions, which are wholly owned subsidiaries of Beal Financial Corporation (Beal). Beal is wholly owned by D. Andrew Beal, an individual and resident of the State of Texas, who is also the Chairman and President of Beal. Beal has two indirect subsidiaries that own or control generation facilities in California and Arizona. Apart from what Petitioners characterize as relatively small

holdings of natural gas and oil production rights, neither Beal nor its affiliates own or control, directly or indirectly, any essential inputs to electricity products or electric power production, or any other facilities for the generation, transmission, distribution, or sale of electric energy in the United States.

The Petitioners report that NE Gas and its subsidiaries, including New Athens, filed for relief under Chapter 11 of the U.S. Bankruptcy Code on June 18, 2020, in the United States Bankruptcy Court for the District of Delaware. Pursuant to a plan of reorganization to be approved by the Bankruptcy Court, it is proposed that a wholly owned indirect subsidiary of BBUSA and BBSSB will acquire, indirectly, all of the ownership interests of New Athens (the Transaction). As contemplated, one or more entities (the Transferee) designated by BBUSA and BBSSB will consummate the Transaction simultaneously with NE Gas and its subsidiaries. Any such designee will be a wholly owned direct or indirect subsidiary of Beal. Upon consummation of the Transaction, the Transferee will indirectly own all of the equity interests in New Athens, resulting in New Athens becoming an affiliate of Beal and its subsidiaries. As a result of the Transaction, New Athens will cease to be affiliated with Riverstone or Talen Energy and its remaining subsidiaries. While the proposed Transaction may be modified by the Bankruptcy Court, the Petitioners indicate that they expect the final contracts and written instrument will not have a material impact on the Commission's analysis under PSL §70. It is anticipated, however, that Beal will, in time, seek to dispose of its indirect interests in New Athens or the New Athens generating facility to achieve the best available financial recovery.

According to Petitioners, the Transaction will not cause any harm to the interests of captive utility ratepayers, nor raise any competitive issues. The Petitioners maintain that the proposed Transaction will not result in the potential to exercise either vertical or horizontal market power. The Petition therefore requests a declaratory ruling, consistent with prior Commission rulings addressing upstream transfers of ownership interests in entities subject to lightened regulation, that no further review is needed under PSL §70. In the alternative, the Petitioners request that the Commission approve the Transaction under PSL §70 and any other statutory or regulatory provision deemed applicable.

PUBLIC NOTICE

Pursuant to the Commission's Rules of Procedure, 16 NYCRR §8.2(c), responses to the Petition were due within a 21-day period, which expired on October 9, 2020. No comments were received.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support PSL §70 transfer requests with a demonstration that the transaction would not present the purchaser with the opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully

regulated utilities.¹ The Commission has determined that full regulatory review is not needed for transfers of indirect, upstream ownership interests in lightly regulated electric and gas corporations unless the proposed transfer presents a risk of market power or harm to captive ratepayers (i.e., the Wallkill Presumption).²

The Commission is authorized to issue a declaratory ruling with respect to: (i) the applicability of any rule or statute enforceable by it to any person, property, or state of facts; and (ii) whether any action by it should be taken pursuant to a rule. The Commission also may decline to issue such a declaratory ruling. This authority is expressly established by State Administrative Procedure Act §204 and governed by the Commission's Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute. Declaratory rulings involving interpretations of existing statutes, rules, or regulation are not "actions" within meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations and, therefore, they may be issued without further SEQRA review.³ The declaratory relief requested in the Petition falls within the ambit of the statute and regulations authorizing issuance of a declaratory ruling.

¹ See, e.g., Wallkill Order.

² See, e.g., Case 17-E-0620, AP Cricket Valley Holdings I Inc., et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

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

DISCUSSION AND CONCLUSION

For purposes of the proposed Transaction, Petitioners have demonstrated, consistent with Commission precedent, that full regulatory review is not required under PSL §70.⁴ Based on the facts stated in the Petition, the proposed transfer of upstream interests in New Athens will not create the potential for the exercise of horizontal or vertical market power. Neither Beal 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 generation supply, in New York State. Moreover, the Transaction will not result in any adverse impacts to captive ratepayers in New York as there is no opportunity for the pass-through of Transaction-related costs to captive New York ratepayers. Accordingly, based on the facts and circumstances presented in the Petition, the Commission finds that the proposed transaction does not require further review under PSL §70.

The Commission finds and declares:

1. No further review will be conducted of the proposed transfer transactions described in the Petition filed in this proceeding on September 18, 2020, and discussed in the body of this Declaratory Ruling.

⁴ See, Wallkill Order; see also, Case 18-E-0333, Cassadaga Wind LLC, Declaratory Ruling on Transfer Transactions (issued July 17, 2018); see also, Case 17-E-0620, AP Cricket Valley Holdings I Inc., et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

2. This proceeding is closed.

By the Commission,

(SIGNED)

MICHELLE L. PHILLIPS
Secretary