STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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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	Case 20-E-

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VERIFIED JOINT PETITION FOR DECLARATORY RULING OR APPROVAL UNDER SECTION 70 OF THE PUBLIC SERVICE LAW

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Dated: September 18, 2020

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I. INTRODUCTION

Pursuant to Part 8 of the Rules and Regulations of the New York State Public Service Commission ("Commission"), 16 NYCRR Part 8, New Athens Generating Company, LLC ("New Athens"), Beal Bank USA ("BBUSA") and Beal Bank, SSB ("BBSSB" and, with New Athens and BBUSA, the "Petitioners") hereby petition the Commission for a declaratory ruling that the proposed transfer of the indirect ownership interests in New Athens requires no further review under Section 70 of the New York Public Service Law ("PSL"). Specifically, 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")—the direct owner of a natural gas-fired, combined cycle generation facility in Athens, New York that is subject to the Commission's lightened regulation.[1] In the alternative, the Petitioners request that the Commission approve the Transaction under PSL § 70 and any other statutory or regulatory provision deemed applicable.

[1] *See* Case 16-E-0401, *Joint Petition of Riverstone Holdings LLC, Talen Energy Supply, LLC, MACH Gen, LLC, New MACH Gen, LLC and New Athens Generating Company, LLC,* Declaratory Ruling on a Transfer Transaction (Sept. 19, 2016) ("2016 Order"), at 8.

New Athens is directly wholly-owned by NorthEast Gas Generation, LLC ("NE Gas").[2] NE Gas and its subsidiaries ("NE Gas Debtors"), including New Athens, filed petitions for relief under Chapter 11 of the U.S. Bankruptcy Code[3] on June 18, 2020 in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"). New Athens continues to own and operate its electric generating facility as debtor-in-possession. The bankruptcy cases of the NE Gas Debtors are being jointly administered for procedural purposes and are pending before the Bankruptcy Court.[4] The Transaction is proposed to be undertaken pursuant to a plan of reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code to be approved by the Bankruptcy Court.

No competitive issues are raised by the Transaction nor will it cause any harm to the interests of captive utility ratepayers. The proposed Transaction will not result in the potential to exercise either vertical or horizontal market power.

Timely Commission approval of this Petition will facilitate an orderly and timely restructuring of New Athens through the bankruptcy proceedings. Petitioners respectfully request that the Commission act on the Petition at or before its November 19, 2020 session.

II. BACKGROUND

A. The Parties

1. New Athens

New Athens is a Delaware limited liability company that owns and operates an approximately 989 MW (summer rating) natural gas-fired, combined cycle generation facility

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[2] NE Gas was formerly (including at the time of the 2016 Order noted above) known as New Mach Gen, LLC.

[3] 11 U.S.C. §§1101, *et seq.* (2018).

[4] *See* Case 20-11597-MFW, *In re NorthEast Gas Generation, LLC et al.*, Motion for Joint Administration (June 18, 2020). Copies of the petitions and other documents relating to the bankruptcy proceedings are available at https://cases.primeclerk.com/NEG/.

(the “New Athens Facility”) in Athens, New York. All of the membership interests of New Athens are held by NE Gas.

2. NE Gas

NE Gas owns all of the membership interests of New Athens. NE Gas also owns, directly and indirectly 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”) – the direct owner of an approximately 335 MW (summer rating) 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”). All of the membership interests of NE Gas Holdings are held by Talen NE LLC, all of whose membership interests are held by Talen Energy Supply, LLC (“Talen Energy Supply”).

3. Talen Energy Supply

Talen Energy Supply is a Delaware limited liability company, which is a wholly-owned subsidiary of Talen Energy Corporation (“Talen Energy”). Talen Energy 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.

4. BBUSA and BBSSB

BBUSA and BBSSB are banking institutions, engaged in deposit, lending and other traditional banking activities, and are subject to applicable federal and state banking regulation.

Each of BBUSA and BBSSB is a wholly-owned subsidiary of Beal Financial Corporation ("Beal"). It is proposed that one or more entities designated by BBUSA and BBSSB ("Transferee") will consummate the Transaction simultaneously with the NE Gas Debtors emerging from bankruptcy in the pending proceedings before the Bankruptcy Court. Any such designee will be a wholly-owned direct or indirect subsidiary of Beal.

Currently, Beal has two indirect subsidiaries that own or control generation facilities – one in California and the other in Arizona. None of Beal or its affiliates own or control, directly or indirectly, any other facilities for the generation, transmission, distribution, or sale of electric energy in the United States. Further, apart from relatively small holdings of natural gas and oil production rights, none of Beal or its affiliates own or control, directly or indirectly, any essential inputs to electricity products or electric power production.

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. No other person owns 10 percent or more of the outstanding voting securities in Beal. Other than through his interests in Beal and its subsidiaries, Mr. Beal does not (1) directly or indirectly own, control, or hold with power to vote, 10 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, or (2) directly or indirectly own, control, or hold with power to vote, 10 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.

B. The Transaction

BBUSA and BBSSB are lenders to NE Gas, and the other NE Gas Debtors, including New Athens, are subsidiary guarantors under the loan documents. The outstanding loans to NE

Gas are secured by liens and security interests on substantially all of the assets of NE Gas and its subsidiaries, including the New Athens Facility and the equity interests in New Athens. The NE Gas Debtors sought protection pursuant to Chapter 11 of the U.S. Bankruptcy Code as noted above because of, among other things, their inability to pay principal and interest on the loans from BBUSA and BBSSB when due and the resulting default under the loan documents. BBUSA and BBSSB are undertaking the Transaction as a means of obtaining ownership and control of the collateral for the loans to NE Gas and in anticipation of eventually, to the extent possible, realizing on that collateral. As the Transaction arises out of the lending activities of BBUSA and BBSSB, which are banking institutions, not entities primarily engaged in the business of an electric utility, it is anticipated that Beal will in time seek to dispose of its indirect interests in New Athens or the New Athens Facility to achieve the best available financial recovery.

The Transaction will be undertaken pursuant to a plan of reorganization pursuant to Chapter 11 of the U.S. Bankruptcy Code, which plan must be approved by the Bankruptcy Court. The NE Gas Debtors filed a proposed plan of reorganization (the "Proposed Plan") with the Bankruptcy Court on September 18, 2020. The Proposed Plan contemplates that, in exchange for discharge of a portion of the loans owned by the NE Gas Debtors to BBUSA and BBSSB and the other consideration described in the Proposed Plan, the Transferee(s) designated by BBUSA and BBSSB will acquire, directly or indirectly, through the acquisition of the equity interests in NE Gas, all the equity interests of New Athens.[5] As a result of the Transaction, New Athens will cease to be affiliated with Riverstone or Talen Energy and its remaining subsidiaries.

[5] As noted above, Transferee will be one or more indirect wholly-owned subsidiaries of Beal.

The Proposed Plan remains subject to approval by the Bankruptcy Court and may be modified as required or permitted by the Bankruptcy Court during the bankruptcy proceedings. Petitioners expect, however, that neither the final plan of reorganization nor any of the other contracts and written instruments that may be entered into in connection with the Transaction will be inconsistent with the Proposed Plan or the description of the Transaction set forth in this Petition in any way material to the Commission's analysis under PSL § 70. In any case, upon consummation of the Transaction Transferee will indirectly own 100 percent of the equity interests in New Athens, as a result of which New Athens will become an affiliate of Beal and its subsidiaries.

III. THE COMMISSION SHOULD DECLARE THAT THE WALLKILL PRESUMPTION APPLIES TO THE TRANSACTION AND DECLINE TO FURTHER REVIEW IT UNDER PSL § 70 OR, IN THE ALTERNATIVE, APPROVE IT UNDER PSL § 70.

According to Commission precedent, PSL § 70 requires written consent of the Commission for transfer of a sufficiently controlling interest in an electric plant, including ownership transfer at a holding company (*i.e.*, upstream) level.[6] However, in the Wallkill Order (defined below), the Commission established a lightened regulatory regime for wholesale generators in New York under which PSL § 70 review of changes in ownership is not required.[7] In the Wallkill Order, the Commission decided that under this 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

[6] *See, e.g.*, Case 07-E-1385, *Calpine Corp. and LS Power Development*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (Jan. 22, 2008), at 15.

[7] Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (Apr. 11, 1994) ("Wallkill Order"); *see also* Case 14-E-0195, *Bayonne Energy Center, LLC et al.*, Order Modifying Lightened Ratemaking Regulation Authorizations and Approving Financing and Declaratory Ruling on a Transfer Transaction (Aug. 15, 2014).

unless there was a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption (the "Wallkill Presumption"). The Commission has previously granted New Athens such lightened regulation and afforded it the Wallkill Presumption for transfers of ownership interests in its upstream parent entities.[8]

In past decisions, the Commission has determined that the Wallkill Presumption applies to transactions involving upstream changes in control of lightly regulated entities and has declined to review those transactions under PSL § 70 when it has determined that the transactions would not provide the petitioners with the ability to exercise horizontal or vertical market power or to harm the interests of captive New York ratepayers.[9] As discussed more fully above, the Transaction involves a change in the ownership interests in a parent entity (i.e., NE Gas) upstream from the entity owning and operating a New York competitive electric generation facility (i.e., New Athens). Petitioners request that the Commission follow its precedent, continue to afford New Athens the Wallkill Presumption, and issue a declaratory ruling stating that the Commission need not further review the Transaction described herein under PSL § 70.

The Transaction does 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.

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[8] Case 16-E-0401, *supra*, Declaratory Ruling on a Transfer Transaction (Sept. 19, 2016), at 8.

[9] *See*, *e.g*., Case 12-M-0351, *Dynegy Inc. and Franklin Resources, Inc.*, Declaratory Ruling on Review of a Stock Acquisition Transaction (Sept. 14, 2012); Case 09-E-0055, *Constellation Energy Nuclear Group LLC et al.*, Declaratory Ruling on Review of a Transfer Transaction (Apr. 23, 2009); Case 06-M-0210, *Constellation Energy Group, Inc. and FPL Group, Inc.*, Declaratory Ruling on Review of Ownership Interest Transfer (July 25, 2006).

Moreover, the Transaction will not result in any adverse impacts to captive ratepayers in New York. New Athens does not make power sales at cost-based rates or provide third party electric transmission service. New Athens is an exempt wholesale generator ("EWG") within the meaning of Section 1262(6) of the Public Utility Holding Company Act of 2005 ("PUHCA") and Section 366.1 of the regulations of the Federal Energy Regulatory Commission ("FERC") and is authorized by FERC pursuant to Section 205 of the Federal Power Act to sell electric power, including energy and capacity, at market-based rates. Therefore, New Athens' sales of electric power from the New Athens Facility are exclusively at wholesale at market-based rates pursuant to its FERC-approved market-based rate tariff. That will continue to be the case following the consummation of the Transaction, and there will be no change in the status of the New Athens Facility as an EWG as a result of the Transaction. In addition, none of the Transferee or its affiliates makes power sales at cost-based rates or provides third-party electric transmission service. Thus, the Transaction provides no opportunity for the pass-through of Transaction-related costs to captive wholesale or transmission customers and will not have any adverse effect on wholesale rates.

Accordingly, the Wallkill Presumption applies to New Athens, as a lightly regulated entity, and consistent with Commission precedent, the Commission may decline to review the Transaction under PSL § 70 because the Transaction will not provide Petitioners with the ability to exercise horizontal or vertical market power or to harm the interests of captive New York ratepayers. Alternatively, if the Commission decides to review the Transaction pursuant to PSL § 70, the Commission should approve the Transaction as in the public interest for the reasons discussed above.

IV. CONCLUSION

WHEREFORE, Petitioners respectfully request that the Commission issue a declaratory ruling that no further review of the Transaction is required under PSL § 70 or authorize the Transaction under PSL § 70, without condition, as in the public interest. Petitioners respectfully request that the Commission act on the Petition at or before its November 19, 2020 session.

Dated: September 18, 2020

Respectfully submitted,

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VERIFICATION

I, Dale E, Lebsack, Jr., as President, of New Athens Generating Company, LLC, do hereby affirm that the contents of this document are true to the best of my knowledge and belief.

Signed: Dale E Lebsack Jr
Date: September 18, 2020

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VERIFICATION

I, James Erwin, as an Authorized Signatory of Beal Bank, SSB and Beal Bank USA do hereby affirm that the contents of this document are true to the best of my knowledge and belief.

Signed: ______________________
Date: September 18, 2020

STATE OF TEXAS)
) ss.:
COUNTY OF COLLIN)

September 18, 2020

On this 18th day of September, 2020, before me, the undersigned notary public, personally appeared James Erwin, proved to me through satisfactory evidence of identification, which was personally known (state form of identification or state that the signer is personally known to the notary), to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he)/(she) signed it voluntarily for its stated purpose.

MARY R. LAWRENCE
Notary Public, State of Texas
Comm. Expires 03-19-2024
Notary ID 125377689

Mary R. Lawrence
Notary Public
My commission expires: 03/19/2024