

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on August 18, 2011

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman  
Patricia L. Acampora  
Maureen F. Harris  
Robert E. Curry, Jr.  
James L. Larocca

CASE 11-E-0306 - Astoria Generating Company, L.P. and USPG DevCo Holdings, LLC - Petition for an Order Approving a Transaction Pursuant to Public Service Law §70 and Continuing A Lightened Regulatory Regime.

ORDER APPROVING TRANSFER

(Issued and Effective August 23, 2011)

BY THE COMMISSION:

BACKGROUND

In a petition filed on June 7, 2011, Astoria Generating Company, L.P. (Astoria Gen) and USPG DevCo Holdings LLC - (DevCo)(collectively, the Petitioners) request approval, pursuant to Public Service Law (PSL) §70, of the transfer of the ownership interests in the South Pier Improvement Project (SPIP) from Astoria Gen to DevCo; both entities are indirect wholly-owned subsidiaries of U.S. Power Generating Company (USP Gen). SPIP is a proposed 100 MW gas-fired generation facility to be constructed in Brooklyn, New York.

In conformance with State Administrative Procedure Act (SAPA) §202(1), notice of the petition was published in the State Register on June 29, 2011. The SAPA §202(1)(a) period for

submitting comments in response to the notice expired on August 15, 2011. No comments have been received.

THE PETITION

The Petitioners begin by noting that Astoria Gen has obtained a Certificate of Public Convenience and Necessity (CPCN) authorizing it to construct the 100 MW SPIP generation facility, and that the facility will be regulated lightly once it commences operation.<sup>1</sup> In order to facilitate the development of the SPIP, the Petitioners continue, Astoria Gen plans to transfer the permits and authorizations needed to construct and operate the facility to DevCo, which is a special purpose entity dedicated to SPIP's development. Astoria Gen maintains that the creation of such a special purpose entity is a common approach to the financing and development of a new generation facility like SPIP.<sup>2</sup>

The Petitioners assert that the transfer is in the public interest. They state that the transfer of the SPIP from one USP Gen subsidiary, Astoria Gen, to another subsidiary, DevCo, will not lead to the exercise of horizontal market power because USP Gen's share of the New York wholesale market will remain the same. They also contend that the exercise of vertical market power is not a concern, because neither USP Gen, nor its Astoria Gen and DevCo subsidiaries, are affiliated with any public utilities.

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<sup>1</sup> Case 09-E-0250, Astoria Generating Company, Order Granting a Certificate of Public Convenience and Necessity, Providing For Lightened Regulation and Approving Financing (issued December 23, 2009)(CPCN and Light Regulation Order).

<sup>2</sup> See Case 08-E-111, Astoria Energy II LLC, et al., Order Approving Transfers and Financing and Making Other Findings (issued December 15, 2008).

The same management team that has directed the operations of Astoria Gen, the Petitioners relate, will also direct DevCo in its efforts to develop and construct the SPIP. The Petitioners also assert that USP Gen is adequately financed, notwithstanding the bankruptcy and sale of an affiliate, Boston Generating Company LLC. That affiliate, they state, was ringfenced from USP Gen's other operations and so the financial difficulty it encountered has no effect on the financial viability of either Astoria Gen or DevCo. As a result, the Petitioners ask that the transfer be approved.

#### DISCUSSION AND CONCLUSION

##### Environmental Quality Review

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), we must determine whether the actions we are authorized to approve may have a significant impact on the environment. Other than our approval of the action proposed here, no additional state or local permits are required, so a coordinated review under SEQRA is not needed. We will assume Lead Agency status under SEQRA and conduct an environmental review.

SEQRA requires applicants to submit a complete EAF describing and disclosing the likely impacts of the actions they propose.<sup>3</sup> The Petitioners have submitted a narrative and short-form EAF Part 1 that substantially comply with this requirement.

The proposed action over which we have jurisdiction is the transfer of ownership interests in the proposed SPIP 100 MW generation facility from Astoria Gen to DevCo, both of which are subsidiaries of USP Gen, the existing indirect owner of SPIP. The proposed action does not meet the definition of Type 1 or

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<sup>3</sup> 6 NYCRR §617.6(a)(3).

Type 2 actions listed in 6 NYCRR §§617.4, 617.5 and 16 NYCRR §7.2, so it is classified as an "unlisted" action requiring SEQRA review. After review of the petition we conclude, based on the criteria for determining significance listed in 6 NYCRR §617.7(c), that there will be no changes to the existing authorizations and permits for the construction and operation of the proposed generation facility underlying the proposed transfer will result in adverse environmental impacts. Our Staff has completed the short-form EAF Part 2.

As Lead Agency, we determine that the proposed action will not have a significant impact on the environment and adopt a negative declaration pursuant to SEQRA. Because no adverse environmental impacts were found, no public notice requesting comments is required or will be issued. A negative declaration concerning this unlisted action is attached. The completed EAF will be retained in our files.

#### The Transfer

Under PSL §70(1), our approval is required before an electric corporation may transfer ownership interests conveying control over electric plant.<sup>4</sup> In conducting a review under §70 that pertains to a lightly-regulated electric corporation operating in wholesale electric markets, we examine any affiliations, including those with fully-regulated New York utilities or power marketers, that might afford opportunities for the exercise of market power or pose the potential for other harms detrimental to captive ratepayer interests.

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<sup>4</sup> Since construction of the SPIP facility has already been authorized under PSL §68, no further action under that provision of law is required upon the transfer of ownership of the SPIP project to new owners. See Case 06-E-1465, USRG Niagara Biomass LLC, Declaratory Ruling on Application of Public Service Law §68 (issued January 22, 2007).

When reviewed with the reduced scrutiny applicable under lightened regulation, the ownership transfer the Petitioners propose is in the public interest. The transaction does not pose the potential for the exercise of horizontal market power. Since USP Gen will remain the indirect owner of the SPIP project, through its DevCo subsidiary instead of through its Astoria Gen subsidiary, its share of the New York wholesale generation market will remain the same.<sup>5</sup> It has been decided that Astoria Gen's existing market share does not raise state-wide market power issues, and neither exacerbates nor alleviates existing levels of market concentration within New York City.<sup>6</sup> Consequently, market concentration in New York wholesale generation markets will not increase cognizably as a result of the transaction.

The proposed transaction does not pose the potential for the exercise of vertical market power. Neither USP Gen, nor its Astoria Gen and DevCo affiliates, exercise control over electric delivery facilities in New York (other than interconnections), or report an affiliation with a power marketer, or exert substantial influence over inputs, like fuel, into the production of generation supply within New York. As a result, those avenues to the undue exercise of vertical market power are foreclosed. The transfer does not otherwise pose the potential for harm to captive ratepayer interests.

Moreover, DevCo will remain an indirect wholly-owned subsidiary of USP Gen, which is an experienced generation

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<sup>5</sup> As the CPCN and Light Regulation Order indicates, the size of the SPIP capacity addition, at 100 MW, is not sufficiently large to substantially affect USP Gen's proportionate share of either the New York state-wide or New York City markets.

<sup>6</sup> See Case 07-E-0332, Astoria Generating Company, L.P., et al., Declaratory Ruling on Review of a Merger Transaction (issued May 22, 2007).

facility operator, appears sufficiently capitalized, and will continue, through the Astoria Gen management team, the existing arrangements for the development and construction of the SPIP facility. The transaction that the Petitioners propose is therefore approved.

After the transfer transaction is consummated, lightened ratemaking regulation of the 100 MW SPIP generation facility will continue in accordance with the CPCN and Light Regulation Order.<sup>7</sup> USP Gen and DevCo are reminded that, under lightened regulation,<sup>8</sup> the proposed SPIP generation facility and the entities that will control its operations remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in the CPCN and Light Regulation Order and other previous orders.<sup>9</sup> Included among these requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,<sup>10</sup> to give notice of generation unit retirements, and to report personal injury accidents pursuant to 16 NYCRR Part 125.

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<sup>7</sup> The PSL 66(6) annual report requirement that pertains to lightly regulated entities is under review pursuant to the Notice Soliciting Comments issued June 3, 2011 in Case 11-M-0294; any revisions to the requirement adopted in that proceeding will adhere to DevCo.

<sup>8</sup> Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

<sup>9</sup> See, e.g., Case 09-M-0251, Saranac Power Partners, L.P., Order Providing for Lightened Regulation of an Electric Corporation and Making Findings on Steam Corporation Regulation (issued June 19, 2009).

<sup>10</sup> 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).

The Commission orders:

1. The transfer of the ownership interests in the proposed generation facility described in the petition filed in this proceeding and in the body of this Order is approved.

2. This proceeding is closed.

By the Commission,

JACLYN A. BRILLING  
Secretary

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NOTICE OF DETERMINATION OF  
NON-SIGNIFICANCE

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 ownership interests in the proposed South Pier Improvement Project (SPIP), a 100 MW gas-fired generation facility to be located in Brooklyn, New York, from Astoria Generating Company L.P. to USPG DevCo Holdings LLC, based on our determination, in accordance with Article VIII of the Environmental Conservation Law, that such action will not have a significant adverse affect 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 proposed action, which will lead to the ownership, development and operation of the proposed SPIP 100 MW generation facility by USPG DevCo Holdings LLC instead of the existing entity, when both are indirect subsidiaries of U.S. Power Generating Company, will not have a significant adverse environmental impact. A change in the identity of the developer and owner of the proposed generation plant will not otherwise cause any physical alterations to the generation plant or its development and construction in accordance with existing authorizations and permits.

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

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12223-1350. Questions may be directed to Leonard Van Ryn at  
(518) 473-7136 or at the address above.

JACLYN A. BRILLING  
Secretary