Petriman, Viorica

From: Riva, Steven
Sent: Thursday, June 12, 2014 10:57 AM
To: Siegel, Joseph
Subject: FW: Greenidge NSR/PSD Inapplicability Request
Attachments: 20140401144514770.pdf

FYI

-----Original Message-----
From: Riva, Steven
Sent: Monday, June 09, 2014 8:54 AM
To: Petriman, Viorica
Subject: FW: Greenidge NSR/PSD Inapplicability Request

Please review and provide comments

-----Original Message-----
From: Schul, Lesley K. [mailto:LSchul@hblaw.com]
Sent: Tuesday, April 01, 2014 3:09 PM
To: tlmarrio@gw.dec.state.ny.us
Cc: Bifera, Frank V.
Subject: Greenidge NSR/PSD Inapplicability Request

Dear Mr. Marriott:

Attached please find Mr. Bifera's letter requesting a NSR/PSD Inapplicability Determination.

Thank-you.

Lesley K. Schul
Legal Secretary
Hiscock & Barclay, LLP
80 State Street
Albany, NY 12207
D: (518) 429-4247
F: (518) 533-2912
E: mailto:LSchul@hblaw.com
http://www.hblaw.com

Federal Tax Disclosure and Confidentiality Notice:
In accordance with IRS requirements, we inform you that any Federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

This electronic mail transmission is intended only for the use of the individual or entity to which it is addressed and may contain confidential information belonging to the sender which is protected by the attorney-client privilege. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or the taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please notify the sender immediately by e-mail and delete the original message.

~HB~

HISCOCK & BARCLAY LLP

Frank V. Bifera
Partner

April 1, 2014

VIA OVERNIGHT MAIL
VIA ELECTRONIC MAIL

Thomas Marriott
Regional Air Pollution Control Engineer
New York State Department
Of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414

Re: Request for a New Source Review/Prevention of Significant Deterioration Inapplicability Determination for the Restart of the Greenidge Electric Generating Facility

Dear Mr. Marriott:

Atlas Holdings LLC ("Atlas"), through its affiliate, recently purchased Greenidge Generation LLC (f/k/a GMMM Greenidge, LLC), owner of the Greenidge Generating Station located in Torrey, New York ("Greenidge" or the "Facility"), from GMMM Holdings I, LLC ("GMMM"). As we have discussed, because of the operation-ready state of the Facility, and because of the Facility's significant environmental attributes, Atlas is bringing the Facility out of its current protective lay-up status and resuming normal operation of the Facility as an electric generating station.. Therefore, as previously discussed in Atlas's March 14, 2013 letter to the New York State Department of Environmental Conservation (the "Department" or "DEC"),[1] Atlas is requesting that the Department issue a New Source Review ("NSR")/Prevention of Significant Deterioration ("PSD") inapplicability determination letter related to the reactivation of Greenidge and the issuance of a new Title V operating permit.[2]

As discussed in more detail below and in the March 14, 2013 letter, the Clean Air Act's NSR/PSD requirements, contained in 6 NYCRR Part 231, are not applicable to the reactivation of Greenidge and the issuance of a new Title V operating permit by the Department. This conclusion is based, among other things, on the following: (1) the short duration that the Facility

---

[1] A copy of the March 14, 2013 letter is included as Attachment 1. The attachments to the March 14, 2013 letter that were included in the original submittal are not included hereto, but will be provided upon request.

[2] An application for a Title V operating permit is expected to be submitted to the Department in April 2014.

80 State Street - Albany, New York 12207 hblaw.com
fbifera@hblaw.com Direct: 518.429.4224 Fax: 518.427.3487

has been in protective lay-up status; (2) the operation-ready state in which the Facility has been maintained; and (3) the owner's intent not to permanently deactivate the Facility.

I. Background

Greenidge consists of one 106-megawatt, predominantly coal-fired, electric generating unit (Unit 4). In addition to combusting coal, the Facility has the ability to co-fire biomass and/or natural gas. In 2006, as part of the U.S. Department of Energy's ("DOE") Clean Coal Technology Program, approximately $50 million of environmental retrofits were installed at Greenidge. The retrofits and upgrades included: selective catalytic reduction ("SCR"), selective non-catalytic reduction ("SNCR"), a dry scrubber and a baghouse with activated carbon injection. In 2009, the Facility was further enhanced with equipment to allow for biomass co-firing at a cost of approximately $9 million. As a direct result of these upgrades and improvements, Greenidge is currently one of the cleanest burning coal-fired power plants in the Northeast, with emission removal rates of 95% for NO_X and SO_2, 99% for mercury, and the ability to reduce CO_2 emissions by co-firing with biomass and natural gas.

On March 18, 2011, the Facility was placed into protective lay-up pursuant to a Notice of Protective Lay-up dated September 17, 2010, which was filed by the Facility's then-owner, AES EE2, LLC ("AEE2").[3] As stated in the attached affidavit from AEE2's then-president Peter Norgeot, AEE2 intended the protective lay-up of the Facility to be temporary.[4] Before placing the Facility into protective lay-up, AEE2 planned the lay-up preparation activities, steps, and maintenance activities that would be completed at the Facility during the lay-up period to maintain quick restart capability. Further underscoring this intention and preparation to be able to restart Greenidge, AEE2's Chapter 11 Petition filed on December 30, 2011 included the statement that:

> In March 2011, as part of its efforts to improve operating margins and cash flows, the Debtors placed the Westover facility and Greenidge Facility, representing a total combined capacity of 189 MW, into "protective layup" status, which means that although the facilities are currently out of service and it is intended that they will continue to be out of service for an extended period, the equipment and systems of both facilities are being protected so that production could restart if market conditions improve.

Throughout its ownership, AEE2 implemented the maintenance schedule during the protective lay-up period by, among other things, employing a maintenance manager, an operator, and a technician at the Facility to complete all maintenance activities required to preserve the protective lay-up state and to be able to reactivate the facility quickly. Maintenance activities included continued compliance with the permits held for Greenidge,[5] and implementation of the

---

[3] The Notice of Protective Lay-up is included as Attachment 2.

[4] An affidavit from former AEE2 President Peter Norgeot, sworn to March 13, 2013, is included as Attachment 3.

[5] The Facility continues to hold the following permits: State Pollution Discharge Elimination System ("SPDES") permit for the Facility; the Part 360 Solid Waste Management Facility Permit for the Lockwood ash disposal facility; the Lockwood SPDES permit; Greenidge Petroleum Bulk Storage Registration; and a Resource

Department-approved Lockwood Layup Plan. GMMM continued all of these maintenance activities during its ownership, and Atlas is doing the same. Attachment 4 is a list of the maintenance activities that have been completed at the Facility during the protective layup.

The reactivation of Greenidge as an electric generating station will require only (i) minimal routine maintenance activities that can be completed in less than 30 days for approximately $275,000 (ii) receipt of the Title V operating permit and (iii) certain agreements with NYSEG, NYISO and PSC to allow for the sale of electricity to the grid.

II. NSR/PSD Reactivation Analysis

Under the federal Clean Air Act, a major source of air emissions must obtain an NSR/PSD pre-construction permit only if it meets one of two criteria: (1) it is a major *new* source; or (2) it is an existing major source that is undergoing a nonexempt modification that will result in a significant net emissions increase (the significance thresholds for different pollutants are set in the regulations). 40 CFR § 52.21(a)(2).

A reactivation analysis is based on a mosaic of letters and decisions by environmental regulatory agencies addressing when a previously deactivated source will be treated as either an existing source or a new source. A source being reactivated is considered new for purposes of NSR/PSD only if it was "permanently shutdown."[6] If it was not permanently shutdown, a reactivation of the facility is considered the restart of an existing facility, subject to NSR/PSD only if it is considered a major modification.[7]

EPA has explained that shutdowns of a two-year duration or less are considered temporary and likely not subject to NSR/PSD requirements, while shutdowns of more than two years are presumed to be permanent.[8] In the Coleville PSD applicability determination, it was determined that since the purchaser of the facility, which was purchased out of bankruptcy, was restarting the facility less than two years after the facility had been deactivated, the restart of the facility was not presumed to be permanent, and the facility was not subject to PSD as a new source.[9]

Conservation and Recovery Act ("RCRA") EPA Generator ID Number. The Facility also continues to maintain its Energy Information Administration ("EIA") registration and its Department of Homeland Security ("DHS") Chemical Security Assessment Tool registration, its EPA Greenhouse Gas Mandatory Reporting Rule Account, and completes all requirements associated with each of these programs.

6 In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, dated June 11, 1999.

7 Id.

8 October 9, 1979 Memo from William A. Spratlin, Chief Air Support Branch, Region VII, to Harvey D. Shell

9 September 7, 2001 Memo from Douglas E. Hardesty, Manager Federal and Delegated Air Programs, Region X, to Jerold w. Holmes, General Manger Forest Products Division Colville Tribal Enterprise Corporation.

As provided in *Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition 6-99-2, at 8-9 (EPA June 11, 1999) ("*Monroe*"),

> The key determination to be made under this policy is whether the facility to be reactivated was "permanently shutdown." In general, EPA has explained that whether or not a shutdown should be treated as permanent depends on the intention of the owner or operator <u>at the time of shutdown</u> based on all facts and circumstances. Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emission inventory, are presumed to be permanent. In such cases it is up to the facility owner or operator to rebut the presumption....
>
> While the policy suggests that the key determination is whether, <u>at the time of shutdown</u>, the owner or operator intend shutdown to be permanent, in practice, after two years, statement of original intent are not considered determinative.

(Emphasis original.) Thus, where, as here, a facility has been deactivated for less than two years, an owner's "statement of original intent" "at the time of shutdown" is considered "determinative" on the key issue of whether the deactivation was intended to be permanent.

Conversely, where a facility has been deactivated for more than two years, statements of original intent are no longer "considered determinative." Prior decisions established a rebuttable presumption that a facility deactivated for two years or more was intended to be permanently deactivated. *Monroe* articulated several factors that environmental regulatory agencies such as the DEC typically consider in evaluating the intended permanence of a deactivation, including: (1) the amount of time the facility has been out of operation; (2) reason for the shutdown; (3) contemporaneous statements by an owner/operator regarding intent; (4) cost and time required to reactivate the facility; (5) status of permits; and (6) ongoing maintenance and inspection activities conducted during the shutdown. If a facility owner can demonstrate that a shutdown was not intended to be permanent, the source will not be considered "new" upon reactivation for NSR/PSD purposes – even if the length of the shutdown far exceeds the two-year threshold identified in the reactivation policy.

For example, in a 1991 decision applying the reactivation analysis to the Watertown Power Plant in South Dakota, it was found that the owner had successfully rebutted the presumption of a permanent shutdown even though the facility had been deactivated for nine years:

> Since 1982, the unit has been treated as being in cold standby, requiring 6-8 weeks to reactivate. Information submitted to EPA thus far indicates that the plant has been maintained to ensure its readiness. [A letter from the owner] details what has been done during the entire standby period to ensure readiness; thereby, validating the intent to reactivate. These actions include maintaining two full time employees on site, and periodic testing and maintenance of the system to

> ensure quick reactivation. It appears that reactivation of the plant would not require more than a limited amount of time and capital....
>
> With the facts presented, which include an intent to maintain the turbine, [the owner] has overcome the presumption that the shutdown was permanent.

Applicability of PSD to Watertown Power Plant, South Dakota (EPA Nov. 19, 1991) ("*WPP*").

III. The Restart of Greenidge is Not Subject to NSR/PSD Permitting as a New Source Because the Facility Has Been in Protective Lay-Up for Less Than Two Years and the Owner Did Not Intend for the Protective Lay-up to be a Permanent Deactivation

Greenidge went into protective lay-up on March 18, 2011 – less than two years before Atlas's January 22, 2013 request to resume normal operations at the Facility. While a reactivation analysis creates a rebuttable presumption that deactivations lasting two years or more are intended to be permanent, no such presumption applies to facilities deactivated for less than two years. In fact, there does not appear to be a single instance where a facility that was restarted in less than two years has been found by EPA to have been permanently deactivated and subject to NSR/PSD permitting as a new source.

At the time of Atlas's March 14, 2013 letter to DEC requesting a determination that Greenidge was not a "new" source for PSD/NSR purposes, the Facility had been in protective lay-up for less than two years, and AEE2 was clear and emphatic in its September 17, 2010 Notice of Protective Lay-up that the protective lay-up was intended to be temporary. Then-president of AEE2 Peter Norgeot has expressed that AEE2's intent was to reactivate the Facility[10] and AEE2 employees also made statements to the media regarding the company's intent to reactivate the Facility. Accordingly, the Facility was not permanently deactivated and should not be treated as a "new" source for PSD/NSR permitting purposes.

While no presumption of permanent deactivation applies to Greenidge because the Facility had been in protective lay-up for less than two years when the inapplicability determination was first requested, even if such a presumption were applied to the Facility, that presumption would be rebutted pursuant to the six factors articulated in *Monroe* and elsewhere. While "no single factor is likely to be conclusive," *Monroe* makes clear that "the owner's or operator's *actions at the facility during shutdown*" are crucial.[11] Crucially, here all of the "actions at the facility during shutdown," which include maintenance of the Facility and preparations for reactivation, corroborate the conclusion that the Facility's protective lay-up was intended to be temporary.

---

[10] See Norgeot Affidavit.

[11] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 9, dated June 11, 1999 ("*Monroe*").

When AEE2 placed the Facility in protective lay-up on March 18, 2011, the company immediately instituted (at considerable expense) a comprehensive protective lay-up plan and regular maintenance schedule designed to preserve the Facility in full working order so that it could resume operations upon short notice. Once the protective lay-up period began, AEE2 implemented a comprehensive maintenance plan to preserve the Facility in total working order, including employing the Greenidge maintenance manager, an operator, and a maintenance technician to complete regular maintenance activities. GMMM continued these practices – including retaining key Facility maintenance employees – when it acquired the Greenidge Facility in late December 2012 up until Atlas purchased the Facility. Atlas continues to implement protective layup practices in preparation for the reactivation of the Facility. As a result, the Facility remains ready to resume operations. Such activity is fully consistent with the kind of "continuous intent to reopen" that will effectively rebut any presumption that a deactivation was intended to be permanent.[12]

While the scope, scale and cost of the maintenance regime implemented at the Greenidge Facility during the lay-up is overwhelming evidence of an intent to resume normal operations at the Facility, the cost and time required to reactivate the facility, because it has been maintained in a state of constant technical readiness that would allow it to resume full operations, is minimal. The maintenance activities necessary to reactivate the Facility are similar to those that would take place during a typical outage and are expected to cost less than $275,000. By way of comparison, in the *WPP* matter discussed above, it was determined that the owners of the facility, which had been deactivated for nine years and would require between six to eight weeks to reactivate, overcame the presumption of shutdown permanence by showing an ongoing maintenance regime at the facility.

The continual and comprehensive maintenance activities undertaken by AEE2, GMMM and Atlas at the Facility throughout the protective lay-up period are the best evidence that the lay-up was intended by all parties to be temporary. In addition, throughout the protective lay-up period AEE2, GMMM and Atlas have complied with the reporting obligations required under the Facility's environmental permits, and AEE2 submitted timely renewal applications for the Title IV and Title V permits. As discussed above, the other significant operating permits associated with the Facility were maintained by AEE2, GMMM, and now by Atlas. Other non-environmental registrations, including those with EIA and DHS, have also been maintained.

Based on the above analysis, Greenidge should not be treated as a "new" facility for NSR/PSD permitting purposes when the Facility ends its protective lay-up and resumes normal operations.

IV. <u>The Restart of Greenidge is Not Subject to NSR/PSD as a Major Modification</u>

Restart of the Greenidge facility will require only regular routine maintenance work normally completed during a maintenance outage, and therefore the activities are exempt from NSR/PSD requirements as routine maintenance, repair, or replacement ("RMRR").

---

[12] *See, e.g., Monroe.*

Additionally, the post-restart emissions from Greenidge will not exceed the major modification thresholds.[13] Thus, the restart of the Facility is not a major modification based on a physical change or change in the method of operation and NSR/PSD is not applicable to the restart of Greenidge.

Conclusions

The Greenidge Facility has been in protective lay-up for less than two years from the date of Atlas's request to resume operation of the Facility. As a result, the deactivation is not presumed to be permanent, and AEE2's unambiguous written statements in its Notice of Protective Lay-up are "determinative" that deactivation of the Facility was not intended to be permanent. This conclusion is confirmed by the comprehensive and ongoing maintenance activities performed by the Facility owners before and during the protective lay-up – all of which clearly manifest a continual intention to preserve Greenidge in full working order so that it can resume operations upon short notice, which is wholly inconsistent with an intention to permanently deactivate the Facility. Therefore, Greenidge should not be treated as a "new" facility for NSR/PSD permitting purposes when the Facility ends its protective lay-up and resumes normal operations.

Even if the post-two-year presumption were applied to the Facility, analysis of the factors discussed in *Monroe* and the continual and comprehensive maintenance regimen and other actions at Greenidge demonstrates that the protective lay-up was intended to be temporary.

The Greenidge Facility is one of the cleanest coal-fired power plants in the Northeast and provides reliability to the electric grid in New York. In fact, Greenidge emits less pollutants per unit of energy than as much as 40% of current electric generation capacity in the Northeast. In addition, the approximately forty employees who will be employed to operate the Facility, and the significant tax revenues that the State and local municipalities will receive from the operation of Greenidge, are additional benefits associated with the reactivation of the Facility.

Atlas would be happy to host the Department at the Facility so that it can see the restart-ready state in which Greenidge has been maintained. Please contact us if the Department would like to set up a mutually agreeable time for such a visit.

---

[13] 6 NYCRR § 231-4.1(b)(29).

Based on the above discussion and analysis, we respectfully request that the Department issue a NSR/PSD inapplicability determination letter for the reactivation of Greenidge.

Very truly yours,

Frank V. Bifera

FVB/lks
Enclosures
cc: Alison H. Crocker
Robert J. Stanton, P.E.
William G. Little, Esq.
Blaise W. Constantakes
Chris Hogan
Daniel W. Walsh
Paul D'Amato
Scott Sheeley
Lisa Schwartz, Esq.
Leo J. Bracci, Esq.

ATTACHMENT 1

HISCOCK & BARCLAY LLP

Frank V. Bifera
Partner

March 14, 2013

VIA HAND DELIVERY
VIA OVERNIGHT MAIL

Thomas Marriott
Regional Air Pollution Control Engineer
New York State Department
Of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414

Re: Request for a New Source Review/Prevention of Significant Deterioration Inapplicability Determination for the Restart of the Greenidge Electric Generating Facility

Dear Mr. Marriott:

We represent Atlas Holdings LLC ("Atlas"), which is currently finalizing a contract to purchase the Greenidge Generating Station, located in Torrey, New York ("Greenidge" or the "Facility"), from GMMM Holdings I LLC ("GMMM"). Upon completing its purchase of Greenidge, Atlas will bring the Facility out of its current protective lay-up and resume normal operation of the Facility as an electric generating station. A review of the facts and circumstances demonstrates that new source review ("NSR")/prevention of significant deterioration ("PSD") permitting will not be required to bring the Facility out of its current protective lay-up. This conclusion is based, among other things, on the following: (1) the short duration that the Facility has been in protective lay-up status – less than two years; (2) the facts surrounding the Facility's protective lay-up status; and (3) the owner's intent not to permanently deactivate the Facility, particularly at the time the Facility entered protective lay-up status. We respectfully submit that the Clean Air Act's NSR/PSD requirements, contained in 6 NYCRR Part 231, are not applicable to the reactivation of Greenidge and the issuance of a new Title V operating permit for the Facility by the New York State Department of Environmental Conservation ("DEC" or the "Department").

Accordingly, and based on the further information which follows, please accept this letter as a request from Atlas for an NSR/PSD inapplicability determination from the Department regarding the reactivation of the Greenidge Facility.

80 State Street - Albany, New York 12207 hblaw.com
fbifera@hblaw.com Direct: 518.429.4224 Fax: 518.427.3487

I. Background

Greenidge consists of one 106 megawatt, predominantly coal-fired, electric generating unit (Unit 4).[1] In addition to combusting coal, the Facility has the ability to co-fire biomass and/or natural gas. In 2006, AES EE2, LLC ("AEE2")[2], the then-owner of Greenidge, in partnership with CONSOL Energy Inc. and Babcock Environmental, and as part of the U.S. Department of Energy's ("DOE") Clean Coal Technology Program, installed $38 million worth of environmental retrofits to Greenidge.[3] The retrofits and upgrades included: selective catalytic reduction ("SCR"), selective non-catalytic reduction ("SNCR"), a dry scrubber, a baghouse with carbon injection, and the equipment to allow for biomass co-firing. As a direct result of these upgrades and improvements, Greenidge is currently one of the cleanest burning coal plants in the Northeast, with emission removal rates of 95% for NO_X and SO_2, 99% for mercury, and reduced CO_2 emissions from biomass and natural gas co-firing. In its last few years of operation, Greenidge operated as a baseload facility with a capacity factor of approximately 55-75%. In comparison, Atlas currently plans to operate the Facility as a peaking unit with a capacity factor of less than 50%.

On September 17, 2010, due to economic constraints, AEE2 provided notice to the New York State Public Service Commission ("PSC") of its intent to temporarily suspend operations and place the Facility into protective lay-up status effective March 18, 2011 ("Notice of Protective Lay-up").[4] As stated in the attached Notice of Protective Lay-Up, and the attached affidavit from AEE2's then-president, Peter Norgeot, AEE2 intended the protective lay-up of the Facility to be temporary.[5] Before placing the Facility into protective lay-up, AEE2 planned the lay-up preparation activities, steps, and maintenance activities that would be completed at the Facility during the lay-up period in order to maintain quick restart capability.

When operating, the Facility was the direct employer of approximately 40 individuals, and was also one of the largest taxpayers in Yates County, contributing millions of dollars in property and other taxes annually. As a result, the Notice of Protective Lay-up was publicized and AEE2's management expressed their intent and desire to resume operations of the Facility to the media.[6] The activities that occurred at the Facility thereafter implemented this intent.

---

1 While we understand that Unit 3, which was permanently shutdown in 2009, still exists, Atlas does not intend on restarting Unit 3.

2 The term "AEE2" is used in this letter to refer collectively to AES EE2, LLC; AEE2, LLC; AES Greenidge LLC; AES Eastern Energy, LP; and several related entities.

3 A copy of the Description/Abstract for the Multi-Pollutant Control Project is included as Attachment 1. For more information and the full report, see http://www.osti.gov/bridge/product.biblio.jsp?osti_id=960446

4 The Notice of Protective Lay-Up of Greenidge Unit 4 submitted to the New York Public Service Commission on September 17, 2010 is included as Attachment 2.

5 An affidavit from AEE2 President Peter Norgeot, sworn to March 13, 2013 ("Norgeot Aff."), is included as Attachment 3.

6 Copies of some of these articles are included as Attachment 4.

The Facility always maintained and continues to maintain interconnection to the New York State Electric and Gas ("NYSEG") electric transmission system, and the Facility operated and generated electricity right up until March 18, 2011, when the boiler was taken off-line pursuant to the Notice of Protective Lay-up. The coal ash handling emission source, permitted by the Facility's Title V permit, remained active until July 2011, and AEE2 continued the employment of its personnel, who completed the lay-up preparation activities at the Facility, until June 30, 2011. AEE2 maintained and implemented a regular maintenance schedule throughout the protective lay-up period to ensure the Facility was continuously capable of restarting quickly.[7] AEE2 continued to employ a maintenance manager, an operator, and a maintenance technician at the Facility during the protective lay-up period to complete all maintenance activities required to preserve the protective lay-up state and to be able to restart the Facility quickly. Throughout its ownership, AEE2 continued the maintenance activities to ensure quick reactivation, as well as regulatory compliance. A complete description of the regular maintenance activities undertaken at the Facility during the protective lay-up period is included as Attachment 6.

The Department also approved AEE2's operation and maintenance plan to put the Lockwood ash disposal facility ("Lockwood") into lay-up. This action was taken to ensure Greenidge would have the use of the landfill when it resumed normal operations.[8] Throughout the period that Greenidge has been in protective lay-up, and to this day, the Lockwood Layup Plan has been implemented in compliance with all applicable requirements.

Due to the AEE2's deteriorating financial condition, in December 2011 the company filed for Chapter 11 bankruptcy protection. As with many bankruptcy proceedings, decisions made during AEE2's bankruptcy were often results-oriented and designed principally to expeditiously consummate transactions that would realize revenue for the bankruptcy estate and AEE2's creditors. During the course of the bankruptcy, several and concurrent options regarding AEE2's assets were explored with different parties. The somewhat uncertain nature of the bankruptcy process notwithstanding, however, AEE2 continued to employ the maintenance manager, operator, and maintenance technician at the Facility and constantly performed all necessary lay-up maintenance activities at the Facility. Throughout the bankruptcy proceeding, the Facility remained ready to be restarted quickly, either by AEE2 or a new owner.[9]

Among other things to ensure continuous operation capability, AEE2 timely submitted a Title V renewal application to the Department in May 2012 in anticipation of the Facility resuming normal operations. Subsequent to the submittal of the application, DEC Region 8 Division of Air was in discussions with AEE2 regarding renewal of the Facility's Title V permit,

---

[7] A copy of the maintenance plan is included as Attachment 5. A document drafted by the Greenidge maintenance manager, discussing the completed lay-up preparation activities and the on-going maintenance that has continued to be completed, is included as Attachment 6.

[8] The Landfill Layup Plan is included as Attachment 7.

[9] See Attachment 6, a document drafted by the Greenidge Maintenance Manager discussing the activities completed during the lay-up period to keep the Facility operation ready.

and had created a working copy of a draft renewed Title V permit for the Facility.

On October 10, 2012, AEE2 and other related entities entered into an Asset Purchase Agreement whereby they agreed to sell Greenidge and three other electric generating facilities (the Hickling, Westover, and Jennison plants) to GMMM.[10] Although GMMM meant to scrap the Jennison and Hickling plants, GMMM's primary and original objective for Greenidge was to re-sell the Facility to an entity that would resume operations at the Facility (which is why GMMM maintained the comprehensive protective lay-up maintenance regime at the Facility after finalizing its purchase).[11] In the event such an entity could not be found, however, GMMM made alternative contingency plans to scrap the Facility.[12]

GMMM felt it had no need for the Facility's Title IV and Title V air permits and did not want to assume the legal obligations associated with those permits because GMMM did not intend to itself operate the Greenidge Facility; instead, GMMM intended to re-sell the Facility to another entity that would resume operations.[13] It was GMMM's understanding that because the Greenidge Facility consisted of electricity generating assets, the sale of the Facility would have to be approved by the Federal Energy Regulatory Commission ("FERC") if the Greenidge Facility was deemed to be active.[14] While GMMM had considered making the necessary applications for FERC approval to keep the Greenidge Facility active, GMMM had determined, upon the advice of counsel, that there was a real possibility that FERC approval would not be granted before the December 28, 2012 closing deadline if any third-party raised an objection to the transfer.[15] The December 28, 2012 deadline was critical because the bondholders and creditors of AEE2 made it clear to GMMM that their approval of the sale was contingent upon closing before year end.[16] Therefore, if the Facility's Title IV and Title V air permits had not been surrendered, third parties could have thwarted the transaction by causing the FERC proceeding to be unduly delayed, which would in turn delay the closing date past the December 28, 2012 deadline. GMMM also believed that it would be relatively simple for the entity purchasing the Facility from GMMM to re-acquire the permits.[17] Consequently, rather than applying to NYSDEC to have the Facility's Title IV and Title V air permits transferred from AEE2 to GMMM, GMMM instead advised AEE2 to surrender the Facility's Title IV and Title V permits to NYSDEC.[18]

---

[10] An affidavit from GMMM manager Vincent Alison, sworn to on March 13, 2013 ("Alison Aff."), is included as Attachment 8.

[11] Alison Aff. ¶¶ 8-12.

[12] Alison Aff. ¶ 12.

[13] Alison Aff. ¶ 13.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

On November 28, 2012, AEE2 surrendered the Title IV and Title V air permits for the Facility. Apparently unaware that GMMM's first priority was re-selling Greenidge to a buyer that would resume operations at the Facility, AEE2's November 28 letter erroneously stated that GMMM intended to "scrap" the Facility.[19] While Greenidge's Title IV and Title V air permits were surrendered, all of the Facility's other significant operating permits were retained by AEE2 (and subsequently transferred to GMMM upon purchase of the Facility). These permits, all of which are still effective, include: the State Pollution Discharge Elimination System ("SPDES") permit for the Facility; the Part 360 Solid Waste Permit for the Lockwood ash disposal facility; the Lockwood SPDES permit; Petroleum Bulk Storage Registration; and a Resource Conservation and Recovery Act ("RCRA") EPA ID Number. As of February 21, 2013, the Facility remained listed on the state's emission inventory most recently completed by the Department. The Facility also currently maintains its Energy Information Administration ("EIA") registration and its Department of Homeland Security ("DHS") Chemical Security Assessment Tool registration, and completes all requirements associated with each of these programs.

On December 28, 2012, GMMM purchased the Facility with the approval of the bankruptcy court. Since its purchase of the Facility, GMMM has maintained two full-time employees at the Facility (including the same maintenance manager previously employed by AEE2) and utilizes contractors as needed to continue all lay-up maintenance activities at the Facility.

In a letter dated January 24, 2013, David Pierce, an attorney representing GMMM, requested that DEC rescind AEE2's surrender of the Facility's Title IV and Title V permits. In his letter, however, Mr. Pierce failed to accurately describe GMMM's parallel plans for Greenidge – *i.e.*, a primary and original objective to re-sell Greenidge to an entity that would restart the Facility's operations, with scrapping the Facility being a much less preferred potential contingency plan – and Mr. Pierce erroneously stated that it was GMMM's original intent to scrap the Facility.[20] GMMM clearly would not have expended the resources to continue all the protective lay-up activities at Greenidge, or had discussions with several potential buyers seeking to restart the facility, if the company's primary intention was to permanently scrap the Facility. From the moment GMMM acquired the Facility in late December 2012, through the date of Mr. Pierce's letter, and up until today, all of GMMM's activities at the Facility demonstrate a continuing intention for the Facility to resume operations.[21]

As mentioned above, Atlas and GMMM are in the process of finalizing an agreement for

---

[19] Alison Aff. ¶ 14; Norgeot Aff. ¶¶ 17-18. AEE2's mistaken understanding of GMMM's plans with respect to Greenidge also accounts for the erroneous statements included in the December 18, 2012 Stipulation and Order to Terminate Consent Decree (No. 05 CV 6014 CJS(P)) that Mr. Norgeot signed on behalf of AEE2.

[20] Alison Aff. ¶ 16.

[21] Alison Aff. ¶¶ 16-17.

Atlas to purchase the Facility and operate it as a peaking unit. On January 22, 2013, Atlas's environmental counsel, Hiscock & Barclay, spoke with Region 8 regarding the reissuance of the Title V permit for the Facility so that Atlas could reactivate and resume operation of the Facility. On February 1, 2013, Atlas and GMMM participated in a teleconference with DEC Region 8 Division of Air and, among other things, discussed the submission of a Title V permit application and related issues. On February 22, 2013, Atlas and GMMM participated in a follow-up meeting with the Department to discuss the resumption of operations at the Facility.

The restart of Greenidge as an electric generating station will require only minimal routine maintenance activities to be completed, similar to the maintenance that would normally occur during any other scheduled outage. Since the Facility has been maintained to ensure a quick restart, Greenidge can be operational in less than 30 days, at a cost of less than $275,000.

II. NSR/PSD Reactivation Analysis

Under the federal Clean Air Act, a major source of air emissions must obtain an NSR/PSD pre-construction permit if it meets one of two criteria: (1) it is a major *new* source; or (2) it is an existing major source that is undergoing a nonexempt modification that will result in a significant net emissions increase (the significance thresholds for different pollutants are set in the regulations). 40 CFR § 52.21(a)(2).

A reactivation analysis is based on a mosaic of letters and decisions by environmental regulatory agencies addressing when a previously deactivated source will be treated as either an existing source or a new source. A source being reactivated is considered new for purposes of NSR/PSD, only if it was "permanently shutdown." [22] If it was not permanently shutdown, a reactivation of the facility is considered the restart of an existing facility, subject to NSR/PSD only if it is a major modification.[23]

EPA has explained that "temporary emissions and temporary shutdowns are considered to be of two-year duration or less" and likely not applicable to NSR/PSD, while shutdowns of

---

[22] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, dated June 11, 1999 (Attachment 9). See also, Sept. 6, 1978 Memo from Edward E. Reich, Director, Div. of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II (Attachment 10); Aug. 8, 1980 Memo from Edward E. Reich, Director, Stationary Source Enforcement Div., to William K. Sawyer, General Enforcement Branch, Region II (Attachment 11); May 27, 1987 Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (Attachment 12); Nov. 6, 1987 Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Attachment 13); Nov. 9, 1991 Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Director, Air Programs Branch (Attachment 14); September 7, 2001 Memo from Douglas E. Hardesty, Manager Federal and Delegated Air Programs, Region X, to Jerold w. Holmes, General Manger Forest Products Division Colville Tribal Enterprise Corporation, p. 2 (Attachment 15).

[23] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, dated June 11, 1999 (Attachment 9)

more than two years are presumed to be permanent.[24] EPA has consistently reiterated that a presumption of permanence does not apply to facilities that have been shutdown for less than two years.[25] In the Coleville PSD applicability determination, it was determined that since the purchaser of the facility, which was purchased out of bankruptcy, was restarting the facility less than two years after the facility had become deactivated, the shutdown of the facility was not presumed to be permanent, and not subject to PSD as a new source.[26]

As provided in *Monroe Electric Generating Plant Entergy Louisiana, Inc.*, Proposed Operating Permit, Petition 6-99-2, at 8-9 (EPA June 11, 1999) ("*Monroe*"),

> The key determination to be made under this policy is whether the facility to be reactivated was "permanently shutdown." In general, EPA has explained that whether or not a shutdown should be treated as permanent depends on the intention of the owner or operator <u>at the time of shutdown</u> based on all facts and circumstances. Shutdowns of more than two years, or that have resulted in the removal of the source from the State's emission inventory, are presumed to be permanent. In such cases it is up to the facility owner or operator to rebut the presumption....
>
> While the policy suggests that the key determination is whether, <u>at the time of shutdown</u>, the owner or operator intend shutdown to be permanent, in practice, after two years, statement of original intent are not considered determinative.

(emphasis original). Thus, where, as here, a facility has been deactivated for less than two years, an owner's "statement of original intent" "at the time of shutdown" is considered "determinative" on the key issue of whether the deactivation was intended to be permanent. Since, in the present situation the Facility has been in protective lay-up for less than two years, the statements of original intent at the time the Facility was placed into protective lay-up are to be focused on to determine the owner's intention.

---

[24] October 9, 1979 Memo from William A. Spratlin, Chief Air Support Branch, Region VII, to Harvey D. Shell (Attachment 16)

[25] April 9, 2008 Memo from Thomas H. Diggs, Associate Director for Air, Region VI, to Richard A. Hyde, Air Permits Division Texas Commission on Environmental Quality ,p. 1 (Attachment 17); December 13, 2000 Memo from R. Douglass Neeley, Chief Air and Radiation Technology Branch, Region IV, to Ronald Mathier, Chief Air Protection Bureau Georgia Environmental Protection Division (Attachment 18); See also, In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 8 and FN 9, dated June 11, 1999 (Attachment 9); Cmtys. For a Better Environment v. Cenco Ref. Co., 179 F. Supp.2d 1128, 1145 (2001 Central Dist. Of Ca.) (Attachment 19).

[26] September 7, 2001 Memo from Douglas E. Hardesty, Manager Federal and Delegated Air Programs, Region X, to Jerold w. Holmes, General Manger Forest Products Division Colville Tribal Enterprise Corporation (Attachment 15).

Conversely, where a facility has been deactivated for more than two years, statements of original intent are no longer "considered determinative."[27] Prior decisions established a rebuttable presumption that a facility deactivated for two years or more was intended to be permanently deactivated. *Monroe* articulated several factors that environmental regulatory agencies such as the DEC typically consider in evaluating the intended permanence of a deactivation, including: (1) the amount of time the facility has been out of operation; (2) reason for the shutdown; (3) contemporaneous statements by an owner/operator regarding intent; (4) cost and time required to reactivate the facility; (5) status of permits;[28] and (6) ongoing maintenance and inspections conducted during the shutdown. If a facility owner can demonstrate that a shutdown was not intended to be permanent, the source will not be considered "new" upon reactivation for NSR/PSD purposes – even if the length of the shutdown far exceeds the two-year threshold identified in the reactivation policy.

For example, in *Applicability of PSD to Watertown Power Plant, South Dakota* (EPA Nov. 19, 1991) ("*WPP*"), a 1991 decision applying the reactivation analysis to the Watertown Power Plant in South Dakota, it was found that the owner had successfully rebutted the presumption of a permanent shutdown even though the facility had been deactivated for nine years:

> Since 1982, the unit has been treated as being in cold standby, requiring 6-8 weeks to reactivate. Information submitted to EPA thus far indicates that the plant has been maintained to ensure its readiness. [A letter from the owner] details what has been done during the entire standby period to ensure readiness; thereby, validating the intent to reactivate. These actions include maintaining two full time employees on site, and periodic testing and maintenance of the system to ensure quick reactivation. It appears that reactivation of the plant would not require more than a limited amount of time and capital....
>
> With the facts presented, which include an intent to maintain the turbine, [the owner] has overcome the presumption that the shutdown was permanent.
>
> [Deleted Applicability of PSD to Watertown.....]

---

[27] Id at 2. ("A source which has been shut down would be a new source for PSD purposes if the shutdown was permanent. Conversely, it would not be a new source if the shutdown was not permanent." (Attachment 15); *see also* Sept. 6, 1978 Memo from Edward E. Reich, Director, Div. of Stationary Source Enforcement, to Stephen A. Dvorkin, Chief, General Enforcement Branch, Region II (Attachment 10); Aug. 8, 1980 Memo from Edward E. Reich, Director, Stationary Source Enforcement Div., to William K. Sawyer, General Enforcement Branch, Region II (Attachment 11); May 27, 1987 Memo from John S. Seitz, Director, Stationary Source Compliance Div., OAQPS, to David P. Howekamp, Director, Air Mgt. Div., Region IX (Attachment 12); Nov. 6, 1987 Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Attachment 13); Nov. 9, 1991 Memo from John B. Rasnic, Director, Stationary Source Compliance Div., OAQPS, to Douglas M. Skie, Director, Air Programs Branch (Attachment 14).

[28] In addition to the status of permits, the analysis in *Monroe* also evaluated whether the facility remained on the state's emissions inventory. In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 8, 13, 22, dated June 11, 1999 (Attachment 9).

III. The Restart of Greenidge is Not Subject to NSR/PSD Permitting as a New Source Because the Facility Has Been in Protective Lay-Up for Less Than Two Years and the Owner Did Not Intend for the Protective Lay-up to be a Permanent Deactivation

Greenidge went into protective lay-up on March 18, 2011 – less than two years ago. The coal ash handling system, a permitted emission point at the Facility included in the Title V permit, continued to operate into July of 2011. As discussed above, Atlas's request to resume normal operations at Greenidge began on January 22, 2013, when Hiscock & Barclay, on behalf of Atlas, contacted Thomas Marriott of Region 8 to discuss the possibility of reinstating the Title IV and Title V permits for the Facility. The effort to reactivate the Facility continued with a conference call with Region 8 Division of Air on February 1, 2013, to discuss a new Title V permit for the operation of the Facility, a meeting with the Department on February 22, 2013, and the submission of this letter seeking an NSR/PSD applicability determination from the Department.

While a reactivation analysis creates a rebuttable presumption that deactivations lasting two years or more are intended to be permanent, as discussed above, no such presumption applies to facilities deactivated for less than two years. In fact, there does not appear to be a single instance where a facility that was restarted in less than two years has been found by EPA to have been permanently deactivated and subject to NSR/PSD permitting as a new source.

The Greenidge Facility has been in protective lay-up for less than two years and is included on the most recent emissions inventory completed by the Department. Because the Facility has been in protective lay-up for less than two years, statements of "original intent" by AEE2 "at the time of shutdown" are "determinative" on the "key determination" of whether the deactivation of the Facility was intended to be permanent.[29] In its September 17, 2010 Notice of Protective Lay-up,[30] AEE2 was clear and emphatic in its statement that the protective lay-up was intended to be temporary:

> AEE2 further intends to take all steps within its control to avoid permanently shutting down the facility by, e.g., continuing to explore any and all alternatives with its suppliers and other parties, including reductions in its variable and fixed costs. In that vein, during this six month period and any subsequent protective lay-up period that may ensue thereafter, AEE2 will direct AES Greenidge to perform associated maintenance and inspection work to keep the source in New York State's emissions inventory and maintain its environmental permits while closely monitoring market conditions and circumstances that will allow it to continue – or to reinstate – service from its Greenidge Unit 4 facility.

AEE2 employees also made statements to the media regarding the company's intent to reactivate

---

[29] *See Monroe* at 8-9. (Attachment 9)

[30] The September 17, 2010 Notice of Protective Lay-up is included as Attachment 2.

the Facility.[31] Accordingly, the Facility was not permanently deactivated and should not be treated as a "new" source for PSD/NSR permitting purposes.

While no presumption of permanent deactivation applies to Greenidge because the Facility has been in protective lay-up for less than two years, even if such a presumption were applied to the Facility, that presumption would be rebutted pursuant to the six factors articulated in *Monroe* and elsewhere. While "no single factor is likely to be conclusive," *Monroe* makes clear that "the owner's or operator's *actions at the facility during shutdown*" are crucial.[32] At least four of the *Monroe* factors clearly weigh in favor of a determination that the protective lay-up of the Greenidge Facility was not intended to be a permanent deactivation, and none of the factors weigh decidedly against such a determination. Crucially, all of the "actions at the facility during shutdown" corroborate the conclusion that the Facility's protective lay-up was intended to be temporary.

The first *Monroe* factor – "the amount of time the facility has been out of operation" – weighs against a determination of permanent deactivation because Greenidge has been in protective lay-up for less than two years. Likewise, the third *Monroe* factor – "statements by the owner or operator regarding intent" – weigh against a determination of permanent deactivation because AEE's September 17, 2010 Notice of Protective Lay-up unambiguously states that the lay-up was intended to be temporary.

The sixth *Monroe* factor – "ongoing maintenance and inspections that have been conducted during shutdown" – obviously weighs in favor of a conclusion that the protective lay-up at Greenidge was intended to be temporary. When AEE2 placed the Facility in protective lay-up on March 18, 2011, the company immediately instituted (at considerable expense) a comprehensive protective lay-up plan and regular maintenance schedule designed to preserve the Facility in full working order so that it could resume operations upon short notice. AEE2 retained its employees, who executed the lay-up preparation activities, until June 30, 2011. Once the protective lay-up period began, AEE2 implemented a comprehensive maintenance plan to preserve the Facility in total working order, including employing the Greenidge maintenance manager, an operator, and a maintenance technician to complete regular maintenance activities. GMMM continued these practices – including retaining key Facility maintenance employees – when it acquired the Greenidge Facility in late December 2012. As a result, the Facility remains ready to resume operations. Such activity is fully consistent with the kind of "continuous intent to reopen" that will effectively rebut any presumption that a deactivation was intended to be permanent.[33]

---

[31] Copies of some of the articles are included as attachment 4, a copy of the PSC notice is included as Attachment 2 and the affidavit of AEE2 president Peter Norgeot is included as Attachment 3.

[32] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 9, dated June 11, 1999 (Attachment 9).

[33] *See, e.g., Monroe.* (Attachment 9)

While the scope, scale and cost of the maintenance regime implemented at the Greenidge Facility during the lay-up is overwhelming evidence of an intent to resume normal operations at the Facility, the fourth *Monroe* factor – "cost and time required to reactivate the facility" – also supports that conclusion. Throughout the protective lay-up period, the Facility has been maintained in a state of constant technical readiness that would allow it to resume full operations within a manner of days. Furthermore, the routine maintenance activities necessary to reactivate the Facility are similar to those that would take place during a typical outage and are expected to cost less than $275,000. By way of comparison, in the *WPP* matter discussed above, it was determined that the owners of the facility, which had been deactivated for nine years and would require between six to eight weeks to reactivate, overcame the presumption of shutdown permanence by showing an ongoing maintenance regime at the facility.

The second *Monroe* factor is "reason for the shutdown." As stated above, Greenidge went into protective lay-up in March 2011 for economic reasons. Courts examining the *Monroe* factors and reactivation analysis have held that "under the Reactivation Policy, an economic reason for shutdown, standing alone, does not militate in favor of finding one or the other."[34] Consequently, the second *Monroe* factor does not weigh in favor of a determination that the protective lay-up of the Greenidge Facility was intended to be permanent.

The fifth *Monroe* factor is "status of permits." While the Title IV and V operating permits were surrendered by AEE2 in November 2012 for the reasons described above, the Title IV and V permits were retained by AEE2 up until that point, and the Facility remains as a source on New York State's most recently completed emissions inventory. As stated in *Monroe*, even where a facility has been deactivated for more than two years, "activities" at the facility "during time of shutdown that evidence the continuing validity of the original intent not to permanently shut down" are weightier than statements of intent. Consequently, the continual and comprehensive maintenance activities undertaken by AEE2 and GMMM at the Facility throughout the protective lay-up period are the best evidence that the lay-up was intended to be temporary – and these activities outweigh any possible inferences of intent derived from the surrender of the Title IV and V permits. In addition, throughout the protective lay-up period AEE2 and GMMM complied with the reporting obligations required under the Facility's environmental permits, and AEE2 submitted timely renewal applications for the Title IV and Title V permits. As discussed above, the other significant operating permits associated with the Facility were maintained by AEE2, and then by GMMM upon its purchase of the Facility. Other non-environmental registrations, including those with EIA and DHS, have also been maintained.

Based on the above analysis, Greenidge should not be treated as a "new" facility for NSR/PSD permitting purposes when the Facility ends its protective lay-up and resumes normal operations.

---

[34] *Communities For a Better Environment v. Cenco Refining Co.*, 179 F. Supp. 2d 1128, 1145 (C.D. Cal. 2001); *aff'd*, 35 Fed. Appx. 508 (9th Cir. 2002). (Attachment 19)

IV. The Restart of Greenidge is Not Subject to NSR/PSD as a Major Modification

A. The Restart of Greenidge is Not a Major Modification Based on a Physical Change

Whether NSR/PSD is applicable to the restart of a non-operational facility because the restart consists of a physical change that results in a major modification depends on the type of work and associated costs involved.[35] This analysis requires a determination of whether the activities necessary to restart a facility are exempt from NSR/PSD review as routine maintenance, repair, or replacement ("RMRR").[36] In situations where the restart of a facility requires extensive work and rehabilitation of key equipment, the work is considered a major modification and NSR/PSD is triggered.[37] Conversely, when the activities required to restart a facility involve only RMRR, the restart is exempt from NSR/PSD requirements.[38] Even if the activities required to restart a facility are not exempt based on RMRR, to be a major modification subject to NSR/PSD, pursuant to 6 NYCRR § 231-8.1, the post change emissions must be above the applicable major modification threshold.

Restart of the Greenidge facility will require only regular routine maintenance work normally completed during a maintenance outage, and therefore the activities are exempt from NSR/PSD requirements as RMRR. Additionally, the post-restart emissions from Greenidge will not exceed the major modification thresholds.[39] Thus, the restart of the Facility is not a major modification based on a physical change and NSR/PSD is not applicable to the restart of Greenidge.

B. The Restart of Greenidge is Not a Major Modification Based on a Change in the Method of Operation

Since Greenidge has only been in protective lay-up for less than two years, the restart of the Facility is not a change in the method of operation for purposes of NSR/PSD applicability, and is also not a major modification because post-restart emissions will not exceed major modification thresholds. Greenidge is unlike a long-dormant facility where the baseline is

---

[35] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 18, dated June 11, 1999 (Attachment 9).

[36] See Routine Maintenance, Repair and Replacement exemption to NSR, 40 CFR 52.21(b)(2); 6 NYCRR 200.1; In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 19, dated June 11, 1999 (Attachment 9); Nov. 6, 1987 Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Attachment 13).

[37] Nov. 6, 1987 Letter from David P. Howekamp, Director, Air Mgt. Div., Region IX, to Robert T. Connery, Holland & Hart (Attachment 13).

[38] September 2, 2001 Memo from Douglas E. Hardesty, Manager Federal and Delegated Air Programs, Region X, to Jerold w. Holmes, General Manger Forest Products Division Colville Tribal Enterprise Corporation, p. 2. (Attachment 15) (regular boiler maintenance activities pre-restart of the facility were exempt from PSD based on RMRR exemption).

[39] 6 NYCRR § 231-4.1(b)(29).

zero[40], and where a restart may be considered a change in operations. Greenidge operated in 2008, 2009, 2010, and part of 2011, and therefore baseline emissions can be established under 6 NYCRR § 231-4.1(b)(7).

Since the Greenidge facility has only been in a protective lay-up for less than two years, the act of restarting the Facility is not itself a change in the method of operation. Further, Greenidge's baseline emissions are not zero, and the post-restart emissions from Greenidge will not be above the major modification thresholds, particularly since the total annual generation of the Facility will be lower than its maximum historic operation as a baseload facility. Therefore, the restart will not be a major modification, and NSR/PSD is not applicable.

V. Conclusions

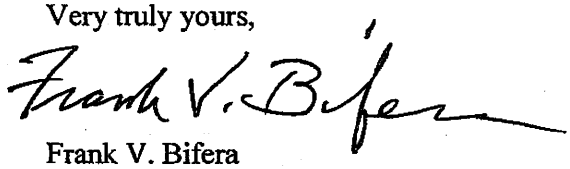
The Greenidge Facility has been in protective lay-up for less than two years. As a result, the deactivation is not presumed to be permanent, and AEE2's unambiguous written statements in its Notice of Protective Lay-up are "determinative" that deactivation of the Facility was not intended to be permanent. This conclusion is confirmed by the comprehensive and ongoing maintenance activities performed by the Facility owners before and during the protective lay-up – all of which clearly manifest a continual intention to preserve Greenidge in full working order so that it could resume operations upon short notice, which is wholly inconsistent with an intention to permanently deactivate the Facility. Therefore, Greenidge should not be treated as a "new" facility for NSR/PSD permitting purposes when the Facility ends its protective lay-up and resumes normal operations.

In addition, since reactivation of the Facility will not involve a physical change or change in the method of operation of the Facility, and its emissions will not exceed major modification thresholds, the reactivation is also not a major modification and NSR/PSD is not applicable.

Based on the above discussion and analysis, we respectfully request the Department to make a determination that NSR/PSD is inapplicable to the reactivation of Greenidge.

Thank you for your attention to this matter. Please contact me if you would like to discuss the issues raised in this letter further.

Very truly yours,



Frank V. Bifera

FVB:lks
Enclosures

---

[40] In the Matter of Monroe Electric Generating Plant Proposed Operating Plant, Petition No. 6-99-2, p. 22, dated June 11, 1999 (shutdown for 11 years). (Attachment 9).

cc: Steven C. Riva, Chief
USEPA Region 2
Permitting Section, Air Programs Branch

Allison Crocker, Esq.
Deputy Counsel

Robert Stanton
Director Bureau of Stationary Sources

William Little, Esq.
Chief, Energy & Environmental Bureau

Blaise Constantakes, Esq.
Assistant Counsel

Christopher Hogan
Environmental Permits

Paul D'Amato
Regional Director
Region 8

Scott Sheeley
Regional Permit Administrator
Region 8

Dan Walsh
Division of Air
Region 8

Lisa Schwartz, Esq.
Region 8

Leo J. Bracci, Esq.
Regional Attorney
Region 8

ATTACHMENT 2

AES
the power of being global

AES AEE2, LLC
Suite 505
130 East Seneca Street
Ithaca, New York 14850
tel 607.272.5970
fax 607.272.5971

September 17, 2010

VIA HAND DELIVERY

Hon. Jaclyn A. Brilling
Secretary
New York Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Notice of Protective Lay-Up of Greenidge Unit 4,
Torrey, Yates County, New York

Dear Secretary Brilling:

AEE2, LLC ("AEE2"), a wholly owned subsidiary of AES Eastern Energy, L.P., is the owner of, and AES Greenidge, LLC, a wholly owned subsidiary of AEE2, LLC, is the operator of, the Greenidge Unit 4 generating facility located in the town of Torrey in Yates County, New York. In its order adopting generator retirement notice requirements, the New York Public Service Commission ("Commission") noted that it had established in its initiating order that, for purposes of the Generator Retirement Notice Proceeding, the term "retirement" collectively included, inter alia, "mothballing, and other circumstances where a generating unit is taken out of service for a substantial period of time, excluding scheduled maintenance and forced outages."[1] Pursuant to the Generator Retirement Notice Order and the broad definition of the term "retirement" set forth therein limited to application thereto, AEE2 hereby provides this written notice that, in light of the market conditions and other circumstances as they are known as of this time, it intends to put its Greenidge Unit 4 facility in protective lay-up on Friday, March 18, 2010.

The Greenidge Unit 4 facility is a 108 MW net, coal & biomass-fired generating facility that provides energy, capacity and ancillary services in Central New York. The Greenidge Unit 3 facility also is owned by AEE2, was operated by AES Greenidge and is located on the same site. It was permanently retired on December 31, 2009. No other generating facilities are located on this site.

---

[1] See NYPSC Case 05-E-0889, Proceeding on Motion of the Commission To Establish Policies and Procedures Regarding Generation Unit Retirements, "Order Adopting Notice Requirements for Generation Unit Retirements" (issued and effective December 20, 2005) (hereinafter, "Generator Retirement Notice Proceeding" and "Generator Retirement Notice Order," respectively) at 1, n.1.

AES
the power of being global

Since AEE2 purchased the Greenidge Unit 4 facility, more than $40 million has been invested in environmental retrofits, including an SCR, a Dry Scrubber, and a Baghouse, to limit its emissions. In addition, $9 million was invested to provide for biomass co-firing of up to 10% at the facility to lower its overall carbon levels. The combination of this significant investment in state-of-the-art technology coupled with the biomass conversion make AES Greenidge one of the cleanest coal fired units in the Northeast with respective removal rates of 95% for SO2 and NOx, and more than 99% for mercury.

Moreover, it has invested substantial additional dollars in the facility to improve its heat rate, reduce its outages and otherwise improve its operating capability. With respect to reliability, during the past 10 years, the facility has achieved a 90.1% availability factor. The site employs 40 direct employees, is one of the largest taxpayers in Yates County paying millions of dollars in property and other taxes annually and provides significant economic benefits and indirect employment benefits to the Yates County area.

However, based on the current and forecasted wholesale electric prices in Central New York and current and pending environmental regulations, the Greenidge Unit 4 facility is, and will continue to be, operating at a net loss. Thus, given that the unit is not economic at this time, AEE2 intends to put the Greenidge Unit 4 facility in protective lay-up to limit the costs that are incurred at the facility. AEE2 further intends to take all steps within its control to avoid permanently shutting down the facility by, e.g., continuing to explore any and all alternatives with its suppliers and other parties, including reductions in its variable and fixed costs. In that vein, during this six month period and any subsequent protective lay-up period that may ensue thereafter, AEE2 will direct AES Greenidge to perform associated maintenance and inspection work to keep the source in New York State's emissions inventory and maintain its environmental permits while closely monitoring market conditions and circumstances that will allow it to continue -- or to reinstate -- service from its Greenidge Unit 4 facility.

In accordance with the requirements that are set forth in the Generator Retirement Notice Order and Technical Bulletin No. 185 issued by the New York Independent System Operator, Inc. ("NYISO"), AEE2 contemporaneously has sent a copy of this protective lay-up notice to the NYISO via e-mail directed to its designated web address. In addition to providing a copy of this notice to the NYISO, the Generator Retirement Notice Order further provided that the notice must be provided to "any affected T&D utility" without, however, defining such term or otherwise providing guidance on how it was to be applied. The Greenidge Unit 4 facility is located in the service territory, and interconnected to the transmission and distribution system, of New York State Electric and Gas Corporation ("NYSEG"). While transmission and distribution studies of the local and bulk systems in the vicinity of the Greenidge Unit 4 facility have not yet been conducted,[2] AEE2 has provided a copy of this notice to NYSEG.

[2] In its Generator Retirement Notice Order, the Commission established that it had adopted the 180 day notice period for facilities sized equal to or greater than 80 MW with which AEE2 herein complies because it "equate[d] to the minimum period that NYISO indicates as adequate to identify and resolve reliability concerns." (See Generator Retirement Notice Order at 15.)

AES
the power of being global

Kindly date-stamp the copy of this notice provided herein and return it to our messenger. Should you have any questions about this notice, please call or email me using the contact information noted above.

Sincerely,

Peter S. Norgeot
President, AES AEE2, LLC

cc: New York Independent System Operator at generator_retirement@nyiso.com (via e-mail and Overnight mail)
Mr. Jeffrey McKinney, New York State Electric & Gas Corp. (via e-mail and Overnight mail)

ALB 1,359,271v1 9-13-10

ATTACHMENT 3

GLOBAL POWER ADVISORS, LLC
P.O. BOX 7159
ENDICOTT, NY 13761-7159
Telephone: 607-239-6906
Facsimile: 607-239-6907
www.globalpoweradvisors.com

GLOBAL POWER ADVISORS, LLC

To:	Danielle Mettler	From:	Pete Norgeot
Fax:	585-295-8470	Pages:	5
Phone:	585-295-4358	Date:	3/13/13
Re:	Atlas Affidavit	cc:	

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

Danielle,

Here is the signed and notarized affidavit.

Pete

In the Matter of Atlas Holdings LLC Application for a New Source Review/ Prevention of Significant Deterioration Inapplicability Determination for the Greenidge Generating Station

STATE OF NEW YORK)
COUNTY OF BROOME) SS:

Peter S. Norgeot, being duly sworn, deposes and states that:

1. I am currently the President of Global Power Advisors, LLC, ("Global Power") a power industry consulting company, with offices located at 998 Taft Avenue, Endicott, NY 13760. Among other things, Global Power specializes in providing consulting services on project development, engineering, procurement, construction, commissioning and commercial operations and maintenance in various power technologies in the energy industry.

2. Global Power is currently engaged by Atlas Holdings LLC to provide consulting services related to the restart of the Greenidge Generating Station ("Greenidge Generating Station" or "the Facility").

3. I graduated from the Massachusetts Maritime Academy in 1987 with a Bachelor of Science degree in Marine Engineering.

4. I was employed by AES Corporation in various engineering and management capacities from 1987 until January 1, 2013. Among the positions I held were the following: Vice President of Generation – North America East Group, President and Plant Manager of AES Shady Point Power Station, President, Plant Manager and Construction Manager of AES Ironwood Power Station, President, Plant Manager and Construction Manager of AES Barry Power Station, Start-Up Manager and Control Room Leader of AES Medway Power Station.

HISCOCK & BARCLAY, LLP

5. In April 2006, I was appointed by the Board of Directors of AES Corporation to the position of President of AES NY, LLC, the general partner of AES Eastern Energy, LP, AES Somerset, LLC, AES Cayuga, LLC, AEE2, LLC, AES Westover, LLC and AES Greenidge, LLC, and served in that capacity until December 28, 2012. AES Greenidge, LLC was the operating company for the Greenidge Generating Station.

6. I understand that a New Source Review/Prevention of Significant Deterioration Inapplicability Determination for the restart of the Greenidge Generating Station is being sought, and I have reviewed a copy of the final draft letter prepared by Frank V. Bifera, dated March 12, 2013 which requests such Inapplicability Determination. I make this affidavit for the purpose of providing a factual background regarding the events described in Mr. Bifera's letter.

7. I make this affidavit based primarily upon my own personal knowledge, as the former President of AEE2, LLC, AES Eastern Energy LP and AES Greenidge LLC, concerning the Greenidge Generating Station located in the Town of Torrey, New York.

8. AEE2, LLC owned the Westover Generating Station and the Greenidge Generating Station.

9. The Greenidge Generating Station was considered the "gem" of the AEE2, LLC fleet, since it had installed over $38 million worth of environmental control technology upgrades under the United States Department of Energy Clean Coal Technology Program in 2006-2007, and was one of the cleanest coal-fired generating facilities in the Northeast.

10. As President of AEE2, LLC, AES Eastern Energy LP and AES Greenidge, LLC, I was familiar with, and had a working knowledge of, the competitive market position, daily operations, environmental compliance, maintenance and overall economic and financial position of the Greenidge Generating Station.

HISCOCK & BARCLAY, LLP

11. During 2010, the power prices in the New York power market trended downward, coinciding with rising coal prices and falling North America natural gas prices. In addition, the NYISO moved forward with the addition of a new capacity zone to its market, which market congestion put further downward pressure on the capacity prices paid to the power plants. These factors were projected to result in significant reductions in margin, increased costs and forecasted operating losses. As a result of these economic conditions, I directed that the Westover and Greenidge Generating Stations be put into Protective Lay-up to reduce and continue to limit the operating costs incurred at the Facility.

12. Upon information and belief, it was the intent of AES Greenidge, LLC to place the Facility into protective lay-up on a temporary basis and take steps to reduce costs and restart the Greenidge Generating Station when economic and market conditions improved.

13. Throughout the protective lay-up period, I continued to oversee AES Greenidge, LLC and directed several employees and contractors to maintain the Greenidge Generating Station so that it could be quickly reactivated in the event that the Facility's competitive market position changed.

14. During the protective lay-up period, AES Greenidge, LLC continued to employ the Maintenance Manager, and a former Operations Manager along with several other contractors to continuously maintain the Greenidge Generating Station so that it could be restarted in a timely manner.

15. On December 30, 2011, AEE2, LLC, AES Greenidge LLC and AES Eastern Energy LP (along with other debtor entities) filed for bankruptcy protection and I was asked by the President of North America - Generation to continue in my position as President. During this time, I worked closely with AES Eastern Energy, LP Board of Directors, the debtor entities' financial and legal advisors, the Creditor's Committee and the US Bankruptcy Trustee. Throughout the bankruptcy proceeding, while I remained in my position as President, I directed the employees and contractors employed by AES Greenidge, LLC to continue to maintain the Facility in Protective Lay-up so that it could be restarted if

HISCOCK & BARCLAY, LLP

economic conditions improved. These activities continued up until the sale of the Greenidge Generating Station on December 28, 2012.

16. During the entire time that AES Greenidge, LLC owned the Greenidge Generating Station after it was put into protective lay-up, it was maintained in a protective lay-up condition and it remained ready to be restarted in a relatively short period of time.

17. GMMM LLC did not at any time communicate to me what its business plan was for the Greenidge Generating Station, including whether the Facility would be demolished.

18. The November 28, 2012 letter from AEE2 to the New York State Department of Environmental Conservation requesting that the Title IV and Title V permits be terminated was drafted by AEE2's bankruptcy counsel, and, at the recommendation of counsel, signed by me as President of AEE2.

19. The December 18, 2012 Stipulation and Order to Terminate Consent Decree, was negotiated by AEE2's bankruptcy counsel, and, at the recommendation of counsel, signed by me as President of AEE2.

20. The grounds for my information and the basis of my belief are derived from carrying out my responsibilities as President of AES Greenidge, LLC and my personal observations at the Greenidge Generating Station during the time I held such position.

HISCOCK & BARCLAY, LLP

Peter S. Norgeot

Subscribed and sworn to before me

this 13th day of March, 2013.

Emily Mugeo

Notary Public

EMILY TESTA MUGGEO
Lic. #01TE6198097
Notary Public-State of New York
Qualified In Broome County
My Commission Expires 12/08/2014

ATTACHMENT 4

Greenidge Generating Station
Maintenance Activities Performed

The following list highlights many of the activities performed at the Greenidge Generating Station ("Greenidge" or the "Facility") following the period in which the Facility was put into protective lay-up that began in March 2011. These activities would typically only be conducted in a plant that was intended to operate in the future.

- Fixes
  - Repaired sump pumps, waste pumps and fire pumps
  - Repaired waste water treatment facility
  - Repaired emergency generators
  - Repaired landscaping ditches
  - Repaired boiler roof
  - Repaired the compressed air system
  - Repaired office heater multiple times
  - Repaired Potable Water System piping
  - Repaired and Maintained the Lockwood Landfill Cover System from erosion and deep rooted vegetation
- Maintenance
  - Maintained transformers (station service transformers and generator step-up transformers) and all associated switch gear.
    - Nitrogen (inert gas) blanket on transformers
  - Maintained all high voltage motors
    - Wrapped and Dehumidified with electric lights
  - Maintained backup battery systems
  - Maintained the Distributed Control System
  - Maintained inert gas blanket on generator
  - Maintained locomotive and rail road spur
  - Maintained bulldozer for coal handling and biomass handling machinery
  - Maintained and operated the house service water system
  - Maintained and operated the station compressed air system
  - Maintained and operated the potable water System
- Other:
  - Cleaning and general janitorial and landscaping
  - Performed ongoing treatment of waste water runoff from the coal pile so that it could continue to be maintained (instead of remediating the coal pile)
  - Did not electrically isolated any of the equipment (i.e., have kept everything ready to run)
  - Maintained and supervised 24hr security
  - Coordinated construction activities with NYSEG to prevent any interference with the future reactivation of the generating capabilities of the facility