

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on January 8, 2015

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Garry A. Brown
Gregg C. Sayre
Diane X. Burman

CASE 14-E-0509 - Joint Petition of First Wind Holdings, LLC,
et al., for a Declaratory Ruling that Public
Service Law Section 70 Does Not Apply to
Proposed Transactions.

DECLARATORY RULING ON REVIEW
OF AN ACQUISITION TRANSACTION

(Issued and Effective January 13, 2015)

BY THE COMMISSION:

BACKGROUND

In a petition filed on November 25, 2014, First Wind Holdings, LLC (First Wind), First Wind Operating Company, LLC , First Wind Northeast Company, LLC , Northeast Wind Partners II, LLC (Northeast Wind Partners), CSSW Cohocton Holdings, LLC, New York Wind LLC, Canandaigua Power Partners, LLC (CPP), Canandaigua Power Partners II, LLC (CPP II), Northeast Wind Holdings LLC, SunEdison, Inc. (SunEdison), and TerraForm Power, LLC (TerraForm) (collectively, Petitioners) request issuance of a Declaratory Ruling deciding that the indirect acquisition of the ownership interests in the Cohocton and Dutch Hill facilities need not be reviewed further under Public Service Law (PSL) §70, or in the alternative, for an approval of the transactions under PSL §70. Through a three-stage transaction, the current indirect owners of CPP and CPP II will sell all of

their ownership interests to TerraForm, in which SunEdison holds a 94.7% ownership interest.

Responses to the petition were due within the 21-day period prescribed under the Rules of Procedure, 16 NYCRR §8.2(c), which expired on December 16, 2014. No comments have been received.

THE PETITION

Petitioners begin by describing First Wind as a limited liability company owned by D.E. Shaw MWP Acquisition Holdings, LLC (45.9%), Madison Dearborn Capital Partners IV, LP (45.9%), and other entities or individuals in aggregate (8.2%). First Wind indirectly, through Northeast Wind Partners, holds 51% of the membership interests in CPP and CPP II, which, Petitioners elaborate, own and operate, respectively, the Cohocton (87.5MW) and Dutch Hill (37.5MW) wind projects in the Town of Cohocton, New York. First Wind also indirectly owns Niagara Wind Power, LLC (Steel Winds),¹ and Erie Wind, LLC (Steel Winds II),² neither of which are an electric corporation under the PSL and thus no determination is required with respect to these facilities.

¹ Steel Winds is the owner of a 20 MW wind project in Lackawanna, New York, which is a qualifying facility (QF) exempt from PSL regulation except for Article VII. Case 06-E-1203, Steel Winds Project LLC and Steel Winds LLC, Declaratory Ruling on Electric Corporation Jurisdiction (Issued December 13, 2006).

² Steel Winds II owns and operates a 15 MW wind project in Lackawanna, New York, which is also a QF a qualifying facility (QF) exempt from PSL regulation except for Article VII. Case 10-E-0260, Steel Winds LLC, et al., Declaratory Ruling on Restoration of Qualifying Facility Status (Issued July 19, 2010).

In addition to the New York wind projects discussed above, Petitioners continue, First Wind subsidiaries own and operate approximately 232.4 MW of generating capacity in the ISO New England, Inc. (ISO-NE) balancing area. First Wind does not own or operate any generating capacity in the PJM Interconnection, LLC (PJM) balancing area.

The indirect owner of the remaining 49% of the membership interests in Northeast Wind Partners, and its indirect CPP and CPP II subsidiaries, Petitioners relate, is Emera, Inc. (Emera), a diversified Canadian energy and services company. Emera's acquisition of these indirect interests was previously approved by the Commission.³

TerraForm, Petitioners explain, is a limited liability company managed by TerraForm Power, Inc. (TerraForm, Inc.), which is a publicly traded company listed on the NASDAQ stock exchange. TerraForm plans to acquire in the near future approximately 12 MW of small wholesale and behind the meter generation in New York.

SunEdison, Petitioners continue, is a publicly traded company that is a leading developer of solar energy products and seller of photovoltaic energy solutions. SunEdison owns approximately 7 MW of behind the meter generation in New York, and indirectly owns a 94.7% voting interest in TerraForm, through TerraForm, Inc.

The proposed transaction, according to Petitioners, will be effectuated in three stages. Emera will sell its indirect interests in CPP and CPP II; TerraForm separately will acquire all of those indirect interests; and, SunEdison, as the owner of 94.7% of the interests in TerraForm, will become the

³ Case 11-E-0253, First Wind Holdings, LLC, Order Approving Transfer, Imposing Filing Requirements and Making Other Findings (issued September 20, 2011) and Order Accepting Compliance Filing (issued August 20, 2012).

indirect owner of CPP and CPP II to that extent. As a result, TerraForm is inserted into the upstream ownership structure for CPP and CPP II while Northeast Wind Partners is excised from that structure.

The proposed transaction, Petitioners asserts, does not create the potential for the exercise of horizontal market power. According to Petitioners, once the transaction is consummated, SunEdison and TerraForm will own a de minimis portion of the market share in the New York Control Area (NYCA) (approximately 0.5%). Additionally, the Petitioners state that the transaction presents no market power issues in adjoining markets, because neither First Wind nor SunEdison own any generating facilities in PJM, and the combined market share First Wind and SunEdison hold in ISO-NE is approximately 1%, and thus is also de minimis.

Nor do the proposed transactions, Petitioners continue, create the potential for the exercise of vertical market power. Neither SunEdison nor TerraForm has ownership interests in or control over any monopoly electric transmission or delivery facilities, or substantial influence over inputs, like fuel, into the production of generation supply within the NYCA.

Petitioners believe they have satisfied the presumption established in the Wallkill Order.⁴ There, it was decided that PSL §70 regulation would not adhere to a transfer of ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generating distribution facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption.

⁴ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

Consequently, the Petitioners request that further review of this acquisition and stock transaction be eschewed. If that relief is not granted, alternatively, Petitioners request that the Commission approve the proposed transaction.

DISCUSSION AND CONCLUSION

For the purposes of this transaction, the Petitioners have satisfied the presumption established in the Wallkill Order, under which transactions involving parent entities upstream from the entities owning wholesale electric generation facilities, located in New York will be reviewed only if there is the potential for the exercise of market power or other harm to the interests of captive New York ratepayers. No such potential is apparent here, based on the facts stated in the petition.⁵

The proposed transaction does not pose the potential for the exercise of horizontal market power. Both SunEdison and TerraForm are new entrants into New York wholesale generation markets and are acquiring only the interests in generation already held by First Wind. Consequently, market concentration in those markets will not increase as a result of the transaction. Additionally, post-transaction, SunEdison and TerraForm will indirectly control a de minimis portion of the generating capacity in the NYCA. Moreover, the proposed transactions do not present any market power issues in adjoining markets. First Wind (including TerraForm) does not own any

⁵ Petitioners misstate the effect the of the Wallkill presumption in their petition; the presumption is not a determination that PSL §70 jurisdiction is eschewed but is instead a finding that the review under §70 need not be conducted further beyond that undertaken in a Declaratory Ruling. Case 00-E-1585, Sithe Energies, Inc., Order on Review of Stock Transfer and Other Transactions (issued November 16, 2000).

generation facilities in PJM and the combination of the capacity owned in ISO-NE by First Wind and SunEdison (including TerraForm) is also de minimis.

Nor does the proposed transaction pose the potential for the exercise of vertical market power. Neither SunEdison nor TerraForm exercise control over electric delivery facilities (other than interconnections), or 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. Moreover, any potential for the exercise of market power resulting from any affiliation with retail energy suppliers or power marketers can be addressed through PSL §110(1) and (2), which, pursuant to the Light Regulation Order, are imposed on SunEdison, TerraForm, and their affiliates conditionally, to the extent necessary. Since this transaction, as described in the petition, poses no other potential harm to the interests of captive ratepayers, the Commission finds, in conformance with the Wallkill Order, that we need not review the transaction further.

After the transaction is consummated, lightened regulation of the CPP and CPP II facilities will continue as described in the Light Regulation Order. SunEdison, TerraForm, CPP, and CPP II are reminded that, under lightened regulation, the owners of the CPP and CPP II facilities and the entities controlling their operations remain subject to the PSL with respect to matters such as annual reporting,⁶ enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent

⁶ Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

discussed in the Light Regulation Order and other previous Orders.⁷ Included among those requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,⁸ to give notice of generation retirements,⁹ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

The Commission finds and declares:

1. No further review will be conducted of the transactions described in the petition filed in this proceeding and in the body of this Order.

2. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary

⁷ See, e.g., Case 10-E-0501, CPV Valley LLC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing (issued May 9, 2014).

⁸ 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).

⁹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).