

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on September 15, 2016

COMMISSIONERS PRESENT:

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

CASE16-E-0408 - Joint Petition of Cricket Valley Energy Center, LLC, Cricket Valley Energy Holdings LLC, AP Cricket Valley Holdings II, Inc., APNA Holdings GmbH, 730 Cricket, LLC, BlackRock Financial Management, Inc. and ASG Frontier Holdings, LLC for a Declaratory Ruling Regarding Transfers of Upstream Ownership Interests or, in the Alternative, an Order Approving the Transfers Pursuant to Section 70 of the New York State Public Service Law and for a Declaratory Ruling that 730 Cricket, LLC, BlackRock Financial Management, Inc. and ASG Frontier Holdings, LLC Will Not Become an Electric Corporation.

DECLARATORY RULING ON TRANSFER TRANSACTIONS

(Issued and Effective September 19, 2016)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on July 22, 2016, Cricket Valley Energy Center, LLC (Cricket Valley), Cricket Valley Energy Holdings LLC (CVEH Holdings), AP Cricket Valley Holdings II, Inc. (Cricket Holdings II), APNA Holdings GmbH (APNA), 730 Cricket, LLC (730 Cricket), BlackRock Financial Management, Inc. (BlackRock Management), and ASG Frontier Holdings, LLC (ASG Frontier) (collectively, the Petitioners) requested issuance of a declaratory ruling that Public Service Law (PSL) §70 does not

apply to: (a) Cricket Holdings II's proposed sale of 16%-30% of the issued and outstanding membership interests in CVEH Holdings to 730 Cricket (the 730 Cricket Transaction); (b) Cricket Holding II's proposed sale of 7.75%-15% of the issued and outstanding membership interests in CVEH to ASG Frontier (the ASG Frontier Transaction; collectively with the 730 Cricket Transaction, the Proposed Transactions); (c) potential future transfers by Cricket Holdings II to 730 Cricket of up to 3% of the issued and outstanding membership interests in CVEH Holdings (the 730 Cricket Additional Transfers); and (d) potential future transfers by Cricket Holdings II to ASG Frontier of up to 3% of the issued and outstanding membership interests in CVEH Holdings (the ASG Frontier Additional Transfers; together with the 730 Cricket Additional Transfers, the Additional Transfers) (collectively, the Petition).

The Petition also seeks a declaratory ruling that: (a) a proposed intra-corporate reorganization does not require further review under PSL §70; (b) the acquisition of indirect ownership interests in the Cricket Valley generation facility (Facility) would not make either 730 Cricket, ASG Frontier, or BlackRock Management electric corporations within meaning of the PSL; and (c) the future transfer of up to 15% of the issued and outstanding membership interests in CVEH Holdings to a currently-unknown third party investor in the Facility (the Future Transactions) will not be subject to PSL review or require a filing with the Commission.

Cricket Valley is developing an approximately 1,000 MW combined cycle, natural gas-powered electric generating facility in the Town of Dover, New York (Facility). On February 14, 2013, the Commission granted Cricket Valley a Certificate of Public Convenience and Necessity (CPCN) to construct, operate, and maintain the Facility, and established a lightened

regulatory regime with respect to Cricket Valley's ownership and operation of the Facility.¹ In this ruling, the Commission determines that no further review under the PSL is required to be conducted of the Proposed Transactions, the Additional Transfers, or the intra-corporate reorganization described in the Petition. The Commission also finds that neither 730 Cricket, ASG Frontier, nor BlackRock Management will become electric corporations by virtue of acquiring purely passive indirect ownership interests in the Facility. Finally, the Commission declines to grant a declaratory ruling that the proposed future transfer of indirect ownership interests to an indeterminate buyer do not require future Commission review.

THE PETITION

Cricket Valley, CVEH Holdings, and Cricket Holdings II

According to the Petition, Cricket Valley currently has three member owners. AP Cricket Valley Holdings I, Inc. (Cricket Holdings I) holds a 40% interest, Cricket Holdings II holds a 40% interest, and MC CVEC Project Holdings I, LLC (MC Holdings) holds a 20% interest. Cricket Holdings I is wholly owned by APNA Holdings GmbH (APNA), which is wholly-owned by Advanced Power AG (APAG). Cricket Holdings II is wholly-owned by AP Energy Holdings Inc., which is wholly-owned by APNA. MC Holdings is indirectly wholly-owned by Marubeni Corporation (Japan).

To facilitate financing for the Facility, the Commission recently issued a declaratory ruling that Cricket Holdings I, Cricket Holdings II, and MC Holdings may transfer

¹ Case 11-E-0593, Cricket Valley Energy Center, LLC, Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Ratemaking Regulation (issued February 14, 2013) (CVEC Order).

100% of their membership interests in Cricket Valley to CVEH Holdings, a new holding company that would wholly-own Cricket Valley after a proposed intra-corporate reorganization, without further review under PSL §70.² When that reorganization is complete, Cricket Holdings I, Cricket Holdings II, and MC Holdings will each own the same percentage interest in CVEH Holdings that they previously held in Cricket Valley.

APNA

Petitioners explain that APNA is a wholly-owned subsidiary of APAG whose sole purpose is to hold APAG's various interests in companies located within the United States. APNA, Petitioners continue, currently manages development of the Facility pursuant to a Consulting Services Agreement (Consulting Agreement) executed between APAG and Cricket Valley. According to Petitioners, the Consulting Agreement will end upon the closing of project financing, after which Cricket Valley will manage itself.

According to Petitioners, APNA will manage Facility development until project financial closing. After financial closing, Cricket Valley Asset Management Services LLC, an APNA affiliate, will manage Facility construction and operation pursuant to an asset management agreement. Also, Cricket Holdings II, another APNA affiliate, will assume management responsibilities for CVEH Holdings.

730 Cricket

Petitioners aver that 730 Cricket was formed for the purpose of owning membership interests in CVEH Holdings and is a wholly-owned, indirect subsidiary of Teachers Insurance and Annuity Association of America (TIAA). TIAA, Petitioners

² Case 16-E-0201, AP Cricket Valley Holdings I Inc. et al., Declaratory Ruling on Transfer Transactions (issued August 2, 2016) (CVEC Ruling).

continue, is a nonprofit organization that provides investment and insurance services for people working in education, medicine, culture, and research.

According to Petitioners, TIAA owns de minimis interests in generation located within the markets administered by the New York Independent System Operator, Inc. (NYISO), PJM Interconnection, L.L.C. (PJM), and ISO New England Inc. (ISO-NE). Within the NYISO market, Petitioners continue, TIAA indirectly owns approximately 4.2% of the 575 MW Astoria Energy II LLC (Astoria Energy) generation facility located in Queens, New York. Petitioners explain that TIAA also holds limited indirect interests in equity investments in the energy sector. According to Petitioners, these indirect interests are passive investments that do not provide TIAA with any ability to control the operation of generating assets.

BlackRock Management, ASG Frontier, and BlackRock, Inc.

As explained in the Petition, BlackRock Management is a registered investment advisor that manages ASG Frontier, a company formed to own membership interests in CVEH Holdings. BlackRock Management, Petitioners continue, is a wholly-owned subsidiary of BlackRock, Inc. (BlackRock), a publicly-traded investment management firm.

Petitioners explain that neither ASG Frontier nor BlackRock Management have direct equity ownership interests in transmission, distribution, or generation assets within the NYISO, PJM, or ISO-NE markets. According to Petitioners, BlackRock Management and other BlackRock affiliates provide investment advice or management services for accounts or funds that own equity investments in publicly-traded companies in the energy sector. Petitioners aver that the investments advised by these companies are passive, indirect ownership interests that do not provide either BlackRock Management or other BlackRock

affiliates any measure of control over the operation of transmission, distribution, or generating assets.

The Proposed Transactions

Petitioners explain that the Proposed Transactions would consist of two sales of indirect ownership interests in CVEH Holdings from Cricket Holdings II to 730 Cricket and ASG Frontier. As proposed, Cricket Holdings II would sell between 16%-30% of its CVEH Holdings interests to 730 Cricket, and between 7.75%-15% of its CVEH Holdings to ASG Frontier. The exact amount of interests to be transferred, Petitioners continue, will be determined in the future based on certain terms and conditions of Facility financing. Petitioners explain that the indirect ownership interests in Cricket Valley ultimately will be held as follows: (a) 16%-30% held by 730 Cricket; (b) 7.75%-15% held by ASG Frontier; (c) 3%-12% held by Cricket Holdings II, (d) 41% held by J Cricket Holdings, LLC, which will own 100% of Cricket Holdings I;³ and (e) MC Holdings will own the remainder, or approximately 16.4% of Cricket Valley.

Petitioners describe the sequential identity of project managers that will oversee Facility construction and operation. None of those entities, Petitioners aver, would be subject to direction or control by 730 Cricket, ASG Frontier, or BlackRock Management. Petitioners assert that the indirect ownership interests that 730 Cricket, ASG Frontier, and BlackRock Management acquire will be "operationally passive," and that these companies would not influence Facility operation or appoint any members to the Board of Representatives that have the authority to control Facility operations. According to

³ Case 16-E-0116, Cricket Holdings LLC et al., Declaratory Ruling on Review of Acquisition Transactions (issued April 20, 2016).

Petitioners, these companies would acquire only those voting rights necessary to protect their financial interest, and would not acquire any authority to influence Facility operation. Citing Commission precedent, Petitioners request affirmation that the indirect, passive ownership interests to be acquired will not subject either 730 Cricket, ASG Frontier, or BlackRock Management to Commission regulation as electric corporations within meaning of the PSL.

Petitioners believe that 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 and distribution facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. According to Petitioners, the Proposed Transactions contemplate a change in indirect ownership interests that are upstream of Cricket Valley, the operating company.

The Proposed Transactions, Petitioners continue, pose no risk of horizontal or vertical market power, or other harm to captive utility ratepayers. Petitioners explain that they operate in a competitive market and do not serve captive ratepayers. Moreover, Petitioners continue, 730 Cricket and its affiliates do not hold ownership interests in generation assets located in the NIYSO, PJM, or ISO-NE markets, aside from limited interests described in the Petition. Petitioners aver that ASG Frontier and BlackRock Management do not have direct equity interests in transmission, distribution, or generation located in those markets. BlackRock Management, Petitioners continue,

⁴ Case 91-E-0950, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

does not advise funds or accounts that hold direct equity interests in transmission, distribution, or generation assets located in the NYISO, PJM, or ISO-NE markets, except to the extent described above, and holds no authority to control any such assets by virtue of its advisory role.

Consequently, Petitioners request that further review of the Proposed Transactions be eschewed. In the event that the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transaction pursuant to PSL 70.

Additional Transfers

According to the Petition, Cricket Holdings II is contractually obligated to transfer to 730 Cricket an incremental, indirect ownership interest in Cricket Valley of up to 3% if the Facility fails to achieve certain financial milestones. Cricket Holdings II and ASG Frontier executed a similar agreement. As a result, Petitioners explain, Cricket Holdings II is obligated to transfer to ASG Frontier an incremental, indirect ownership interest in Cricket Valley of up to 3% if the Facility fails to achieve certain financial milestones.

Petitioners believe that they have satisfied the Wallkill Presumption for Additional Transfers for the same reasons described above for the Proposed Transactions. Petitioners add that the Additional Transfers would strengthen Facility finances without changing its management or organization. Consequently, Petitioners request that further review of the Additional Transfers be eschewed. In the event that the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transaction pursuant to PSL 70.

Future Transaction

Petitioners explain that financing of Facility construction depends on equity investment secured through the

sale of indirect ownership interests in Cricket Valley. According to the Petition, it is anticipated that one additional investor will be needed to meet project equity requirements. These interests, Petitioners continue, would be the same class of passive interests that 730 Cricket, ASG Frontier, and BlackRock Management are acquiring. Petitioners thus seek a Commission ruling that the Future Transaction will not require a filing with the Commission, or Commission review of the transfer pursuant to PSL §70.

Intra-Corporate Reorganization

In the CVEC Ruling, the Commission found that inserting CVEH Holdings into the Cricket Valley upstream ownership structure would not require further review under PSL §70. Here, Petitioners explain that the Cricket Valley members may consider inserting a second holding company - Cricket Valley Energy Partners LLC (Cricket Valley Partners) - between CVEH Holdings and the CVEH Holdings members (the Intra-Corporate Reorganization). If the restructuring is completed, Petitioners continue, CVEH Holdings would become a wholly-owned subsidiary of Cricket Valley Partners, which would be owned by the members in the same proportion as the interests described in the Petition. Petitioners explain that this intra-corporate reorganization, if effectuated, (i) would not introduce a new owner into, or remove an existing owner from, the organizational structure, and (ii) the proportionate shares of the indirect owners would remain unchanged. Petitioners request a declaratory ruling that the Intra-Corporate Reorganization, if effectuated, would not require Commission review and approval pursuant to PSL §70.

Electric Corporation Regulation

Petitioners explain that the indirect CVEH Holdings interests that 730 Cricket, ASG Frontier, and BlackRock

Management will acquire are purely passive investment vehicles that would not enable any of these companies to control Facility operation or management. Citing Commission precedent that passive owners of electric plant are not electric corporations within meaning of the PSL,⁵ Petitioners aver that closing of the Proposed Transactions and/or Additional Transfers should not subject these companies to Commission regulation as electric corporations. Petitioners assert that these companies will acquire operational rights in CVEH Holdings that are tailored and limited to only those voting rights necessary to protect the companies' respective investments. According to Petitioners, the Commission previously has held that similar ownership interests do not confer operational control over electric plant sufficient to designate the companies as electric corporations subject to Commission regulation.

DISCUSSION AND CONCLUSION

As discussed further below, we find that Petitioners have satisfied the Wallkill Presumption with respect to the Proposed Transactions and Additional Transfers, which will not require further review under PSL §70. The Intra-Corporate Reorganization similarly will not require further regulatory review, and we find that acquiring indirect, passive interests in CVEH Holdings will not subject 730 Cricket, ASG Frontier, or BlackRock Management to regulation as electric corporations. We decline to rule on the Future Transaction, however, because the requisite market power analysis cannot be conducted until the future buyer has been identified.

⁵ Case 08-E-1267, Noble Altona Windpark, LLC et al., Declaratory Ruling on Review and Regulation of a Passive Ownership Interest Transfer (issued December 15, 2008) (Noble Altona Ruling).

Proposed Transactions

For the purposes of the Proposed Transactions, Petitioners have satisfied the Wallkill Presumption. Under this presumption, transactions involving parent entities upstream from the 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.

The Proposed Transactions do not pose the potential for the exercise of horizontal market power. 730 Cricket and ASG Frontier will acquire passive interests that will not enable either company to exert control over Facility operation or maintenance. Their respective interests in CVEH Holdings will be limited, and voting rights attached to their membership interests are limited to actions requiring a unanimous or supermajority (85%) vote of the members. The voting rights are narrowly tailored and limited to matters that protect their financial interest in the CVEH Holdings investment. Further, although 730 Cricket does not hold ownership interests in other generation assets, the limited interests held by its affiliates are insubstantial and do not present a risk of horizontal market power in New York. To the extent that ASG Frontier or its affiliates hold indirect interests in generation assets located in the NYISO, PJM, and/or ISO-NE markets, those interests are passive and do not enable the companies to control the operation of any generating assets. As to BlackRock Management, Petitioners have demonstrated that it will not be able to exercise horizontal market power through assets owned or advised in New York.

The Proposed Transactions, similarly, do not pose the potential for the exercise of vertical market power. Neither

730 Cricket nor ASG Frontier will exercise control over electric delivery facilities or a substantial influence over inputs, like fuel, into the production of generation supply within New York. As a result, these avenues for the undue exercise of vertical market power are foreclosed.

Finally, Petitioners will operate in wholesale competitive markets and will not have captive utility ratepayers. The Proposed Transactions, therefore, do not present a risk of harm to such ratepayers. Accordingly, based on the facts and circumstances presented in the Petition, the Proposed Transactions do not require further review under PSL §70.

Additional Transfers

Petitioners also satisfied the Wallkill Presumption for purposes of the Additional Transfers. These transactions, if consummated, would result in an immaterial increase of no more than 3% in the amount of membership interests held by 730 Cricket and ASG Frontier. These potential transfers to known buyers do not change the market power analysis described above for the Proposed Transactions, and they pose no risk of harm to captive utility ratepayers. The Additional Transfers, however, would improve the Facility's ability to secure all financing necessary for its owners to complete construction and commence commercial operations. Accordingly, based on the facts and circumstances presented in the Petition, the potential transfers contemplated under the Additional Transfers do not require further review under PSL §70.

The Future Transaction

In the CVEC Ruling, we found that a potential future transfer of ownership interests to specific buyers warranted application of the Wallkill Presumption and would not require further review under PSL §70. We explained that the future

transactions would not present a risk of horizontal or vertical market power, or other potential harm to captive utility ratepayers. The analysis underlying these findings included consideration of whether any entity involved in the future transactions would acquire the ability to leverage its interests in other generation or transmission assets owned in New York to benefit its passive interests in Cricket Valley. This consideration is standard in our market power analyses under the Wallkill Presumption.

Here, Petitioners ask that we disclaim regulatory oversight of the Future Transaction because the interests to be transferred are passive. As noted above, there is a risk that an entity might leverage generation or transmission assets owned in New York to benefit its passive, indirect investment in Cricket Valley. This part of the market power analysis cannot be completed without knowing the identity of the buyer in the Future Transaction. Consequently, we decline to rule on the Future Transaction at this time. Petitioners may seek a declaratory ruling on the transfer of additional passive interests when the identity of the buyer is known.

Electric Corporation Regulation

The Proposed Transactions comprise passive investments through ownership interests upstream from Cricket Valley by 730 Cricket, ASG Frontier, and BlackRock Management. Petitioners have demonstrated that these investors lack the ability to direct Cricket Valley in its operation and management of the generating facility, and do not possess the authority to influence Cricket Valley's participation in competitive markets. As a result, they will not own or control electric plant as

defined in PSL §2(12), and therefore will not become electric corporations pursuant to PSL §2(13).⁶

Intra-Corporate Reorganization

In reviewing proposed intra-corporate reorganizations, the Commission has determined that certain transactions do not require review under PSL §70 because they do not affect the ultimate ownership of the operating company and its jurisdictional facilities. In particular, the Commission has found that “[i]nserting a holding company into an ownership structure upstream from lightly-regulated entities that operate electric plant does not amount to a transfer under PSL §70 because there is no change in the identity of the ultimate ownership.”⁷ The intra-corporate reorganization described in the Petition would insert CV Energy Partners between CVEH Holdings and its direct owners, and falls squarely within this precedent.

As a result of such restructuring, no new owner will be brought into the organizational structure, no existing owner will be removed, and the proportionate share of the indirect owners will remain the same. The only consequence of the transaction is that the existing members that have a direct ownership interest in CVEH Holdings will have an indirect interest, as they become owners of CV Energy Partners. Moreover, the reorganization would not create the potential for the exercise of market power, as the mere creation of the holding company cannot enhance the ability of Petitioners to exercise either horizontal or vertical market power. As a

⁶ Case 15-E-0243, Cross-Sound Cable Company, LLC et al., Order Approving a Transfer Transaction and a Financing and Making Other Findings (issued August 17, 2015); see also Noble Altona Ruling.

⁷ Case 07-E-0584, NRG Energy, Inc., Declaratory Ruling on Review of an Intra-corporate Transaction (issued July 23, 2007) at 3-4 (NRG Ruling).

result, the restructuring does not pose the potential for harm to captive ratepayer interests. Accordingly, this intra-corporate transaction falls within the ambit of the NRG Ruling and the Horizon Ruling,⁸ where it was decided that intra-corporate transactions that do not affect ultimate ownership fall outside the scope of PSL §70.

Lightened Regulation

Petitioners are reminded that, under lightened regulation, they will remain subject to the PSL with respect to matters such as annual reporting,⁹ enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders.¹⁰ Included among those requirements are the obligations to give notice of generation retirements,¹¹ to report personal injury accidents pursuant to 16 NYCRR Part 125 and, where applicable, to conduct tests for stray voltage on all publicly accessible electric facilities.¹² PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated

⁸ Case 06-E-0006, Horizon Wind Energy LLC, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 14, 2006) (Horizon Ruling).

⁹ 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.

¹⁰ 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).

¹¹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

¹² See 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).

interests, will apply immediately if Petitioners and/or any affiliate or subsidiary thereof, will market electric energy to retail customers in New York after the proposed corporate restructuring is complete.

The Commission finds and declares:

1. To the extent discussed in the body of this ruling, no further reviews will be conducted of the proposed transactions described in the Petition and discussed in this ruling.

2. 730 Cricket, LLC, BlackRock Financial Management, Inc., and ASG Frontier Holdings, LLC will not be deemed to be electric corporations under the Public Service Law, based on the information presented in the Petition and discussed in the body of this ruling.

3. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary