STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on April 19, 2018

COMMISSIONERS PRESENT:

John B. Rhodes, Chair
Gregg C. Sayre
Diane X. Burman
James S. Alesi

CASE 18-E-0023 – Petition of Lockport Energy Associates, L.P. and Castleton Power, LLC, for Order Approving Financing Pursuant to Section 69 of the New York State Public Service Law and Declaratory Ruling Regarding Application of Sections 70 and 83 of the New York State Public Service Law, and, in the Alternative, Sections 70 and 83 Approval.

ORDER APPROVING FINANCING AND MAKING OTHER FINDINGS

(Issued and Effective April 19, 2018)

BY THE COMMISSION:

INTRODUCTION

On January 12, 2018, Lockport Energy Associates, L.P. (LEA) and Castleton Power, LLC (Castleton) (collectively, the Petitioners) requested approval, pursuant to Public Service Law (PSL) §69 and §82, to enter into indebtedness of up to $200 million (Petition). The Petition indicates that the indebtedness is needed so that Petitioners may cross-collateralize debt with affiliated interests and support continued access to capital. Petitioners also requested issuance of declaratory rulings that the Public Service Commission’s approval is not needed under PSL §70 and §83 with respect to an intra-corporate restructuring and transfers of indirect, upstream interests in a 200 MW cogeneration facility that is located in Lockport, New York (Lockport Facility), and a 72 MW natural gas-fired electric generation facility that is located in Castleton-on-Hudson, New York (Castleton Facility). Both facilities operate under lightened regulatory regimes.[1]

In this Order, the Public Service Commission (Commission) authorizes Petitioners to enter into the requested indebtedness. The Commission also finds and determines that no further review, pursuant to PSL §70 and §83, is required of the proposed intra-corporate restructuring or transfers of upstream, indirect interests in the Lockport Facility.

NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking (Notice) with respect to the Petition was filed in the State Register on February 7, 2018 [SAPA No. 18-E-0023SP1]. The SAPA §202(1)(a) period for submitting comments in response to the Notice expired on April 9, 2018. No comments were received.

THE PETITION

LEA

Petitioners explain that LEA owns and operates the cogeneration Lockport Facility subject to lightened regulation for both its electric and steam operations.[2] LEA, Petitioners

[1] Case 08-M-1301, Lockport Energy Associates, L.P., Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened and Incidental Regulation (issued January 20, 2009) (LEA Order); Case 05-E-1905, TransCanada Power (Castleton) LLC, Declaratory Ruling on Transfer of Ownership Interests and Order Providing for Lightened Regulation (issued January 26, 2006).

[2] LEA Order.

continue, is owned indirectly by Fortistar Capital Inc. (Fortistar Capital), Fortistar LLC (Fortistar), and Osaka Gas Energy USA Corporation (Osaka Gas), which hold interests of 12.15%, 55.974%, and 24.376%, respectively.

Petitioners aver that FCI Lockport GP, Inc. (FCI) holds a 1% general partnership interest in LEA and is responsible for the day-to-day operations and management of the Lockport Facility. FCI, Petitioners continue, is a wholly-owned indirect subsidiary of Fortistar Capital. Petitioners explain that LEA GP, Inc. (GPI) owns a 0.1% general partnership interest in LEA and is owned by Osaka Gas (76%), LEA A3 LLC (LEA A3) (14%), and Tuscarora Energy LLC (Tuscarora Energy) (10%).[3] Both LEA A3 and Tuscarora Energy, Petitioners continue, are owned 1% by Fortistar LEA Holdings LLC (LEA Holdings) and 99% by Fortistar Projects LLC (Fortistar Projects), both of which are wholly-owned by Fortistar. According to Petitioners, LEA Holdings and Fortistar are wholly-owned and managed by Mark Comora.

Petitioners aver that additional entities hold limited partnership interests in LEA, as follows: LEA LP 1 LLC, 7.58%; LEA A2 LLC, 5.15%; and Lockport LP LLC, 11.79%. LEA A4 LLC (LEA A4), Petitioners continue, owns a 24.3% interest in LEA and is owned 50% by Fortistar Projects and 50% by Fortistar Family Holdings LLC (Family Holdings). Petitioners explain that Fortistar Projects has the sole authority to manage LEA A4. Family Holdings, Petitioners continue, has Class A voting interests that are held 0.99% by Mr. Comora and 0.01% by his wife. Two family trusts whose beneficiaries are Mr. Comora's children and grandchildren hold 98% of the Class B non-voting interests in Family Holdings. Petitioners explain that Family

[3] LEA A3 and Tuscarora Energy hold limited partnership interests in LEA of 3.84% and 11.36%, respectively.

Holdings does not have voting rights in LEA or the ability to control LEA management or operations. Osaka Gas indirectly holds the remaining 24.3% limited partnership interests in LEA.

Petitioners assert that FIP LLC (FIP) is a partnership owned by current and former Fortistar employees, with Fortistar as the managing partner. FIP, Petitioners continue, provides a long-term incentive for Fortistar employees. According to Petitioners, no single Fortistar employee or former employee will own (i) more than a 10% limited partnership interest in LEA A4, (ii) more than 10% or any controlling interest in generation or transmission facilities located in the United States, or (iii) any voting or management rights in LEA A4 or other generation or transmission assets in the United States.

Castleton

Petitioners explain that Castleton owns and operates the 72 MW natural gas-fired electric generating facility located in Castleton-on-Hudson, New York pursuant to a lightened ratemaking regulatory regime for its electric operations.[4] Fortistar and Fortistar Family Holdings 3 LLC (Family Holdings 3) hold equal indirect interests as the indirect ultimate owners of Castleton.

Petitioners further explain that Castleton is wholly-owned by Fortistar Castleton LLC (Fortistar Castleton), which is wholly-owned by Fortistar Castleton Holdings LLC (Castleton Holdings) which, in turn, is owned in equal shares by Family Holdings 3 and Fortistar Projects. Petitioners aver that Family Holdings 3 has neither voting rights with respect to Castleton, nor the ability to control its management or operations. Petitioners explain that the daily management and operations of

[4] Case 16-E-0244, Castleton Energy Center, LLC, Order Approving Transfer and Continuing Lightened Regulation (issued July 14, 2016).

Castleton and the Castleton Facility are controlled by Fortistar Projects, which is controlled by Mr. Comora. Ownership interests in Family Holdings 3, Petitioners continue, are divided between Class A voting and Class B non-voting shares. According to Petitioners, Mr. Comora and his wife own Family Holdings 3 Class A interests of 0.99% and 0.01%, respectively. Petitioners aver that two Comora family trusts have combined Class B non-voting interests of 98% in Family Holdings 3. Petitioners aver that these trusts were established to benefit Mr. Comora's children and grandchildren.

Proposed Financing

Petitioners seek authority under PSL §69 and §82 to jointly and severally incur indebtedness of up to $200 million, or guarantee and pledge ownership interests in LEA and Castleton and their jurisdictional assets as collateral security for the repayment of up to $200 million in debt. According to Petitioners, the proposed financing is in the public interest because it will strengthen their creditworthiness by enabling LEA, Castleton, and their affiliates to cross-collateralize debt. Petitioners assert that the financing would also provide them and their affiliates with continuing access to capital and improve their ability to provide cost-effective, safe, and reliable service. Petitioners further request the authority to modify, without prior Commission approval, the identity of the financing entities, payment terms, and the amount financed, up to the $200 million limit.

According to Petitioners, the Commission has granted such flexibility to other lightly-regulated owners of electric generation facilities.[5] Petitioners cite Commission precedent for the proposition that lightly-regulated entities operating in

[5] See, e.g., Case 11-M-0483, Sithe/Independence Power Partners, L.P., Order Approving Financing (December 21, 2011).

a competitive environment assume all risk associated with their financing arrangements. Consequently, they maintain that captive ratepayers in New York will not be harmed by such arrangements and there is no need for additional scrutiny of the financing transactions.[6]

Proposed Intra-Corporate Restructuring

Petitioners explain that the proposed intra-corporate restructuring would consist of at least four distinct transactions. First, Petitioners explain that a new holding company named Generational Power LLC (Generational Power) will be created as a direct, wholly-owned subsidiary of Fortistar Projects. Second, Fortistar Castleton would be eliminated, thereby leaving Castleton Holdings as the direct owner of Castleton. Third, Petitioners explain that LEA A3, Tuscarora Energy, and two affiliates would be merged into LEA LP 1 LLC (LEA LP 1). Finally, Petitioners continue, the proposed restructuring would eliminate LEA Holdings.

Citing Commission precedent, Petitioners argue that the intra-corporate transactions that would effectuate the restructuring do not require review under PSL §70 or §83 because they do not affect the ultimate ownership of either LEA or Castleton (the operating companies) or the Lockport or Castleton Facilities (the jurisdictional assets), or change the proportionate shares held by the ultimate owners.[7] In those decisions, Petitioners argue, the Commission found that transfers within meaning of PSL §70 and §83 do not include

---

[6] See, e.g., Case 11-M-0483, Sithe/Independence Power Partners, L.P.

[7] Case 06-E-0006, Horizon Wind Energy LLC, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 14, 2006); Case 07-E-0584, NRG Energy, Inc., Declaratory Ruling on Review of an Intra-Corporate Transaction (July 23, 2007) (NRG 2007 Ruling).

inserting a holding company into, or removing a holding company from, an ownership structure upstream of a lightly-regulated entity if there is no change in the ultimate ownership of the operating company or the proportionate shares held by the ultimate owner(s).

Petitioners explain that LEA and Castleton will continue as the direct owners of the Lockport Facility and Castleton Facility, respectively, after the intra-corporate restructuring is effectuated. The restructuring, Petitioners continue, will not change the ultimate owners of the Lockport and Castleton Facilities, or change their proportionate shares in LEA and Castleton. Petitioners aver that the intra-corporate restructuring cannot create horizontal or vertical market power for Petitioners or their affiliates because there will be no change in their market penetration or the facilities' ultimate ownership. Petitioners request a declaratory ruling that the intra-corporate restructuring would not require Commission review and approval pursuant to PSL §70 and §83.

Proposed Transactions

Petitioners describe several transactions involving the transfer of passive, indirect upstream interests in LEA and Castleton. First, Petitioners explain that FIP has the right to receive: (a) up to a 30% passive limited partnership interest in LEA A4 from Fortistar Projects if Fortistar achieves certain defined financial targets for LEA A4; and (b) up to a 30% passive limited partnership interest in Castleton Holdings from Fortistar Projects and Family Holdings 3 if Fortistar achieves certain defined financial targets (together, the FIP Transfers). As to the latter transfers, if Family Holdings 3 achieves certain financial targets, it will reduce its passive limited partnership interests in Castleton Holdings from 50% to 35.675%

by transferring a 14.325% passive interest to FIP.[8] Simultaneously, Petitioners continue, Fortistar Projects would transfer to FIP a 15.765% passive interest in Castleton Holdings. According to Petitioners, these transfers will result in Fortistar Projects holding a 34.325% active limited partnership interest in Castleton Holdings, and Family Holdings 3 and FIP holding 35.675% and 30% passive limited partnership interests, respectively, in Castleton Holdings.

Finally, Petitioners aver that LEA A4 and Castleton Holdings were wholly-owned by Fortistar Projects until it transferred a 50% passive ownership interest in LEA A4 to Family Holdings, and a 50% passive ownership interest to Family Holdings 3 (the "Family Holdings Transfers"). Fortistar Projects thus reduced its ownership stake in these companies from 100% to 50%. Significantly, Petitioners report that they did not seek Commission approval before consummating the Family Holdings Transfers. Petitioners explain that they did not think these transfers required regulatory review because they were executed as part of an estate plan for Mr. Comora, the Petitioners' ultimate owner and manager, and did not transfer control over Petitioners or their jurisdictional facilities. Petitioners state their "regret" for not seeking a Commission ruling before effectuating the Family Holdings Transfers and pledge to "take greater care in the future" to ensure that Commission review of future ownership changes is sought before the potential transfers are consummated.

Petitioners believe that they have satisfied the presumption established in the Wallkill Order.[9] There, it was decided that PSL §70 regulation would not adhere to a transfer

[8] Case 18-E-0023, supra, Letter (dated March 15, 2018).

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

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 LEA and Castleton, the operating companies.

The Family Holdings and FIP Transfers, Petitioners continue, pose no risk of horizontal or vertical market power, or other harm to captive ratepayers. Petitioners aver that these transfers will not effectuate a change in market shares or concentration levels in New York. According to Petitioners, neither Family Holdings, Family Holdings 3, nor any current or former employee owner of FIP own any controlling interest in generation or transmission in the United States. Petitioners emphasize that the indirect interests held or to be acquired by Family Holdings, Family Holdings 3, and FIP are purely passive and do not confer any right to influence the operation or control of either LEA or Castleton.

Consequently, Petitioners request that further review of the Family Holdings and FIP Transfers be eschewed. In the event that the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transactions pursuant to PSL §70.

LEGAL AUTHORITY

The Commission is authorized, pursuant to PSL §69 and §82, to approve certain financings, such as the type proposed in the Petition. Financings proposed under PSL §69 and §82 by lightly-regulated companies operating in a competitive environment may be addressed on the basis of representations made in the petition, and do not require an in-depth analysis.[10]

Pursuant to PSL §70 and §83, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. The PSL §70 and §83 review processes have been adapted over time to accommodate lightened ratemaking regulation policies. Entities subject to lightened regulation operate in competitive markets and, therefore, must support a §70 or §83 transfer request with a demonstration that the transaction will not present the purchaser with the opportunity to exercise either horizontal or vertical market power, or otherwise harm the interests of captive ratepayers of fully-regulated utilities.[11]

The Commission's regulations, at 16 NYCRR §8.1, provide for declaratory rulings, which a party may request with respect to the applicability of a rule or statute enforceable by the Commission to any person, property or state of facts.

DISCUSSION AND CONCLUSION

As discussed further below, the Commission finds that the proposed financing is consistent with financings approved for other lightly-regulated companies, appears to be for a statutory purpose, and is not contrary to the public interest. Therefore, the proposed financing is approved under PSL §69 and §82, up to $200 million. The Commission further finds that

[10] Case 17-E-0016, TC Ravenswood et al., Order Approving Transfer Subject to Acceptance of Conditions and Making Other Findings (issued April 19, 2017).

[11] See, e.g., Walkill Order. The Commission has determined that full regulatory review is not needed for transfers of indirect, upstream ownership interests in lightly-regulated electric and gas corporations unless the proposed transfer presents a risk of market power or harm to captive ratepayers (i.e., the Wallkill Presumption).

Petitioners have satisfied the Wallkill Presumption with respect to the Family Holdings and FIP Transfers, which will not require further review under PSL §70 or §83. The intra-corporate transactions will not change the ultimate owners of LEA and Castleton or their proportionate shares in these operating companies. These transfers, therefore, do not require regulatory review.

Proposed Financing

Approval of Petitioners' financing plan is appropriate under lightened regulation.[12] The scrutiny applicable to monopoly utilities may be reduced for lightly-regulated companies like LEA and Castleton. As a result, an in-depth analysis of the proposed financing transactions is not needed. Instead, by relying on the representations Petitioners make in their filing, prompt regulatory action is possible.

The proposed financing appears to be for a statutory purpose and does not appear contrary to the public interest. It is therefore approved up to an aggregate maximum amount of $200 million for both LEA and Castleton, as proposed. Given that Petitioners are subject to lightened regulation, they are afforded the flexibility to modify, without our prior approval, the identity of the financing entities, payment terms, and amount financed under the transactions, up to the $200 million aggregate limit for the two companies.[13] Affording Petitioners this flexibility avoids disruption of financing arrangements and

[12] Because the approval of a securities issuance under PSL §69 and §82 is listed as a Type 2 action for the purposes of SEQRA, 16 NYCRR §§7.2(b)(2)(v), no review of the proposed financing is required under that statute.

[13] See, e.g., Case 10-E-0405, NRG Energy, Inc., Order Approving Financing (issued November 18, 2010); Case 01-E-0816, Athens Generating Company, L.P., Order Authorizing Issuance of Debt (issued July 30, 2001).

enables them to operate more effectively in competitive wholesale electric markets, thereby promoting the efficient development of these markets. Captive New York ratepayers cannot be harmed by the terms of this financing because Petitioners bear all the financial risk associated with this financial arrangement.

Proposed Transactions

For purposes of the Family Holdings and FIP Transfers, 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 or vertical market power, or otherwise present any risk to captive ratepayers. Executing the Family Holdings and FIP Transfers will shift indirect, passive ownership interests which do not enable any control or influence over the operation of the LEA or Castleton Facilities. The entities receiving the passive, indirect interests are investment vehicles created for estate planning purposes (i.e., Family Holdings and Family Holdings 3) and an employee association (i.e., FIP) that provides a financial incentive to current and former Fortistar employees. These entities do not hold controlling interests in other generation or transmission assets. Accordingly, based on the facts and circumstances presented in the Petition, the proposed transfers described in the Petition do not require further review or approval under PSL §70 or §83.

Finally, as noted, PSL §70 and §83 require electric corporations to seek approval before completing a transfer transaction. Petitioners, however, did not seek Commission approval before the Family Holdings Transfers were effectuated. Petitioners thus are requesting nunc pro tunc (i.e., retroactive) Commission approval of those transactions.

The Commission does not issue nunc pro tunc orders.[14] Commission approval, therefore, should be granted prospectively, rather than retroactively to the closing date of the Family Holdings Transfers. Because such approval will not have retroactive effect, the Petitioners will be at risk for any consequences that may result from failure to obtain Commission approval prior to the close of these transfers.

Intra-Corporate Reorganization

In reviewing proposed intra-corporate reorganizations, the Commission has determined that certain transactions do not require review under PSL §70 or §83 because they do not affect the ultimate ownership of the operating company and its jurisdictional facilities, or the proportionate shares held by those owners.[15] These restructuring transactions typically involve only entities that are wholly-owned subsidiaries of the ultimate corporate parent(s). In particular, the Commission has found that "[i]nserting a holding company into an ownership

---

[14] Case 09-C-0021, Yak America, Inc., Order (issued February 18, 2009); Case 03-C-1361, FreedomStarr Communications, Inc. and AmericanFone, LLC, Order (issued January 23, 2004).

[15] See, e.g., NRG 2007 Ruling; Case 05-E-1582, NRG Energy Inc. and NRG Northeast Generating LLC, Declaratory Ruling on Review of an Intra-Corporate Dissolution Transaction (issued January 26, 2006) (NRG 2006 Ruling; collectively, with the NRG 2007 Ruling, the NRG Rulings); Case 17-M-0735, Sithe/Independence Power Partners, L.P. et al., Declaratory Ruling on Transfer and Making Other Findings (issued February 27, 2018) (SIPP Ruling).

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."[16] For similar reasons, the Commission has found that eliminating a holding company from an ownership structure upstream from lightly-regulated entities does not amount to a transfer under PSL §70.[17] The finding that no further regulatory review is needed for such transactions, however, remains subject to examination of whether they present a risk of market power or harm to captive ratepayers. If either risk is present, then further review would be needed.

The intra-corporate transfers described in the Petition fall squarely within this precedent as they would: (a) insert a new holding company, Generational Power, between Fortistar Projects and its subsidiaries; (b) eliminate Fortistar Castleton LLC, thereby leaving Castleton Holdings as the direct owner of Castleton; (c) eliminate the holding company LEA Holdings; and, (d) merge several affiliated companies into LEA LP 1. 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 shares of the indirect owners will remain the same. Moreover, the reorganization would not create the potential for the exercise of market power, as the mere creation or elimination of the holding company cannot enhance the ability of the LEA Facility and Castleton Facility to exercise either horizontal or vertical market power. As a result, the restructuring does not pose the potential for harm

[16] NRG 2007 Ruling at 3-4.

[17] Case 05-E-1582, NRG Energy Inc. and NRG Northeast Generating LLC, Declaratory Ruling on Review of an Intra-Corporate Dissolution Transaction (issued January 26, 2006) (NRG 2006 Ruling; collectively, with the NRG 2007 Ruling, the NRG Rulings).

to captive ratepayer interests. Accordingly, these intra-corporate transactions fall within the ambit of the NRG Rulings and the SIPP Ruling, where it was decided that intra-corporate transactions that do not affect ultimate ownership fall outside the scope of PSL §70 and §83.

Lightened Regulation

Petitioners are reminded that, under lightened regulation, they will remain subject to the PSL with respect to matters such as annual reporting,[18] enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders.[19] Included among those requirements are the obligations to give notice of generation retirements,[20] 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.[21] PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will apply immediately if Petitioners, and/or any affiliate or subsidiary thereof, will market electric energy to retail customers in New York.

---

[18] 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.

[19] 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).

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

[21] 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).

The Commission finds, declares, and orders:

1. The financing arrangements described in the Petition filed in this proceeding, and discussed in the body of this Order, shall be approved under Public Service Law Sections 69 and 82, up to a maximum amount of $200 million, subject to the discussion in the body of this Order.

2. To the extent discussed in the body of this Order, no further reviews will be conducted under Public Service Law Sections 70 and 83 of the proposed transfers of indirect and passive interests in Lockport Energy Associates, L.P. and Castleton Power, LLC, as described in the Petition and discussed in the body of this Order.

3. To the extent discussed in the body of this Order, no further reviews will be conducted of the proposed intra-corporate transactions described in the Petition under Public Service Law Sections 70 and 83.

4. This proceeding shall be closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary