

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on October 18, 2018

COMMISSIONERS PRESENT:

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

CASE 18-E-0564 - Petition of Noble Altona Windpark, LLC, Noble Bliss Windpark, LLC, Noble Chateaugay Windpark, LLC, Noble Ellenburg Windpark, LLC., Noble Wethersfield Windpark, LLC, and Zephyr Wind Energy, LLC for a Declaratory Ruling That Further Review of a Transfer of Upstream Ownership Interests is Not Required, or, in the Alternative, for Expedited Approval of the Transfer Pursuant to Section 70.

DECLARATORY RULING ON TRANSFER AND MAKING OTHER FINDINGS

(Issued and Effective October 19, 2018)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on August 31, 2018 (Petition), Noble Altona Windpark, LLC (Noble Altona), Noble Bliss Windpark, LLC (Noble Bliss), Noble Chateaugay Windpark (Noble Chateaugay), Noble Clinton Windpark I, LLC (Noble Clinton), Noble Ellenburg Windpark, LLC (Noble Ellenburg), and Noble Wethersfield Windpark, LLC (Noble Wethersfield) (collectively, the Noble Wind Companies), and Zephyr Wind Energy, LLC (Zephyr) (collectively with the Noble Wind Companies, the Petitioners) requested issuance of a declaratory ruling that Public Service Commission (Commission) approval is not needed under Public Service Law (PSL) §70 with respect to a proposed transfer of indirect,

upstream interests in the Noble Wind Companies to Zephyr. The Noble Wind Companies own wind generation facilities with an aggregate capacity of approximately 612 MW, and are subject to lightened regulatory regimes.¹ The Petition requests confirmation that these regimes will continue after the proposed transaction is consummated.

Responses to the Petition were due within the 21-day period prescribed under the Commission's Rules of Procedure, contained in 16 NYCRR §8.2(c). No comments were received by the deadline, which expired on September 21, 2018. In this ruling, the Commission determines that no further review under the PSL is warranted for the proposed transaction. The Commission also confirms that the existing lightened regulatory regimes previously granted to the Noble Wind Companies will continue.

¹ Case 05-E-1634, Noble Clinton Windpark I, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued October 19, 2006); Case 05-E-1633, Noble Ellenburg Windpark, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued November 9, 2006); Case 06-E-0135, Noble Bliss Windpark, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued November 9, 2006); Case 06-E-0216, Noble Altona Windpark, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued November 9, 2016); Case 07-E-0257, Noble Chateaugay Windpark, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued November 19, 2007); Case 07-E-0258, Noble Wethersfield Windpark, LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing for Lightened Regulation (issued December 18, 2007) (collectively, the Regulation Orders).

THE PETITION

The Noble Wind Companies

Noble Altona

Petitioners explain that Noble Altona owns and operates the Altona Project, an approximately 97.5 MW wind energy facility located in Altona, New York. The Altona Project, Petitioners continue, is interconnected with transmission facilities owned by the New York Power Authority (NYPA) and sells its output into the wholesale markets administered by the New York Independent System Operator, Inc. (NYISO). Petitioners aver that Noble Altona is wholly-owned by Noble Environmental Power 2008 Hold Co., LLC (2008 HoldCo) which, in turn, is wholly-owned by Noble Environmental Power 2008 Hold Co. Prime, LLC (Noble 2008 Prime) and EFS Noble II, LLC (EFS Noble II).

Noble Bliss

Petitioners explain that Noble Bliss owns and operates the Bliss Project, an approximately 100.5 MW wind energy facility located in Eagle, New York. The Bliss Project, Petitioners continue, is interconnected with transmission facilities owned by the Village of Arcade, New York, and its output is sold into the NYISO markets. Petitioners aver that Noble Bliss is wholly-owned by Noble Environmental Power 2006 Hold Co., LLC (2006 HoldCo) which, in turn, is wholly-owned by Noble Environmental Power 2006 Hold Co. Prime, LLC (Noble Prime) and EFS Noble Holdings, LLC (EFS Noble).

Noble Chateaugay

Petitioners explain that Noble Chateaugay owns and operates the Chateaugay Project, an approximately 100.5 MW wind energy facility located in Chateaugay, New York. The Chateaugay Project, Petitioners continue, is interconnected with transmission facilities owned by NYPA and its output is sold

into the NYISO markets. Petitioners aver that Noble Chateaugay is wholly-owned by 2008 HoldCo.

Noble Clinton

Petitioners explain that Noble Clinton owns and operates the Clinton Project, an approximately 100.5 MW wind energy facility located in Clinton, New York. The Clinton Project, Petitioners continue, is interconnected with transmission facilities owned by NYPA and its output is sold into the NYISO markets. Petitioners aver that Noble Clinton is wholly-owned by 2006 HoldCo.

Noble Ellenburg

Petitioners explain that Noble Ellenburg owns and operates the Ellenburg Project, an approximately 81 MW wind energy facility located in Ellenburg, New York. The Ellenburg Project, Petitioners continue, is interconnected with transmission facilities owned by NYPA and its output is sold into the NYISO markets. Petitioners aver that Noble Ellenburg is wholly-owned by 2006 HoldCo.

Noble Wethersfield

Petitioners explain that Noble Wethersfield owns and operates the Wethersfield Project, an approximately 126 MW wind energy facility located in Wethersfield, New York. The Wethersfield Project, Petitioners continue, is interconnected with transmission facilities owned by New York State Electric and Gas Corporation and its output is sold into the NYISO markets. Petitioners aver that Noble Clinton is wholly-owned by 2008 HoldCo.

Noble Wind Company Ownership

Noble Prime and EFS Noble

Petitioners aver that Noble Prime and EFS Noble hold the Class B managing and Class A non-voting membership

interests, respectively, in 2006 HoldCo, thus accounting for all of the equity interests in 2006 HoldCo.

Noble 2008 Prime and EFS Noble II

Petitioners aver that Noble 2008 Prime and EFS Noble II hold the Class B managing and Class A non-voting membership interests, respectively, in 2008 HoldCo, thus accounting for all of the equity interests in 2008 HoldCo.

Noble Environmental Power, LLC

Petitioners aver that Noble Environmental Power, LLC (Noble Environmental) and Noble 2008 Prime are wholly-owned subsidiaries of Noble Environmental which, in turn, is wholly-owned by Paragon Noble LLC (Paragon Noble). According to Petitioners, Paragon Noble is a special purpose entity established with funds controlled by MSD Capital, L.P. (MSD), which holds more than 90% of the Paragon Noble interests.

Zephyr Wind Energy, LLC

According to Petitioners, Zephyr will be controlled by Cogentrix Zephyr Holdings, L.L.C. (Cogentrix Zephyr) after the proposed transaction is consummated. Petitioners aver that Cogentrix Zephyr might own Zephyr directly, or indirectly through one or more special purpose entities created for the sole purpose of holding a Zephyr equity interest.

Petitioners explain that, after the proposed transaction is effectuated, Carlyle Power CPP II Zephyr, L.L.C. (Carlyle Zephyr) and Carlyle Power Partners II-C, L.P. (CPP II-C) will be the sole members of Cogentrix Zephyr. Carlyle Zephyr, Petitioners continue, will own a majority of the membership interests and will hold the right to designate a majority of the Cogentrix Zephyr board members. Petitioners aver that Cogentrix Zephyr and CPP II-C (the CPP II Fund Vehicles) are investment funds sponsored and managed by The Carlyle Group, L.P. (Carlyle Group) or its affiliates.

CPP II General Partner, L.P. (CPP II GP), Petitioners continue, is the general partner of both Cogentrix Zephyr and CPP II-C. Petitioners aver that the CPP II GP general partner is TC Group II, L.L.C., whose managing member is TC Group Sub L.P. (TC Group Sub). TC Group, L.L.C. (TC Group), a wholly-owned subsidiary of Carlyle Holdings I L.P. (Holdings I) is the TC Group general partner. Petitioners explain that the Holdings I general partner is Carlyle Holdings I GP Sub L.L.C., a wholly-owned subsidiary of Carlyle Holdings I GP, Inc. which, in turn, is a direct subsidiary of Carlyle Group.

Petitioners aver that Carlyle Group is a publicly-traded global alternative investment management firm. Although no unitholder of Carlyle Group owns 10% or more of its publicly traded units, Petitioners continue, three individuals (William E. Conway, Jr., Daniel A. D'Aniello, and David Rubinstein) (collectively, the Founders) each own more than 10% of Carlyle Group Management LLC, which is the Carlyle Group general partner. Petitioners aver that the Founders do not directly or indirectly own or control a 10% or greater voting interest in any electric generation or transmission facilities, any public utility with a franchised service territory, or any essential inputs to electricity products or production, although their affiliates might.

Petitioners explain that Carlyle Group is affiliated with two power marketers. SEPG Energy Marketing Services, LLC (SEMS) and Nautilus Power, LLC (Nautilus Power), Petitioners continue, were authorized by the Federal Energy Regulatory Commission (FERC) to make wholesale power sales at market-based rates in New York. According to Petitioners, neither SEMS nor Nautilus Power directly own or control any electric generation facilities, or purchase capacity or energy from an unaffiliated third party under a long-term firm agreement. Petitioners note,

however, that SEMS and Nautilus Power may market generation capacity owned or controlled by their affiliates through Carlyle Group.

According to Petitioners, the Carlyle Group is affiliated with entities that own or control generation facilities outside, but not within, the NYISO control area. The Carlyle Group is affiliated with approximately 1,313 MW and approximately 1,855 MW of generating capacity in the neighboring ISO-New England Inc. (ISO-NE) and PJM Interconnection, L.L.C. (PJM) markets, respectively.

Petitioners aver that Carlyle Group is affiliated with Essential Power Rock Springs, LLC (Rock Springs), which currently owns a 50% interest in limited transmission facilities needed to interconnect the Rock Springs facility to the PJM transmission system. According to Petitioners, these transmission facilities are controlled by PJM and do not transmit energy into New York. Otherwise, Petitioners continue, the Carlyle Group and its affiliates do not own a 10% or greater voting interest in, or control, any transmission facilities other than those needed to interconnect generation facilities to the grid.

The Carlyle Group also is affiliated with entities that own or control potential inputs to electricity products and production. Targe Energy LLC (Targe Energy) is one such affiliated interest. Petitioners explain that Targe Energy, through its subsidiaries, operates coal and limestone mines in Pennsylvania. Carlyle Group, Petitioners aver, is not affiliated with any public utility with a franchised electric service territory.

The Proposed Transaction

Petitioners explain that, on August 31, 2018, Noble Prime, EFS Noble, Noble 2008 Prime, and EFS Noble II executed an

agreement to sell 100% of their respective interests in 2006 HoldCo and 2008 HoldCo to Zephyr. After the proposed transaction is consummated, Petitioners continue, Zephyr will own 100% of the Class A and Class B membership interests in 2006 HoldCo and 2008 HoldCo and, therefore, indirectly will hold 100% of the Noble Wind Companies membership interests. Noble Prime, EFS Noble, Noble 2008 Prime, and EFS Noble II will cease to own any interest in the Noble Wind Companies. Petitioners aver that the proposed transaction is conditioned on Commission approval.

Petitioners maintain that they have satisfied the presumption established in the Wallkill Order.² 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.

The proposed transaction, Petitioners continue, poses no risk of horizontal or vertical market power,³ or other harm to captive utility ratepayers. Petitioners explain that the proposed transaction does not present a risk of horizontal market power because Zephyr and the Noble Wind Companies currently do not operate within the same geographic markets. Neither Zephyr nor its affiliates, Petitioners continue, own or control any generation in New York. Petitioners aver that

² Case 91-E-0950, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Order).

³ An entity's horizontal market power relates to its share of power plants (market share) in relation to the total size of power plants participating in the market. Vertical market power may arise where a single firm owns both generation and delivery assets, and the delivery assets can be used to give a preference to the affiliated generation assets.

Zephyr will acquire approximately 612 MW of generation in New York, which is less than 2% of the total statewide generating capacity. Petitioners cite recent Commission precedent finding that a higher ownership level does not raise horizontal market power concerns.⁴

Petitioners also explain that the proposed transaction will not create opportunities to leverage assets held in the neighboring ISO-NE and PJM markets to exercise market power in New York. According to Petitioners, Zephyr is affiliated with approximately 4.2% and 1.0% of the total generating capacity in the ISO-NE and PJM control areas, respectively. Petitioners contend that these ownership levels are de minimis and do not raise market power concerns.⁵

Petitioners assert that the proposed transaction will not present any vertical market power issue in the NYISO control area, or create opportunities to exercise vertical market power in New York. With one exception, Petitioners explain, Zephyr, its affiliates, and the Noble Wind Companies own only the limited transmission facilities in New York and adjoining markets that are needed to interconnect their generation facilities to the grid. The exception pertains to the Rock Springs transmission facilities, which Petitioners claim do not transmit energy into New York and are under PJM's operational control. Moreover, Petitioners continue, none of the Joint Petitioners or their affiliates own or control any essential input to electricity generation or products in the NYISO control area. For the foregoing reasons, Petitioners maintain that the

⁴ Case 17-M-0735, Sithe/Independence Power Partners, L.P. et al., Declaratory Ruling on Transfer and Making Other Findings (issued February 27, 2018) (Sithe Ruling).

⁵ Citing Sithe Ruling.

proposed transaction will not have any adverse effect on vertical market power.

Petitioners thus request that further review of the proposed transaction be eschewed. If the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transaction pursuant to PSL §70.

Finally, Petitioners request that the lightened ratemaking regulatory regime previously granted to the Noble Wind Companies for owning and operating their respective wind generation facilities be continued after the proposed transaction is consummated. Petitioners explain that the proposed transaction will not impact the facilities' operations as wholesale power plants, or otherwise effectuate any change that might warrant a modification to their regulatory treatment.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. These 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 §70 transfer requests 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.⁶ The Commission has determined that full regulatory review is not needed for transfers of indirect, upstream ownership interests in lightly-regulated electric, gas, and steam corporations unless the proposed transfer presents a

⁶ See, e.g., Wallkill Order.

risk of market power or harm to captive ratepayers (i.e., the Wallkill Presumption).⁷

The Commission is authorized to issue a declaratory ruling with respect to: (i) the applicability of any rule or statute enforceable by it to any person, property, or state of facts; and (ii) whether any action by it should be taken pursuant to a rule. The Commission also may decline to issue such a declaratory ruling. This authority is expressly established by State Administrative Procedure Act §204 and governed by the Commission's Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute. Declaratory rulings are not "actions" within meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations (see 16 NYCRR §7.2) and, therefore, they may be issued without further SEQRA review.

DISCUSSION AND CONCLUSION

For purposes of the proposed transaction, 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.⁸ No such potential is apparent here, based on the facts stated in the Petition.

The proposed transaction does not pose the potential for the exercise of horizontal market power. Zephyr and its

⁷ See, e.g., Case 17-M-0735, Sithe/Independence Power Partners, L.P. et al., Declaratory Ruling on Transfer and Making Other Findings (issued February 27, 2018); Case 17-E-0620, AP Cricket Valley Holdings I Inc. et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).

⁸ See Wallkill Order.

affiliates do not directly or indirectly hold any generating capacity in New York other than the potential interest in the Noble Wind Companies that Zephyr seeks to acquire. The Noble Wind Companies participate in the competitive wholesale markets administered by the NYISO, and comprise a de minimis portion of total statewide generating capacity. Consequently, Zephyr will not be able to manipulate operations of generation facilities owned by the Noble Wind Companies to exercise market power in the NYISO markets.

The proposed transaction similarly does not present an opportunity for Zephyr or its affiliates to leverage generation owned in the ISO-NE and PJM markets to manipulate prices in New York. Petitioners demonstrated that the proposed transaction, when consummated, would not increase the de minimis amount of generation controlled by Zephyr and its affiliates in the adjoining markets.

Furthermore, the proposed transaction does not present a vertical market power risk. Neither Zephyr nor its affiliates exercise control over electric delivery facilities other than interconnections, or have a substantial influence over inputs, like fuel, into the production of generation supply within New York.

Finally, the Noble Wind Companies will continue operating their facilities in wholesale competitive markets and will not have captive utility ratepayers. The proposed transaction, therefore, does not present a risk of harm to such ratepayers. Accordingly, based on the facts and circumstance presented in the Petition, the proposed transaction does not require further review under PSL §70.

Lightened Regulation

After the proposed transaction is consummated, lightened regulation of the Noble Wind Companies will continue, as described in prior orders.⁹ Petitioners are reminded that, under lightened regulation, they will remain subject to the PSL with respect to matters such as annual reporting,¹⁰ enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders. 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 interests, will apply based on affiliations with power marketers.

The Commission finds and declares:

1. No further review will be conducted of the proposed transaction described in the petition filed in this proceeding and discussed in the body of this ruling.

⁹ See n.1 (Regulation Orders).

¹⁰ 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.

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).

2. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary