STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

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Verified Petition of Canandaigua Power Partners, LLC and Canandaigua Power Partners II, LLC for a Declaratory Ruling Regarding Corporate Restructuring and Transfer of Stock, or, in the Alternative, an Approval Pursuant to Section 70 of the Public Service Law	Case 20-E-

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VERIFIED JOINT PETITION FOR DECLARATORY RULING
OR APPROVAL UNDER SECTION 70 OF THE PUBLIC SERVICE LAW

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Dated: May 4, 2020

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I. INTRODUCTION

Pursuant to Part 8 of the Rules and Regulations of the New York State Public Service Commission ("Commission"), 16 NYCRR Part 8, Canandaigua Power Partners, LLC ("CPP") and Canandaigua Power Partners II, LLC ("CPP II") (collectively, "Petitioners"), the direct owners of two wind energy generation projects subject to the Commission's lightened regulation[1] and which are indirectly wholly-owned by TerraForm Power, Inc. ("TerraForm"), hereby petition the Commission for a declaratory ruling that proposed changes in their upstream ownership require no further review under Section 70 of the New York Public Service Law ("PSL"). Specifically, certain affiliates of Brookfield Asset Management Inc. ("BAM") propose to acquire the Class A common stock of TerraForm not already owned by other affiliates of BAM and complete an associated corporate restructuring (the "Transaction"). In the alternative, Petitioners request that the Commission approve the Transaction under PSL § 70 and any other statutory or regulatory provision deemed applicable.

[1] Case 07-E-0138, *Canandaigua Power Partners, LLC*, Order Granting Certificates of Public Convenience and Necessity, Providing for Lightened Regulation, and Approving Financing (Aug. 16, 2007); Case 07-E-1003, *Canandaigua Power Partners II, LLC*, Order Providing for Lightened Regulation and Approving Financing (Jan. 17, 2008) (collectively, the "CPP Regulation Orders").

BAM, through two affiliates, BBHC Orion Holdco L.P. and Orion U.S. Holdings 1 L.P. (together, the "BAM Stockholders"), own approximately 61.5% of the Class A common stock of TerraForm. The remaining approximately 38.5% of the Class A common stock of TerraForm (*i.e.*, the "Public Shares") is widely dispersed among public investors ("Public Stockholders"), none of which owns or controls (together with its associate or affiliate companies) 10% or more of the Class A common stock of TerraForm. In addition to its indirect, majority ownership interest in CPP and CPP II, BAM indirectly owns Carr Street Generating Station, L.P. ("Carr Street"), the owner of a gas-fired generation facility subject to the Commission's lightened regulation.[2]

No competitive issues are raised by the Transaction nor will it cause any harm to the interests of captive utility ratepayers. The Commission determined that BAM's ownership of a majority, controlling interest in TerraForm will have no adverse effect on market concentration in New York and does not present a vertical market power risk.[3] BAM's proposed acquisition of the remaining approximately 38.5% of the Class A common stock of TerraForm and its proposed corporate restructuring will not increase BAM's market share of generating capacity in New York.[4] Thus, the Commission should make the same ruling it made in its 2017 Order,

[2] Case 98-E-1680, *Carr Street Generation Station, L.P.*, Order Providing for Lightened Regulation (Apr. 23, 1999). As described herein, BAM also indirectly owns more than 70 hydroelectric facilities in New York that are not subject to the Commission's jurisdiction. BAM also indirectly owns a minority interest in a cogeneration facility in New Jersey that supplies power into New York that is not subject to the Commission's jurisdiction.

[3] Case 17-E-0308, *Canandaigua Power Partners, LLC et al.*, Declaratory Ruling on Transactions (Sept. 19, 2017) ("2017 Order") at 11–12.

[4] The market concentration resulting from BAM's acquisition of a controlling interest in TerraForm in 2017 that was reported to the Commission and was the basis for the Commission's determination in its 2017 Order that it will not raise market power concerns conservatively assumed BAM indirectly owned 100% of TerraForm's generating capacity.

determining that Petitioners have satisfied the Wallkill Presumption and no further review of the Transaction is required.[5]

Finally, Petitioners respectfully request expeditious action on this Petition and urge the Commission to issue an order no later than its June 11, 2020 session. Commission approval of this Petition at the soonest possible date is appropriate as the Transaction merely increases BAM's indirect ownership interest in CPP and CPP II in which it already holds a controlling interest.

II. BACKGROUND

A. The Parties

1. Terraform

TerraForm indirectly owns and operates a portfolio of utility-scale wind and solar projects, distributed generation, and behind-the-meter solar projects throughout the United States, as well as Canada, the United Kingdom, Spain, Portugal, Chile, and Uruguay. In New York, TerraForm indirectly owns CPP and CPP II, which own and operate 87.5 MW and 37.5 MW wind-powered generating facilities, respectively, in Steuben County, New York. TerraForm indirectly owns Niagara Wind Power, LLC ("Niagara Wind") and Erie Wind, LLC ("Erie Wind"). Niagara Wind and Erie Wind together own and operate 35 MW of wind generation in Erie County, New York.[6]

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[5] Petitioners' affiliates submitted an application to the Federal Energy Regulatory Commission requesting approval of the Transaction under Section 203 of the Federal Power Act on April 24, 2020. *See* Docket No. EC20-58-000, *Bishop Hill Energy LLC* et. al., Application for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Action (Apr. 24, 2020).

[6] TerraForm indirectly owns generating capacity in markets adjacent to the New York Independent System Operator, Inc. ("NYISO") market. In addition, TerraForm also indirectly owns certain Qualifying Facilities ("QF"), as that term is defined in the Public Utility Regulatory Policies Act of 1978 ("PURPA"), that range in size and configuration from less than one MW residential rooftop solar photovoltaic ("PV") projects that are located behind-the-meter, to 20 MW solar PV projects that sell to utilities or commercial and industrial buyers in New York and adjacent markets. The generating capacity associated with these QFs is committed to unaffiliated third-party

TerraForm currently is a publicly traded entity listed on the NASDAQ Global Select Market exchange under the symbol TERP. Two affiliates of BAM, BBHC Orion Holdco L.P. and Orion U.S. Holdings 1 L.P., own approximately 61.5% of the Class A common stock of TerraForm.[7] BBHC Orion Holdco L.P. is a wholly-owned indirect subsidiary of Brookfield Renewable Partners L.P., which is described in section II.A.2 below. Orion U.S. Holdings 1 L.P. is managed and controlled by Orion US GP LLC, which is a wholly-owned indirect subsidiary of BAM. The remaining approximately 38.5% of the Class A common stock of TerraForm is widely dispersed among public investors, none of which owns or controls (together with its associate or affiliate companies) 10% or more of the Class A common stock of TerraForm. In anticipation of the Transaction, TerraForm has created a new wholly-owned subsidiary, TerraForm Power NY Holdings, Inc. ("Holdings").

2. BAM

BAM is an Ontario corporation with its principal place of business in Toronto, Ontario, Canada. BAM is a leading global alternative asset manager with over US $540 billion in assets under management across real estate, infrastructure, renewable power, private equity, and credit. BAM is a publicly traded company listed on the Toronto Stock Exchange and New York Stock Exchange under the symbols BAM.A and BAM, respectively.

In addition to TerraForm and Holdings, the relevant affiliates of BAM involved in the Transaction are:

- Brookfield Renewable Partners L.P. ("BEP"), a Bermuda limited partnership that is publicly traded on the Toronto Stock Exchange and New York Stock Exchange, under the symbols BEP.UN and BEP, respectively. BAM's wholly-owned

purchasers. The committed capacity is included in the market concentrations indicated herein to simplify the analysis.

[7] Following acquisition of its majority controlling interest in TerraForm in accordance with the 2017 Order on September 19, 2017, the BAM Stockholders increased their ownership to the current 61.5% interest through a series of incremental transactions.

subsidiary Brookfield Renewable Power Inc. ("BRPI") indirectly owns the 0.01% general partnership interest in BEP and has sole responsibility and authority for the management and control of BEP.[8] The limited partnership interests in BEP ("BEP LP Units") are held by BRPI and public investors. No individual public investor (together with its associate or affiliate companies) holds 10% or more of the BEP LP Units. In addition, the public investors in BEP are passive limited partners that: (i) cannot take part in the management or control of the activities of BEP; (ii) do not have authority to act or bind BEP or its affiliates; (iii) cannot manage or control the day to day operations of BEP or its affiliates; and (iv) are not entitled to vote on matters related to BEP, except for limited consent rights in respect of material amendments to the limited partnership agreement that adversely affect the public investors and with respect to a sale of all or substantially all of the assets held by BEP.

- Brookfield Renewable Corporation ("BEPC"), a newly created corporation incorporated under the laws of British Columbia that will be publicly listed on the Toronto Stock Exchange and New York Stock Exchange. BEPC currently is a wholly-owned indirect subsidiary of BEP.

- 2252876 Alberta ULC (Acquisition Sub), a newly created unlimited liability corporation incorporated under the laws of Alberta and a wholly-owned direct subsidiary of BEP.

Through various affiliates, BAM currently indirectly controls approximately 61.5% of the voting interests in TerraForm through the BAM Stockholders' ownership of Class A common stock in TerraForm. As a result, TerraForm's indirectly owned generation in New York is already affiliated with BAM. In addition to TerraForm's generation, BAM is affiliated with a number of electric generation facilities located throughout the United States.

In addition to the generating capacity indirectly owned through Terraform in New York, BAM indirectly owns and controls Carr Street, Erie Boulevard Hydropower, L.P. ("Erie Boulevard"), FH Opco LLC ("FH Opco"), and West Delaware Hydro Associates L.P. ("West Delaware").

- Carr Street. Carr Street owns and operates the East Syracuse Station, an approximately 88.2 MW gas-fired combined-cycle cogeneration facility located in East Syracuse, New York.

[8] BAM also provides management services to BEP under a long-term Master Services Agreement.

- Erie Boulevard. Erie Boulevard directly owns and operates 73 hydroelectric facilities in the State of New York with a combined generating capacity of approximately 671.5 MW. Erie Boulevard also owns interests in FH Opco and West Delaware, as described below.

- FH Opco. FH Opco owns and operates Glens Falls, a 14.79 MW QF located in Glens Falls, New York.

- West Delaware. West Delaware owns and operates the West Delaware Project, a 7.0 MW QF in New York.

BAM indirectly owns an approximate 9% interest in the Linden Cogeneration Facility in Linden, New Jersey, which supplies approximately 796 MW to the NYISO market.[9] Including generating capacity owned through TerraForm and conservatively including 100% of the Linden Cogeneration Facility's NYISO capacity, BAM is affiliated with approximately 1,764 MW in the NYISO market.

BAM is also affiliated with generating capacity in markets adjacent to the New York Independent System Operator, Inc. Including generating capacity owned through TerraForm, BAM is affiliated with approximately 2,380 MW of generating capacity in the ISO-New England, Inc. ("ISO-NE") market and 1,360 MW in the PJM market.

B. The Transaction

The Transaction will be consummated through a series of individual transactions. First, TerraForm will merge with and into its newly formed subsidiary, Holdings, with Holdings as the surviving entity ("Reincorporation Merger"). Holdings will have up to three classes of voting common stock: (i) Class A common stock held by the BAM Shareholders in the same proportion to their current shares of TerraForm (61.5%), (ii) Class B common stock held by Public

[9] In 2019, BAM acquired an approximate 62% interest in Oaktree Capital Group, LLC, which indirectly owns a 14% interest in Cogen Technologies Linden Venture, L.P. and East Coast Power Linden Holding, L.L.C., the owners of the Linden Cogeneration Facility, a federal Qualifying Facility in New Jersey that is not subject to the Commission's jurisdiction. In addition to the 796 MW supplied into the NYISO market, the Linden Cogeneration Facility also supplies an additional 158 MW into the PJM Interconnection, L.L.C. ("PJM") market for sale to an off-taker pursuant to a long-term power sales agreement.

Stockholders that do not elect to receive Class C common stock in Holdings ("Non-Electing Investors"), and (iii) Class C common stock held by Public Stockholders that elect to receive Class C stock ("Electing Investors").[10] Each Non-Electing Investor will receive Class B common stock in Holdings equal to the number of Public Shares held by such Non-Electing Investor. Similarly, each Electing Investor will receive Class C common stock in Holdings equal to the number of Public Shares held by such Electing Investor.

The Reincorporation Merger will be immediately followed by binding share exchanges in which (i) BEPC will acquire 100% of the Class B common stock of Holdings in exchange for Class A shares of BEPC and cash in lieu of fractional Class A shares of BEPC ("BEPC Exchange"), and (ii) Acquisition Sub will acquire 100% of the Class C common stock of Holdings in exchange for non-voting BEP LP Units and cash in lieu of fractional BEP LP Units ("BEP Exchange," and together with the BEPC Exchange, the "Share Exchanges").[11] The Class A shares of BEPC and the BEP LP Units issued to the Non-Electing Investors and the Electing Investors, respectively, together with cash in lieu of fractional shares or units, as the case may be, are the consideration for the Transaction.

Prior to the BEPC Exchange, BEPC will complete a corporate restructuring. BEPC's articles will be amended such that BEPC will have three classes of shares: Class A shares, Class B shares, and Class C shares. By their terms, BEPC Class A shares will, in aggregate, represent 25% of its voting securities regardless of the number of Class A shares outstanding from time to time, and Class B shares will, in aggregate, represent 75% of its voting securities regardless of the number of Class B shares outstanding from time to time. BEPC Class C shares are non-

[10] All three classes of common stock of Holdings will have equal voting rights.

[11] The BAM Stockholders' approximately 61.5% ownership of Holdings will not be affected by the Share Exchanges.

voting, except in limited circumstances prescribed by applicable law. A portion of the Class A shares will be held by public investors, including Non-Electing Investors, none of which will hold 10% or more of the outstanding voting securities of BEPC (in aggregate together with its associate or affiliate companies). BAM, through BRPI, will indirectly own the remaining Class A shares, which are anticipated to represent approximately 40% to 60% of the outstanding Class A shares, depending on the number of Class A shares outstanding, which will depend on the number of Class A shares issued to Non-Electing Investors. BEP will indirectly own 100% of the Class B shares of BEPC. Therefore, BEP will in no case control less than 75% of the voting securities of BEPC. As a result, BAM, indirectly through BRPI and BEP, is expected to control approximately 85% to 90% of the voting securities of BEPC, depending on BAM's indirect ownership of Class A shares of BEPC, as described above.

The BEP Exchange will not result in a change in control of BEP. The BEP LP Units acquired by the Electing Investors as a result of the BEP Exchange will remain passive, non-voting interests with only limited economic consent rights as described above. BEP will continue to be exclusively managed and controlled by BRPI. In addition, BAM, through BEP, will retain 100% of the voting control of Acquisition Sub.

As a result, following the Share Exchanges, BAM, indirectly through BRPI's and BEP's interests in BEPC, will indirectly control approximately 85% to 90% of the Class B common stock in Holdings, if any. BAM, indirectly through BEP's interest in Acquisition Sub, will indirectly control 100% of the Class C common stock in Holdings, if any. BAM also will continue to indirectly control 100% of the Class A common stock in Holdings held by the BAM Stockholders. Therefore, BAM's indirect voting control over Holdings following the

Transaction is expected to be (i) approximately 94%, if there are no Electing Investors,[12] or (ii) 100%, if there are no Non-Electing Investors.[13]

There will be no change in the day-to-day operations of any of the generation facilities indirectly owned by BAM as a result of the proposed Transaction.

III. THE COMMISSION SHOULD DECLARE THAT THE WALLKILL PRESUMPTION APPLIES TO THE TRANSACTION AND DECLINE TO FURTHER REVIEW IT UNDER PSL § 70 OR, IN THE ALTERNATIVE, APPROVE IT UNDER PSL § 70.

PSL § 70 requires written consent of the Commission for transfer of a sufficiently controlling interest in an electric plant, including ownership transfer at a holding company (*i.e.*, upstream) level.[14] However, in the Wallkill Order, the Commission established a lightened regulatory regime for wholesale generators in New York under which PSL § 70 review of changes in ownership is not required.[15] In the Wallkill Order, the Commission decided that under this lightened regulatory regime, 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 generation facilities unless there was a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption (the "Wallkill Presumption"). The Commission granted CPP and CPP II such lightened regulation and

[12] If all Public Stockholders are Non-Electing Investors that receive Class A shares in BEPC, Holdings will not issue Class C common stock and BAM will indirectly control 100% of the Class A common stock and approximately 85%–90% of the Class B common stock of Holdings.

[13] If all Public Stockholders are Electing Investors that receive BEP LP Units, Holdings will not issue Class B common stock and BAM will indirectly control 100% of the Class A common stock and 100% of the Class C common stock of Holdings.

[14] *See, e.g.*, Case 07-E-1385, *Calpine Corp. and LS Power Development*, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (Jan. 22, 2008), at 15.

[15] Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (Apr. 11, 1994) ("Wallkill Order"); *see also* Case 14-E-0195, *Bayonne Energy Center, LLC et al.*, Order Modifying Lightened Ratemaking Regulation Authorizations and Approving Financing and Declaratory Ruling on a Transfer Transaction (Aug. 15, 2014).

afforded them the Wallkill Presumption for transfers of ownership interests in its upstream parent entities.[16]

In past decisions, the Commission has determined that the Wallkill Presumption applies to transactions involving upstream changes in control of lightly regulated entities and has declined to review those transactions under PSL § 70 when it has determined that the transactions would not provide the petitioners with the ability to exercise horizontal or vertical market power or to harm the interests of captive New York ratepayers.[17] As discussed more fully above, the Transaction involves a change in the ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generation facilities. Petitioners request that the Commission follow its precedent, continue to afford CPP and CPP II the Wallkill Presumption, and issue a declaratory ruling stating that the Commission need not further review the Transaction described herein under PSL § 70.

The Transaction does not create the potential for the exercise of horizontal or vertical market power or harm to the interests of captive utility ratepayers. As the Commission determined in the 2017 Order, BAM's ownership of a majority, controlling interest in TerraForm will have no adverse effect on market concentration in New York and does not present a vertical market power risk.[18] BAM's proposed acquisition of the remaining approximately 38.5% of the Class A common stock of TerraForm, resulting in BAM controlling 100% of the voting interests therein, and its proposed corporate restructuring will not increase BAM's market share of

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[16] CPP Regulation Orders.

[17] *See, e.g.*, Case 12-M-0351, *Dynegy Inc. and Franklin Resources, Inc.*, Declaratory Ruling on Review of a Stock Acquisition Transaction (Sept. 14, 2012); Case 09-E-0055, *Constellation Energy Nuclear Group LLC et al.*, Declaratory Ruling on Review of a Transfer Transaction (Apr. 23, 2009); Case 06-M-0210, *Constellation Energy Group, Inc. and FPL Group, Inc.*, Declaratory Ruling on Review of Ownership Interest Transfer (July 25, 2006).

[18] 2017 Order at 11–12.

generating capacity in New York or elsewhere. After the proposed Transaction is consummated, BAM will be affiliated with the same amount of capacity in NYISO as it is currently affiliated with, 1,764 MW or approximately 4.5% of the approximately 39,000 MW of capacity installed within the NYISO market. This is only slightly more than the market concentration that the Commission ruled is inadequate to present a risk of horizontal market power in New York.[19] Similarly, the transaction would result in BAM and its affiliates being affiliated with the same amounts of capacity available in the PJM and ISO-NE markets as it is now, approximately 0.7% and 7.7%, respectively. The Commission has ruled that these amounts are insufficient to raise market power concerns because this market share is *de minimis* and is reduced further by transmission constraints that limit the amount of affiliated capacity that potentially could be imported to the NYISO market.[20] Finally, as the Commission ruled in its 2017 Order, the proposed Transaction does not present a vertical market power risk because neither BAM 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.[21]

Finally, the Transaction will not result in any adverse impacts to captive ratepayers in New York. There will be no change in the day-to-day operations of any of the generation owned by BAM as result of the Transaction. Thus, the Commission should make the same ruling it made in its 2017 Order, determining that Petitioners have satisfied the Wallkill Presumption and no further review of the Transaction is required. If the Commission decides to review the

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[19] *Id*. at 11. As noted, *supra*, BAM's increased market concentration in New York is not due to the Transaction, but rather to its prior acquisition of a 9% ownership interest in the 796 MW Linden Cogeneration Facility, located in New Jersey, and the conservative assumption that BAM is affiliated with 100% of the capacity of the facility.

[20] *Id*. at 11–12.

[21] *Id*. at 12.

Transaction pursuant to PSL § 70, the Commission should approve the Transaction as in the public interest for the reasons discussed above.

IV. CONCLUSION

WHEREFORE, Petitioners respectfully request that the Commission issue a declaratory ruling that no approval of the Transaction is required under PSL § 70, or, in the alternative, that further review of the Transaction is not required, or authorize the Transaction under PSL § 70, without condition, as in the public interest. Finally, Petitioners respectfully request that the Commission issue an order no later than its June 11, 2020 session.

Dated: May 4, 2020

Respectfully submitted,

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VERIFICATION

I, William Fyfe, as Authorized Representative, of Canandaigua Power Partners, LLC and Canandaigua Power Partners II, LLC, do hereby affirm that the contents of this document are true to the best of my knowledge and belief.

Signed: ______________________________

Date: May 4, 2020