STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on July 12, 2018

COMMISSIONERS PRESENT:

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

CASE 18-E-0333 – Petition of Cassadaga Wind LLC, Trireme Energy Development LLC, and Innogy Renewables US LLC for a Declaratory Ruling That Public Service Law Section 70 Does Not Apply to a Proposed Acquisition or, That No Further Review of the Acquisition is Required.

DECLARATORY RULING ON TRANSFER TRANSACTIONS

(Issued and Effective July 17, 2018)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on June 1, 2018, Cassadaga Wind LLC (Cassadaga), Trireme Energy Development LLC (Trireme), and Innogy Renewables US LLC (Innogy US) (collectively, the Petitioners) requested issuance of a declaratory ruling that the proposed transfer of indirect ownership interests in Cassadaga, which directly owns and is developing an approximately 126 MW wind electric generating facility in Chautauqua County, New York (the Project), to Innogy US does not require further review under Public Service Law (PSL) §70. Cassadaga is developing the Project pursuant to a Certificate of Environmental Compatibility and Public Need (Certificate) issued by the New York State Board on Electric Generation Siting and the Environment (Siting Board) in Case 14-F-0490 (the Certificate Proceeding).[1]

Responses to the Petition were due within the 21-day period prescribed under the Public Service Commission's (Commission) Rules of Procedure, contained in 16 NYCRR §8.2(c). Comments from Wendy Pennica, a local resident, were received by the deadline, which expired on June 22, 2018. In this ruling, the Commission determines that no further review under the PSL is warranted for the proposed transaction.

THE PETITION

Cassadaga

Petitioners explain that Cassadaga is a company that was formed to develop, own, and operate the Project. Cassadaga, Petitioners continue, currently owns the Project Certificate and development rights and plans, but does not own any assets or related facilities for any other generation project.

Petitioners aver that Terra Firma Capital Partners III, L.P. (Terra Firma III) is the ultimate corporate parent of Cassadaga. Cassadaga, Petitioners continue, was wholly-owned by EverPower Wind Holdings (EverPower) until a recent corporate reorganization placed the company under the ownership of Trireme Energy Development III LLC (Trireme III).

Innogy US

According to Petitioners, Innogy US is a subsidiary of the German company Innogy SE, which signed an agreement to acquire, from Terra Firma Capital Partners (Terra Firma Capital), all of EverPower's interests in onshore wind development within the United States. Terra Firma Capital,

[1] Case 14-F-0490, Cassadaga Wind LLC, Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions (issued January 17, 2018) (Certificate Order).

Petitioners continue, is a private equity investor based in the United Kingdom.

The Project

Petitioners explain that, when constructed, the Project will consist of up to 48 wind turbines with an aggregate generating capacity of approximately 126 MW. The turbines, Petitioners continue, will be located in the Towns of Cherry Creek, Charlotte, and Arkwright, New York.

Petitioners aver that the Certificate did not authorize them to commence Project construction. Instead, Petitioners continue, the Siting Board ordered Cassadaga to petition the Commission for a Certificate of Public Convenience and Necessity (CPCN) pursuant to PSL §68 for a license to construct and operate the Project. Petitioners report that they have not yet filed a petition seeking a CPCN.

The Proposed Transaction

Petitioners explain that a two-stage intra-corporate reorganization preceded the agreement underlying the proposed transaction. Pursuant to the reorganization, Petitioners continue, EverPower created special purpose entities wholly-owned by Trireme, which it also created. These intra-corporate transactions included the transfer of ownership interests in Cassadaga to Trireme III, while Terra Firma III remained the ultimate upstream parent of Cassadaga.

As proposed, Innogy US will acquire Trireme III by merging it into a special purpose entity owned by Innogy US. The special purpose entity will dissolve when the transfer is complete, thereby leaving Innogy US as the sole owner of Trireme III and, indirectly, Cassadaga.

Petitioners explain that Innogy US does not hold any affiliation, ownership, or control of any utility, power marketer, generating facility, or electric or gas transmission or distribution facility in the United States. Assuming that the proposed transfer is consummated, Petitioners continue, the Project would be Innogy US's first entry into the New York wholesale markets.

Petitioners contend, as an initial matter, that no regulatory review of the proposed transaction is required because PSL §70 requires Commission approval before an "electric corporation" may "transfer" "its franchise, works or system or any part of such franchise, works or system to any other person or corporation…." Petitioners note that PSL §2(13) defines an "electric corporation" broadly as any entity that owns, operates, or manages any "electric plant." Petitioners observe that PSL §2(12) defines "electric plant" as including "all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power…."

Cassadaga, Petitioners argue, is not an "electric corporation" within meaning of PSL §2(13) because it currently holds only the Certificate and certain Project designs and drawings, and certain options and other agreements to secure the real property needed to develop the Project if the Commission authorizes construction. According to Petitioners, these assets are not "electric plant" within meaning of PSL §2(13) and, therefore, Cassadaga is not an "electric corporation" because it does not own, operate, or manage electric plant. Petitioners maintain that Trireme III is not an electric corporation for similar reasons.

Petitioners also argue that regulatory review is not required because the proposed transaction does not include the "transfer" of a franchise, works, or system, or any part of same. Petitioners explain that Cassadaga has not secured any franchise relative to the Project, and the Project assets consist only of the Certificate and property rights. According to Petitioners, such assets are not "works" or "system" within meaning of PSL §70. Petitioners cite support for the proposition that (i) "works" means, in relevant part, any building or structure on land, (ii) "public works" means structures built by the government for public use and paid for by public funds, and (iii) "system" means a group of interacting or interdependent items forming a unified whole. Petitioners suggest that Cassadaga's assets are not a "works" or "system" because there currently is no building or structure, and the assets do not create a unified whole (i.e., a generating facility). Consequently, Petitioners continue, the proposed transaction cannot constitute a "transfer" that requires review under PSL §70.

Petitioners also aver that the proposed transaction does not include the transfer of stocks or bonds between electric corporations that warrants review under PSL §70(3). Innogy US, Petitioners proffer, does not own or operate any electric plant in New York and, therefore, should not be considered an electric corporation that could trigger application of this law.

If, however, the Commission determines that PSL §70 applies to the proposed transaction, then Petitioners believe 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

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

facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. According to Petitioners, the Wallkill Presumption adheres to the proposed transaction because it pertains to the transfer of upstream, indirect interests in lightly-regulated entities.

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 Innogy US entered the North American energy markets by acquiring wind farm projects from EverPower. Innogy US, Petitioners continue, does not own any electric generation or electric or gas transmission or distribution assets, or entities that can exercise control over the provision of fuels used in generation within the New York Control Area or the United States. Petitioners aver that Innogy US is not affiliated with any power marketers. According to Petitioners, the proposed transaction will not create any market power opportunities for Innogy US. Further, the Project will not serve captive utility ratepayers and, therefore, it cannot harm such ratepayers. Petitioners thus request that further review of the proposed transaction be eschewed.

Finally, Petitioners note that PSL §68 requires the Commission to make certain findings before it issues a CPCN. Petitioners argue that it would be premature to make those findings here, including with respect to Innogy US's financial fitness, because they are not seeking a CPCN at this time and

[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.

petitions regarding transfers under PSL §70 do not require such findings.

COMMENTS

Wendy Pennica noted that Petitioners failed to notify stakeholders in the Certificate Proceeding, which remains pending before the Siting Board. Ms. Pennica alleges that Petitioners intentionally filed the Petition under a separate case from the Certificate Proceeding in order to avoid notifying stakeholders that may be opposed.[4] Addressing Petitioners' arguments that PSL §70 should not apply to the proposed transaction, Ms. Pennica avers that PSL Article 10 does not waive the requirement that the Commission must review and approve such transfers.

LEGAL AUTHORITY

Pursuant to PSL §70, the Commission must review and approve proposed transfers of ownership interests in jurisdictional facilities and properties. The PSL §70 review process has 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 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.[5] The Commission has determined that full

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[4] Subsequent to the submission of Ms. Pennica's comments, Petitioners filed notice of this proceeding in the Certificate Proceeding to ensure that all stakeholders in that proceeding would have notice and opportunity to comment here.

[5] See, e.g., Wallkill Order.

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).[6]

The Commission's authority to issue a declaratory ruling with respect to (i) the applicability to any person, property, or state of facts of any rule or statute enforceable by it, or (ii) whether any action by it should be taken pursuant to a rule, and to decline to issue such a declaratory ruling, is expressly established by State Administrative Procedure Act §204 and governed by regulations, 16 NYCRR Part 8, implementing that statute.

DISCUSSION AND CONCLUSION

As discussed below, the Commission finds that the proposed transaction pertains to the "transfer" of "electric plant" by an "electric corporation," as those terms are defined under the PSL. The Commission also finds that the Petitioners have satisfied the Wallkill Presumption. Therefore, the proposed transaction does not require further review under PSL §70.

PSL Applicability

Petitioners argue that the PSL should be interpreted in a manner that avoids the need for their proposed transaction to be reviewed under PSL §70. The arguments presented to support their proffered interpretations, however, are not persuasive.

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[6] 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).

PSL §2(12) defines "electric plant" broadly to include "all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation … of electricity for light, heat or power…." PSL §2(12) defines "electric plant" using similarly broad language that includes assets which will "be used for or in connection with or to facilitate the generation" of electricity.

Petitioners noted that Cassadaga holds the Certificate authorizing Project development, as well as certain rights for the real property where the Project will be constructed. These are assets that will be used to construct the Project, which will generate electricity. Consequently, they are "electric plant" that will "be used for or in connection with or to facilitate the generation" of electricity.

Petitioners acknowledge that PSL §2(13) defines "electric corporation" broadly to include any entity that owns, operates, or manages electric plant. Cassadaga owns electric plant that will be used in connection with and to facilitate electric generation. Cassadaga, therefore, currently is an "electric corporation" within meaning of PSL §2(13). Contrary to Petitioners' arguments, Trireme III is also an "electric corporation" based on its ownership and control of Cassadaga.

Petitioners' claims that the electric plant owned by Cassadaga (i.e., the Certificate and certain property rights) are not elements of its "works" or "system" are similarly unavailing. PSL §70 states, in relevant part, that no electric corporation "shall transfer … its franchise, works or system or any part of such franchise, works or system … without the written consent of the commission." The Siting Board authorized Cassadaga to develop the Project, which, when constructed and operating, will be a major electric generating facility.

Cassadaga would not be able to develop the Project without the Certificate and property rights. Petitioners thus inaccurately frame their "system" or "works" as comprised only of the completed, operational collection of wind turbines. The narrower interpretation urged by Petitioners, if adopted, would unduly limit the intended scope of PSL §70. It also would be inconsistent with long-standing Commission precedent that applied PSL §70 to transfers involving electric generation facilities that were under development.[7]

Given that the proposed transaction consists of an electric corporation conveying ownership interests in electric plant, the exchange constitutes a "transfer" within meaning of PSL §70. Ms. Pennica notes in her comments that PSL §70 should be applied to the proposed transaction before it may be consummated.[8] As explained below, however, Petitioners have demonstrated that the proposed transaction fits within the ambit of Commission precedent finding that certain transfers do not require further regulatory review under PSL §70.

Wallkill Presumption

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

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[7] See, e.g., Case 17-E-0620, AP Cricket Valley Holdings I Inc. et al., Declaratory Ruling on Transfer Transaction (December 14, 2017).

[8] Petitioners were under no obligation to file the Petition in the Certificate Proceeding, or otherwise notify stakeholders involved in that case. It is advisable, however, for any entity that files a petition for relief to notify potentially-interested stakeholders that are involved in a separate but related proceeding. Petitioners provided such notice, albeit after the initial Petition filing date.

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 transaction does not pose the potential for the exercise of horizontal or vertical market power. Petitioners have demonstrated that Innogy US will not hold other utility assets or power marketer affiliations in the United States when the proposed transaction is consummated. The Project, when constructed, will operate in wholesale competitive markets and will not have captive utility ratepayers. The proposed transfer, therefore, does not present a risk of harm to such ratepayers. Accordingly, based on the facts and circumstances presented in the Petition, the proposed transaction does not require further review under PSL §70.

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.

2. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS
Secretary