STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 9, 2017

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair
Gregg C. Sayre
Diane X. Burman

CASE 17-M-0072 – Joint Petition for a Declaratory Ruling Regarding an Intra-Corporate Restructuring.

DECLARATORY RULING ON INTRA-CORPORATE REORGANIZATION

(Issued and Effective March 13, 2017)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on February 1, 2017, RED-Rochester, LLC (RED-Rochester), RED Investment, LLC (RED Investment), and Ironclad Energy Partners LLC (Ironclad) (collectively, Petitioners), requested issuance of a declaratory ruling that an intra-corporate reorganization involving RED-Rochester does not require approval under Public Service Law (PSL) §§70, 83, or 89-h. RED-Rochester owns and operates a power plant and other utility systems at the Eastman Business Park (Eastman Park) located in Rochester, New York.

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 February 22, 2017. In this ruling, the Commission determines that no further review under the PSL is warranted, and accordingly grants the relief requested in the Petition.

THE PETITION

As described in the Ironclad Ruling,[1] RED-Rochester is a wholly-owned subsidiary of RED Investment which, in turn, is a wholly-owned subsidiary of Ironclad. RED-Rochester owns and operates the utility systems at Eastman Park. A key component of those systems is a "tri-generation" power plant that simultaneously generates electricity, steam, and refrigeration for use at the Eastman Park. RED-Rochester also owns and operates distribution facilities used to distribute the outputs of the power plant, and to generate, collect, treat and/or distribute, compressed air, demineralized water, natural gas, high-purity water, nitrogen, calcium chloride brine, chilled water, industrial water, potable water, fire water, and industrial wastewater treatment. RED-Rochester acquired the utility systems at the Eastman Park in 2013 when the Commission approved the transfer from Eastman Kodak Company (Kodak),[2] and subsequently granted RED-Rochester the necessary Certificates of Public Convenience and Necessity.[3]

The Eastman Park, Petitioners explain, is an industrial park located in the City of Rochester and Town of Greece that covers an area of approximately four miles long by one mile wide. Within the Eastman Park, Petitioners continue, RED-Rochester provides utility services to Kodak and 12

[1] Case 16-M-0370, RED-Rochester, LLC et al., Declaratory Ruling on Review of Acquisition Transactions (issued August 2, 2016) (Ironclad Ruling).

[2] Case 13-M-0028, RED-Rochester, LLC et al., Order Approving Transfer Subject to Conditions, Providing for Lightened Ratemaking Regulation, and Making Other Findings (issued May 30, 2013) (Transfer Order).

[3] Case 13-M-0028, RED-Rochester, LLC et al., Order Confirming Prior Order and Granting Certificates of Public Convenience and Necessity (issued June 13, 2013).

independent businesses, all of which are direct utility customers of RED-Rochester.

According to the Petition, Ironclad is a joint venture between Stonepeak Infrastructure Fund II LP (Stonepeak) and Ironclad Energy Ventures, LLC (Ironclad Ventures). Ironclad, Petitioners indicate, is owned 98% by Stonepeak, and 2% by Ironclad Ventures. Petitioners explain that Ironclad was formed for the purpose of acquiring, developing, owning, and investing in middle-market generation facilities similar to that owned by RED-Rochester, although Ironclad currently owns no generation, transmission, or distribution assets in New York other than those held indirectly in RED-Rochester. According to Petitioners, Ironclad does not hold any interest over the inputs, such as fuel, for generation in New York, or own or otherwise hold any affiliation with a retail energy or power marketer.

Petitioners explain that Stonepeak is a private equity firm that focuses on North American investments with hard assets in the energy, power and renewables, transportation, utilities, water, and communications sectors. Ironclad Ventures, Petitioners continue, is owned equally by John Prunkl and Christopher Fanella.

According to Petitioners, neither Stonepeak, Ironclad Ventures, nor their affiliates hold any interests in generation assets in New York other than indirect interests in RED-Rochester. Stonepeak, Ironclad Ventures, and their affiliates, Petitioners continue, do not hold any interests in generation assets located in the neighboring PJM Interconnection LLC (PJM) or ISO New England Inc. (ISO-NE) wholesale markets, or transmission or distribution facilities in the PJM, ISO-NE, or New York Independent System Operator, Inc. (NYISO) markets (collectively, Northeastern Markets). Petitioners aver that

Stonepeak, Ironclad Ventures, and their affiliates do not hold any influence over the inputs to generation (i.e., fuel) in New York, and do not hold any ownership interest in or affiliation with any retail energy or power marketer.

The Proposed Intra-Corporate Restructuring

Petitioners propose to: (i) create two new holding companies - Ironclad Energy Holdings LLC (Ironclad Holdings) and Ironclad Energy Thermal LLC (Ironclad Thermal); (ii) insert Ironclad Holdings and Ironclad Thermal in the corporate ownership chain between Ironclad and RED-Rochester; and (iii) transfer ownership of RED Rochester from RED Investment to Ironclad Thermal. After the proposed restructuring is completed, Ironclad Thermal would be a wholly-owned subsidiary of Ironclad Holdings which, in turn, would be wholly-owned by Ironclad. Ironclad Holdings and Stonepeak, Petitioners continue, would remain the ultimate owners of RED-Rochester, and no new owners would be brought into or removed from the corporate ownership structure upstream of RED-Rochester.

The restructuring, Petitioners aver, would not change the identity of the ultimate ownership of RED-Rochester, remove any existing owner, or alter the proportionate shares held by Ironclad Holdings or Stonepeak. Based on precedent cited for the proposition that such reorganizations do not require

Commission approval,[4] Petitioners request that the Commission decline to review the restructuring under PSL §§70, 83, and 89-h. Petitioners argue that the proposed transfer of RED-Rochester from one wholly-owned subsidiary (i.e., RED Investment) to a different wholly-owned subsidiary (i.e., Ironclad Thermal) is consistent with other transactions in which the Commission declined to review a proposed restructuring under PSL S70. Petitioners note for example that, in the PPM Ruling, the Commission concluded that the transfer of ownership interests in a jurisdictional generating facility from one wholly-owned upstream parent to another wholly-owned upstream parent did not constitute a "transfer" within meaning of PSL §70 because there would be no change in identity of the ultimate ownership.[5] Here, Petitioners continue, the proposed restructuring would result in a similar intra-corporate change in ownership of an operating company without any change in status of the ultimate RED-Rochester owners.

Petitioners further argue that, in the NRG, Horizon, and PPM Rulings, the Commission approved the proposed intra-corporate restructurings after finding that the transactions would not create the risk of market power or harm to captive ratepayers. According to Petitioners, the Commission found in

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[4] See, e.g., Case 07-E-0584, NRG Energy, Inc., Declaratory Ruling on Review of an Inter-Corporate Transaction (issued July 23, 2007) and Case 05-E-1582, NRG Energy Inc. and NRG Northeast Generating LLC, Declaratory Ruling on Review of an Inter-Corporate Dissolution Transaction (issued January 26, 2006) (collectively, NRG Rulings); Case 06-E-0006, Horizon Wind Energy LLC, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 14, 2006) (Horizon Ruling); Cases 06-E-1106 and 06-E-1073, PPM Energy, Inc. et al., Declaratory Ruling on Regulation of Intra-Corporate and Other Transactions (issued Oct. 19, 2006) (PPM Ruling).

[5] PPM Ruling.

the Ironclad Ruling that the indirect transfer of RED-Rochester to Ironclad Ventures and Stonepeak, through Ironclad, would not enable those companies to exercise horizontal or vertical market power, or risk harm to captive ratepayers. Petitioners aver that the intra-corporate restructuring proposed here does not present a changed circumstance that might warrant a different finding at this time. Finally, Petitioners request a ruling that PSL §§83 and 89-h do not apply to the proposed restructuring for the same reasons advanced in support of their request regarding PSL §70.

DISCUSSION AND CONCLUSION

In reviewing intra-corporate reorganizations, the Commission has determined that certain transactions do not require review under PSL §70 because they do not affect the ultimate ownership of the operating company and its jurisdictional facilities. In particular, the Commission has found that inserting a holding company into an ownership structure upstream from lightly-regulated entities that operate electric plant does not amount to a transfer under PSL §70 because there is no change in the identity of the ultimate owner.[6] Moreover, as Petitioners note, the Commission has also applied this reasoning to wholly intra-corporate transfers involving direct interests in companies that own and operate jurisdictional facilities,[7] as well as transactions involving natural gas and steam assets.

The proposed restructuring fits within this precedent. The restructuring will not introduce a new owner into the organizational structure, remove an existing owner, or alter the

[6] See, e.g., Case 07-E-0584, supra, Declaratory Ruling at 3-4.

[7] PPM Ruling at 4.

proportionate shares held by the existing owners. Moreover, the restructuring would not create the potential for the exercise of market power, as the mere creation of the intermediate companies cannot enhance the Petitioners' ability to exercise either horizontal or vertical market power. As a result, the restructuring does not pose the potential for harm to captive ratepayer interests. Accordingly, the restructuring falls within the ambit of the NRG, Horizon, and PPM Rulings, where it was decided that intra-corporate transactions that do not affect ultimate ownership do not require further regulatory review, even if the restructuring includes an intra-corporate transfer of direct interests in a jurisdictional operating company.

Lightened Regulation

After the restructuring is consummated, lightened regulation of RED-Rochester will continue as described previously.[8] Petitioners are reminded that, under lightened regulation, the owners of the RED-Rochester facilities and any entities controlling its operations remain subject to the PSL with respect to matters such as annual reporting,[9] enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in prior orders.[10] Included among those requirements

[8] See generally, Case 13-M-0028, supra, Transfer Order.

[9] Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation, issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

[10] See, e.g., Case 10-E-0501, CPV Valley LLC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing (issued May 9, 2014).

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

The Commission finds and declares:

1. No further review will be conducted of the intra-corporate restructuring described in the Petition filed in this proceeding and described in the body of this Ruling.

2. This proceeding is closed.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

[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).