STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on July 14, 2016

COMMISIONERS PRESENT:

Audrey Zibelman, Chair
Patricia L. Acampora
Gregg C. Sayre
Diane X. Burman

CASE 16-E-0244 - Joint Petition of Castleton Energy Center, LLC, Castleton Power, LLC and Fortistar Castleton LLC for Approval of the Transfer of Ownership Interests Pursuant to Section 70 of the Public Service Law.

ORDER APPROVING TRANSFER AND CONTINUING LIGHTENED REGULATION

(Issued and Effective July 14, 2016)

BY THE COMMISSION:

INTRODUCTION

In a joint petition filed on April 27, 2016 (and supplemented on June 24, 2016), Castleton Energy Center, LLC (CEC), Castleton Power, LLC (Castleton Power) and Fortistar Castleton LLC (Fortistar Castleton) (collectively, Petitioners) seek Commission approval of the transfer of ownership interests from Castleton Power and CEC to Fortistar Castleton, pursuant to §70 of the Public Service Law (PSL). Petitioners also request an order confirming that Castleton Power will continue to be lightly regulated as an electric corporation participating in the wholesale energy market. Moreover, Petitioners request Commission action in July in order to timely consummate the transfer in compliance with the transfer documents. In this Order, the relief requested is granted.

## BACKGROUND

Castleton Power's 72-megawatt (MW) gas-fired electric generating facility (Facility) in Castleton-on-Hudson, New York is interconnected with the transmission system of Niagara Mohawk Power Corporation d/b/a National Grid. The Facility began operation in 1992 as a qualified cogeneration facility pursuant to both federal and state law under the ownership of Cogen Energy Technology L.P. The Facility was purchased by TransCanada Power (Castleton) LLC, (TC Castleton) in 1999, and ceased to operate as a qualified cogeneration facility in 2002. The Federal Energy Regulatory Commission (FERC) determined TC Castleton to be an exempt wholesale generator (EWG) in 2002,[1] and FERC approved TC Castleton's market-based rate tariff in 2005.[2]

In 2006, the Commission held that the transfer of 100% of the ownership interests in TC Castleton by its indirect owner, TransCanada Power, L.P., to two Alberta corporations indirectly owned by EPCOR Utilities, Inc. (EPCOR) did not require approval under PSL §70, as the transaction involved entities upstream from the ownership of the Facility.[3] In that same 2006 Order, the Commission held that TC Castleton would be lightly regulated, consistent with regulatory regimes afforded to other comparably situated EWGs participating in wholesale electric markets.[4] As part of that transaction, TC Castleton was re-named EPCOR Power (Castleton) LLC, (EPCOR Castleton). In 2009, the Commission approved the transfer of EPCOR Castleton

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1 TransCanada Power (Castleton) LLC, 94 FERC ¶ 62,168 (2001).

2 TransCanada Power (Castleton) LLC, 111 FERC ¶ 61,264 (2005).

3 Case 05-E-1095, TransCanada Power (Castleton) LLC, Declaratory Ruling on Transfer of Ownership Interests and Order Providing for Lightened Regulation (issued Jan. 26, 2006).

4 Id.

under PSL Section 70 from EPCOR to CEC.[5] The Commission also held that lightened regulation of the Facility, CEC and its owners would continue in accordance with the prior 2006 Order regarding the Facility.[6] As part of that transfer, EPCOR Castleton was re-named Castleton Power.

## THE PETITION

According to Petitioners, all three are Delaware limited liability companies. Castleton Power is wholly owned by CEC, which is wholly owned by Wayzata Opportunities Fund, LLC, a private investment vehicle in which no single member or partner owns more than a ten percent equity interest. The fund manager of Wayzata Opportunities Fund, LLC is Wayzata Investment Partners LLC. Castleton Power sells energy, capacity and ancillary services exclusively at wholesale into the New York Independent System Operator Inc.'s (NYISO) competitive electricity markets.

Petitioners further assert that, Fortistar Castleton is a wholly-owned, indirect subsidiary of Fortistar LLC, (Fortistar) and was formed for the purpose of acquiring the ownership interests in Castleton Power. Fortistar engages in the generation or sale of power only from, or has ownership interests only in, electric facilities that are qualifying facilities under the Public Utilities Regulatory Policies Act of 1978 or entities that are exempt wholesale generators under the Public Utility Holding Company Act of 2005. Fortistar indirectly wholly owns an approximately 55 MW natural-gas fired electric generating facility in North Tonawanda, New York and an approximately 6 MW land-fill gas electric generating facility in

[5] Case 09-E-0059, EPCOR Power (Castleton) LLC, Order Approving Transfer (issued April 22, 2009).

[6] Id.

Albany, New York. Fortistar also indirectly owns a 75.6% interest in an approximately 221 MW gas-fired electric generating facility in Lockport, New York. In markets adjacent to the NYISO, Fortistar's affiliates own seven generating facilities with an aggregate generating capacity of 54.9 MW. Petitioners state that neither Fortistar Castleton nor its affiliates have any captive electric ratepayers. Further, neither Fortistar Castleton nor its affiliates own or control any electricity transmission facilities other than generation interconnection facilities. Fortistar Castleton proposes to acquire 100% of the ownership interests in Castleton Power from CEC. Once the Transfer is consummated, Fortistar will indirectly wholly own the Facility.[7]

The transfer, Petitioners assert, fully satisfies the Commission's standard of review for lightly regulated entities. The Transfer does not create any potential for harm to the interests of captive utility ratepayers because Fortistar Castleton operates in a competitive market and has no captive ratepayers. The Transfer will not permit Fortistar Castleton or any of its affiliates to exercise market power in the New York Control Area (NYCA). The combination of the Facility with the facilities of other affiliates in the NYCA and adjacent balancing authority areas totals 337 MW, which is 0.75% percent

[7] According to the Petition, as part of the Transfer, Fortistar Castleton will also acquire 100% of the ownership interests in Castleton Energy Services, LLC (CES) from CEC. CES has a contract with Castleton Power to manage the operations and maintenance of the Facility, including the direct sale of capacity and energy in the markets operated by the NYISO. CES has been granted authority to make sales of energy, capacity, and to the extent applicable, ancillary services at market-based rates by FERC under Section 205 of the Federal Power Act, see, Castleton Energy Services, LLC, Docket No. ER10-385-000, et al., Letter Order (issued Mar. 3, 2010), but is not subject to regulation by the Commission.

of the total nameplate capacity of approximately 45,000 MW in the NYCA. This is well below the level of market concentration that the Commission has determined not to raise a market power concern.

## NOTICE OF PROPOSED RULE MAKING

Pursuant to the State Administrative Procedure Act (SAPA) §202(1), a Notice of Proposed Rulemaking was published in the State Register on May 18, 2016 [SAPA No. 16-E-0244SP1]. The time for submission of comments pursuant to the Notice expired on July 5, 2016. No comments were received.

## DISCUSSION AND CONCLUSION

### Environmental Quality Review

The proposed action under review is the transfer of ownership interests in Castleton Power from CEC to Fortistar Castleton. Pursuant to the State Environmental Quality Review Act (SEQRA), Article 8 of the Environmental Conservation Law (ECL) and its implementing regulations at 6 NYCRR Part 617 and 16 NYCRR Part 7, we must determine whether the proposed action may have a significant impact on the environment.[8] No other agency is involved in the review of this action, so we will assume lead agency status and conduct an environmental review. The proposed action is an unlisted action because it does not meet the regulatory criteria for Type I or Type II actions set forth in 6 NYCRR §§617.2, 617.4, 617.5 and 16 NYCRR §7.2.

The petition includes a Short Environmental Assessment Form (EAF) with Part I completed. We conclude, based on the criteria for determining significance listed in 6 NYCRR

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[8] Petitioners' request for confirmation of Castleton Power's lightly-regulated status as an electric corporation is a Type II action pursuant to 6 NYCRR §617.5(c)(31), so no SEQRA review of that action is required.

§617.7(c) and the information in the record, that the proposed action will not have a significant adverse impact on the environment and adopt a negative declaration pursuant to SEQRA.[9] A Notice of Determination of Significance is attached to this order.

Section 70 Transfer

Under PSL §70, our approval is required before direct ownership interests in an electric corporation may be transferred. In conducting a review under §70 that pertains to a lightly-regulated electric corporation operating in wholesale electric markets, we examine any affiliations with fully-regulated New York utilities or power marketers that might afford opportunities for the exercise of market power or pose the potential for other transactions detrimental to captive ratepayer interests.[10]

When reviewed with the reduced scrutiny applicable under lightened ratemaking regulation, the ownership transfer the Petitioners propose is in the public interest. The transaction does not pose the potential for the exercise of horizontal market power. Standing alone, the Facility, at 72 MW of capacity, is not sized at a level that would pose the potential for the exercise of market power within NYISO markets. Nor would the 337 MW of aggregate capacity owned by affiliates pose such risk, as Petitioners have demonstrated. The market power of the 337 MW of aggregate capacity would represent .075% of the 45,000 MW of the NYCA, which falls well below other approved levels where the Commission held there were no market powers concerns. The Commission held recently in Case

[9] Staff completed Parts 2 and 3 of the EAF; the EAF will be retained in our files.

[10] See, Case 10-M-0186 et al., Alliance Energy Renewables, LLC, et al., Order Approving Transfers Upon Conditions and Making Other Findings (issued July 23, 2010), p. 17.

15-E-0580, Upstate New York Power Producers, Inc., Order Approving Transfer (issued Feb. 25, 2016), that a 2.2% market share did not raise horizontal market power concerns. And in Case 14-E-0022, MACH Gen LLC and New Athens Generating Company, Order Approving Transfers of Ownership Interests and Making Other Findings (issued Apr. 25, 2014), that a 4.2% market share did not raise horizontal market power concerns. Here, the aggregate capacity of the combined seven generators of .075% of NYCA capacity falls below the Commissions standards for market power concerns.

Lightened Regulation

Lightened regulation of Castleton Power as an electric corporation continues to be appropriate in accordance with the Order in Case 05-E-1095. Castleton Power is reminded that, under light regulation, the Facility and the entities controlling its operations remain subject to the PSL with respect to matters such as annual reporting, enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in the order in Case 05-E-1095 and other previous Orders.[11] Included among those requirements are the obligations to conduct tests for stray voltage on all publicly accessible electric facilities,[12] to give notice of generation retirements,[13] and to report personal injury accidents pursuant to 16 NYCRR Part

[11] See, e.g., Case 11-E-0593, Cricket Valley Energy Center, LLC, Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Ratemaking Regulation (issued February 14, 2014).

[12] See, Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005).

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

125.[14] Finally, PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will apply automatically in the future if and when such affiliation arises in New York.

<u>The Commission orders</u>:

1. The transfer of ownership interests in Castleton Power, LLC, as described in the Petition filed in this proceeding and in the body of this Order, is approved pursuant to Public Service Law §70.

2. This proceeding is closed.

By the Commission,

(SIGNED) KATHLEEN H. BURGESS
Secretary

[14] Case 11-M-0295, Annual Reporting Requirements, Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation (issued January 23, 2013).

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NOTICE OF DETERMINATION OF SIGNIFICANCE

(NEGATIVE DECLARATION)

NOTICE IS HEREBY GIVEN that an Environmental Impact Statement will not be prepared in connection with the proposed transfer of 100% ownership interest in capital assets from Castleton Energy Center, LLC and Castleton Power LLC, to Fortistar Castleton without modification. Having completed our review of the proposed activity, we have determined that the proposed action would not result in significant, adverse environmental impacts. The proposed transfer is an Unlisted action, as defined in 6 NYCRR Part 617.2(ak) because the action does not rise to the level of a Type I action and is not listed as a Type II action by the Public Service Commission or by the Department of Environmental Conservation.

Based upon our review of the petitioner's filings and the record in this case, we find that no significant adverse environmental impacts would result from this transfer and issue a negative declaration of environmental significance.

The address of the Public Service Commission, the Lead Agency for purposes of environmental quality review of this project, is Three Empire State Plaza, Albany, New York 12223-1350. For further information, please contact the Environmental Certification and Compliance Section at (518) 474-8702.

KATHLEEN H. BURGESS
Secretary