STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 15, 2021

COMMISSIONERS PRESENT:

John B. Howard, Chair
Diane X. Burman
Tracey A. Edwards
David J. Valesky
John B. Maggiore
Rory M. Christian

CASE 21-M-0241 – In the Matter of Lockport Energy Associates, L.P., Petition for Declaratory Ruling Regarding Application of Sections 70 and 83 of the New York State Public Service Law, and, in the Alternative, Approval Under Sections 70 and 83.

DECLARATORY RULING ON UPSTREAM TRANSFER TRANSACTION

(Issued and Effective July 16, 2021)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on April 16, 2021, and supplemented on June 22, 2021 (the Petition), Lockport Energy Associates, L.P. (LEA) sought a declaratory ruling that a proposed transfer of upstream ownership interests in LEA does not require further review under Sections 70 and 83 of the Public Service Law (PSL) or, in the alternative, approval of such transaction under PSL §70 and §83. As discussed below, the Public Service Commission (Commission) finds that LEA has satisfied the presumption established in the Wallkill Order and its progeny by demonstrating that the upstream transfer of ownership interests would not present an ability to exercise horizontal or vertical market power or otherwise harm captive ratepayer interests.[1] Accordingly, the Commission declares that no further review of the proposed transaction is required pursuant to PSL §70 and §83.

THE PETITION

The Petition indicates that LEA is a Delaware limited partnership that owns and operates a 200 megawatt natural gas-fired cogeneration facility located in Lockport, New York (the Lockport Facility) that is subject to the Commission's lightened regulation.[2] The upstream owners of LEA are: (1) Fortistar Capital Inc. (Fortistar Capital), which indirectly owns a 7.5% interest, (2) Fortistar Family Holdings LLC (Family Holdings), which indirectly owns a 12.15% interest, (3) Fortistar LLC (Fortistar), which indirectly owns a 55.974% interest, and (4) Osaka Gas Energy USA Corporation (Osaka Gas), a Japanese corporation, which indirectly owns a 24.376% interest.[3] Both Fortistar Capital and Fortistar are wholly-owned and managed by Mark Comora. According to the Petition, Mr. Comora also owns a 0.99% Class A voting interest in Family Holdings, while his wife owns a 0.01% Class A voting interest and two of Mr. Comora's family trusts have a combined 98% Class B non-voting interest.

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[1] Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994) (Wallkill Order); Case 98-E-1670, Carr Street Generation Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999) (Carr Street Order).

[2] Case 08-M-1301, Lockport Energy Associates, L.P., Order Granting a Certificate of Public Convenience and Necessity and providing for Lightened and Incidental Regulation (issued January 20, 2009) (LEA Order).

[3] As part of the June 22, 2021 supplement to the Petition, LEA provided diagrams of the corporate organizational structure pre- and post-transaction.

The day-to-day operations and management of LEA and the Lockport Facility are vested solely in LEA's general partner, FCI Lockport GP, Inc. (FCI), a wholly-owned subsidiary of Fortistar Capital with a 1% general partnership interest in LEA. LEA GP, Inc. (GPI) also owns a 0.1% general partnership interest in LEA. Osaka Gas has a 76% indirect ownership interest in GPI, while Fortistar has a 24% indirect ownership interest in GPI.

One of LEA's direct parents is LEA A4 LLC (LEA A4), which currently has a 24.3% ownership interest in LEA. LEA A4 is 50% owned by Fortistar and 50% owned by Family Holdings. FIP, LLC (FIP), a partnership that provides a long-term incentive for current and former Fortistar employees, has the right to receive up to a 30% passive limited partnership interest in LEA A4 once Fortistar has achieved certain financial targets.[4] Fortistar is the managing partner of FIP while current and former employees of Fortistar, none of whom have any voting or management rights, are the other owners of FIP. According to the Petition, no single employee or former employee of Fortistar will own more than a 10% limited partnership interest in LEA A4, and they do not have a greater than 10% interest or any controlling interest in generation or transmission facilities in the United States.

Osaka Gas proposes to transfer its 24.376% indirect ownership interest in LEA to LEA A5 LLC (LEA A5), which, like LEA A4, is 50% owned by Fortistar and 50% owned by Family

[4] According to the Petition, Fortistar has not yet achieved these financial targets. As such, FIP's current indirect ownership interest in LEA is 0%.

Holdings (the Proposed Transaction).[5] Thus, following the Proposed Transaction, Fortistar and Family Holdings' combined indirect ownership interest in LEA would increase from 68.12% to 92.50%. The Petition states that LEA A5 Investments LLC (LEA A5 Investments), a partnership similar to FIP that provides a long-term incentive for Fortistar employees, would have the right to receive a 38% passive limited partnership interest in LEA A5 once Fortistar has achieved certain financial targets (which have not been met). As with FIP, LEA A5 Investments is managed by Fortistar, and is otherwise owned by current and former Fortistar employees, none of whom have any voting or management rights. The Petition also states that no single employee or former employee of Fortistar will own more than a 10% limited partnership interest in LEA A5, and they do not have a greater than 10% interest or any controlling interest in generation or transmission facilities in the United States.

LEA maintains that the proposed transfer satisfies the presumption established in the Wallkill Order, where the Commission decided that, under a 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 the exercise of vertical or horizontal market power, or the potential for harm to the interests of captive utility ratepayers of fully-regulated utilities (the Wallkill Presumption).[6] According to

[5] Osaka Gas' indirect ownership stake in LEA is comprised of: (1) two wholly-owned subsidiaries with a combined 24.3% direct ownership interest in LEA; and (2) the 76% ownership interest in GPI.

[6] The Wallkill Presumption is equally applicable to upstream transfers of ownership in lightly-regulated steam plant under PSL §83. LEA Order, p. 8.

LEA, 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 because it does not result in changes to market shares or concentration levels in New York State. Other than Mark Comora, who has been and will continue to be the ultimate owner and manager of LEA, neither the other owners of Family Holdings nor any single employee or former employee of Fortistar will have a greater than 10% ownership interest or any controlling interest in generation or transmission facilities in the United States. Further, LEA A5 Investments, FIP, and Family Holdings are all passive investments with no ability to influence the management or operation of the Lockport Facility.

Based on these factors, LEA seeks a declaratory ruling from the Commission finding that no further review of the proposed transaction is necessary pursuant to PSL §70 and §83. If the Commission decides to review the Proposed Transaction under PSL §70 and §83, LEA requests that it approve the transaction as in the public interest.

PUBLIC NOTICE

Pursuant to the Commission’s Rules of Procedure, 16 NYCRR §8.2(c), responses to the Petition were due within the 21-day period, which expired on May 7, 2021. No comments were received.

LEGAL AUTHORITY

Pursuant to both PSL §70 and §83, 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 PSL §70 and §83 transfer requests with a demonstration under the Wallkill Presumption that the transaction would 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.[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 involving interpretations of existing statutes, rules, or regulation are not "actions" within meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations and, therefore, they may be issued without further SEQRA review.[8] The declaratory relief requested in the Petition falls within the ambit of the statute and regulations authorizing issuance of a declaratory ruling.

DISCUSSION AND CONCLUSION

In the LEA Order, the Commission, inter alia, found that LEA may avail itself of the Wallkill Presumption, pursuant to which regulation under PSL §70 and §83 does not adhere to the

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[7] See, e.g., Wallkill Order, p. 9; see also Carr Street Order, p. 8.

[8] 6 NYCRR §617.5(c)(37) (defining "interpretation[s] of an existing code, rule or regulation," as Type II actions not subject to review under SEQRA).

transfer of ownership interests in entities upstream from the parents of a New York competitive electric and/or steam generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption, or the potential for the exercise of market power arising out of an upstream transfer. For purposes of the Proposed Transaction, LEA has satisfied the Wallkill Presumption by demonstrating that the upstream transfer will not present an ability to exercise horizontal or vertical market power, or any potential for harm to captive utility ratepayers.

Here, Osaka Gas is transferring its indirect ownership interest in LEA to LEA A5, which in turn is owned by Fortistar and Family Holdings, two of the other existing upstream owners of LEA. After the Proposed Transaction is consummated, there will not be any change to market shares or concentration levels of generation assets in New York State. Aside from Mark Comora, neither the owners of Family Holdings nor any single employee or former employee of Fortistar will have a greater than 10% ownership interest or any controlling interest in generation or transmission facilities in the United States.

Further, LEA A5 Investments, FIP, and Family Holdings are all passive investments with no ability to influence the management or operation of the Lockport Facility, which is vested solely in FCI. As noted above, assuming Fortistar achieves certain financial targets, FIP and LEA A5 Investments would only have the right to passive limited partnership interests in LEA A4 and LEA A5, respectively. After the Proposed Transaction is completed, aside from the changes to upstream ownership percentages, there will be no other changes to the day-to-day operations of the Lockport Facility.

Based on these facts, LEA has adequately demonstrated that the Proposed Transaction does not present an opportunity to exercise either horizontal or vertical market power, or a potential to harm the interests of captive New York ratepayers. Accordingly, the Proposed Transaction does not require further regulatory review under PSL §70 or §83.[9]

The Commission finds and declares:

1. No further review will be conducted of the proposed transaction described in the petition filed in this proceeding on April 16, 2021, and supplemented on June 22, 2021, and discussed in the body of this Declaratory Ruling.

2. This proceeding is closed.

By the Commission,

(SIGNED) MICHELLE L. PHILLIPS
Secretary

[9] See, Wallkill Order; see also, Case 18-E-0333, Cassadaga Wind LLC, Declaratory Ruling on Transfer Transactions (issued July 17, 2018); see also, Case 17-E-0620, AP Cricket Valley Holdings I Inc., et al., Declaratory Ruling on Transfer Transaction (issued December 14, 2017).