STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

Verified Joint Petition of Ball Hill Wind Energy, LLC, RES America Developments Inc., & Northland Power New York Wind LLC, for Approval of the Proposed Transaction Pursuant to Section 70 of the Public Service Law	Case 20-E-0240

VERIFIED JOINT SUPPLEMENTAL PETITION FOR A DECLARATORY RULING IN THE ALTERNATIVE THAT NO FURTHER REVIEW IS REQUIRED UNDER SECTION 70 OF THE PUBLIC SERVICE LAW

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Dated: July 7, 2020
Albany, New York

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On May 21, 2020, Ball Hill Wind Energy, LLC ("Ball Hill"), RES America Developments Inc. ("RES"), and Northland Power New York Wind LLC ("Northland") (collectively, the "Petitioners") filed their *Verified Joint Petition of Ball Hill Wind Energy, LLC, RES America Developments Inc., & Northland Power New York Wind LLC, for Approval of the Proposed Transaction Pursuant to Section 70 of the Public Service Law* ("Verified Petition"). Petitioners now further request, in the alternative to that original request, a declaration that no further review is required of the Proposed Transaction under Section 70 of the Public Service Law ("PSL"), pursuant to Part 8 of the Rules and Regulations of the Public Service Commission (the "Commission"). Petitioners respectfully submit that the proposed transaction described in Section I(D) herein constitutes a transfer of upstream ownership interests in a lightly regulated entity – Ball Hill – that owns a generating facility currently under development and therefore qualifies for the *Wallkill* presumption. Petitioners seek this relief in the alternative to the original relief sought in the Verified Petition. Accordingly, if the Commission declines to apply the *Wallkill* presumption and issue declaratory relief as requested in this Supplemental Petition, Petitioners request approval of the Proposed Transaction under Section 70 of the PSL.

I. THE PARTIES

A. Ball Hill Wind Energy, LLC

Ball Hill is a Delaware limited liability company and direct wholly owned subsidiary of RES. Ball Hill is developing an approximately 100 megawatt (MW) wind-powered electric generation project in the Town of Villenova and Town of Hanover in Chautauqua County, New York (the "Project").

On April 18, 2019, the Commission granted Ball Hill a certificate of public convenience and necessity with conditions ("CPCN") pursuant to Section 68 of the PSL, authorizing construction of the Project.[1] In that same Order, the Commission authorized lightened ratemaking regulation for Ball Hill.[2]

B. RES America Developments Inc.

RES is a wholly-owned subsidiary of Renewable Energy Systems Americas Inc., a Delaware corporation ("RES Americas"). RES Americas, together with its affiliates, has constructed over 160 renewable energy projects with a total capacity of more than 9,000 MW globally. RES Americas has been active in North America since 1997 and has a renewable energy and storage construction portfolio that exceeds 7,500 MW from over 80 projects, as well as 600 miles of overhead and underground transmission lines. RES Americas also has a robust development pipeline of wind and solar projects across North America, and the company currently operates more than 250 MW of renewable energy and storage projects.

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[1] Case 18-E-0654, Ball Hill Wind Energy, LLC, *Order Granting Certificate of Public Convenience and Necessity and Providing for Lightened Regulation* (Apr. 18, 2019) ("CPCN Order"). Article 10 of the Public Service Law does not apply to the Project; it was instead subject to review under local zoning regulations and the State Environmental Quality Review Act ("SEQRA"). *See* Case 16-F-0289, Ball Hill Wind Energy, LLC, *Declaratory Ruling Concerning Jurisdiction Over Proposed Generating Facility* (Dec. 20, 2016).

[2] *Id.*

C. Northland Power New York Wind LLC

Northland is a Delaware limited liability company and an indirect wholly owned subsidiary of Northland Power Inc. ("Northland Power"). Northland Power is a publicly traded company on the Toronto stock exchange (TSX: NPI), based in Toronto, Canada, that develops, builds, owns and operates power infrastructure assets. Northland Power currently owns no generation assets operating or under construction in the United States and owns only a single project under development in the United States as described further below; outside the United States, Northland Power owns generation assets operating or under construction in Canada, Germany, Netherlands, and Mexico, and projects under development in Taiwan, Korea, and Japan. The power generation assets owned by Northland Power are based on wind, natural gas, biomass, and solar technologies.

Northland Power owns or has a gross economic interest in 2,681 MWs of operating generating capacity. The 2,681 MWs of operating capacity is comprised of the following projects: (i) three offshore wind projects in Europe (1,184 MWs), (ii) two natural gas-fired projects in Saskatchewan, Canada (346 MWs), and (iii) solar, wind and thermal projects in Ontario and Quebec, Canada (1,151 MWs). In 2020, Northland acquired Empresa de Energía de Boyacá, a regulated power distribution utility located in Colombia serving approximately 480,000 customers.

Northland Power also has an indirect ownership interest in Northland Power Energy Marketing (US) Inc. ("NPEMUS"). NPEMUS is incorporated under Ontario provincial law. Northland Power is the sole shareholder of NP Energy Services Holdings Inc., an Ontario corporation, which is the sole shareholder of NPEMUS. NPEMUS engages in the purchase and sale of electric energy in the United States wholesale energy markets and does not engage in retail sales to New York ratepayers. NPEMUS does not own or control electric generation, transmission, or distribution facilities in the United States and does not hold a franchise, service territory or native load obligation within the United States or Canada. NPEMUS has received market-based rate authorization, authorizing its sale at wholesale of electric capacity, energy, and certain ancillary services, from the Federal Energy Regulatory Commission ("FERC").[3]

On May 1, 2020, Northland entered into a proposed upstream transaction that would result in Northland indirectly acquiring in separate closings and owning the membership interests of (i) the Bluestone Wind project (an up to 124.2 MW wind energy generation facility to be located in the Towns of Windsor and Sanford, New York), and (ii) the High Bridge Wind project (an up to 100.8 MW wind energy generation facility to be located in the Town of Guilford, New York). Both of these projects are under development and have yet to begin construction. On May 12, 2020, Northland, along with other parties, jointly petitioned the Commission for a declaratory ruling or, in the alternative, for approval of the Bluestone Wind project proposed transaction under Section 70 of the Public Service Law.[4] That petition remains pending before the Commission. On May 13, 2020, Northland successfully completed the closing and indirect acquisition of the High Bridge Wind project, which is the first project in the United States owned by Northland and its parent company, Northland Power. The Bluestone Wind closing has not yet occurred and remains subject to applicable Commission approval, among satisfaction of other conditions precedent. Subject to applicable Commission approval, Ball Hill Wind and Bluestone

[3] *See* FERC Docket No. ER19-1069-000.

[4] Case No. 20-E-0230, *Joint Petition of Bluestone Wind, LLC, Calpine Wind Holdings, LLC & Northland Power New York Wind LLC, for a Declaratory Ruling That No Further Review is Required of Upstream Ownership Transfer, or in the Alternative, for Approval of the Proposed Transaction Pursuant to § 70 of the Public Service Law* (May 12, 2020).

Wind would represent the second and third projects (in whichever order acquired) in the United States for Northland and its parent company, Northland Power.

D. Proposed Transaction

On May 8, 2020, RES entered into a membership interest purchase agreement ("MIPA") with Northland, under which Northland would purchase from RES, subject to satisfaction of the terms and conditions precedent to closing therein, 100% of the membership interests in Ball Hill currently owned by RES, thereby acquiring an upstream ownership interest in the Project (the "Proposed Transaction"). Ball Hill is the project company that owns the Project, that executes all contracts regarding the Project including real property, interconnection and other agreements, and that will, if the Project is completed, own and operate the generation assets. Under the Proposed Transaction, neither Northland nor Northland Power Inc. will directly purchase or own any of Ball Hill's project assets or equipment, nor would Northland or Northland Power directly own or operate the facility once it is operational. All project assets will continue to be owned by Ball Hill, and as such, the Proposed Transaction would not constitute a direct purchase or sale of Ball Hill's project assets.

Petitioners request that the Commission rule expeditiously on the Joint Petition. As discussed further below, a condition precedent to the closing of the Proposed Transaction is the Commission's declaration that no PSL § 70 review is necessary, or in the alternative, granting of approval under Section 70. Any delay in receiving this declaration or granting of approval could delay development of the Project, and in turn, the Project's ability to fulfill the State's renewable energy mandate under the Climate Leadership and Community Protection Act.[5] Accordingly, Joint Petitioners respectfully request action by the Commission's session on August 13, 2020.

II. PETITION

A. THE COMMISSION SHOULD APPLY THE WALLKILL PRESUMPTION TO THE PROPOSED TRANSACTION AND FIND NO FURTHER SECTION 70 REVIEW IS WARRANTED

Section 70 of the PSL states that no electric corporation "shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or corporation . . . without the written consent of the commission."[6] The Commission has interpreted this statute over time to reflect lightened ratemaking regulation policies. In *Wallkill*, the Commission established a presumption that further review under PSL Section 70 of the transfer of upstream project ownership interests is not required "unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption."[7] Under the *Wallkill* presumption, such transactions are reviewed only if there is the potential (i) for the exercise of market power or (ii) other harm to the interests of captive New York ratepayers.[8]

Here, the Proposed Transaction is an upstream transfer of the project company, Ball Hill. Northland will not directly purchase or own any of Ball Hill's project assets or equipment. Rather, all project assets will continue to be owned by Ball Hill, Ball Hill will continue as the lightly regulated project entity, and, as such, the Proposed Transaction would not constitute a direct, downstream purchase or sale of Ball Hill's project assets.

[5] The Project is under contract to sell Renewable Energy Credits to the New York State Energy Research and Development Authority.

[6] *See* PSL § 70(1).

[7] Case 91-E-0350, Wallkill Generating Company, L.P., *Order Establishing Regulatory Regime* (Apr. 11, 1994).

[8] *See* Case 18-E-0333, Cassadaga Wind LLC, *Declaratory Ruling on Transfer Transaction* (July 17, 2018).

Accordingly, the Proposed Transaction satisfies the *Wallkill* presumption. The Project's anticipated nameplate capacity is approximately 100 MW and thus, considered by itself, would not afford its owner the opportunity to exert horizontal market power. Neither Northland nor the Ball Hill entity currently owns any other generation facilities in New York. As noted above, Northland has entered into a transaction to indirectly purchase membership interests in the Bluestone Wind project (124 MWs) and has recently acquired and currently owns the proposed High Bridge Wind project (100 MWs), which remains in development and has yet to be fully permitted or commence construction. Northland Power also owns generating facilities in Ontario and Quebec, Canada, totaling 1,151 MWs. However, transmission constraints and NYISO-imposed import restrictions limit the ability of Northland Power's Canadian assets in neighboring control areas to fully participate in New York's electricity markets.[9]

However, even if the Commission were to include in its market share calculation in connection with its review of the Proposed Transaction all of the Ontario and Quebec assets held by subsidiaries of Northland Power (the ultimate parent of Ball Hill), the Bluestone Wind project, as well as the yet-to-be-permitted High Bridge Wind project , the total capacity still would only amount to approximately 1,475 MWs. That would comprise less than 3.6 percent of New York's total resource capability for summer 2020 (41,341 MW).[10] In prior rulings, the Commission has found that higher percentages of market share did not create an opportunity to exercise horizontal market power.[11] As such, Northland Power's market share vis-à-vis other

[9] *See* NYISO, *Manual 4, Installed Capacity Manual* § 4.9.6 (April 2020) (indicating maximum allowances for installed capacity provided by resources outside the New York Control Area).

[10] *See New York Independent System Operator, Inc.*, 2020 Load & Capacity Data Report ("Gold Book"), at 3.

[11] *See* Case 08-E-0410, LS Power Development LLC, *Declaratory Ruling on the Acquisition of Common Stock*, at 8 (May 27, 2008) (declaratory ruling finding that an 8.1% market share did not present an opportunity to exercise market power); *see also* Case 04-E-1364, Sithe Energies, Inc., et al., *Declaratory Ruling on*

subsidiaries that hold participating power plant assets is relatively small and would not provide it the ability to exercise horizontal market power.

Similarly, Northland is not “a single firm [that] owns both generation and delivery assets, [where] the delivery assets can be used to give a preference to the affiliated generation assets.”[12] Apart from its interests in Empresa de Energía de Boyacá, the Colombian regulated power distribution utility, Northland is not affiliated with entities that own or control traditional public utilities. Northland’s ultimate parent company, Northland Power, has indirect ownership interests in NPEMUS. To the extent NPEMUS participates in wholesale markets, it will be subject to oversight by the FERC and the New York Independent System Operator and market rules protecting against anti-competitive behavior and ensuring wholesale market integrity. Neither Northland nor NPEMUS will engage in retail sales to New York ratepayers. Nor does Northland own electric transmission or fuel inputs into generation that operates in New York. Accordingly, Northland owns no distribution or delivery assets that could give a preference to energy generated by the Project, and the Proposed Transaction, in turn, does not create an opportunity for vertical market power.

The Proposed Transaction likewise will not threaten or harm the interests of captive New York ratepayers. As noted above, the Project will be operating in ISO-administered competitive wholesale markets and without reliance on captive ratepayer funds. The Project has no captive ratepayers. Furthermore, by facilitating the development and construction of a 100 MW wind

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Review of Stock Transfers, at 6 (Jan. 14, 2005) (finding 7.1% of the total resource capability permissible), at 5-6; *see also*; Case 17-M-0735, Sithe/Independence Power Producers, *Declaratory Ruling on Transfer and Making Other Findings* (Feb. 27, 2018) (4.8% of the state’s total installed capacity was “below levels previously found insufficient to create market power”).

[12] Case 17-M-0735, Sithe/Independence Power Producers, *Declaratory Ruling on Transfer and Making Other Findings* (Feb. 27, 2018), at 7 footnote 7 (describing vertical market power).

project, the Proposed Transaction contributes towards New York's public policy goal of having 70 percent renewable energy by the year 2030 and a carbon-free electricity grid by the year 2040, as enacted in the Climate Leadership and Community Protection Act. In addition, the Proposed Transaction will help realize the multitude of State and local benefits of the Project enumerated in the CPCN Order.[13]

B. BALL HILL SHOULD CONTINUE TO BE ENTITLED TO LIGHTENED REGULATORY TREATMENT

On April 18, 2019, the Commission granted Ball Hill a CPCN pursuant to Section 68 of the PSL and authorized lightened ratemaking regulation for Ball Hill.[14] Petitioners respectfully request that the Commission continue to apply such lightened regulatory treatment to Ball Hill and grant the relief requested in the Verified Petition or this Verified Joint Supplemental Petition. There has been no change in circumstances that would require disturbing the Commission's original ruling.

III. **CONCLUSION**

In sum, the Petitioners respectfully request that the Commission declare that no further review of the Proposed Transaction is required under Section 70 of the PSL and that Ball Hill remains entitled to lightened ratemaking regulation.

[13] CPCN Order at 3-6.

[14] *See* id.

Dated: July 7, 2020

Respectfully submitted,

HODGSON RUSS LLP

Attorneys for Northland Power New York Wind LLC

/s/

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/s/ *Konstantin Podolny*

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Case 20-E-0240

VERIFICATION

Mike Crawley, being duly sworn according to law, upon his oath, deposes and says:

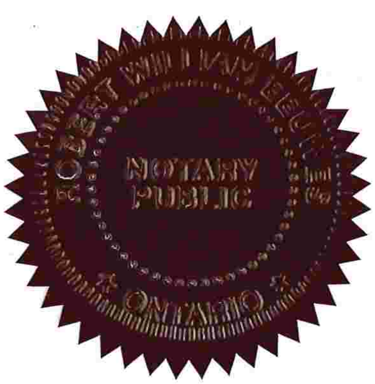
1. I am the Chief Executive Officer of Northland Power Inc. and Northland Power New York Wind LLC. I am authorized to make this Verification on behalf of Northland Power New York Wind LLC.

2. I have read the contents of the foregoing Verified Joint Petition and hereby verify that the statements therein contained are true and accurate to the best of my knowledge and belief as to Northland Power New York Wind LLC, and Northland Power Inc.

Mike Crawley

Sworn to and subscribed before me
this 6th day of July, 2020

Notary Public
Robert William Eeuves



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VERIFICATION

1. I, Chad Horton, am the Senior Vice President of Petitioners Ball Hill Wind Energy, LLC and RES America Developments Inc. and am authorized to make this Verification on behalf of Ball Hill Wind Energy, LLC and RES America Developments Inc.

2. I have read the contents of the foregoing Supplemental Petition and hereby affirm that the statements therein contained are true and accurate to the best of my knowledge and belief as to Ball Hill Wind Energy, LLC, and RES America Developments Inc.

Ball Hill Wind Energy, LLC
a Delaware limited liability company

By: RES America Developments Inc.
its Manager

By: ________________________
Chad Horton
Senior Vice President

Date: June 26, 2020

RES America Developments Inc.
a Delaware corporation

By: ________________________
Chad Horton
Senior Vice President

Date: June 26, 2020

ACKNOWLEDGMENTS

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

The foregoing instrument was acknowledged before me this 26th day of June, 2020, by Chad Horton, as Senior Vice President of RES America Developments Inc., a Delaware corporation, and Manager of BALL HILL WIND ENERGY, LLC, a Delaware limited liability company, on behalf of said company.

[SEAL]

NOTARY PUBLIC STATE OF TEXAS
KRISTIN GLASS
Notary Public, State of Texas
Comm. Expires 11-14-2020
Notary ID 124038512

Kristin Glass
Notary Public

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

The foregoing instrument was acknowledged before me this 26th day of June, 2020, by Chad Horton, as Senior Vice President of RES AMERICA DEVELOPMENTS INC., a Delaware corporation, on behalf of said corporation.

[SEAL]

NOTARY PUBLIC STATE OF TEXAS
KRISTIN GLASS
Notary Public, State of Texas
Comm. Expires 11-14-2020
Notary ID 124038512

Kristin Glass
Notary Public