STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on March 14, 2019

COMMISSIONERS PRESENT:

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

CASE 19-E-0087 – Petition of FPL Energy New York, LLC, FPL Energy Rockaway Peaking Facilities, LLC, Bayswater Peaking Facility, LLC, Jamaica Bay Peaking Facility, LLC, and MPH Rockaway Peakers, LLC for a Declaratory Ruling Concerning a Proposed Transfer of Upstream Interests in FPL Energy Rockaway Peaking Facilities, LLC or, in the Alternative, Approval Pursuant to Section 70 of the Public Service Law; and Confirming Financing and Lightened Regulation.

DECLARATORY RULING ON TRANSFER AND MAKING OTHER FINDINGS

(Issued and Effective March 19, 2019)

BY THE COMMISSION:

INTRODUCTION

In a petition filed on February 11, 2019, FPL Energy New York, LLC (FPL NY), FPL Energy Rockaway Peaking Facilities, LLC (FPL Rockaway), Bayswater Peaking Facility, LLC (Bayswater), Jamaica Bay Peaking Facility, LLC (Jamaica Bay), and MPH Rockaway Peakers, LLC (MPH Rockaway) (collectively, the Petitioners) request issuance of a declaratory ruling that Public Service Commission (Commission) approval is not needed under Public Service Law (PSL) §70 with respect to a proposed transfer of indirect, upstream interests in FPL Rockaway from

FPL NY to MPH Rockaway (the Petition). The Petitioners explain that Bayswater owns and operates an approximately 54 MW gas-fired electric generation facility (the Bayswater Facility), and Jamaica Bay owns and operates an approximately 55 MW gas-fired generation facility (the Jamaica Bay Facility). Bayswater and Jamaica Bay (together, the Subsidiaries) operate their respective facilities subject to lightened regulatory regimes.[1]

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 March 4, 2019. In this Declaratory Ruling, the Commission determines that no further review under the PSL is warranted for the proposed transfer of indirect, upstream interests in the Subsidiaries.

THE PETITION

Bayswater

The Petitioners explain that Bayswater is a wholly-owned direct subsidiary of FPL Rockaway. Bayswater owns, operates, and manages the Bayswater Facility, which is located in Far Rockaway, New York, subject to lightened ratemaking regulation.[2] According to the Petitioners, the Bayswater Facility capacity is fully committed on a firm basis through June 28, 2020, pursuant to a Power Purchase Agreement (PPA) executed with the Long Island Power Authority (LIPA).

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[1] Case 03-E-1145, Bayswater Peaking Facility, LLC and Jamaica Bay Peaking Facility, LLC, Order Approving Financing (issued November 3, 2019) (Financing Order); Case 01-E-0929, Bayswater Peaking Facility, LLC, Order Providing for Lightened Regulation and Approval of Financing (issued January 31, 2002) (Bayswater Order); Case 02-E-147, Jamaica Bay Peaking Facility LLC, Order Providing for Lightened Regulation and Approving Financing (issued January 23, 2003) (Jamaica Bay Order).

[2] See Financing Order; Bayswater Order.

Petitioners aver that Bayswater does not have any retail electric facilities, distribution facilities, or captive customers, and cannot erect any barriers to market entry. Petitioners also report that Bayswater does not make any sales outside of the wholesale markets administered by the New York Independent System Operator, Inc. (NYISO), nor does it make any retail sales of power to electric customers.

Jamaica Bay

Petitioners explain that Jamaica Bay is a wholly-owned direct subsidiary of FPL Rockaway. Jamaica Bay owns, operates, and manages the Jamaica Bay Facility, which is located in Far Rockaway, New York, subject to lightened ratemaking regulation.[3] According to Petitioners, the Jamaica Bay Facility capacity is fully committed on a firm basis through June 28, 2020, pursuant to a PPA executed with LIPA. Petitioners aver that Jamaica Bay does not have any retail electric facilities, distribution facilities, or captive customers, and cannot erect any barriers to market entry. Petitioners also report that Jamaica Bay does not make any sales outside of the NYISO-administered wholesale markets, nor does it make any retail sales of power to electric customers.

FPL NY and Relevant Affiliates

FPL Rockaway

Petitioners explain that FPL Rockaway was established for the purpose of owning all of the direct interests in Jamaica Bay and Bayswater. FPL Rockaway is the sole member of the Subsidiaries, Petitioners continue, and is wholly-owned by FPL NY. Petitioners state that FPL Rockaway is the parent company of the Subsidiaries and does not directly own any generation or transmission assets.

[3] See Financing Order; Jamaica Bay Order.

According to Petitioners, neither FPL Rockaway nor the Subsidiaries have a franchised retail service territory or captive utility customers or engage in the state-regulated sale of electricity at retail. Neither FPL Rockaway nor the Subsidiaries, Petitioners continue, have retail electric facilities or distribution facilities or captive customers in the New York City submarket, which Petitioners claim to be the only market relevant to the Petition. Petitioners assert that neither FPL Rockaway nor the Subsidiaries are a holding company of any electric utility or public utility that owns, operates, or controls electric transmission rights or electric transmission facilities other than limited facilities necessary to interconnect generating facilities, and they cannot erect any barriers to market entry.

FPL NY

Petitioners report that FPL NY is a wholly-owned direct subsidiary of ESI Energy, LLC (ESI Energy) which, in turn, is a wholly-owned direct subsidiary of NextEra Energy Resources, LLC (NextEra Resources). NextEra Resources, Petitioners continue, is a wholly-owned indirect subsidiary of NextEra Energy, Inc. (NextEra). Petitioners assert that FPL NY neither owns nor controls any retail electric facilities or distribution services within or into New York, nor does it have any captive customers in New York or the ability to erect any barrier to market entry. According to Petitioners, FPL NY does not have a franchised retail service territory or captive customers, and it does not engage in state-regulated retail sales of electricity. Petitioners aver that FPL Energy does not own, operate, or control electric transmission rights or facilities other than limited facilities necessary to interconnect generating facilities. FPL Energy, Petitioners continue, does not own or control any electric facilities other than certain Qualifying Facilities and Exempt Wholesale Generators, and does not own or control any essential inputs to electric generation in New York.

MPH Rockaway and Relevant Affiliates

MPH Rockaway, Petitioners explain, was formed to acquire FPL Rockaway and is a wholly-owned subsidiary of Hull Street Energy, LLC (Hull Street). Petitioners report that Hull Street is a private equity firm that is involved primarily in the development and acquisition of, and investment in, energy infrastructure assets. It also engages in activities related to the ownership, operation, and management of those assets, which include electric generation facilities. Petitioners assert that Hull Street currently is not affiliated with any generation capacity in the NYISO control area.

Hull Street, Petitioners continue, is affiliated with electric generation facilities located in the neighboring ISO New England, Inc. (ISO-NE) and PJM Interconnection, LLC (PJM) control areas. Petitioners report that, in the ISO-NE market, Hull Street or its affiliates indirectly own Maxim Power (USA), Inc. (MUSA) and are affiliated with three electric generating facilities with a total generating capacity of approximately 267 MW in Connecticut, Massachusetts, and Rhode Island. Petitioners report that Hull Street also is affiliated with BFALP-GP, LLC (BFALP-GP), which is the general partner of Berkshire Feedline Acquisition Limited Partnership (Berkshire Feedline). Berkshire Feedline owns a 6.2-mile natural gas pipeline that serves an affiliated generating facility. Petitioners explain that a local distribution company has capacity rights on the pipeline as well as an exclusive license to operate it.

Petitioners report that, through its indirect ownership of MUSA, Hull Street also is affiliated with an approximately 77 MW gas-fired generating facility located in the

PJM market. Hull Street, Petitioners aver, is not affiliated with any entity that owns or controls electric transmission facilities in the United States other than limited equipment necessary to interconnect generating facilities to the transmission system. Hull Street similarly is not affiliated with any entity that owns or controls any essential inputs to electricity products or power production, nor is it affiliated with any public utility that has a franchised electric service territory.

According to Petitioners, Hull Street is controlled by Sarah Wright, an individual. Petitioners report that, aside from the facilities and companies described above, Ms. Wright is not affiliated with and does not hold or control, directly or indirectly with the power to vote, voting or equivalent securities in any electric generation facility, electric transmission facility, or any essential input to electricity products or production. Petitioners also assert that Ms. Wright is not employed or affiliated with and does not hold the position of officer or director of, any public utility with a franchised electric service territory.

The Proposed Transaction

Petitioners explain that FPL NY agreed to sell to MPH Rockaway all of its interests in FPL Rockaway, including its indirect interests in the Subsidiaries and their generating facilities. Petitioners report that MPH Rockaway’s parent company, Hull Street, indirectly owns and operates a number of electric generating facilities in the neighboring ISO-NE and PJM markets. According to Petitioners, the Hull Street management team has expertise at running various investment and operating energy businesses, and cumulatively have acquired, developed, and operated more than 10,000 MW of electric generating capacity over the last 20 years. Moreover, Petitioners continue, Hull

Street has managed and optimized fuel supply programs for power plants of all fuel types.

Petitioners maintain that they have satisfied the presumption established in the Wallkill Order.[4] 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 facilities, unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption.

The proposed transaction, Petitioners continue, poses no risk of horizontal or vertical market power,[5] or other harm to captive utility ratepayers. Petitioners explain that the proposed transaction does not present a risk of market power because MPH Rockaway and its affiliates do not hold any interests in electric generating facilities in New York, transmission or distribution facilities, entities that are scheduling or reliability coordinators or balancing area authorities in New York, energy service companies, electric or gas transmission or distribution service providers, or entities that can exercise control over the provision of fuels used in generation in New York.

Petitioners assert that affiliated companies that hold such interests in the neighboring ISO-NE and PJM markets are limited. Petitioners note that affiliates of MPH Rockaway

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

[5] 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.

currently hold approximately 345 MW and 77 MW of generating capacity in the ISO-NE and PJM markets, respectively. According to Petitioners, those affiliated interests do not pose the potential for the exercise of market power in New York because the facilities operate in separate geographic markets and the generating capacity represents a de minimis amount (i.e., less than 1%) of the total generating capacity in each of those markets. Petitioners argue that these penetration levels are insufficient to enable the exercise of market power in New York and cite Commission rulings where greater market penetration levels did not raise market power concerns.[6]

Petitioners argue that MPH Rockaway's affiliation with a natural gas pipeline in the ISO-NE control area does not present any market power concerns. According to Petitioners, the pipeline was built to serve an electric generation facility, with some pipeline capacity reserved for use by the local distribution company that operates the pipeline.

The proposed transaction, Petitioners aver, will not result in any adverse impacts in New York. There will be no change in day-to-day operations of the Bayswater and Jamaica Bay Facilities following consummation of the proposed transfer. Moreover, the Subsidiaries do not engage in any retail sales and neither MPH Rockaway nor its affiliates have any captive utility customers.

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[6] See, e.g., Case 11-E-0181, ReEnergy Black River LLC et al., Order Approving Transfer and Making Other Findings (issued August 23, 2011); Cases 12-E-0211, et al., Alliance Energy New York, LLC et al., Order Approving Transfer Subject to Conditions Precedent and Approving Financings (issued September 17, 2012).

LEGAL AUTHORITY

Pursuant to PSL §70, 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 §70 transfer requests 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.[7] The Commission has determined that full 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).[8]

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

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

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

governed by the Commission’s Rules of Procedure, contained in 16 NYCRR Part 8, implementing that statute.[9]

DISCUSSION

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 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 market power. MPH Rockaway will hold an indirect interest in the Subsidiaries and neither MPH Rockaway nor its affiliates own or control any other electric generating facilities in New York. Although MPH Rockaway is affiliated with generating capacity of approximately 345 MW and 77 MW in the neighboring ISO-NE and PJM control areas, respectively, that capacity constitutes less than 1.0% of the total generating capacity in each market and is insufficient to raise horizontal market power concerns in New York.

The proposed transaction similarly does not present a vertical market power risk. Neither MPH Rockaway nor its affiliates exercise control over electric transmission or distribution facilities in the United States other than the limited facilities necessary to interconnect individual generators.

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[9] Declaratory rulings are not “actions” within the meaning of the State Environmental Quality Review Act (SEQRA) and its implementing regulations (see 16 NYCRR §7.2) and, therefore, they may be issued without further SEQRA review.

Finally, the Bayswater and Jamaica Bay Facilities will remain fully-committed under their respective PPAs through June 28, 2020. After that date, the Subsidiaries are likely to execute an extension of the PPA, negotiate a new PPA with LIPA or a different entity, or participate in competitive wholesale markets on a merchant basis. These activities will not present a risk of harm to captive ratepayers. The proposed transaction, therefore, does not present a risk of harm to such ratepayers. Accordingly, based on the facts and circumstance presented in the Petition, the proposed transaction does not require further review under PSL §70.[10]

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

[10] The proposed transaction does not present any new facts or circumstances that warrant reconsideration of the lightened ratemaking regulatory regimes previously granted to Bayswater and Jamaica Bay. Prior financing approvals granted to the Subsidiaries similarly will continue without change after the proposed transaction is consummated.