STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on September 16, 2010

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

CASE 08-M-0659 – Proceeding on Motion of the Commission Regarding Regulation of Owners of Stock Interests in Electric and Steam Corporations.

CASE 08-E-0397 - Petition of Harbinger Capital Partners Master Fund I, Ltd. And Harbinger Capital Partners Special Situations Fund, L.P. for a Declaratory Ruling Regarding Acquisition of Common Stock, and, in the Alternative, Approval Under Section 70 of the New York State Public Service Law.

CASE 07-E-1385 - Calpine Corporation and LS Power Development, LLC – Petition For a Declaratory Ruling Regarding Acquisition of Common Stock, or in the Alternative, Approval Under PSL §70 and §83.

CASE 07-E-1371 - Calpine Corporation, Harbinger Capital Partners Master Funds I, Ltd., Harbinger Capital Partners Special Situations Fund, L.P., SPO Partners II, L.P., and San Francisco Partners II, L.P. – Joint Petition For a Declaratory Ruling Regarding Acquisition of Common Stock, and in the Alternative, Approval Under PSL §70.

ORDER ESTABLISHING PRESUMPTION AND CLOSING PROCEEDINGS WITHOUT PREJUDICE

(Issued and Effective September 21, 2010)

BY THE COMMISSION:

BACKGROUND

In the Wallkill Order, it was decided that Public Service Law (PSL) §70 would adhere to lightly-regulated electric corporations operating generation facilities selling their output at wholesale in newly-emerging competitive markets.[1] PSL §70(1) provides for review and approval of the transfer to a new owner of all or any part of the "works or system" owned by an electric corporation, and PSL §§70(3) and (4) provide for review and approval of certain acquisitions of common stock in electric corporations. Prior to 2009, the stock acquisitions within the purview of §70 were limited to an acquisition of any share of stock in one electric corporation by another electric corporation, pursuant to §70(3), and an acquisition resulting in the holding of more than 10% of the common stock in an electric corporation by another stock corporation, pursuant to PSL §70(4). In 2009, §70(4) was amended to provide that an acquisition resulting in the holding of more than 10% of the common stock in an electric corporation by any person or type of company would be subject to review and approval,[2] not just an acquisition of such a holding by another stock corporation.[3]

PSL §70 reviews of transfers of lightly-regulated generation ownership interests have been conducted in

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[1] Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

[2] Laws of 2009, Ch. 226.

[3] Any acquisition of common stock that results in the owner holding more than 10% of the stock in an electric corporation is subject to approval, including any acquisitions made subsequent to the time the 10% level is first exceeded, as any subsequent acquisition will also result in the holding of more than the 10% limit.

conformance with the Wallkill Order since the first request for such a review was received in 2000.[4] In those reviews, PSL §70 was initially applied to transfers of 50% or more of the interests in lightly-regulated owners of generation facilities located in New York. Such a transfer of ownership interests amounted to a transfer of "works or system" of an electric corporation under PSL §70(1), because any entity controlling 50% or more of the ownership interests in a generation facility was clearly an electric corporation managing or operating that generation facility, which constitutes the PSL §70(1) "works or system" of that electric corporation.

In the 2008 Calpine Ruling,[5] however, two new issues on application of PSL §70 to transfers of wholesale generator ownership interests were raised. First, the transfer of a minority ownership interest of less than 50% of the interests in a wholesale generation facility presented the question of whether PSL §70(1) review and approval of the transfer was required, because a change in control over the ownership of the generation facility had occurred. Second, approval under PSL §70(4) of an acquisition resulting in the new owner holding more than 10% of the common stock in an electric corporation owning a wholesale generator presented the question of whether the new owner also becomes an electric corporation by virtue of its new holding.

In an Order Instituting Proceeding and Notice Soliciting Comments (Order Instituting Proceeding) issued June 23, 2008 in Case 08-M-0659, an inquiry was launched into finding

[4] Case 00-E-1585, Sithe Energies, Inc., Order on Review of Stock Transfer and Other Transactions (issued November 16, 2000).

[5] Cases 07-E-1385 and 07-E-1371, supra, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (issued January 22, 2008).

generic answers to the new questions raised in the 2008 Calpine Ruling. Moreover, petitions for rehearing to the 2008 Calpine Ruling, and the subsequent 2008 Mirant Ruling,[6] were filed on February 21 and July 23, 2008, respectively, by LS Power Development LLC (LS Power) and Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. (collectively, Harbinger), respectively. Those petitions raised questions similar to those adumbrated in the Case 08-E-0659 Order Instituting Proceeding.

In the Order Instituting Proceeding, interested parties were invited to submit comments by July 25, 2008, with reply comments due by August 8, 2008. Extensive initial comments were submitted, in conformance with the deadline, as extended by the Secretary, of August 1, 2008. No reply comments were received. No responses to the petitions for rehearing of the 2008 Calpine Ruling and the 2008 Mirant Ruling were received within the 15-day periods prescribed under 16 NYCRR §3.7(c), which expired on March 10 and August 7, 2008, respectively. The positions of the parties are summarized in Appendix A.

DISCUSSION AND CONCLUSION

The comments submitted in Case 08-M-0659 displayed wide disagreement over what generic principles should be adopted for reviewing transfers involving minority ownership interests of less than 50% in electric corporations and for determining when the acquisition of a minority ownership interest of less than 50% but more than 10% in a generation facility, pursuant to PSL §70(4) or otherwise, rendered that new owner itself an electric corporation. Those comments therefore indicate that

[6] Case 08-E-0397, supra, Declaratory Ruling on the Acquisition of Common Stock (issued June 23, 2008).

arriving at generic principles governing those two circumstances would be difficult, if feasible at all.

In the absence of a generic resolution to Case 08-M-0659 following submission of the comments, review of ownership interest transfers has continued to take place on a case-by-case basis. That case-by-case adjudication process is acceptable under PSL §70 as currently structured, and the effort to arrive at a generic resolution of Case 08-M-0659 would not be fruitful at this time. Accordingly, Case 08-M-0659 may be closed, without prejudice to considering the questions at issue there in other proceedings.

As they have in the past, entities may continue to file petitions, under PSL §70(1), requesting approval of transfers of ownership interests in lightly-regulated generation facilities where a change in control over ownership would occur, or requesting that review of a transaction be eschewed in conformance with the presumption established in the Wallkill Order. An entity may also request a determination on when it becomes an electric corporation, for the purpose of determining if it must obtain approval before acquiring any stock in another electric corporation under PSL §70(3), or for other reasons.

To assist entities in deciding when PSL §70 adheres to a transaction, it will be presumed that a transfer of less than 10% of the ownership interests in a generation facility, other than common stock, does not require our review or approval under PSL §§70(1). It is appropriate to apply the 10% ownership level, used in PSL §70(4) to trigger review of common stock acquisitions, to the transfer of ownership interests that would be presumed outside the scope of PSL §70(1) because a change in ownership control would not have occurred. In amending the stock purchase provisions of §70(4) in 2009, the Legislature reaffirmed that at the level of less than 10% ownership, an

acquisition of an ownership interest does not generally require our attention, with the exception that any electric corporation acquiring common stock in another electric corporation must obtain the approval provided for in PSL §70(3). Since approval will not be required under PSL §70(1) for transactions satisfying the presumption, parties engaged in such transactions need not petition or make other filings regarding those transactions.[7]

Moreover, at or below that 10% level of ownership, an entity will be presumed to lack the control over the operation of a generation facility necessary for the entity to become an electric corporation. Consequently, such an entity will be deemed outside the scope of PSL §70(3) and its requirement that electric corporations obtain approval for the acquisition of any common stock in another electric corporation.[8]

The 10% presumption established for these purposes may be overcome upon a finding that an owner of an interest sized at less than 10% of the interests in a lightly-regulated wholesale generation facility is nonetheless controlling the operation of that generation facility. Upon exercising that control over the facility's operation, such an owner would become an electric corporation, justifying a finding that such action as is necessary under the PSL may be taken. An entity may also concede that it controls a generation facility even at an ownership interest level of less than 10%, and may thereupon

[7] Once the 10% ownership level in an electric corporation is exceeded, each additional acquisition of ownership interests in that electric corporation by that owner would raise anew the question of the need for PSL §70(1) review and approval.

[8] As noted in the Order Instituting Proceeding, treatment of lightly-regulated steam corporations generally follows treatment of lightly-regulated electric corporations, and so these principles will adhere to those steam corporations.

seek required approvals under PSL §70. With the 10% presumption in place, the statutory framework currently laid out in PSL §70, as amended in 2009, is most satisfactorily implemented through a case-by-case approach.

As to the petitions for rehearing of the 2008 Calpine Ruling and the 2008 Mirant Ruling, both LS Power and Harbinger were treated in those proceedings as electric corporations only to the extent necessary to establish our jurisdiction over those acquisitions under PSL §70(1) or (3), as either a transfer of control over another electric corporation or the acquisition of common stock in one electric corporation by another electric corporation.[9] It was not necessary, however, to decide that either would remain an electric corporation for the purpose of transactions or other activities that would be conducted in the future.

Therefore, any findings made in the 2008 Calpine Ruling and the 2008 Mirant Ruling are restricted to the approvals granted in those proceedings. Consequently, following the closing of those proceedings, the determinations made there that LS Power and Harbinger were electric corporations will cease to bind them, and they are free to assert in the future that they are not electric corporations, unless and until we determine otherwise upon a review of the facts and circumstances present at the time the issue is raised. Upon that basis, Cases 07-E-1385, 07-E-1371 and 08-E-0397 may be closed, without prejudice on the question of when an owner of interests in a lightly-regulated wholesale generator becomes an electric corporation.

[9] Because one of Harbinger's affiliates was a foreign stock corporation, grounds also existed to assert jurisdiction over it under PSL §70(4) as a stock corporation acquiring a holding of more than 10% of the stock in an electric corporation.

The Commission orders:

1. Acquisitions and transfers of ownership interests in lightly-regulated electric generation facilities located in New York will be reviewed in accordance with the principles established in the body of this Order.

2. These proceedings are closed without prejudice.

By the Commission,

Jaclyn A. Brilling

Digitally Signed by Secretary
New York Public Service Commission

JACLYN A. BRILLING
Secretary

Appendix A

POSITIONS OF THE PARTIES

THE PETITIONS FOR REHEARING IN CASES 08-E-0397, 07-E-1385 and 07-E-1371

LS Power's Petition

LS Power begins by claiming that it is not an electric corporation under PSL §2(13) because it does not own or operate any generating capacity in New York, albeit it owns 1,765 MW of generating capacity elsewhere in the U.S. Analyzing the Dynegy Ruling,[1] which addressed its acquisition of 40% of the voting stock in Dynegy, Inc. (Dynegy), LS Power argues that no finding was made there on its ownership of, or control over, generation facilities, and the Dynegy Ruling does not establish that it is an electric corporation as defined in PSL §2(13). Turning to the 2008 Calpine Ruling at issue here,[2] LS Power interprets it as deciding only that it could acquire up to 25% of the common stock of Calpine Corporation (Calpine). The Ruling, LS Power claims, lacks a foundation that would support a conclusion that it is an electric corporation under PSL §2(13).

In support of its arguments, LS Power analyzes precedents cited in the Calpine Ruling,[3] which reference, in addition to instances where entire or majority interests in electric plant ownership were transferred, transfers of between 30% and less than 50% of the ownership interests in a generation

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[1] Case 06-M-1305, Dynegy, Inc. and LS Power Development LLC, Declaratory Ruling on Review of a Merger Transaction (issued December 20, 2006).

[2] Case 07-E-1385, Calpine Corporation and LS Power Development LLC, Declaratory Ruling on Review of Stock Transfer and Acquisition Transactions (issued January 22, 2008).

[3] See, e.g., Case 07-E-0288, Astoria Energy LLC, Declaratory Ruling on Review of Ownership Interest Transfer and Making Other Findings (issued May 22, 2007).

facility. LS Power does not believe those Rulings determined that the owners of minority stock interests in corporations owning electric plant became electric corporations by virtue of those stock ownership interests.

Its 40% ownership interest in Dynegy, LS Power asserts, does not justify treating it as an electric corporation, because the interest does not enable it to exercise control over the management or operation of the 2,686 MW of generating capacity that Dynegy operates in New York. According to LS Power, it cannot vote its 40% interest in a manner that would allow it to influence the day-to-day operations of Dynegy.[4] Since it cannot control the operations of Dynegy's generation facilities, LS Power concludes that it does not own, operate or manage electric plant within the meaning of PSL §2(13).

LS Power claims that its primary business is investment in the energy industry, and it states it frequently pursues the acquisitions of interests of less than 10% of the common stock in New York electric corporations. These investments, it asserts, must be timed to take advantage of market conditions, which prevents it from first seeking regulatory approval before proceeding with the investment. In requiring it to obtain that regulatory approval because it is an electric corporation, LS Power protests, the Calpine Ruling in effect deprives it of the ability to make these types of investments.

If it is determined that it is an electric corporation, LS Power asks that it be permitted to purchase 10%

[4] LS Power describes its 40% ownership interest in Dynegy as consisting of Class B shares subject to restrictions on their sale and explicitly premised upon the absence of control of Dynegy, and which limit LS Power to electing three of the eleven Dynegy Directors.

or less of the common stock of other New York electric corporations without obtaining approval under PSL §70. It believes that a requirement that it report such purchases would be adequate to protect the public interest, while enabling it to pursue the investment activities expected of an investment entity participating in the competitive markets where wholesale generators operate.

Harbinger's Petition

In requesting rehearing of the 2008 Mirant Ruling, Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. (collectively, Harbinger), assert that they do not become an electric corporation by virtue of their ownership of more than 10% of the outstanding common stock of Mirant Corporation (Mirant).[5] Harbinger complains that the 2008 Mirant Ruling could be interpreted to the contrary. Like LS Power, Harbinger argues that asserting jurisdiction over it as an electric corporation would unreasonably impede investment in New York generation facilities, eventually causing the price of generation in New York to rise to the detriment of electric utility ratepayers.

According to Harbinger, categorizing it as a PSL §2(13) electric corporation, and then asserting jurisdiction over each share of stock it would purchase in another electric corporation under PSL §70(3), would be preempted by the enactment of the Energy Policy Act of 2005 (EPAct 2005). That statute, Harbinger argues, modified Federal Power Act (FPA) §203 by extending Federal Energy Regulatory Commission (FERC) jurisdiction to the transfer of ownership interests in

[5] Case 08-E-0397, Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P., Declaratory Ruling on the Acquisition of Common Stock (issued June 23, 2008).

generation facilities making wholesale sales. Since it has already been decided that FERC's jurisdiction over the transfer of ownership interests in transmission facilities preempts PSL §70, Harbinger believes that EPAct 2005 similarly preempts PSL §70 jurisdiction over generation facility transfers, when output from such a facility is sold in wholesale markets. Harbinger also points out that FERC eschews review of transfers of 10% or less of the outstanding voting securities in a corporation.

Harbinger also asserts that it is not an electric corporation under PSL §2(13) because it does not control Mirant. Harbinger points out that it does not own a majority of the voting shares in Mirant, and has no seats on its Board of Directors. As a result, Harbinger maintains that assertions of jurisdiction premised upon the assumption that an entity controls the operation of a generation facility are not relevant to its ownership of Mirant stock. Harbinger believes that a similar analysis should adhere to its ownership of Calpine stock, and that the 2008 Calpine Ruling should not be interpreted as deciding that it is an electric corporation by virtue of its ownership of Calpine stock. Harbinger asks that it be determined it is not an electric corporation, while a determination in Case 08-M-0659 is awaited.

ANALYSIS OF COMMENTS IN CASE 08-E-0659

IPPNY

The Independent Power Producers of New York (IPPNY) believes that the extent of PSL regulation over all forms of ownership interests in electric and steam corporations should be clarified, to establish the certainty investors in highly capital intensive electric facilities must rely upon in making their commitments. Over-regulation, IPPNY cautions, could chill

investment in the new electric generation plant needed to meet growing load in New York, thereby harming consumers.

Arguing that the PSL does not provide for regulation of indirect owners, IPPNY claims that holding companies are not the persons or corporations owning or operating the "electric plant" defined in PSL §2(12), and so are outside the scope of the PSL §2(13) definition of an electric corporation. The stock, partnership, or other ownership interests in a §2(13) electric corporation should not be defined as §2(12) electric plant, IPPNY adds, because that approach would unreasonably bring hundreds of thousands of individual stockholders and other owners within the realm of electric corporation regulation.

In support of its argument on jurisdiction over holding companies, IPPNY reads PSL §§110(1) and (2), which address affiliated interests, as a limitation on jurisdiction. Since those sections of the PSL provide for the disclosure of interests in voting capital stock and access to accounts and records of affiliated interests, IPPNY maintains that the Commission may not extend regulation of holding companies beyond those boundaries.

According to IPPNY, jurisdiction over holding companies and other indirect owners of lightly-regulated generators was first asserted only recently, in the 2008 Calpine Ruling. That decision, IPPNY argues, contradicts the Wallkill Ruling, which it interprets as decided that upstream entities owning interests in lightly-regulated generators would not be electric corporations. IPPNY contends that the Wallkill Ruling policy was continued in the Carr Street Order,[6] and other

[6] Case 91-E-0350, Wallkill Generating Company, L.P., Declaratory Ruling on Regulatory Policies Affecting Wallkill Generating Company and Notice Soliciting Comments (issued August 21, 1991).

subsequent Orders, until issuance of the Great Lakes Order in 2005,[7] which stated that the affiliates of direct owners were also subject to lightened regulation, without defining those entities that would be treated as affiliates. As a result, IPPNY contends, the Great Lakes Order should not be construed as extending lightened regulation to indirect owners or holding companies generally.

The Sithe I Ruling, IPPNY explains, should not be interpreted as providing for lightened regulation of holding companies.[8] According to IPPNY, that decision addressed only a transfer subject to PSL §70. None of the participants in the transaction, IPPNY emphasizes, were specifically deemed electric corporations.

IPPNY also maintains that telephone holding companies have not been treated telephone corporations. It argues that Opinion No. 97-8, which addressed a transfer of telephone holding company interests, did not specifically determine that the holding companies involved were telephone corporations.[9] IPPNY interprets similarly the Verizon-MCI Order,[10] which, it argues, establishes that PSL jurisdiction over a holding company is limited.

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[7] Case 05-E-1217, Great Lakes Holding America Company, Order Approving Transfer and Making Other Findings (issued December 21, 2005).

[8] Case 00-E-1585, Sithe Energies, Inc., Order on Review of Stock Transfer and Other Transactions (issued November 16, 2000).

[9] Case 96-C-0603, NYNEX, Inc. and Bell Atlantic, Inc., Opinion No. 97-8 (issued May 30, 1997).

[10] Case 05-C-0237, Verizon Communications, Inc. and MCI, Inc., Order Asserting Jurisdiction and Approving Merger Subject to Conditions (issued November 22, 2005).

Regulating holding companies as electric corporations, IPPNY declares, is inconsistent with federal law and the policies of the Federal Energy Regulatory Commission (FERC). IPPNY asserts that FERC does not treat entities acquiring ownership interests in FERC-regulated public utilities as public utilities themselves whatever the size of their ownership share, so long as the acquiring entity does not participate in the management of operations at the regulated utility.[11] FERC's approach, says IPPNY, is based upon interpretation of the Federal Power Act (FPA) §201(e) definition of a public utility, a provision IPPNY would analogize to the PSL §2(13) definition of an electric corporation.

If holding companies are deemed electric corporations, IPPNY argues in the alternative, PSL requirements other than §70 should not adhere to them. For example, IPPNY posits, an upstream investor in the owner of New York generation plant should not be responsible for failure to give notice of a generation retirement, or to report injuries, as lightly regulated operating entities are.

Turning to the potential for the exercise of horizontal market power, IPPNY would accomplish regulation by applying §70 to transfers of indirect ownership interests even where the indirect owners are not electric corporations. That scope of regulation, IPPNY theorizes, can be extended to the secondary market in stocks, where an acquirer may purchase equity interests without the knowledge of the issuing corporation. IPPNY also believes that PSL §70 review can be expanded beyond corporations as acquirers, to encompass review

[11] Missouri Basin Municipal Power Agency v. Midwest Energy Co., 53 FERC ¶61,368 (1990) at ¶62,298.

of stock acquisitions by any acquiring entity, whatever its form of business organization.

IPPNY, however, would limit review of stock acquisitions to circumstances where interests of 20% or more of a corporation's stock is transferred, a level it says is sufficient to capture those acquisitions that pose a realistic potential for the exercise of market power. The 20% test, IPPNY notes, would readily tie into the Securities Exchange Commission's (SEC) requirement of public disclosure of acquisitions of between more than 5% and up to 20% of the securities in a publicly traded company. Filings made under the SEC's Schedule 13G allow the acquirer to establish that, at those levels, it is not attempting to control the operations of the corporation that issued the stock.

IPPNY also would rely upon the concept of passive ownership to exempt entities from regulation as electric corporations. To determine when an owner is passive, IPPNY would require a demonstration that an entity lacks the ability to control the operation of electric plant. The passive owner designation, IPPNY believes, would be particularly important for the financing of wind and other renewable energy projects by large institutions that avail themselves of the tax credits associated with those projects. These institutional investors, IPPNY asserts, may be reluctant to invest in New York if their passive ownership arrangements subject them to PSL regulation.

Turning to another aspect of PSL §70, IPPNY notes that it provides that any electric corporation must obtain approval to acquire stock in another electric corporation "in this state or any other state." IPPNY believes that, under that provision, jurisdiction could be asserted over the acquisition of stock in out-of-state electric corporations. That jurisdiction, says IPPNY, can be justified only if the goal is to protect captive

ratepayers from the dilution of earnings that could occur if a regulated utility were to purchase stock in an out-of-state corporation.[12] Attempting to assert jurisdiction over other out-of-state transactions, IPPNY claims, would unduly burden multi-state holding companies, in violation of the Commerce Clause of the U.S. Constitution.[13]

Harbinger

Harbinger contends that PSL regulation of holding companies is not needed to prevent the exercise of horizontal market power, because FERC is responsible for regulating that matter. Since FERC has decided that New York's wholesale electric markets are competitive, Harbinger claims that any additional New York regulation would be superseded. Harbinger also maintains that EPAct 2005 preempts PSL regulation of transfers of ownership interests in wholesale generating facilities, just as the FPA has long preempted PSL regulation of transfers of ownership interests in transmission facilities.[14]

Harbinger interprets the PSL §70(4) provision triggering a review when any stock corporation acquires 10% or more of an electric corporation's stock as applicable only to the stock of electric corporations organized or existing under or by virtue of the laws of New York. Most wholesale generators, Harbinger points out, are not organized under New York law. Harbinger argues the application of the 10% limit could be even further restricted, to the companies organized

[12] Brooklyn Union Gas Co. v. Public Service Commission, 34 A.D.2d 71 (3d Dept. 1970).

[13] ANR Pipeline Co. v. Schneidewind, 801 F.2d 228 (6th Cir. 1986, aff'd, 485 U.S. 293 (1988).

[14] Case 05-E-0669, Neptune Regional Transmission System LLC, Order Providing For Lightened Regulation (issued November 30, 2005).

under the Transportation Corporation Law that may avail themselves of condemnation authority.

Given the limited ambit it ascribes to the PSL, Harbinger concludes that the proposals for regulating holding companies made in the Order Instituting Proceeding should be abandoned. If they are not, Harbinger would restrict the scope of the jurisdiction propounded there, by applying PSL §70 regulation only to those entities that acquire a majority ownership interest in a holding company. Harbinger claims the Securities and Exchange Act of 1934 (SECA), at §13(d), addresses minority stock acquisitions, rendering §70 review of minority interest transfers unnecessary.

Harbinger joins IPPNY in asking that jurisdiction over passive ownership interests and out-of-state stock acquisitions be eschewed. Harbinger adds a proposal to apply PSL §70 review only to acquisitions of 10% more of stock in a holding company even if the acquirer is an electric corporation. In Harbinger's view, regulating the purchase of a single share by an electric corporation makes little sense.

Horizon

Horizon Wind Energy LLC (Horizon) states that it appreciates the need to protect New York electric consumers from the exercise of horizontal market power, but it cautions that expanding jurisdiction could adversely affect investment in wind generation projects, contravening New York's policy of promoting wind generation. Horizon also believes over-asserting jurisdiction could unduly burden the Commission with the review of unnecessary filings. As a result, Horizon joins IPPNY in proposing that only transfers of at least a 20% interest be reviewed.

LS Power

LS Power supports IPPNY's reading of the Wallkill Ruling, the Sithe I Ruling, the Great Lakes Order and Calpine Ruling. It would further decline to interpret the Sithe II Ruling as deciding that owners of a majority interest in a holding company entity themselves become electric corporations.[15]

Like IPPNY, LS Power believes that entities acquiring only passive investment interests in holding companies should not be regulated. If the concern is that otherwise-passive minority owners of holding companies might be able to assert control over New York generators in unusual circumstances, or might conspire amongst themselves to obtain that control, LS Power argues that ownership interests can be constrained to prevent such actions.

LS Power explains that decisions to invest in holding company stocks are time-sensitive, and the delay encountered in obtaining approval for a transaction may undermine its economics altogether. To avoid that outcome, LS Power supports IPPNY's proposal to eschew review of the acquisition of an interest 20% or less in a holding company's equity. Moreover, according to LS Power, the acquisition of an interest of that size should not render the acquirer an electric corporation. LS Power would also permit an acquirer of an ownership interest in the range of more than 20% but less than 50% to demonstrate that the interest is passive only, and does not render the acquiring entity an electric corporation.

PSEG

Stating that it supports IPPNY, Public Service Electric & Gas Company (PSEG), argues that treating indirect

[15] Case 03-E-1136, Sithe Energies, Inc., Declaratory Ruling on Review of Ownership Transactions (issued October 28, 2003).

holding company owners of New York generating facilities as electric corporations could unduly require them to seek New York approval for out-of-state transactions that have no connection to New York. PSEG asks that entities that do not directly own New York generating plant be exempted from obtaining approval of acquisitions of stock in out-of-state corporations.

Suez

Also joining in IPPNY's comments, Suez Energy North America, Inc. (Suez) posits that the extension of regulatory oversight to electric utility holding companies should be balanced against the potential for discouraging investment in needed electric generation infrastructure within New York. Suez is concerned that investors may avoid New York if they believe their passive interests in a holding company will render them responsible for the operating practices of a New York generation subsidiary that they cannot control.

Wholesale electric market participants, Suez stresses, will require clear guidance on the application of PSL §70 if they are to invest in New York. To provide the needed certainty, Suez supports IPPNY in recommending adoption of a bright-lined rule providing that an investment at the level of 20% or less will not be reviewed. Suez believes other, similar regulatory proscriptions might provide additional certainty.