

PENDING PETITION MEMO

Date: 5/18/2007

TO : OGC  
OEE  
OHADR  
A&F

FROM: CENTRAL OPERATIONS

UTILITY: NRG ENERGY, INC.

SUBJECT: 07-E-0584

**Petition of NRG Energy, Inc. for a Declaratory Ruling that the Public Service Commission Law Section 70 Does Not Apply to Proposed Corporate Reorganization and Stock Transfer.**

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May 17, 2007

**Via Hand Delivery**

Hon. Jaclyn Brilling, Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

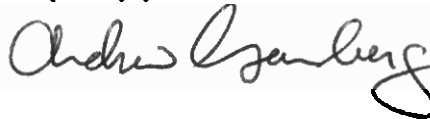
**Re: Case 07-E-\_\_\_\_ - Petition of NRG Energy, Inc. for a Declaratory Ruling  
that Public Service Commission Law Section 70 does not apply to  
Proposed Corporate Reorganization and Stock Transfer**

Dear Secretary Brilling:

Enclosed please find an Original and five copies of the Petition of NRG Energy, Inc. for a Declaratory Ruling that Public Service Commission Law Section 70 does not apply to Proposed Corporate Reorganization and Stock Transfer.

Thank you for your consideration.

Very truly yours,



Andrew Gansberg

Enclosures

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

**ORIGINAL**

**PETITION OF NRG ENERGY, INC. FOR A  
DECLARATORY RULING THAT PUBLIC SERVICE  
LAW SECTION 70 DOES NOT APPLY TO PROPOSED  
CORPORATE REORGANIZATION AND STOCK  
TRANSFER**

**Case 07-E-\_\_\_\_\_**

**PETITION OF NRG ENERGY, INC.**

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*Counsel for NRG Energy, Inc.*

Dated: May 17, 2007

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PUBLIC SERVICE COMMISSION**

**PETITION OF NRG ENERGY, INC. FOR A  
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***Counsel for NRG Energy, Inc.***

**Dated: May 17, 2007**

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Case 07-E-\_\_\_\_\_

**PETITION OF NRG ENERGY, INC.**

**INTRODUCTION**

This Petition is submitted on behalf of NRG Energy, Inc. (“NRG Energy”) for a declaratory ruling that Section 70 of the Public Service law does not apply to the formation of an upstream holding company (NRG Holdco)<sup>1</sup> and the subsequent conversion of NRG Energy’s common stock into common stock of NRG Holdco (the “Transaction”). In the alternative, NRG Energy seeks a declaratory ruling that the *Wallkill*<sup>2</sup> presumption applies and that, therefore, Section 70 would not adhere to the transfer of ownership interests in parent entities upstream from the affiliates owning and operating New York competitive electric generation facilities, unless there is potential for harm to captive New York ratepayers. The Transaction does not pose any potential for harm to captive New York ratepayers because NRG Energy is not, as a result of the Transaction, changing its share of generating resources in New York or neighboring markets.

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<sup>1</sup> NRG Holdco and NRG Merger Sub have not yet been formed and do not yet have names.

<sup>2</sup> Case 91-E-0350, *Wallkill Generating Company, L.P.*, Order Establishing Regulatory Regime (issued April 11, 1994).

## **Description of NRG and Subsidiaries**

### **NRG Energy**

NRG Energy, a Delaware corporation, is a wholesale power generation company, primarily engaged in the ownership and operation of power generation facilities and the sale of energy, capacity, and related products in the United States and abroad. NRG Energy's common stock is publicly traded. Through its interests in the New York Affiliates, described below, and other exempt wholesale generators ("EWGs") and interests in qualifying facilities ("QFs"), NRG Energy indirectly owns electric generation capacity throughout the United States, as well as international assets.

### **NRG Energy's New York Affiliates**

The New York Affiliates are subsidiaries of NRG Energy that own and operate generating facilities and/or engage in wholesale sales of electric energy, capacity, and related products in interstate commerce and include:

- Arthur Kill Power LLC, which owns an 931.7 MW generator in Staten Island, New York;
- Astoria Gas Turbine Power LLC, which owns a 742.8 MW generator in Queens, New York;
- Dunkirk Power LLC, which owns a 592 MW generator in Dunkirk, New York;
- Huntley Power LLC, which owns a 636 MW generator in Tonawonda, New York,<sup>3</sup> and
- Oswego Harbor Power LLC, which owns a 1,803.6 MW generator in Oswego, New York;

Each of the New York Affiliates listed above is subject to a lightened regulatory regime.

*See Case 99-E-0974, NRG Energy, Inc. and Oswego Harbor Power LLC, Order Providing for*

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<sup>3</sup> By letter dated November 30, 2006, NRG Energy informed the Commission that it intends to permanently discontinue operation of Unit Nos. 65 and 66 at the Huntley Power Station effective June 3, 2007.

Lightened Regulation (issued October 21, 1999); Case 99-E-0616, *NRG Energy, Inc., Huntley Power LLC and Dunkirk Power LLC*, Order Providing for Lightened Regulation (issued June 7, 1999); Case 96-E-0897, *Consolidated Edison Company of New York, Inc.*, Comprehensive Order Approving Transfers of Generating Facilities and Making Other Findings (issued June 17, 1999).

### **The Transaction**

For purposes of the Transaction, NRG Energy will form NRG Holdco as a wholly-owned subsidiary of NRG Energy, and will also form NRG Merger Sub as a wholly-owned subsidiary of NRG Holdco. NRG Energy will merge with, and into, NRG Merger Sub, with NRG Energy as the surviving company. The common stock of NRG Energy will be converted into common stock of NRG Holdco. The end result will be that the existing holders of NRG Energy's common stock will hold NRG Holdco's common stock, and all of NRG Energy's common stock will be owned by NRG Holdco. Thus, from a practical perspective, the only change is a nominal change in upstream ownership of NRG Energy, while the shareholders, directors and officers remain unchanged.

### **DISCUSSION**

#### **Section 70 Does Not Apply to the Transaction**

The Commission's Ruling in Case 05-E-1582, *NRG Energy, Inc. and NRG Northeast Generating LLC*, Declaratory Ruling on Review of an Intra-Corporate Dissolution Transaction (issued January 26, 2006) ("NRG Energy 2006 Declaratory Ruling"), supports the relief requested in the petition. In that case, the Commission determined that an intra-corporate dissolution did not result in a transfer of ownership interests requiring Section 70 review because "no new entities are brought into the NRG Energy corporate structure as a result of this dissolution." NRG Energy 2006 Declaratory Ruling at 5. The Commission further found that

there was no disposition of interests among various entities within a corporate structure and that “. . . there is no change in the identity of the ownership; NRG Energy continues to own all of the interests in the NRG limited liability companies.” *Id.*

Although technically there is a new entity being created (NRG Holdco) that will become the ultimate owner of all of NRG Energy’s New York Affiliates, as a practical matter, the current shareholders of NRG Energy will become the shareholders of NRG Holdco. Therefore, although a conversion of ownership interests from NRG Energy to NRG Holdco will occur, the beneficial owners will remain identical before and after the transaction. In addition, NRG Energy will remain the parent company of the New York Affiliates and the operation of New York generating facilities will be unaffected by the proposed Transaction. In situations in which a new holding company entity is created, but (i) the beneficial owners remain the same, (ii) there is no consolidation of NRG Energy generating resources with assets outside of the corporate structure because no new entities are being brought into the corporate structure except wholly-owned subsidiaries created for the sole purpose of effectuating the Transaction and (iii) operation of jurisdictional facilities will be unaffected, Section 70 approval should be determined to be unnecessary. NRG Energy respectfully requests that the Commission extend the NRG Energy 2006 Declaratory Ruling so that a transfer of ownership interests to an affiliated holding company as contemplated by the Transaction is treated as a transaction not requiring Section 70 approval.

**Should Section 70 Approval be Necessary,  
the *Wallkill* Presumption should be Applied**

In the event that the Commission determines that Section 70 approval is necessary, several Commission rulings support the application of the *Wallkill* presumption.

In Case 04-M-1592, *WPS Power Development, Inc. and WPS Energy Services, Inc.*, Declaratory Ruling on Review of an Intra-Corporate Restructuring (issued February 16, 2005) (“WPS Ruling”), the Commission reviewed a proposal to create a new entity, WPS Power Development, LLC (“WPS PDL”) for the purpose of acquiring three WPS Generation LLCs from WPS Power Development, Inc. (“WPS Power”), owner of WPS Empire State, Inc. (“WPS Empire”), the direct owner of the three generation subsidiaries.

The transaction at issue in the WPS Ruling initially involved the merger of WPS Power into WPS Energy, with the latter surviving as the ownership entity. That merger was to be followed by the transfer by WPS Energy of the interests formerly held by WPS Power to WPS PDL. After completion of the transaction, WPS PDL would hold all of the voting stock in WPS Empire, which would remain the owner of the three WPS Generation LLCs.

The Commission decided that the petitioners had satisfied the *Wallkill* presumption, under which transactions involving parent entities upstream from the entities owning wholesale generation facilities will be reviewed under Section 70 only if there is potential for harm to captive New York ratepayers. WPS Ruling, at 5.

The Commission observed that through the proposed transaction, WPS PDL was to acquire all of the stock in WPS Empire, the upstream owner of the three WPS Generation LLCs. The Commission noted that the ultimate parent of the WPS Generation LLCs would remain the same, with neither it nor any of its subsidiaries affiliating with any other entity that owns generating assets. *Id.* Because the ultimate parent, WPS Corporation, was not increasing its share of the sources of supply in any of the markets for wholesale generation operated by the NYISO, the Commission found that the proposed transfer would not affect horizontal market concentration within those markets. The Commission also found that none of the three WPS

Generation LLCs, nor any of the WPS Corporation's affiliates, exercise control over delivery facility assets or inputs into production of generation supply within New York markets. The Commission determined, therefore, that the transaction did not pose the potential for impacts adverse to captive New York ratepayers and that the proposed transfer need not be reviewed further under Public Service Law Section 70.

In the present case, although a new holding company (NRG Holdco) is being created, the existing holders of NRG Energy's common stock will hold NRG Holdco's common stock, and all of NRG Energy's common stock will be owned by NRG Holdco. Moreover, because no new entity that owns or controls generating assets is being brought into the NRG organizational structure, there is no consolidation of or change in the market share attributable to NRG Energy or its affiliates and, therefore the transaction has no adverse effect on market concentration in New York.

Finally, the proposed transfer of ownership interests is occurring at an upstream level even more remote from the ownership of wholesale generation in New York than was the transaction approved in the WPS Ruling. The new holding company is at the very pinnacle of the corporate structure and will be the ultimate parent of all NRG subsidiaries. Because the shareholders of NRG Energy will become the shareholders of NRG Holdco, the creation of NRG Holdco should be viewed as the functional equivalent of an internal reorganization with no potential to harm the interests of captive New York ratepayers.

The Commission reached a similar result in Case 02-E-0939, *Orion Power New York, L.P.*, Declaratory Ruling on Review of Corporate Reorganization and Order Clarifying Prior Order (issued September 24, 2002). In that case, Orion Power New York, L.P. ("Orion") proposed to insert a new subsidiary into the ownership structure between the then-current parent,

Orion Power Holdings, Inc. (“OPHI”) and its subsidiaries that operated New York generation facilities. OPHI would then transfer to the new subsidiary OPHI-owned stock of other subsidiaries upstream from the New York operating affiliates.

The Commission found that the proposed intra-company transfer of stock within Orion’s ownership framework upstream from the New York affiliates would not affect their operation of the New York facilities. The Commission further found that the corporate reorganization would not increase market concentration or pose any other potential for the exercise of market power to the detriment of captive ratepayers. Finally, the Commission noted that Orion and its affiliates would continue to bear the financial risk associated with their organizational and financial arrangements. The Commission determined that the *Wallkill* presumption applied and found that no further Section 70 review was necessary. *Orion Ruling*, at 5-6.<sup>4</sup> *See also*, Case 06-E-0006, *Horizon Wind Energy LLC*, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 14, 2006).

Therefore, in the event that the Commission determines that Section 70 applies to the Transaction, the *Wallkill* presumption should be applied and the Commission should find that no further review of the Transaction is necessary.

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<sup>4</sup> Similar to the Orion transaction, the proposed Transaction carries no potential for any adverse effect on horizontal or vertical market power and NRG Energy and its affiliates will continue to bear the financial risk associated with their organizational and financial arrangements. The Orion transaction involved, however, the transfer of a portion of the ownership interests in certain affiliates upstream from the New York operating affiliates to a newly created subsidiary. Unlike the present Transaction proposed by NRG Energy, there was no complete transfer of stock from one publicly-held corporation to another which would result in the effective conversion of all shares in the existing corporation to shares in the newly-formed corporation. There is good reason, therefore, to apply an even more reduced level of scrutiny to the Transaction proposed herein than was applied to the Orion transaction.

**ADDITIONAL INFORMATION AND  
REQUEST RELATING TO FINANCING AUTHORITY**

**Organizational Charts**

Organizational charts depicting Petitioner's current and post-Transaction structures are attached as Exhibit A.

**Other Required Regulatory Approvals**

NRG Energy is filing an application with the Federal Energy Regulatory Commission ("FERC") for approval under Section 203 of the Federal Power Act and the FERC regulations promulgated thereunder in connection with the same Transaction proposed herein.

On May 3, 2007, NRG Energy filed an application with the Nuclear Regulatory Commission ("NRC") seeking NRC consent for the indirect transfer of control for the license for the South Texas Project nuclear operating station Units 1 and 2 in accordance with Section 184 of the Atomic Energy Act of 1954 and 10 C.F.R. §50.80.

**Financing Authority**

In Case 05-E-1528, *Petition of NRG Energy, Inc. for Approval of Debt Facility Financing Pursuant to Section 69 of the Public Service Law*, Order Approving Financing (issued February 10, 2006),<sup>5</sup> the Commission approved the issuance of debt facilities in an aggregate amount not to exceed \$10 billion, comprised of credit facilities secured, in part, by NRG Energy's assets within New York, and notes that would similarly encumber those assets. NRG Holdco agrees to abide by and be subject to the terms and conditions in the above-referenced Order Approving Financing. NRG Holdco affirms that any financing issued or refinancing undertaken in connection with the Transaction will be issued and/or undertaken in accordance with the terms and conditions set forth in the Order Approving Financing.

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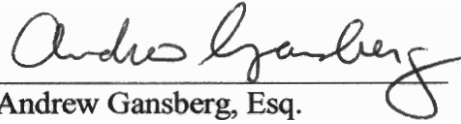
<sup>5</sup> NRG was authorized to modify, without prior approval of the Commission, the financing entities, payment terms and the amounts financed, up to the maximum of \$10 billion. Order Approving Financing at 4-5.

## CONCLUSION

For the reasons set forth herein, NRG Energy respectfully requests that the Commission issue a declaratory ruling finding that approval under Section 70 of the Public Service Law is not necessary for the proposed Transaction, or in the alternative, that the *Walkkill* presumption applies and that no further review of the proposed Transaction is necessary. In so doing, NRG Energy seeks confirmation that the authorization set forth in the Order Approving Financing will apply to NRG Holdco as it applies to NRG Energy.

Dated: May 17, 2007

Respectfully submitted,



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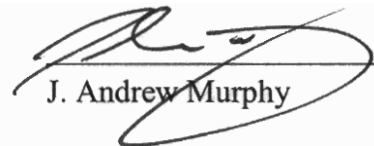
Case 07-E-\_\_\_\_\_

**VERIFICATION**

J. Andrew Murphy, being duly sworn according to law, upon his oath, deposes and says:

1. I am the Executive Vice President and General Counsel of NRG Energy, Inc., and am authorized to make this Verification on behalf of NRG Energy, Inc.

2. I have read the contents of the foregoing Petition and hereby verify that the statements therein contained are true and accurate to the best of my knowledge and belief.

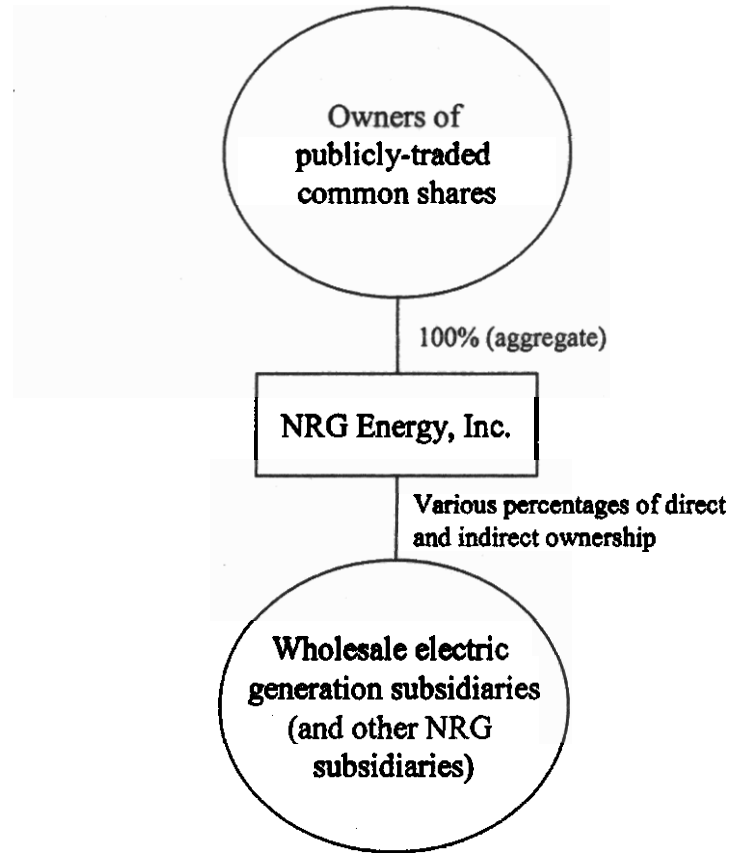
  
J. Andrew Murphy

Sworn to and subscribed before me  
this 16<sup>th</sup> day of May, 2007

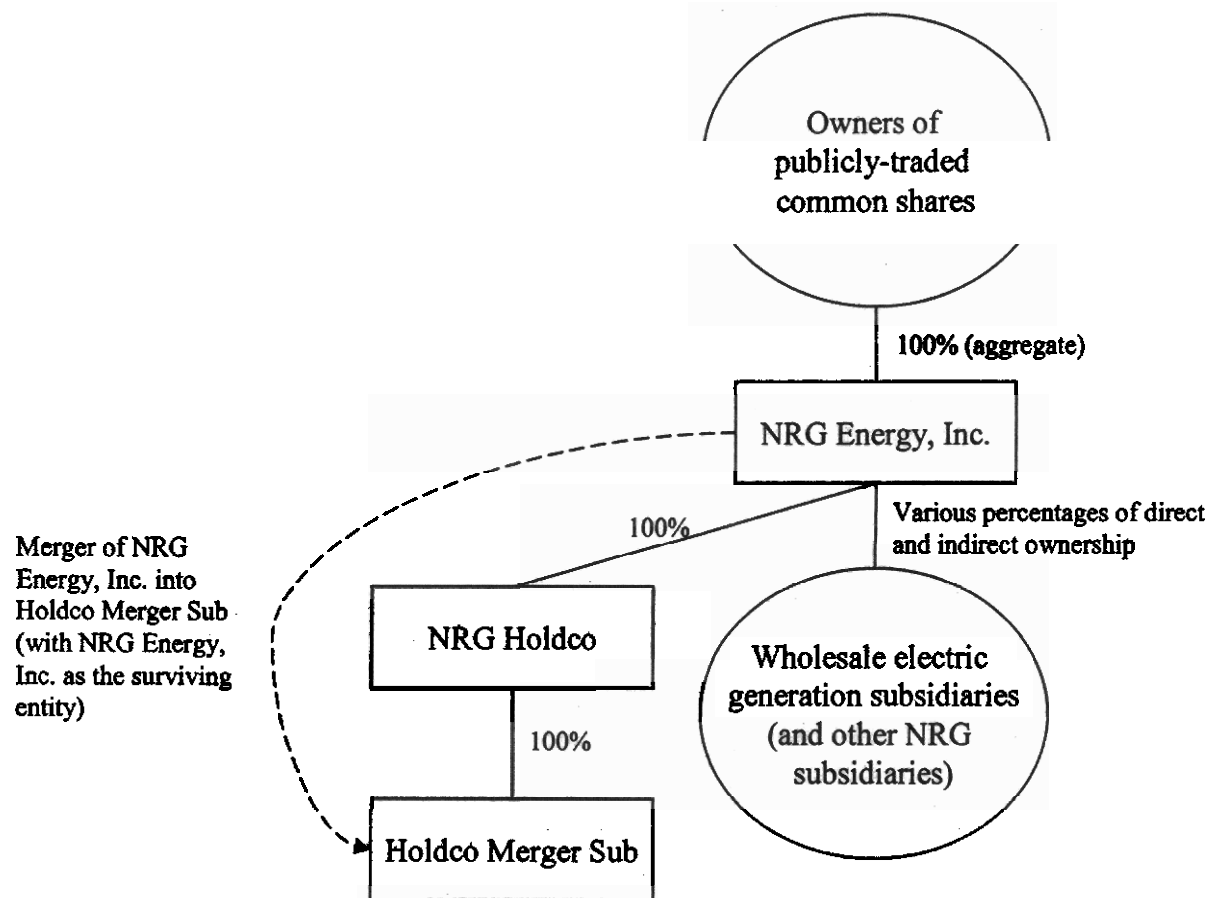
  
Notary Public

KATHRYN B. WIG  
NOTARY PUBLIC  
STATE OF NEW JERSEY  
MY COMMISSION EXPIRES MAY 17, 2009

**Pre-Transaction Organizational Charts**



**Intermediate Step to Effect the Transaction**



**Post-Transaction Organizational Charts**

