

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
New York on December 15, 2016

COMMISSIONERS PRESENT:

Audrey Zibelman, Chair  
Patricia L. Acampora  
Gregg C. Sayre  
Diane X. Burman

CASE 16-E-0614 - Joint Petition of AP Cricket Valley Holdings II Inc., MC CVEC Project Holdings I, LLC, Ullico Infrastructure Cricket Valley Holdco, LLC, Kiwoom SPV, Development Bank of Japan Inc. SPV, SeAH Holdings Corp., Cricket Valley Energy Holdings II LLC, Cricket Valley Energy Center LLC and Cricket Valley Energy Partners, LLC, for a Declaratory Ruling Regarding a Transfer of Ownership Interests or, in the Alternative, an Approval Pursuant to Section 70 of the Public Service Law and for a Declaratory Ruling on Jurisdiction.

DECLARATORY RULING ON TRANSFER TRANSACTIONS

(Issued and Effective December 19, 2016)

BY THE COMMISSION:

INTRODUCTION

Cricket Valley Energy Center, LLC (Cricket Valley) is developing an approximately 1,000 MW combined cycle, natural gas-powered electric generating facility in the Town of Dover, New York (Facility). On February 14, 2013, the Commission granted Cricket Valley a Certificate of Public Convenience and Necessity (CPCN) to construct, operate, and maintain the Facility, and established a lightened regulatory regime with

respect to Cricket Valley's ownership and operation of the Facility.<sup>1</sup>

In a petition filed on October 25, 2016 (Petition), Cricket Valley and various corporate affiliates (i.e., AP Cricket Valley Holdings II Inc. (Cricket Holdings II), MC CVEC Project Holdings I, LLC (MC Holdings), and Cricket Valley Energy Holdings II LLC (CVEH Holdings II), and Cricket Valley Energy Partners, LLC (CV Partners)), as well as Ullico Infrastructure Cricket Valley Holdco, LLC (Ullico), Kiwoom SPV, Development Bank of Japan Inc. SPV (Development SPV), and SeAH Resources & Investment Co., Ltd. (SeAH) (collectively, the Petitioners) requested issuance of a declaratory ruling that further review under Public Service Law (PSL) §70 is not needed with respect to certain proposed transactions. These transactions include: 1) a proposed transfer from MC Holdings of 100% of its membership interests in CV Partners to Cricket Holdings II (the Cricket Holdings Transaction); and, 2) Cricket Holdings II's proposed sales of its issued and outstanding membership interests in CV Partners, as follows: (a) 2.5% to 5.0% to Ullico (the Ullico Transaction); (b) 7.5% to 15.0% to Development SPV (the Development SPV Transaction); (c) 3.0% to 6.0% to Kiwoom SPV (the Kiwoom SPV Transaction); and (d) 5.0% to 10.0% to SeAH (the SeAH Transaction) (collectively, the Proposed Transactions).

The Petition also seeks a declaratory ruling that: (a) a proposed intra-corporate reorganization that would introduce a new holding company - Cricket Holdings II - upstream of Cricket Valley does not require further review under PSL §70; and (b) the acquisition of indirect ownership interests in the Cricket

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<sup>1</sup> Case 11-E-0593, Cricket Valley Energy Center, LLC, Order Granting Certificate of Public Convenience and Necessity and Establishing Lightened Ratemaking Regulation (issued February 14, 2013) (CVEC Order).

Valley generation facility (Facility) would not make either Ullico or Development SPV "electric corporations" within meaning of the PSL.

In this ruling, the Commission determines that no further review of either the Proposed Transactions or the intra-corporate reorganization, as described in the Petition, is required under the PSL. The Commission also finds that Development SPV will not become an electric corporation by virtue of acquiring purely passive indirect ownership interests in the Facility.<sup>2</sup>

#### THE PETITION

##### Cricket Valley, Cricket Holdings II, MC Holdings, and CV Partners

According to the Petition, the Facility is currently under development and Cricket Valley anticipates closing on construction financing in the near future. The relief sought in the Petition is requested in order to enable construction financing and project development. Petitioners explain that Cricket Valley currently has the following three members: (a) AP Cricket Valley Holdings I, Inc. (Cricket Holdings I), which holds a 42.84% interest; (b) Cricket Holdings II, which holds a 41.78% interest; and (c) MC Holdings, which holds a 15.38% interest. Cricket Holdings I is wholly owned by J Cricket Holdings LLC, a subsidiary of JERA, which is owned in equal shares by Chubu Electric Power Company, Inc. and Tokyo Electric Power Company, Inc. Cricket Holdings II is wholly-owned by AP

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<sup>2</sup> As discussed below, Petitioners filed an amendment to the Petition on November 21, 2016, which reported that SeAH and Ullico had withdrawn from the Petition. Accordingly, this Declaratory Ruling does not address the SeAH Transaction, the Ullico Transaction, or the requested finding that SeAH will not become an electric corporation when it consummates the SeAH Transaction.

Energy Holdings Inc., which is wholly-owned by APNA Holdings GmbH (APNA). APNA, in turn, is a wholly-owned subsidiary of Advanced Power AG. MC Holdings is indirectly wholly-owned by Marubeni Corp (Japan).

Development SPV

Petitioners explain that Development SPV will be formed as a wholly-owned subsidiary of the Development Bank of Japan Inc. (Development Bank). Development SPV, Petitioners continue, will be used to acquire indirect interests in Cricket Valley, and to invest in other electric power assets in the United States.

According to Petitioners, Development Bank is a financial institution that is wholly owned by the government of Japan. The company provides financing, investment, and consulting and advisory services internationally. Petitioners explain that neither Development Bank nor its subsidiaries are engaged primarily in energy-related business, or own or control any generating or transmission assets or generation output in the United States. According to Petitioners, neither Development Bank nor its subsidiaries own or control, directly or indirectly, any non-passive interests in firms that own electric generation or transmission facilities in the United States.

Petitioners explain that Development Bank and its subsidiaries hold passive investments in private investment funds that may have direct or indirect ownership interests in generation, transmission, or various interests in natural gas gathering, liquefaction, transmission, or distribution. Petitioners aver, however, that control of each such investment fund resides solely with the fund's relevant general partner or managing member. Moreover, Petitioners continue, each fund's general partner or managing member will never be a firm that is

affiliated with Development Bank or any of its subsidiaries. Petitioners explain that Development Bank and its subsidiaries may own debt instruments issued by firms that own or control facilities for the generation, transmission, distribution, or sale of electric energy, or for the gathering, processing, transmission, distribution, or sale of natural gas. According to Petitioners, however, Development Bank would not acquire any ownership or control over such energy facilities solely by virtue of its holding the debt instruments.

Kiwoom SPV

Petitioners explain that Kiwoom SPV will be formed as a wholly-owned subsidiary of Kiwoom Global Power A.I. Professional & Private Type Investment 2 (Kiwoom Global). Kiwoom Global, Petitioners continue, will be used to acquire indirect interests in Cricket Valley. Kiwoom Global is a Korean investment trust that will be managed and controlled by Kiwoom Asset Management Co., LTD (Kiwoom). According to the Petition, Kiwoom Global will be directly owned by four entities: NH Investment & Securities Co., LTD (NHIS); National Agricultural Cooperative Federation; Kiwoom Securities Co., LTD (Kiwoom Securities); and Kiwoom Asset Management Co., LTD. Petitioners explain, however, that Kiwoom Securities may decide not to acquire interests in Kiwoom Global. In that event, Petitioners continue, Kiwoom would acquire the Kiwoom Global interests that had been designated for purchase by Kiwoom Securities. Petitioners aver that neither Kiwoom SPV nor its affiliates own or control any generation or transmission assets in the markets administered by the New York Independent System Operator, Inc. (NYISO), ISO New England Inc. (ISO-NE), or PJM Interconnection L.L.C. (PJM) (collectively, the Northeastern Markets).

Ullico and SeAH

On November 21, 2016, the Petitioners filed an amendment in order to remove Ullico and SeAH from the Petition. The Petitioners also withdrew the requests for declaratory rulings on the Ullico and SeAH Transactions. Based on these requests, no further consideration need be given to the Ullico Transaction, the SeAH Transaction, or the request for a ruling that SeAH will not become an electric corporation by virtue of acquiring indirect upstream interests in Cricket Valley.

The Proposed Transactions

Petitioners explain that the Proposed Transactions would consist of three sales of indirect ownership interests in Cricket Valley. As proposed, Cricket Holdings II would purchase from MC Holdings 100% of its membership interests in CV Partners. Cricket Holdings II proposes to sell membership interests in CV Partners as follows: (a) 7.5% to 15.0% to Development SPV; and (b) 3.0% to 6.0% to Kiwoom SPV. Petitioners explain that the precise amount of membership interests to be conveyed will be based on certain economic terms of project financing, and will be determined when the financing transaction closes.

Following consummation of the Proposed Transactions, Petitioners report that interests in CV Partners will be held indirectly as follows: (a) 42.84% by Cricket Holdings I; (b) 5.0% to 45.0% by Cricket Holdings II; (c) 16.0% to 30.0% by 730 Cricket, LLC (730 Cricket); (d) 7.75% to 15.0% by ASG Frontier Holdings LLC (ASG Frontier); and (e) 3.0% to 6.0% by Kiwoom SPV.<sup>3</sup>

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<sup>3</sup> See also Case 16-E-0408, Cricket Valley, Declaratory Ruling on Transfer Transactions (issued September 19, 2016) (ruling that the proposed transfer of indirect upstream interests in Cricket Valley to 730 Cricket and ASG Frontier would not require further regulatory review) (CV Ruling).

Petitioners believe that they have satisfied the presumption established in the Wallkill Order.<sup>4</sup> 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 (commonly referred to as the "Wallkill Presumption"). According to Petitioners, the Proposed Transactions contemplate a change in indirect ownership interests that are upstream of Cricket Valley, the operating company.

The Proposed Transactions, Petitioners continue, pose no risk of horizontal or vertical market power, or other harm to captive utility ratepayers. Petitioners explain that they operate in a competitive market and do not serve captive ratepayers. Moreover, Petitioners continue, neither Cricket Holdings II, Kiwoom SPV, Development SPV, or their affiliates have any interests in transmission or generating facilities in the Northeast Markets other than the passive and de minimis interests described in the Petition. Petitioners aver that the Proposed Transactions, if consummated, would not change the day-to-day operations of Cricket Valley.

Consequently, Petitioners request that further review of the Proposed Transactions be eschewed. In the event that the Commission does not apply the Wallkill Presumption, Petitioners seek approval of the transaction pursuant to PSL §70.

#### Intra-Corporate Reorganization

In the CVEC Ruling, the Commission found that inserting Cricket Valley Energy Holdings LLC (CVEH Holdings)

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<sup>4</sup> Case 91-E-0950, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994).

into the ownership structure upstream from Cricket Valley would not require further review under PSL §70.<sup>5</sup> Here, the Petitioners explain that the Cricket Valley members may insert a second holding company - Cricket Holdings II - between CV Partners and Cricket Holdings I. When this restructuring is complete, Petitioners continue, CVEH Holdings would be wholly-owned by Cricket Holdings II which, in turn, would be wholly-owned by CV Partners. Petitioners explain that this intra-corporate reorganization, if effectuated, would not introduce a new owner into, or remove an existing owner from, the organizational structure, and that the proportionate shares of the indirect owners would remain unchanged. Petitioners request a declaratory ruling that the intra-corporate reorganization, if effectuated, would not require Commission review and approval pursuant to PSL §70.

Electric Corporation Regulation

Petitioners explain that the indirect interest in CV Partners that Development SPV will acquire is a purely passive investment vehicle that would not enable the company to control Facility operation or management. Citing Commission precedent that passive owners of electric plant are not electric corporations within meaning of the PSL,<sup>6</sup> Petitioners aver that closing of the Proposed Transactions should not subject this company to Commission regulation as an electric corporation. Petitioners assert that Development SPV would not acquire operating rights in Cricket Valley, and the voting rights

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<sup>5</sup> Case 16-E-0201, AP Cricket Valley Holdings I Inc. et al., Declaratory Ruling on Transfer Transactions (issued August 2, 2016) (CVEC Ruling).

<sup>6</sup> Case 08-E-1267, Noble Altona Windpark, LLC et al., Declaratory Ruling on Review and Regulation of a Passive Ownership Interest Transfer (issued December 15, 2008) (Noble Altona Ruling).



acquired through the Development SPV Transaction would be limited to those rights necessary to protect Development SPV's investment and financial interest. Petitioners note that the Commission recently declared that two similarly-situated indirect, passive investors in Cricket Valley would not acquire, through their investment, sufficient operational control over the electric plant to designate the companies as electric corporations subject to Commission regulation.<sup>7</sup>

#### DISCUSSION AND CONCLUSION

As discussed below, we find that Petitioners have satisfied the Wallkill Presumption with respect to the Proposed Transactions, which will not require further review under PSL §70. The Intra-Corporate Reorganization similarly will not require further regulatory review, and we find that acquiring indirect, passive interests in CV Partners will not subject Development SPV to regulation as an electric corporation.

#### Proposed Transactions

For the purposes of the Proposed Transactions, 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 Transactions do not pose the potential for the exercise of horizontal market power. Development SPV and Kiwoom SPV will acquire passive interests that will not enable either company to exert control over the operation or

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<sup>7</sup> CV Ruling at 13-14.

maintenance of the Facility. Their respective interests in CV Partners will be limited to voting rights that are narrowly-tailored and limited to matters that protect their financial interest in the CV Partners investment. Further, Kiwoom SPV and its affiliates do not hold direct or indirect ownership interests in other generation assets in the Northeastern Markets.<sup>8</sup> As to Development SPV, Petitioners have demonstrated that it does not hold any non-passive interests in generation facilities in the United States, and will not be able to exercise horizontal market power through assets owned or advised by private investment funds in which Development SPV has invested.

The Proposed Transactions, similarly, do not pose the potential for the exercise of vertical market power. Kiwoom SPV will not exercise control over electric delivery facilities or a substantial influence over inputs, like fuel, into the production of generation supply within New York. As to Development SPV, Petitioners have demonstrated that it does not hold any non-passive interests in transmission facilities in the United States, and will not be able to exercise vertical market power through assets owned or advised by private investment funds. As a result, these avenues for the undue exercise of vertical market power are foreclosed.

Finally, Petitioners will operate in wholesale competitive markets and will not have captive utility ratepayers. The Proposed Transactions, therefore, do not present a risk of harm to such ratepayers. Accordingly, based

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<sup>8</sup> As noted above, the Petition explained that Kiwoom may acquire interests in Kiwoom Global if Kiwoom Securities elects not to make such direct investment. This potential change in the ownership structure of Kiwoom Global, if effectuated, would not alter the conclusion that the Proposed Transactions do not present market power risk.

on the facts and circumstances presented in the Petition, the Proposed Transactions do not require further review under PSL §70.

Electric Corporation Regulation

The Proposed Transactions comprise passive investments by Development SPV through ownership interests upstream from Cricket Valley. Petitioners have demonstrated that this investor lacks the ability to direct Cricket Valley in its operation and management of the generating facility, and does not possess the authority to influence Cricket Valley's participation in competitive markets. As a result, it will not own or control electric plant as defined in PSL §2(12), and therefore will not become an electric corporation pursuant to PSL §2(13).<sup>9</sup>

Intra-Corporate Reorganization

In reviewing proposed intra-corporate reorganizations, the Commission has determined that certain transactions do not require review under PSL §70 because they do not affect the ultimate ownership of the operating company and its jurisdictional facilities. In particular, the Commission has found that "[i]nserting a holding company into an ownership structure upstream from lightly-regulated entities that operate electric plant does not amount to a transfer under PSL §70 because there is no change in the identity of the ultimate ownership."<sup>10</sup> The intra-corporate reorganization described in the Petition would insert Cricket Holdings II between CVEH

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<sup>9</sup> Case 15-E-0243, Cross-Sound Cable Company, LLC et al., Order Approving a Transfer Transaction and a Financing and Making Other Findings (issued August 17, 2015); see also CV Ruling, Noble Altona Ruling.

<sup>10</sup> Case 07-E-0584, NRG Energy, Inc., Declaratory Ruling on Review of an Intra-corporate Transaction (issued July 23, 2007) at 3-4 (NRG Ruling).

Holdings and its direct owner, and falls squarely within this precedent.

As a result of such restructuring, no new owner will be brought into the organizational structure, no existing owner will be removed, and the proportionate share of the indirect owners will remain the same. The only consequence of the transaction is that the existing members that have a direct ownership interest in CVEH Holdings will have an indirect interest, as they become owners of Cricket Holdings II. Moreover, the reorganization would not create the potential for the exercise of market power, as the mere creation of the holding company cannot enhance the ability of Petitioners to exercise either horizontal or vertical market power. As a result, the restructuring does not pose the potential for harm to captive ratepayer interests. Accordingly, this intra-corporate transaction falls within the ambit of the Horizon Ruling,<sup>11</sup> where it was decided that intra-corporate transactions that do not affect ultimate ownership fall outside the scope of PSL §70.

#### Lightened Regulation

Petitioners are reminded that, under lightened regulation, they will remain subject to the PSL with respect to matters such as annual reporting,<sup>12</sup> enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in

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<sup>11</sup> Case 06-E-0006, Horizon Wind Energy LLC, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 14, 2006) (Horizon Ruling). See also CV Ruling, NRG Ruling.

<sup>12</sup> Pursuant to the Order Adopting Annual Reporting Requirements Under Lightened Ratemaking Regulation, issued January 23, 2013 in Case 11-M-0294, the owners of lightly-regulated generation facilities are required to file Annual Reports.

prior orders.<sup>13</sup> Included among those requirements are the obligations to give notice of generation retirements,<sup>14</sup> to report personal injury accidents pursuant to 16 NYCRR Part 125 and, where applicable, to conduct tests for stray voltage on all publicly accessible electric facilities.<sup>15</sup> PSL §§110(1) and (2), which provide for Commission jurisdiction over affiliated interests, will apply immediately if Petitioners and/or any affiliate or subsidiary thereof, will market electric energy to retail customers in New York after the proposed corporate restructuring is complete.

The Commission finds and declares:

1. To the extent discussed in the body of this ruling, no further reviews will be conducted of the proposed transactions described in the Petition and discussed in the body of this declaratory ruling.

2. Development Bank of Japan Inc. SPV will not be deemed to be an electric corporation under the Public Service Law, based on the information presented in the Petition and discussed in the body of this declaratory ruling.

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<sup>13</sup> See, e.g., Case 10-E-0501, CPV Valley LLC, Order Granting Certificate of Public Convenience and Necessity, Authorizing Lightened Ratemaking Regulation, and Approving Financing (issued May 9, 2014).

<sup>14</sup> Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).

<sup>15</sup> See Case 04-M-0159, Safety of Electric Transmission and Distribution Systems, Order Instituting Safety Standards (issued January 5, 2005) and Order on Petitions for Rehearing and Waiver (issued July 21, 2005).

3. This proceeding is closed.

By the Commission,

(SIGNED)

KATHLEEN H. BURGESS  
Secretary