

September 16, 2016

VIA E-MAIL

Hon. Kathleen H. Burgess
Secretary
New York State Public Service Commission
Three Empire State Plaza, 14th Floor
Albany, New York 12223-1350

Re: Case No. 16-_____ - In the Matter of the Verified Joint Petition of Noble Environmental Power, LLC, Noble Altona Windpark, LLC, Noble Bliss Windpark, LLC Noble Clinton Windpark I, LLC Noble Ellenburg Windpark, LLC Noble Chateaugay Windpark, LLC, LLC Noble Wethersfield Windpark, LLC for an Expedited Declaratory Ruling Invoking the Wallkill Presumption or for Expedited Approval Pursuant to Section 70 of the Public Service Law

Dear Secretary Burgess:

Attached for filing is the Verified Joint Petition for An Expedited Declaratory Ruling Invoking the Wallkill Presumption and Alternative Petition for Expedited Approval of the Transfer of Certain Upstream Ownership Interests on behalf of Noble Environmental Power, LLC, Noble Altona Windpark, LLC, Noble Bliss Windpark, LLC Noble Clinton Windpark I, LLC Noble Ellenburg Windpark, LLC Noble Chateaugay Windpark, LLC, LLC Noble Wethersfield Windpark, LLC.

Please contact me if you have any questions.

Very truly yours,

COUCH WHITE, LLP

Leonard H. Singer

Leonard H. Singer

LHS/dp

Attachments

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**BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION**

In the Matter of the Verified Joint)	
Petition of Noble Environmental Power,)	
LLC, Noble Altona Windpark, LLC,)	Case No. 16-E-
Noble Bliss Windpark, LLC Noble)	
Clinton Windpark I, LLC Noble)	
Ellenburg Windpark, LLC Noble)	
Chateaugay Windpark, LLC, LLC Noble)	
Wethersfield Windpark, LLC for an)	
Expedited Declaratory Ruling Invoking)	
the Wallkill Presumption or for Expedited)	
Approval Pursuant to Section 70 of the)	
Public Service Law)	

**VERIFIED JOINT PETITION FOR AN EXPEDITED
DECLARATORY RULING INVOKING THE WALLKILL
PRESUMPTION AND ALTERNATIVE REQUEST FOR
EXPEDITED APPROVAL OF TRANSFER OF CERTAIN
UPSTREAM OWNERSHIP INTERESTS PURSUANT TO
SECTION 70 OF THE PUBLIC SERVICE LAW**

The above-captioned entities (“Petitioners”) hereby submit this Verified Joint Petition for An Expedited Declaratory Ruling Invoking the Wallkill Presumption and Alternative Petition for Expedited Approval of the Transfer of Certain Upstream Ownership Interests pursuant to Rules 3.5 and 8.1 of the New York State Public Service Commission’s (“Commission”) Procedural Rules, 16 N.Y.C.R.R. §§ 3.5 and 8.1 (2013).

As set forth herein, Petitioners Noble Environmental Power, LLC (“NEP”), Noble Altona Windpark, LLC, Noble Bliss Windpark, LLC, Noble Clinton Windpark I, LLC, Noble Ellenburg Windpark, LLC, Noble Chateaugay Windpark, LLC, Noble Great Plains Windpark, LLC, and Noble Wethersfield Windpark, LLC (collectively, not including NEP, the “Noble Sellers”) request

authorization for a transaction (“Transaction”) involving a “pre-arranged” Chapter 11 bankruptcy proceeding pursuant to which the existing ownership of NEP will be cancelled and 100 percent of the ownership interests in NEP will be issued to NEP’s existing secured lender, Paragon Noble, LLC (“Paragon Noble”). Since Paragon Noble is also the current majority (54%) owner of NEP, there will be no change in the control of NEP or its public utility subsidiaries. Following the completion of the Transaction, NEP and the Noble Sellers will no longer be affiliated with the other current owners, which are described below. As also explained below, the Transaction is consistent with the public interest because it will not have an adverse effect on competition, rates or regulation and will not result in any cross-subsidization concerns. The terms of the Transaction are set forth in the Plan of Reorganization (“Plan”) attached hereto as confidential Exhibit I. Petitioners seek trade secret protection pursuant to 16 NYCRR § 6-1.3, Sections 87 and 89 of the Public Officers Law and Section 15 of the Public Service Law, and exemption from public disclosure as authorized by the New York Freedom of Information Law (“FOIL”). N.Y. Pub. Off. Law § 87; 16 N.Y.C.R.R. § 6-1.3, for this document. Organizational charts illustrating the current and post-Transaction ownership of Petitioners are attached as Exhibit II.

Because this Transaction will not harm captive retail customers in New York State for the reasons discussed below, and because this Transaction involves a transfer of ownership interests upstream of the actual owner of the Noble Sellers’ facilities, Petitioners request that the Commission disclaim jurisdiction to review this Transaction in accordance with the Wallkill Presumption.¹

¹ Case 91-E-0350, *Wallkill Generating Company L.P. - Petition For a Declaratory Ruling That the Public Service Law is Inapplicable, or That Further Regulation Thereunder is Unnecessary, or in the Alternative, That Light-Handed Regulation be Applied*, Declaratory Ruling On Regulatory Policies Affecting Wallkill Generating Company And Notice Soliciting Comments (Issued and Effective August 21, 1991) (the “Wallkill Ruling”).

In the event that the Commission concludes for any reason that it is unable to disclaim approval jurisdiction over this transaction under the Wallkill Presumption, Petitioners respectfully request that the Commission find this transaction to be in the public interest as required by section 70 of the Public Service Law (“PSL”) for the reasons discussed below.

In either event, Petitioners respectfully request expedited action on this Joint Petition no later than the Commission’s November 17, 2016 Session.

BACKGROUND

I. CORRESPONDENCE AND COMMUNICATIONS

All communications and correspondence with respect to this Joint Petition should be addressed to the following:

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II. DESCRIPTION OF PETITIONERS AND THEIR RELEVANT AFFILIATES

Each of the Noble Sellers is a Delaware limited liability company with its principal place of business located in Centerbrook, Connecticut. Each of the Noble Sellers owns a wind energy project located in the New York Independent System Operator, Inc. (“NYISO”) balancing authority area (“BAA”). Each of the Noble Sellers is an indirect subsidiary of NEP. The upstream ownership of NEP is divided into several classes of voting and non-voting interests that convey proportionate ownership interests in NEP. The voting interests in NEP are currently owned approximately 28 percent by JPMP Wind Energy (Noble), LLC (“JPMP Noble”), 54 percent by Paragon Noble, 14 percent by CPP Investment Board (USRE II), Inc. (“USRE II”), a wholly-owned subsidiary of the Canada Pension Plan Investment Board (“CPPIB”), and 4 percent by individuals, trusts and limited liability companies (collectively, the “Management Investors”). Each of the Noble Sellers and NEP’s upstream owners is described below.

A. Noble Altona Windpark, LLC

Noble Altona Windpark, LLC (“Noble Altona”) owns and operates an approximately 97.5 MW (summer rating) wind-powered generating facility located in Altona, New York (the “Altona Project”). The Altona Project is interconnected with transmission facilities that are owned by the New York Power Authority (“NYPA”) and are under the operational control of the NYISO. The output of the Altona Project may be sold to one or more parties under the bilateral power purchase agreements or into the NYISO markets. Noble Altona is an exempt wholesale generator (“EWG”) with market-based rate authorization from the Federal Energy Regulatory Commission (“FERC”).²

² See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Altona Windpark, LLC, Docket No. EG06-78-000 (filed Aug. 25, 2006); *Calpeak Power LLC*,

B. Noble Bliss Windpark, LLC

Noble Bliss Windpark, LLC (“Noble Bliss”) owns and operates an approximately 100.5 MW (summer rating) wind-powered generating facility located in Wyoming County, New York (the “Bliss Project”). The Bliss Project is interconnected with transmission facilities that are owned by the Village of Arcade, New York. The output of the Bliss Project may be sold to one or more parties under bilateral power purchase agreements or into the NYISO markets. Noble Bliss is an EWG with market-based rate authorization from FERC.³

C. Noble Clinton Windpark I, LLC

Noble Clinton Windpark I, LLC (“Noble Clinton”) owns and operates an approximately 100.5 MW (summer rating) wind-powered generating facility located in the Town of Clinton, New York (the “Clinton Project”). The Clinton Project is interconnected with transmission facilities that are owned by NYPA and are under the operational control of the NYISO. The output of the Clinton Project may be sold to one or more parties under bilateral power purchase agreements or into the NYISO markets. Noble Clinton is an EWG with market-based rate authorization from FERC.⁴

Docket No. EG06-68-000 (Notice of Effectiveness of Exempt Wholesale Generator Status issued Nov. 1, 2006) (“November 1 Notice”); *Noble Bliss Windpark, LLC*, Docket No. ER06-1407-000 (Sept. 28, 2006) (unpublished letter order) (“September 28 Order”) (granting market-based rate authorization).

³ See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Bliss Windpark, LLC, Docket No. EG06-79-000 (filed Aug. 25, 2006); November 1 Notice (effectiveness of EWG Self-Certification); September 28 Order (granting market-based rate authorization).

⁴ See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Clinton Windpark I, LLC, Docket No. EG06-76-000 (filed Aug. 25, 2006); November 1 Notice (effectiveness of EWG Self-Certification); September 28 Order (granting market-based rate authorization).

D. Noble Ellenburg Windpark, LLC

Noble Ellenburg Windpark, LLC (“Noble Ellenburg”) owns and operates an approximately 81 MW (summer rating) wind-powered generating facility located in the Town of Ellenburg, New York (the “Ellenburg Project”). The Ellenburg Project is interconnected with transmission facilities that are owned by NYPA and are under the operational control of the NYISO. The output of the Ellenburg Project may be sold to one or more parties under bilateral power purchase agreements or into the NYISO markets. Noble Ellenburg is an EWG with market-based rate authorization from FERC.⁵

E. Noble Chateaugay Windpark, LLC

Noble Chateaugay Windpark, LLC (“Noble Chateaugay”) owns and operates an approximately 106.5 MW (summer rating) wind-powered generating facility located near the Town of Chateaugay, New York (the “Chateaugay Project”). The Chateaugay Project interconnects with transmission facilities that are owned by NYPA and are under the operational control of the NYISO. The output of the Chateaugay Project is sold to one or more parties under bilateral power purchase agreements or into the NYISO markets. Noble Chateaugay is an EWG with market-based rate authorization from FERC.⁶

F. Noble Wethersfield Windpark, LLC

Noble Wethersfield Windpark, LLC (“Noble Wethersfield”) owns and operates an

⁵ See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Ellenburg Windpark, LLC, Docket No. EG06-77-000 (filed Aug. 25, 2006); November 1 Notice (effectiveness of EWG Self-Certification); September 28 Order (granting market-based rate authorization).

⁶ See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Chateaugay Windpark, LLC, Docket No. EG08-47-000 (filed Mar. 4, 2008); June 24 Notice (effectiveness of EWG Self-Certification); March 27 Order (granting market-based rate authorization).

approximately 126 MW (summer rating) wind-powered generating facility located near the Town of Wethersfield, New York (the “Wethersfield Project”). The Wethersfield Project is interconnected with transmission facilities that are owned by New York State Electric and Gas Corporation, also under the operational control of the NYISO. The output of the Wethersfield Project may be sold to one or more parties under bilateral power purchase agreements or into the NYISO markets. Noble Wethersfield is an EWG with market-based rate authorization from FERC.⁷

G. NEP

NEP is a Delaware limited liability company that is a renewable energy holding company. NEP is governed and managed by a Board of Managers that is appointed or elected by the members of NEP in accordance with the Limited Liability Company Operating Agreement of NEP. The Board of Managers has the sole right to manage the business and affairs of NEP.⁸

H. JPMP Noble

JPMP Noble, a Delaware limited liability company, has limited consent rights in the management of NEP and does not exercise day-to-day control over Petitioners’ jurisdictional activities. JPMP Noble has the right to elect two of the voting members of NEP’s Board of Managers, but at present it does not have any representatives on the NEP Board of Managers. JPMP Wind Energy, LLC is the sole member of JPMP Noble. J.P. Morgan Partners (BHCA), L.P. (“JPMP BHCA”) is the managing member of JPMP Wind Energy, LLC. JPMP Master Fund Manager, L.P. is the general partner of JPMP BHCA, and JPMP Capital Corporation (“JPMPC”) is the general partner of JPMP Master Fund Manager, L.P.

⁷ See FERC Notice of Self-Certification of Exempt Wholesale Generator Status of Noble Wethersfield Windpark, LLC, Docket No. EG08-45-000 (filed Mar. 4, 2008); June 24 Notice (effectiveness of EWG Self-Certification); March 27 Order (granting market-based rate authorization).

⁸ Currently, the Board of Managers consists of the CEO and four members selected by PN.

is the general partner of JPMP Master Fund Manager, L.P. JPMPC is a wholly-owned direct subsidiary of JPMorgan Chase & Co. (“JPMorgan Chase”). JPMorgan Chase, a publicly-traded Delaware corporation headquartered in New York, New York, is a financial holding company regulated by the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956, as amended.

JPMPC and JPMorgan Chase are not primarily engaged in energy-related business activities and do not directly own or control any electric generating or transmission assets or generation output. None of JPMorgan Chase’s affiliates owns any electric transmission (other than limited interconnection facilities) or interstate natural gas pipeline facilities. Further, JPMorgan Chase does not control and is not affiliated with any entity that controls any essential inputs to generation in the relevant market, including any intrastate pipeline facilities.

Through direct or indirect subsidiaries, JPMorgan Chase has a number of energy affiliates that engage in wholesale sales of electricity in the United States and that own various interests in electric generating facilities. For example, J.P. Morgan Ventures Energy Corporation (“JPMVEC”), a non-banking affiliate of JPMCC and wholly-owned subsidiary of JPMorgan Chase, is currently authorized by FERC to sell capacity, energy, and ancillary services at market-based rates in all regions of the United States, except the Southwest Power Pool.⁹ Subsidiaries of JPMVEC are parties to one or more tolling agreements that convey to each entity, respectively, the exclusive right to the output of the generation facilities in various markets. Accordingly, numerous direct and indirect subsidiaries of JPMVEC are authorized by FERC to sell capacity,

⁹ JPMVEC obtained market-based rate authority from FERC on September 20, 2005 in Docket No. ER05- 1232-000. The FERC accepted a Notice of Succession on December 29, 2008, pursuant to which JPMVEC succeeded to Bear Energy LP’s market-based rate tariff and issued a revised rate schedule. On November 17, 2010, the FERC accepted JPMVEC’s baseline e-tariff filing, filed to comply with FERC Order No. 714.

energy, and ancillary services in various regions.¹⁰

JPM Capital Corporation (“JPMCC”), an indirect subsidiary of JPMorgan Chase, owns indirect, passive tax-equity interests in various wind and photovoltaic generating facilities (“Tax Equity Investments”) throughout the United States. JPMCC’s Tax Equity Investments provide JPMCC with limited consent rights substantially similar to passive investments addressed by the FERC in *AES Creative Resources, L.P. et al.*¹¹ Accordingly, JPMCC’s Tax Equity Investments do not create an affiliation for the purposes of the FERC’s market-based rate regulations.

Subsidiaries of JPMorgan Chase also may manage mutual funds, other collective investment vehicles, separate accounts, or any combination thereof as a fiduciary on behalf of persons who hold interests in such funds, investment vehicles, or separate accounts; and such funds, investment vehicles, and separate accounts may buy and sell securities of public utilities and other companies engaged in energy-related activities without exercising control over such public utilities or other companies.

In any case, following the completion of the Transaction, JPMorgan Chase will no longer hold any ownership interest in NEP and will not have any control over NEP or any of the Petitioners. Accordingly, JPMorgan Chase’s energy affiliates are not described in any further detail in the Application.

I. USRE II

USRE II currently holds approximately 14% of the overall units of NEP and has the right to elect one non-voting observer to the Board of Managers of NEP. USRE II’s consent is required

¹⁰ The following JPMVEC subsidiaries, along with the docket in which each subsidiary obtained market-based rate authority from FERC are as follows: BE CA, LLC (Docket No. ER07-1113), BE Alabama, LLC (Docket No. ER07-1356), Utility Contract Funding, L.L.C. (Docket No. ER02-2102) and Florida Power Development L.L.C (Docket No. ER13-1351).

¹¹ 129 FERC ¶ 61,239 (2009) (“*AES Creative Resources*”).

for certain major actions that may negatively affect its ownership interest in NEP, such as certain amendments to NEP’s corporate organization documents and the issuance of certain additional securities by NEP. However, USRE II does not exercise day-to-day control over Applicants or their jurisdictional activities. Following the completion of the Transaction, USRE II will no longer have an ownership interest in NEP or an indirect ownership interest in the Noble Sellers.

CPPIB is a professional investment management organization based in Toronto that invests the assets of the Canada Pension Plan. CPPIB has invested in shares, membership interests, partnership interests and other voting interests in numerous private and public companies, including regulated electric utilities and other public utilities engaged in generation, transmission, or distribution or sale of electric energy. None of such investments related to energy-related companies in the United States or Canada involves the ownership or control of 10% or more of such company’s voting equity interests, other than the investments by CPPIB’s wholly-owned subsidiaries, USRE II and CPP Investment Board Private Holdings Inc. (“PHI”).

USRE II is an investment holding company that is primarily engaged in a business other than that of producing, selling or transmitting electric power. The investment portfolio of USRE II includes interests in a number of public and private companies in various industries, of which holdings in energy-related companies in the United States are a small fraction.¹²

PHI is an investment holding company that is primarily engaged in a business other than that of producing, selling or transmitting electric power. Wholly-owned subsidiaries of PHI have minority ownership interests in various investment funds (“QUI Funds”) managed by Quantum Utility Generation, LLC that own upstream interests in several power generation assets in North

¹² Among other things, USRE II holds an approximately 31.57% interest in Puget Holdings LLC, which in turn indirectly holds 100% of the stock Puget Energy, Inc., the parent company of two FERC-jurisdictional public utilities – Puget Sound Energy, Inc. and Black Creek Hydro, Inc.

America. Each of the PHI subsidiaries has limited consent rights with respect to its respective QUI Fund that are necessary to protect its investment and do not convey control over a public utility or allow the holder of the rights to participate in a public utility's day-to-day operations.

J. Management Investors

The Management Investors collectively hold 100% of the common units and a minority percentage of the preferred units of NEP. The Management Investors, through their ownership of 100% of the common units, have the collective right to elect one of the voting members of NEP's Board of Managers. The Management Investors consist of: (i) Charles C. Hinckley, III, who holds or will hold approximately 20.9% of the allocated common units, and less than 1% of the preferred units of NEP as an individual or through trusts and limited liability companies; (ii) John M. Quirke, who holds approximately 21.0% of the allocated common units and less than 1% of the preferred units of NEP as an individual or through trusts and limited liability companies; (iii) Walter Q. Howard, who holds approximately 7.7% of the allocated common units of NEP; (iv) Christopher M. Lowe, who holds approximately 5.7% of the allocated common units of NEP; (v) Thomas Swank, who holds approximately 13.7% of the allocated common units of NEP; and (vi) certain other individuals, each of whom holds less than 10% of the common units of NEP. Following completion of the Transaction, the Management Investors will no longer have an ownership interest in NEP or an indirect interest in the Noble Sellers.

K. Paragon Noble

Paragon Noble currently holds the majority of the overall units of NEP and has the right to appoint five of the voting members of NEP's Board of Managers. Paragon Noble is a special purpose vehicle established on October 5, 2006, as a Delaware limited liability company, with one or more funds affiliated with and controlled by MSD Capital, L.P., a Delaware limited partnership, ("MSD") as an owner of interests in Paragon Noble that amount to greater than 90 percent; other

owners hold less than 10 percent interests. Paragon Noble currently has no energy-related assets other than through its interest in NEP; it has no energy-related affiliates other than those of MSD described below.

L. MSD

MSD was founded in 1998 and is based in New York with an office in California. The sole general partner of MSD is MSD Capital Management, LLC, which was formed in 2000 to act as the general partner of MSD. MSD was formed to manage the capital of Michael S. Dell and his family. MSD is an investment firm primarily focused on the following investment activities: publicly-traded securities; traditional private equity activities; real estate; special opportunities; and selectively investing with established third-party managers in the private and public markets. While these are the principal areas of focus, MSD engages in a broad range of investment activities and has the flexibility to invest in a wide variety of asset classes. Across this investing spectrum, its primary objective is to build an investment portfolio focused on long-term capital appreciation. MSD's investments do not concentrate primarily on the U.S. public utility sector.

Apart from the Petitioners, MSD does not own or control any electric power production capacity (nor any electric transmission or distribution facilities) within the NYISO BAA. In any case, since MSD is already affiliated with the Applicants, the Applicants' and MSD's affiliations will not change as a result of the Transaction. MSD's energy affiliates and energy subsidiaries are not involved in the Transaction, apart from the Petitioners. These energy affiliates include the following:

Saguaro Power Company, A Limited Partnership ("Saguaro"): Investment funds managed by MSD hold interests in Saguaro, the owner of an existing 105 MW (net, 101 MW – Summer) topping-cycle qualifying cogeneration generation facility near the City of Henderson, Clark County, Nevada, that is interconnected to the transmission system owned and operated by Nevada Power Company. The Saguaro facility is a qualifying cogeneration facility ("QF"); also, Saguaro has been granted market-based rate authority. Saguaro is not interconnected to, does not

deliver into, and is not able to participate in the SPP or NYISO markets, in which the Noble Sellers' facilities are located.

Colstrip Energy Limited Partnership (“Colstrip”): Investment funds managed by MSD hold interests in Colstrip, which owns a 42 MW (35 MW – Summer) coal-fueled small power production QF located in Rosebud County near Colstrip, Montana. NorthWestern Corporation purchases all of the electric power output of the Colstrip facility. MSD has an indirect interest equivalent to approximately 25 percent in Colstrip. Colstrip is not interconnected to, does not deliver into, and is not able to participate in the SPP or NYISO markets in which the Noble Seller's facilities are located.

Blueknight Energy Partners: An “affiliate” (as that term is defined in the Commission's regulations) of MSD also holds in excess of 10% of the common and preferred units in Blueknight Energy Partners, L.P. (“Blueknight”), a publicly-traded master limited partnership which owns and controls certain mid-stream natural gas and oil development facilities. To MSD's knowledge, Blueknight is not a public utility or a holding company of a public utility, and this entity is managed and controlled by persons unaffiliated with MSD. Blueknight invests in mid-stream crude oil storage and transportation facilities only in Oklahoma, Kansas and Texas, all of which are operated pursuant to FERC tariffs.

Apart from Saguaro, Colstrip, and Blueknight, MSD and its affiliates do not own or control 10% or more of any electric facilities or essential inputs to electric generation located in the United States, including ownership or control of coal sources, transmitting utilities (whether or not subject to Commission jurisdiction), natural gas commodities, or rail carriers. Further, MSD and its affiliates are not affiliated with a public utility with a franchised service territory or captive ratepayers in the United States. Neither MSD nor any of its affiliates owns or controls 10% or more of any electric transmission or distribution facilities in the United States or intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, sites for generation capacity development, or sources of coal supplies and the transportation of coal supplies in the United States.

III. THE PROPOSED TRANSACTION

In the third quarter of 2016, NEP intends to file a “pre-arranged” Chapter 11 bankruptcy case in the District of Delaware. The purpose of the filing is to implement a recapitalization of NEP and to reduce secured debt service in a manner that is quick and efficient, and that preserves to the extent possible certain tax attributes of NEP. In the pre-arranged bankruptcy, the existing ownership interests in NEP will be cancelled and 100% of the new ownership interests will be issued to NEP’s existing secured lender Paragon Noble, which is also its current majority owner, in exchange for various beneficial modifications of the existing loan (including the reduction of a portion of the principal amount of the debt, a reduction of interest rate and extension of maturity date.) Paragon Noble has consented to the process and the reorganization. Since Paragon Noble is also the current majority owner of NEP, there will not be a change in control of NEP; the Transaction will simply result in an increase in the amount of the ownership held by Paragon Noble from approximately 54% today to 100% upon approval by the Bankruptcy Court.

General unsecured creditors of NEP will be paid in full in cash (without interest, late fees or legal fees) upon approval of the reorganization plan by the bankruptcy court. NEP, which is a holding company, is the only Noble entity that will be filing for bankruptcy. As a result, none of the Noble Sellers will be involved in any bankruptcy case. The Noble Sellers will continue to operate and pay their obligations in the ordinary course of their respective businesses. It is expected that the prearranged bankruptcy case will be fully consented to and should result in the emergence of NEP within 75-90 days after the filing, and, in any event, before the end of calendar year 2017. In addition to approval by the New York State Public Service Commission, the Transaction is subject to approval by the FERC.

ANALYSIS

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING FINDING THAT IT NEED NOT REVIEW OR FURTHER REVIEW THE TRANSACTION UNDER PSL SECTION 70

PSL Section 70 provides that "no stock corporation of any description, domestic or foreign, other than a gas corporation or electric corporation ... shall purchase or acquire, take or hold, more than ten per centum of the voting capital stock issued by any gas corporation or electric corporation organized or existing under or by virtue of the laws of this state" without Commission approval.¹³ In addition, PSL Section 70 further provides that no electric or gas corporation "shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, in this state or any other state ... unless authorized so to do by the commission."¹⁴

The Commission determined in the Wallkill Ruling that Section 70 applies to transactions that occur at the holding company (*i.e.* upstream) level. However, in the Wallkill Ruling, the Commission also established the Wallkill Presumption, determining that it generally need not apply Section 70 oversight to the upstream transfer of ownership interests in wholesale generation facilities if there is little potential for harm to captive ratepayers.¹⁵

The Commission has applied the Wallkill Presumption to a number of transactions involving the upstream transfer of interests in wholesale generation facilities that are located in

¹³ N.Y. Pub. Serv. Law § 70(3) (McKinney 2009).

¹⁴ N.Y. Pub. Serv. Law § 70(4) (McKinney 2009).

¹⁵ In the Wallkill Ruling, the Commission expressly held, "It will be presumed that § 70 regulation does not adhere to transfer of ownership interests in entities upstream from the parents of the New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption." *See* Case No. 91-E-0350, *supra*, at 9, n. 1.

New York.¹⁶ In these orders, the Commission held that Section 70 regulation did not adhere to the proposed upstream transfer of these ownership interests because these transactions did not cause a potential for market power to be exercised that was sufficient to override the Wallkill Presumption. As such, the Commission determined in each of these cases that no further review would be conducted.

As demonstrated, *infra*, the Commission should equally apply the Wallkill Presumption in this case because the Transaction will not lead to the potential to exercise either horizontal or vertical market power or result in potential harm to New York ratepayers. Thus, even if, *arguendo*, the Commission were to find that PSL Section 70 applies to the Transaction, the Commission

¹⁶ See, e.g., Case No. 08-E-1147, *supra*, at 5 (finding that the transaction did not pose the potential for the exercise of horizontal or vertical market power, PSC held that petitioners satisfied the Wallkill Presumption and that "the transfer of an ownership interest in Calpine and the acquisition of Calpine stock that LS Power proposed do not pose the potential for impacts adverse to the interests of captive New York ratepayers. Accordingly, the proposed transaction need not be reviewed further under PSL § 70."); Case No. 09-E- 0055, *Constellation Nuclear Energy Group LLC, Nine Mile Point Nuclear LLC and EDF Development, Inc.* -- Joint Petition for a Declaratory Ruling Regarding the Application of PSL § 70, or, In the Alternative, For Approval Under § 70, Declaratory Ruling on Review of a Transfer Transaction (Issued and Effective April 23, 2009) (finding that the proposed transaction did not pose the potential for the exercise of horizontal market power, the exercise of vertical market power or other impacts adverse to the interests of captive ratepayers, the Commission held that Wallkill Presumption was satisfied because there was no potential for harm to captive New York ratepayers); Case No. 08-E-0850, *Harbinger Capital Partners Master Fund, Ltd. and Harbinger Capital Partners Special Situations Fund*, Petition for a Declaratory Ruling Regarding the Acquisition of Common Stock, and in the Alternative, Approval Under Public Service Law § 70, Declaratory Ruling (Issued and Effective June 23, 2008) (Wallkill presumption applied where there was no potential for harm to captive New York ratepayers which Commission defined as determined through a market power analysis); Case No. 07-E-1 385, *et al.*, *supra*, at 11 (finding that transaction would not allow the potential for market power to be realized, the Commission held that no potential for harm to captive ratepayers was apparent, and thus, the Wallkill Presumption was satisfied); Case No. 99-E-0148, *AES Eastern Energy, L.P. and AES Creative Resources, L.P.*, Petition on Regulation, Order Providing for Lightened Regulation (Issued April 23, 1999), at 7 (providing that PSL § 70 regulation would not "adhere to transfer of ownership interests in entities upstream from the parents of a New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption" and advising that the potential to exercise market power would be sufficient to defeat the presumption) (footnote omitted).

should declare that no further Section 70 review and approval is needed because the Transaction will not harm captive utility ratepayers.

A. The Transaction Raises No Horizontal Market Power Concerns

The Transaction will have no impact on the potential to exercise horizontal market power.

As the FERC has recognized in promulgating a blanket authorization for certain internal corporate reorganizations, such transactions do not involve any consolidation of ultimate control and thus “are unlikely to cause anticompetitive effects.”¹⁷ The FERC has likewise recognized the absence of competitive concerns with respect to internal corporate reorganizations presented to the Commission in applications pursuant to Section 203 of the FPA.¹⁸

Here, the only change to the ownership of Petitioners will be that the existing ownership interests in NEP will be cancelled and 100% of the new ownership interests will be issued to NEP’s existing secured lender Paragon Noble, which is also its current majority owner. In addition, the Noble Sellers will no longer be affiliated with affiliates of JPMP Noble or USRE II. Accordingly, the horizontal market power of the Noble Sellers will decrease in the relevant markets as a result of the Transaction.

In the Declaratory Ruling in Case 13-E-0302, *supra*, regarding a similar transaction this Commission stated:

The proposed acquisition transaction does not pose the potential for the exercise of horizontal market power. By virtue of its existing ownership interest, Harbert is already deemed to control Astoria II’s operations, and so acquisition of the additional ownership interest through [Gulf Pacific] does not make it a new owner

¹⁷ *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 192 (2005) (adopting a blanket authorization for internal corporate reorganizations), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

¹⁸ *See, e.g., Ameren Corp.*, 131 FERC ¶ 61,240, at P 18 (2010); *see also Cinergy Corp.*, 126 FERC ¶ 61,146, at P 32 (2009).

of the facility. Harbert's resulting market share is de minimis (as calculated by treating it as controlling only the Astoria II capacity proportional to the 50% interest it will own), and well below the level that would cause concern under these circumstances, in either the state-wide NYISO market or in the NYISO Zone J market in New York City. (September 19, 2013 Declaratory Ruling at 5-6.; footnotes omitted)

The same conclusion is applicable to the Transaction described in this case.

B. The Proposed Transaction Raises No Vertical Market Power Concerns

The Proposed Transaction raises no vertical market concerns. The Proposed Transaction does not involve any acquisition or transfer of inputs to electric generation. Other than limited electric interconnection facilities owned by the Noble Sellers, to effectuate wholesale power sales from their respective generation facilities, none of Petitioners, or any of their affiliated entities, owns or controls electric transmission facilities or has dominant control over electric generation sites in the relevant market. Further, none of Petitioners or any of their affiliates owns or controls intrastate natural gas transportation, intrastate natural gas storage or distribution facilities, or sources of coal supplies and the transportation of coal supplies in the relevant geographic market.

None of Petitioners or any of their affiliates owns or controls any transmitting utilities, distribution facilities, natural gas transmission facilities, or oil or rail transportation facilities or interconnection-eligible generation sites in or adjacent to the NYISO markets that provide any essential inputs to power production. In these circumstances, there is no opportunity for horizontal overlap between electric facilities in individual markets, nor the ability or incentive for Petitioners to exercise vertical market power in any electric wholesale market.

In the September 19, 2013 Declaratory Ruling in Case 13-E-0302, the Commission stated:

Nor does the proposed transaction pose the potential for the exercise of vertical market power. Neither Harbert, nor CalPERS, nor their affiliates control electric delivery facilities in New York, other than interconnections, or exert a substantial influence over inputs, like fuel, into the production of generation supply within

New York, other than CalPERS' interest in Neptune's transmission line. Because that interest is passive, and contractual arrangements prevent CalPERS from influencing pricing or allocation of capacity on that line, the interest does not enable CalPERS to exercise vertical market power. Since this transaction, as described in the petition, poses no other potential harm to the interests of captive ratepayers, we find, in conformance with the Wallkill Order, that we need not review the transaction further. (September 19, 2013 Declaratory Ruling at 6; footnotes omitted).

Again, the Commission should reach the same conclusion regarding the Transaction at issue here. Given that the Transaction will not result in the potential to exercise market power, it will not harm the interests of captive ratepayers in New York State. Accordingly, the Commission should determine that the Wallkill Presumption applies to the Proposed Transaction, and thus, no further review pursuant to PSL Section 70 is necessary.

II. ALTERNATIVELY, THE COMMISSION SHOULD APPROVE THE PROPOSED TRANSACTION UNDER PSL § 70

In the alternative, Petitioners respectfully request that the Commission approve the Transaction pursuant to PSL § 70 on an expedited basis. PSL § 70 prohibits any corporation from acquiring more than ten percent of the voting securities of any electric corporation, with certain exemptions not relevant here, without the consent of the Commission. That section further provides that:

No consent shall be given by the Commission to the acquisition of any stock in accordance with this section unless it shall have been shown that such acquisition is in the public interest.

N.Y. Pub. Serv. L. § 70 (McKinney 2008). The Transaction satisfies this public interest requirement for the reasons set out below.

A. Matters Required for Section 70 Approval

In the event the Commission determines that the Wallkill Presumption does not apply, pursuant to section 39.1 of the Commission's regulations (16 N.Y.C.R.R. §39.1), Petitioners provide the following information:

No other governmental authorizations or certifications required for the Transaction have been obtained. Petitioners will file an application with FERC seeking authorization of the transaction under Section 203 of the Federal Power Act.

No municipal consents are required for the consummation of the Proposed Transaction.

Petitioners respectfully request that the Commission waive the requirements of §§ 39.1(a) and 39.1(c), 16 N.Y.C.R.R. §§ 39.1(a) and 39.1(c) (2012), requiring detailed information concerning the financial condition of the Petitioners and the market value of the securities to be transferred on the grounds that these requirements should not apply to lightly regulated entities such as Petitioners and their upstream owners and that the securities involved are not publicly traded.

B. The Proposed Transaction is in the Public Interest

The Commission has consistently ruled that it will review Section 70 petitions of wholesale generators with reduced scrutiny and consistent with the Commission's concerns about market power issues. Petitioners will not be able to exercise market power as a result of the Transaction. As described above, the Transaction will not create or enhance vertical or horizontal market power.

Moreover, because Petitioners and their affiliates do not serve captive customers pursuant to regulated tariffs in New York State, there is no risk that the Transaction could harm captive retail customers in New York State by creating or enhancing vertical market power. No change will occur in NYISO-administered markets for energy, capacity, or ancillary services as a result of

the Transaction and, consequently, no incremental risks of undue exercise of market power exist. Because no issues of vertical or horizontal market power are raised, the Transaction should be approved under PSL § 70.

State Environmental Quality Review Act

Under the State Environmental Quality Review Act (“SEQRA”), Article 8 of the Environmental Conservation Law, and its implementing regulations (6 N.Y.C.R.R. § 617 and 16 N.Y.C.R.R. § 7), the Commission must determine whether certain actions it is authorized to approve may have a significant impact on the environment. SEQRA review is not required if the Commission issues a declaratory ruling and determines that further PSL Section 70 review is not necessary.

In the event the Commission decides to review the Transaction pursuant to PSL § 70, SEQRA review is required since the Transaction does not meet the definition of Type I or Type II actions listed in 6 NYCRR §§617.4, 617.5 and 16 NYCRR §7 and, therefore, is an “unlisted” action requiring SEQRA review.¹⁹ Accordingly, if the Commission reviews the Transaction under PSL § 70, it is proper for the Commission, as lead agency, to conduct an environmental assessment and to determine the significance of the actions proposed.

The Transaction concerns the transfer of upstream ownership and will not change the operations of any of the Noble Sellers’ facilities in a manner that would cause an adverse environmental impact. The Noble Sellers will continue to operate their facilities in accordance with all applicable environmental permits and environmental laws. The Transaction will not cause

¹⁹ See Case 05-E-1341, *Orion Power Holdings, Inc., Astoria Generating Company, L.P. and Astoria Generating Company Acquisitions, LLC – Petition for Authority to Transfer Ownership Interests and to Issue Corporate Debt*, Order Approving Transfers and Financings and Making Other Findings (issued February 15, 2006).

new environmental impacts, and Petitioners respectfully request that should the Commission review the Transaction pursuant to PSL § 70, it should follow precedent and issue a negative declaration and undertake no further environmental review.²⁰

CONCLUSION

WHEREFORE, for the above stated reasons, Petitioners respectfully request that the Commission issue an expedited declaratory ruling finding and declaring that the Transaction satisfies the requirements of the Wallkill presumption and, accordingly, may be consummated without the Commission's prior approval under PSL § 70, or in the alternative, that the Commission grant expedited approval of the Transaction pursuant to PSL § 70.

Respectfully submitted:

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DATED: SEPTEMBER 16, 2016

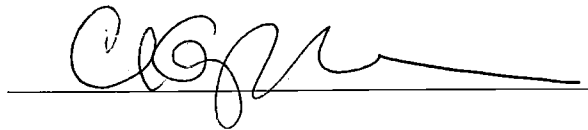
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²⁰ *Id.*

VERIFICATION

STATE OF _____)
) ss.:
COUNTY OF _____)

C. Kay McCall, being duly sworn, deposes and says that she is the President and CEO of Petitioners, that she has read the foregoing Verified Petition and knows the contents thereof as to Petitioners and that the contents set forth therein as to Petitioners are true to the best of her knowledge, information and belief.

Handwritten signature of C. Kay McCall in black ink, positioned above a horizontal line.

Sworn to before me this 15 day
sept 2016

Sharon M. Riddick
Notary Public

SHARON M. RIDDICK
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires May 20, 2018

EXHIBIT I
(CONFIDENTIAL)

EXHIBIT II

EXHIBIT II
Pre-Transaction Organization Chart

