

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on February 27, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-E-0009 - Joint Petition of Scottish Power plc, PPM
Energy, Inc., and Iberdrola, S.A. -For a
Declaratory Ruling Regarding the Application of
Public Service Law §70.

DECLARATORY RULING ON REVIEW
OF AN ACQUISITION TRANSACTION

(Issued and Effective February 28, 2007)

BY THE COMMISSION:

BACKGROUND

In a Joint Petition filed on January 3, 2007, Scottish
Power plc (Scottish Power), PPM Energy, Inc. (PPM) and
Iberdrola, S.A. (Iberdrola) (collectively, Joint Petitioners)
request issuance of a Declaratory Ruling finding that transfers
of ownership interests in Scottish Power, the indirect parent of
Flat Rock Windpower LLC (Flat Rock) and Flat Rock Windpower II
LLC (Flat Rock II), need not be reviewed under Public Service
Law (PSL) §70. Flat Rock and Flat Rock II are the owners and
operators of an approximately 321 MW wind-powered electric
generation facility located in Lewis County, New York (the Maple
Ridge facility). No responses to the petition were received

within the 21-day period prescribed under the Rules of Procedure, 16 NYCRR §8.2(c), which expired on January 24, 2006.¹

THE JOINT PETITION

The Joint Petitioners report that Scottish Power indirectly wholly owns PPM, which, in turn, owns indirectly 50% interests in Flat Rock and Flat Rock II. Horizon Wind Energy LLC owns the other 50% membership interests, indirectly in Flat Rock through a subsidiary, BC2 Maple Ridge Wind LLC, and directly in Flat Rock II.² Flat Rock and Flat Rock II are regulated lightly under the PSL.³

Describing Scottish Power as a public limited company organized under the laws of Scotland, the Joint Petitioners relate that it engages in the business of electric transmission and distribution in the United Kingdom and holds ownership interests in electric generation and gas storage facilities in the United Kingdom and North America. All of Scottish Power's activities in the United States, the Joint Petitioners report, are conducted through PPM and its subsidiaries.

¹ In a comment improperly and late-filed after the close of the 21-day period, Mr. Jeffrey S. Pate opposes the transaction; the comment is rejected on procedural grounds because it is late and on substantive grounds because it does not raise an issue bearing on whether the proposed transaction is in the public interest.

² Case 06-E-0006, Horizon Wind Energy LLC, Declaratory Ruling on Review of an Intra-Company Restructuring Transaction (issued February 16, 2006).

³ Case 04-E-0648, Flat Rock Wind Power II LLC, Order Providing For Lightened Regulation and Declaratory Ruling Concerning Transfer of Ownership (issued December 20, 2004); Case 02-E-0362, Flat Rock Wind Power LLC, Order Granting a Certificate of Public Convenience and Necessity and Providing For Lightened Regulation (issued June 17, 2004)(Light Regulation Orders).

Scottish Power and PPM, the Joint Petitioners report, do not own and are not affiliated with any power marketers in New York or surrounding regions, and similarly do not own and are not affiliated with owners of electric generation or transmission facilities in New York or adjacent regions. In addition, they continue, neither Scottish Power nor PPM have any ownership interests in facilities supplying fuel to electric generators, albeit PPM engages in proprietary gas trading activities.

Turning to Iberdrola, the Joint Petitioners describe it as a Spanish utility holding company that engages in gas and electric operations in 28 countries. Iberdrola, they continue, owns indirectly three small wind energy facilities totaling 57.5 MW either under development or nearing entry into operation in the PJM Interconnection, Inc. (PJM) market, and is the indirect owner of the developer of an approximately 136 MW wind facility in Herkimer County, New York, currently known as the Jordanville Wind Project.⁴ That project, the Joint Petitioners state, is in the early stages of development and is not expected to enter into operation until December 2007. They maintain that its 136 MW size is de minimis in the context of the potential for Iberdrola's exercise of horizontal market power. Neither Iberdrola nor its affiliates, the Joint Petitioners explain, own or control any electric generating or transmission assets or generation output in New York, and are not affiliated with any power marketers in New York or adjacent regions.

Turning to the acquisition transaction, the Joint Petitioners relate that Iberdrola intends to acquire all of the

⁴ The developer of that project has applied for a Certificate of Public Convenience and Necessity under PSL §68. Case 06-E-1424, Petition of Jordanville Wind LLC For an Order Granting Lightened Regulation and For a Certificate of Public Convenience and Necessity.

equity in Scottish Power. As a result, Scottish Power will become a wholly-owned subsidiary of Iberdrola and will cease to exist independently.

According to the Joint Petitioners, the proposed acquisition transaction qualifies for the presumption established in the Wallkill Order. 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 facilities unless there were a potential for harm to the interests of captive utility ratepayers sufficient to overcome the presumption. The Joint Petitioners contend that their proposed transaction should be exempted from further review because it falls within the scope of the presumption.⁵

Joint Petitioners believe that the transaction does not raise market power concerns because the change in generation market share or ownership concentration levels in the NYISO control area is de minimis. Iberdrola, they stress, does not currently own any interests in any New York generation facilities, and the size of its Jordanville facility, if it enters operation, is too small to enable it to exercise market power, even when combined with its interests in the Flat Rock facilities. The Joint Petitioners also maintain that market power cannot be exercised through imports of capacity from neighboring control areas, because Iberdrola's generation interests in PJM are also de minimis.

⁵ Case 91-E-0350, Wallkill Generating Company, L.P., Order Establishing Regulatory Regime (issued April 11, 1994). Case 05-E-1364, Sithe Energies, Inc., Declaratory Ruling on Review of Stock Transfers (issued January 14, 2005); Case 03-E-1136, Sithe Energies, Inc., Declaratory Ruling on Review of Ownership Transactions (issued October 28, 2003).

Joint Petitioners also claim that the transaction does not raise vertical market power concerns. The Joint Petitioners emphasize that the participants in the transaction are not affiliated with traditional public utilities that own transmission or distribution facilities within the NYISO market or markets adjacent to it, and that they do not hold interests in fuel or other inputs to the provision of electricity products in those markets.

DISCUSSION AND CONCLUSION

Joint Petitioners have satisfied the Wallkill Presumption, under which transactions involving parent entities upstream from the entities owning wholesale generation and steam facilities will be reviewed only if there is potential for harm to captive New York ratepayers. No such potential is apparent here, based on the facts stated in the Joint Petition.

Through the proposed stock transaction, Iberdrola will acquire Scottish Power. Because Iberdrola does not currently own any interests in New York generation facilities, market concentration within the NYISO control area will remain the same notwithstanding the transaction. Even if Iberdrola's Jordanville facility were to commence operations as planned, and its capacity were combined with the Maple Ridge facility's capacity, Iberdrola's share of the NYISO market would remain de minimis. The combined capacity of those facilities would amount to only 457 MW of the approximately 38,000 MW of generation operating in the NYISO market, or less than 2% of that market, well below any threshold level for concern.⁶

The Joint Petitioners have also demonstrated that Iberdrola's interests in generation facilities located in

⁶ Case 04-E-1364, Sithe Energies, Inc., Declaratory Ruling on Review of Stock Transfers (issued January 14, 2005).

adjoining regions are de minimis in their effect on New York markets. As a result, Iberdrola's acquisition of Scottish Power will not materially increase electric market concentration within New York, preventing Iberdrola from exercising horizontal market power.

Moreover, the acquisition transaction does not pose the potential for the exercise of market power other than horizontal market power. Neither Iberdrola nor any of its affiliates exercise control over electric delivery facilities, or substantial influence over inputs into the production of generation supply within NYISO markets. As a result, those avenues to undue exercise of market power are also foreclosed.

Consequently, the acquisition transaction does 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.

After the transaction closes, Flat Rock, Flat Rock II and the Maple Ridge facility will remain lightly regulated, in accordance with the Light Regulation Orders. The Joint Petitioners, however, are reminded that Flat Rock, Flat Rock II and the Maple Ridge facility remain subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed in the Light Regulation Orders and other previous orders.⁷ Included among these requirements are the obligations to conduct tests for

⁷ See, e.g., Case 05-E-1095, TransCanada Power (Castleton) LLC, Declaratory Ruling on Transfer of Ownership Interests and Order Providing for Lightened Regulation (issued January 26, 2006).

stray voltage on all publicly accessible electric facilities,⁸ to give notice of generation unit retirements,⁹ and to report personal injury accidents pursuant to 16 NYCRR Part 125.

The Commission finds and declares:

1. No further review will be conducted of the acquisition transaction described in the Joint Petition filed in this proceeding.

2. This proceeding is closed.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary

⁸ 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).

⁹ Case 05-E-0889, Generation Unit Retirement Policies, Order Adopting Notice Requirements for Generation Unit Retirements (issued December 20, 2005).