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DOCKET NO. 47482

APPLICATION OF STERLING WIND, LLC PURSUANT TO SECTION 39.158 OF THE PUBLIC UTILITY REGULATORY ACT	§ § § §	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

STERLING WIND, LLC'S APPEAL OF AN INTERIM ORDER AND MOTION FOR RECONSIDERATION OF ORDER NO. 3

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TO THE HONORABLE PUBLIC UTILITY COMMISSION OF TEXAS:

COMES NOW, Sterling Wind, LLC ("Sterling" or "Applicant"), in the above-styled and numbered docket and pursuant to Commission Procedural Rule 22.123[1] serves this, its Appeal of an Interim Order and Motion for Reconsideration of Order No. 3, issued in this proceeding on September 6, 2017. In support thereof, Sterling respectfully shows as follows:

I. INTRODUCTION

Sterling seeks appeal and reconsideration of Order No. 3, Denying Motion for Certification, pursuant to Rule 22.123(a)(2), which authorizes appeal of an interim order of a presiding officer. In its application filed on August 8, 2017 in this proceeding ("Application"), Sterling explained that it owns a portfolio of operating wind generation assets in the Electric Reliability Council of Texas, Inc. ("ERCOT") region. Sterling and its indirect upstream affiliates, including Sterling's indirect owner NextEra Energy Resources, LLC ("NextEra Energy Resources"), plan to enter into a transaction with EFS Renewables Holdings, LLC ("EFS") and BAL Investment & Advisory, Inc. ("BALIA," and together with EFS, the "Investors") in which Investors will purchase passive, non-controlling, Class B membership interests in Sterling (the

[1] 16 TEX. ADMIN. CODE § 22.123 (TAC).

"Transaction"). In its Application, Sterling requested that, pursuant to Rule 22.127, the presiding officer certify to the Commission the question of whether:

> In an instance where an entity owning electric generation facilities in Texas proposes to sell, and a third-party investor wishes to purchase, private equity shares in the entity where no right to manage or control the entity owning the electric generation facilities in Texas is sold or purchased (other than consent or approval rights granted to passive investors to preserve the value of their investments, which in any event do not include the right to dispatch the electric generation facilities or determine at what price power is sold), is the Commission required to approve such a transaction under the provisions of Public Utility Regulatory Act ("PURA")[2] § 39.158?[3]

Sterling submits that the answer to this question is no. Section 39.158 of PURA provides in part that an owner of electric generation facilities in Texas that "proposes to merge, consolidate, or otherwise become affiliated with another owner of electric generation facilities" in Texas "shall obtain the approval of the commission before closing if the electricity offered for sale in the power region by the merged, consolidated, or affiliated entity will exceed one percent of the total electricity for sale in the power region."[4] However, § 39.158 does not expressly require Commission approval for transactions, such as this one, that involve the issuance only of passive, non-controlling equity interests in electric generation facilities to third parties. These types of transactions do not result in parties becoming "merged, consolidated, or affiliated." While prior applications under § 39.158 have presented this question, the Commission has not expressly addressed it. Therefore, industry participants continue to submit applications for approval of these types of transactions out of an abundance of caution.

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[2] TEX. UTIL. CODE ANN. §§ 11.001-66.016 ("PURA") (Vernon 2007 & Supp. 2017).

[3] If the Commission determined that approval of the Transaction is necessary, Sterling also requested that the Commission approve the Transaction, since, following consummation of the Transaction, the combined percentage ownership of Sterling, Investors, and their respective affiliates will be less than the 20 percent threshold established by PURA § 39.154.

[4] PURA § 39.158(a).

Order No. 3 denied Sterling's request to certify this issue to the Commission. In this order, the Administrative Law Judge ("ALJ") determined that the requested certified issue "is not dispositive of the ultimate finding required under PURA § 39.154 to obtain approval of the application."[5]

Sterling respectfully disagrees and files this appeal and motion for reconsideration of this determination. To the contrary, the issue identified in the Application – whether or not PURA § 39.158 requires prior Commission approval before consummating transactions that involve the transfer of passive, non-controlling equity interests in entities upstream of electric generation facilities in Texas – is dispositive of the Application. If PURA does not require Commission approval for these types of transactions, then the Application is unnecessary and the parties may close the Transaction at any time, without the requirement to wait for Commission action. However, even if the Commission ultimately determines that approval of these types of transactions is necessary under PURA, having the Commission's guidance regarding the correct interpretation of § 39.158 will provide the industry with much-needed certainty. For these reasons, Sterling requests that the Commission grant this appeal and request for reconsideration.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. On August 8, 2017, Sterling filed an Application with the Commission pursuant to PURA § 39.158, regarding a Transaction with Investors, in which Investors will purchase passive, non-controlling, Class B membership interests in Sterling.

[5] Order No. 3 at 3.

2. Sterling owns a portfolio of wind generation assets, which portfolio includes direct ownership of Cap Ridge Wind I, LLC, Cap Ridge Wind III, LLC, and Cap Ridge Wind IV, LLC (collectively, the "Project Companies").[6]
3. Prior to consummation of the Transaction, NextEra Energy Resources indirectly owns 100 percent of the equity interests in Sterling. NextEra Energy Resources also indirectly owns equity interests in other generation facilities that are installed or will be installed in ERCOT. Specifically, NextEra Energy Resources directly or indirectly owns or controls generation facilities that are currently installed or will be installed within 12 months in ERCOT totaling approximately 385.34 MW.
4. Investors and their respective affiliates also own passive equity interests directly or indirectly in other currently installed and expected to be installed generation facilities in ERCOT. Specifically: (1) EFS currently owns, either directly or indirectly through affiliates or subsidiaries, passive equity interests in generation capacity that is installed or will be installed within the next 12 months in ERCOT totaling approximately 206.2 MW; and (2) BALIA currently owns, either directly or indirectly through affiliates or subsidiaries, passive equity interests in generation capacity that is installed or will be installed within the next 12 months in ERCOT totaling approximately 149.6 MW.
5. Certain affiliates of Sterling also own interests in generation assets in adjacent power regions. For simplicity, Sterling assumed that the combined installed generation capacity owned by Sterling's affiliates in adjacent power regions that is capable of being delivered

[6] The Project Companies own and operate the following wind generation assets that are interconnected to the ERCOT grid: Cap Ridge Wind I, LLC owns and operates the Capricorn Ridge Wind 1 facility ("Capricorn Ridge 1"), a 214.5 MW wind generation facility located in Sterling County, Texas. Cap Ridge Wind III, LLC owns and operates the Capricorn Ridge Wind 3 facility ("Capricorn Ridge 3"), a 186.0 MW facility located in Sterling County, Texas. Cap Ridge Wind IV, LLC owns and operates the Capricorn Ridge Wind 4 facility ("Capricorn Ridge 4"), a 112.5 MW wind generation facility located in Sterling and Coke Counties, Texas.

into ERCOT via the DC Ties is equal to the maximum capacity of the DC Ties, which totals 820 MW.

6. Upon consummation of the Transaction, each Investor will own passive Class B membership interests in Sterling. NextEra Energy Resources will continue to indirectly hold the Class A equity interests in Sterling, and the NextEra Energy Resources subsidiary holding the Class A membership interests shall act as the managing member of Sterling. As passive equity interest holders in Sterling, Investors would have no management or control over Sterling, the Project Companies, or the sale of electricity from the Projects.[7]
7. Following consummation of the Transaction, after taking into account the percentage equity ownership interests and capacity factors for the different types of installed generation capacity owned by the Applicant and the Investors, the Applicant's and Investors' combined percentage share of installed generation capacity in or capable of delivery to ERCOT as a result of the Transaction would be 1.68 percent of the total installed capacity in, or capable of delivering electricity to, ERCOT.
8. The Transaction is expected to occur as soon as possible following Commission approval, but on or before December 6, 2017. Sterling submitted its Application 120 days before closing of the Transaction, which is timely under PURA § 39.158(a).[8]
9. In the Application, Sterling requested that the presiding officer certify the following question to the Commission, pursuant to Rule 22.127:

[7] Investors do have a right to participate in certain major decisions that require consent by a majority interest of the Class B membership interests.

[8] *See* PURA § 39.158(a) (requiring Commission approval to be requested at least 120 days prior to the date of the proposed closing).

> In an instance where an entity owning electric generation facilities in Texas proposes to sell, and a third-party investor wishes to purchase, private equity shares in the entity where no right to manage or control the entity owning the electric generation facilities in Texas is sold or purchased (other than consent or approval rights granted to passive investors to preserve the value of their investments, which in any event do not include the right to dispatch the electric generation facilities or determine at what price power is sold), is the Commission required to approve such a transaction under the provisions of PURA § 39.158?

10. On August 10, 2017, the ALJ issued Order No. 1, requiring Commission Staff to file comments and a recommendation on the sufficiency of the application, whether additional notice may be required to comply with the applicable procedural rules, whether certification of an issue to the Commission is appropriate, and on Applicant's proposed procedural schedule.

11. On August 23, 2017, Commission Staff filed comments that recommended the ALJ find the application and notice sufficient. On August 24, 2017, Commission Staff filed amended comments that recommended that the ALJ not certify Sterling's question to the Commission.[9] With respect to certification, Staff stated that the Commission has recently approved similar applications for passive, non-managing interests under PURA §§ 39.154 and 39.158.[10] Staff therefore recommended that a certified question is unnecessary in this case because, in Staff's view, similar requests for certified issues were previously considered and denied in prior dockets, and therefore Staff stated that the Commission has already ruled that it has jurisdiction over these types of transactions.[11]

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[9] Commission Staff's Amended Procedural Schedule Recommendation at 1-2, filed in Docket No. 47481 (Aug. 24, 2017).

[10] *See id.* at 2 (citing *Application of Exgen Renewables Partners, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47020, Final Order (issued June 29, 2017); *Application of Topaz Wind, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47080, Final Order (issued Aug. 18, 2017)).

[11] *See id.* (citing *Application of Panhandle Wind Holdings 2 LLC Pursuant to § 39.158 of the Public Utility Regulatory Act*, Docket No. 42597, Order No. 2 Denying Motion for Certification (issued June 25, 2014);

12. On August 30, 2017, the ALJ issued Order No. 2, finding Sterling's Application and notice sufficient and establishing a procedural schedule for the proceeding.

13. On September 6, 2017, the ALJ issued Order No. 3, denying Applicant's motion for a certified question. Order No. 3 states: "In this docket the Commission must determine whether the transaction meets the standards in PURA § 39.154, thus qualifying for approval under PURA § 39.158. . . . The issue Sterling has identified is not dispositive of the ultimate finding required under PURA § 39.154 to obtain approval of the application."[12]

III. AVAILABILITY OF APPEAL UNDER COMMISSION RULES

Pursuant to Rule 22.123(a), this appeal is available because Order No. 3 denies Sterling's request for guidance from the Commission regarding whether the Application is required by PURA. Order No. 3 therefore "immediately prejudices a substantial and material right" of Sterling and materially affects the course of this proceeding. In this proceeding, Sterling has requested a Commission determination that the Transaction is not subject to PURA § 39.158, or, if the Commission determines that § 39.158 is applicable, approval of the Transaction. As provided by Rule 22.127, Sterling requested that the ALJ certify the question of the statute's applicability to the Commission. Order No. 3 denied the request to certify this issue. As a result, Sterling is compelled to comply with Order No. 2, which establishes procedures that assume § 39.158 is applicable, including a determination on the merits of whether the Transaction should be approved.

Application of Rattlesnake Wind I, LLC Pursuant to § 39.158 of the Public Utility Regulatory Act, Docket No. 44586, Order No. 3 Denying Motion for Certification (issued May 12, 2015)).

[12] Order No. 3 at 3.

Further, absent a Commission interpretation of § 39.158's inapplicability, Sterling's affiliates will be compelled to continue to file for approval of similar applications. NextEra Energy Resources subsidiaries currently have two other applications pursuant to § 39.158 pending before the Commission, in Docket Nos. 47475 and 47481.[13] In these dockets, as in the instant one, the applicants contend that the acquisition of a passive, non-controlling equity interest, with no right to vote on the management or operations decisions of electric generation facilities, does not result in an "affiliation" that requires approval under § 39.158.[14] NextEra Energy Resources anticipates that it or its subsidiaries may continue to enter into these types of transactions in the future, and thus a lack of guidance from this Commission in this proceeding will likely result in a continued need to file applications under § 39.158. A Commission determination on this threshold jurisdictional issue that § 39.158 does not apply to such transactions will obviate the need for applicants to file further applications and avoid the commitment of Commission resources to review future filings.

IV. PURA § 39.158 DOES NOT APPLY TO TRANSACTIONS THAT INVOLVE THE TRANSFER ONLY OF PASSIVE, NON-CONTROLLING INTERESTS IN ELECTRIC GENERATION FACILITIES

A. Order No. 3 Erred by Denying Sterling's Request to Certify Its Jurisdictional Question to the Commission.

Sterling respectfully submits that the ALJ abused his discretion in Order No. 3 by denying Sterling's request to certify this threshold jurisdictional question to the Commission and by determining that this question is not dispositive of the Application. Order No. 3 fails to

[13] *See Application of Horse Ridge Wind, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47475 (filed Aug. 4, 2017); *Application of Palmwood Wind, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47481 (filed Aug. 8, 2017).

[14] Similar to the Application at issue in this proceeding, the applicants in Docket Nos. 47475 and 47481 requested certification to the Commission of the question of the applicability of § 39.158 to these types of transactions. The ALJ in each of these dockets similarly denied certification. *See Application of Horse Ridge Wind, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47475, Order No. 3 Denying Motion for Certification (issued Sept. 1, 2017); *Application of Palmwood Wind, LLC Under § 39.158 of the Public Utility Regulatory Act*, Docket No. 47481, Order No. 3 Denying Motion for Certification (issued Sept. 6, 2017).

provide needed certainty regarding whether transactions involving the transfer of passive, non-controlling equity interests in generation facilities require approval under this statute. Rule 22.127(a) provides that the presiding officer "may certify to the commission an issue that involves an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgments of the commission by law." Rule 22.127(b) further specifies that the following types of issues "are appropriate for certification":

> (1) the commission's interpretation of its rules and applicable statutes;
>
> (2) which rules or statutes are applicable to a proceeding; and
>
> (3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.[15]

Sterling's request for certification fit within these categories and should have been granted pursuant to Rule 22.127. Specifically, the question of § 39.158's applicability "involves an ultimate finding of compliance with or satisfaction of a statutory standard" that is "committed to the . . . judgment of the commission by law." Sterling is specifically seeking a Commission determination of whether § 39.158 is "applicable to [this] proceeding," and is requesting that "commission policy should be established or clarified as to a substantive . . . issue of significance to the proceeding." Rule 22.127(b) expressly provides that these types of issues "are appropriate for certification." Order No. 3 therefore erred by denying Sterling's request to certify its jurisdictional question to the Commission.

B. Order No. 3 Also Erred by Misapplying PURA § 39.158 to Require Commission Approval of the Transaction.

By essentially requiring Commission approval for the instant Transaction under § 39.158, Order No. 3 also misinterpreted the statute. Section 39.158 provides in part that an:

[15] 16 TAC § 22.127(b).

> owner of electric generation facilities that offers electricity for sale in the state and proposes to merge, consolidate, or otherwise become affiliated with another owner of electric generation facilities that offers electricity for sale in this state shall obtain the approval of the commission before closing if the electricity offered for sale in the power region by the merged, consolidated, or affiliated entity will exceed one percent of the total electricity for sale in the power region.[16]

Section 39.158 provides further that the Commission shall approve the transaction unless the Commission finds that the transaction results in a violation of PURA § 39.154. Section 39.154 prohibits a power generation company and any affiliate within the power region from owning or controlling more than 20 percent of the installed capacity located in, or capable of delivering electricity to, the power region. Thus, if the generation ownership of the merged, consolidated, or affiliated entity is at or below 20 percent of the installed capacity located in, or capable of delivering electricity to, ERCOT, the Commission must approve the transaction.

Sterling contends that Commission approval of transactions in which passive, non-controlling equity interests that are sold to entities that directly or indirectly own electric generation facilities, such as the Transaction here, is not contemplated by PURA § 39.158. In this type of transaction, an equity investor purchases shares of an entity that owns, either directly or indirectly, electric generation facilities that offer electricity for sale in Texas. The distinction from other types of investment is that this equity purchase is of a ***passive*** share of the entity. The investor does not obtain shares that confer any authority to manage or control the operations of the electric generation project, its holding entity, or any other entity with ownership or control of the project and its facilities. The passive equity interests have no associated voting interests over the management or control of the project, but instead possess only limited consent rights associated with and to the limited extent necessary to preserve the investor's investment value.

[16] PURA § 39.158(a).

These distinctions are important in light of the express language of PURA § 39.158 and the types of transactions that it clearly intends to govern.

Section 39.158 specifies that review of a transaction is required where an owner of electric generation facilities that offers electricity for sale in the state "proposes to merge, consolidate, or otherwise become affiliated with another owner of electric generation facilities that offers electricity for sale in this state . . . ."[17] The purchase of equity shares in the entities at issue here does not constitute a merger or consolidation of the Investors with the Applicant. Further, this type of transaction also does not result in the Investors and Applicant becoming "affiliated." PURA defines an "affiliate" as a person that owns or holds (or holds in a successive chain of ownership) ***at least five percent of the voting securities*** of a public utility.[18] Thus, in order for one of the Investors to become an affiliate of the Applicant, the equity interests would need to both (1) exceed the five percent threshold, and (2) carry the right to vote in order to direct or control the management of the project entity. As noted above, the passive equity interests that are being transferred in the Transaction (and that are typically transferred in these types of transactions) do not contain the right to vote on the management or control of the Project Companies. Thus, Order No. 3 errs by essentially finding that Sterling and Investors will be "merged, consolidated, or affiliated" under the statute.

C. The Commission Has Not Previously Determined that PURA § 39.158 Is Applicable to Transactions Involving the Transfer of Only Passive, Non-Controlling Interests in Electric Generation Facilities.

In its Application, Sterling requested clarity regarding the question of whether transactions like the instant one require Commission approval pursuant to § 39.158.

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[17] PURA § 39.158(a).

[18] PURA § 11.003(2). Although the affiliate definition applies specifically to public utilities, it is understood that the definition is instructive and is consistent with the meaning of "affiliate" in other corporate law settings and ordinary usage.

Commission Staff's position, as set forth in its August 24 Comments, is that the Commission has already opined on this question and determined that Commission approval is required under § 39.158 for these types of transactions.[19] As support for this proposition, Staff cites two prior proceedings, Docket Nos. 42597 and 44586.[20]

Sterling disagrees that these prior dockets definitively addressed the question of whether PURA § 39.158 requires Commission approval of transactions involving the transfer only of passive, non-controlling equity interests in electric generation facilities. While the applicants in these prior proceedings did raise the question of whether the statute was applicable to similar types of transactions involving passive, non-controlling equity interests, the presiding officers in these cases determined that answering that question was not dispositive to resolution of the application.[21] In other words, the presiding officers in these cases found – much as the ALJ in this proceeding determined in Order No. 3 – that the Commission did not need to answer the question of whether the statute applies in order to find that the transactions at issue resulted in combined ownership percentages below the 20 percent threshold in PURA § 39.154. Importantly, the interim orders in Docket Nos. 42597 and 44586 were not appealed, and thus the Commission did not have the opportunity in these cases to address the jurisdictional question of the statute's applicability. Staff is therefore incorrect in its position that the Commission has previously determined that PURA § 39.158 applies.

Order No. 3 would take a similar approach in this proceeding. However, Sterling believes it is important for the Commission to expressly rule on whether these types of

[19] Commission Staff's August 24 Comments at 1-2.

[20] *Id.*

[21] *Application of Panhandle Wind Holdings 2 LLC Pursuant to Section 39.158 of the Public Utility Regulatory Act*, Docket No. 42597, Order No. 2 Denying Motion for Certification (issued June 25, 2014); *Application of Rattlesnake Wind I, LLC Pursuant to Section 39.158 of the Public Utility Regulatory Act*, Docket No. 44586, Order No. 3 Denying Certification (issued May 12, 2015).

transactions require Commission approval. Uncertainty has existed for generation owners regarding the applicability of this requirement since 2014 when parties began filing applications seeking approval of these types of transactions under § 39.158. Sterling is not aware of any prior Commission determination that expressly requires approval of these types of transactions. And, as explained above, these types of transactions do not involve generation owners becoming "merged, consolidated, or affiliated," as those terms are commonly understood or defined by PURA. However, because prior applications have been filed and approved, generation owners often file applications out of an abundance of caution to ensure compliance with PURA. This uncertainty often results in delay in closing these transactions, since approval must be requested at least 120 days before closing of a proposed transaction.[22] This timing does not always comport with market conditions, which may necessitate closing of transactions on a more expedited schedule. These applications also utilize valuable Commission Staff resources, since Staff typically reviews the applications and evaluates whether applicants have appropriately calculated their combined generation ownership shares.

For these reasons, it would be very helpful to obtain the Commission's guidance on whether § 39.158 actually requires approval of transfers only of passive, non-controlling equity interests in electric generation facilities. Sterling believes that the statute does not contemplate requiring Commission approval for these types of transactions and therefore urges the Commission to determine that § 39.158 does not apply to these types of transactions.

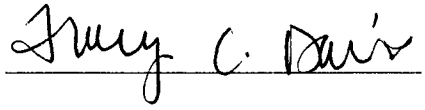
V. RELIEF REQUESTED

WHEREFORE, IN VIEW OF THE FOREGOING, Sterling respectfully requests that the Commission grant this appeal and motion for reconsideration of Order No. 3, and determine that

[22] PURA § 39.158(a).

Commission approval of transactions that involve transfers only of passive, non-controlling interests do not make entities "affiliates" for purposes of PURA and therefore do not require Commission approval under PURA § 39.158.

Respectfully submitted,



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September 18, 2017

CERTIFICATE OF SERVICE

I certify that on September 15, 2017, a true copy of the foregoing document was served by hand delivery on:

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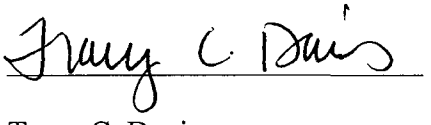

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