

121 FERC ¶ 61,252  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

FPL Energy Mower County, LLC  
FPL Energy Oliver Wind, LLC  
FPL Energy Oliver Wind II, LLC  
Logan Wind Energy LLC  
Peetz Table Wind Energy, LLC  
Peetz Logan Interconnect, LLC

Docket No. EL07-104-000

ORDER DISCLAIMING JURISDICTION

(Issued December 10, 2007)

1. In this order, the Commission grants a petition for a declaratory order regarding the jurisdictional status of certain entities. We find that certain as-yet unidentified financial investors will not be, as a result of their acquisition of a passive ownership interest in a public utility, subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).<sup>1</sup>

**I. Background**

**A. Applicants' Request**

2. On September 24, 2007, FPL Energy Mower County, LLC (Mower), FPL Energy Oliver Wind, LLC (Oliver), FPL Energy Oliver Wind II, LLC (Oliver II), Logan Wind Energy LLC (Logan), Peetz Table Wind Energy, LLC (Peetz Table), and Peetz Logan Interconnect, LLC (PL Interconnect) (collectively, Applicants) filed a petition for a declaratory order. The Applicants request that the Commission confirm that certain as-yet unidentified financial investors (Unidentified Investors) will not be deemed to be

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<sup>1</sup> 16 U.S.C. § 824 (2007).

“public utilities” under the FPA solely by virtue of their acquisition of a passive ownership interest in Northern Frontier Wind, LLC (Frontier Wind) or on the basis of the new ownership structure created by the proposed transaction.<sup>2</sup>

**B. Frontier Wind**

3. Frontier Wind is wholly owned by Northern Frontier Wind Funding, LLC (Frontier Funding), which is wholly owned by Northern Frontier Wind Holding, LLC (Frontier Holding). Frontier Holding is wholly owned by ESI Energy, LLC (ESI). ESI is a direct wholly-owned subsidiary of FPL Energy, LLC (FPLE). FPLE is an indirect wholly-owned subsidiary of FPL Group, Inc. (FPL Group). All Applicants are wholly owned by ESI. Mower, Oliver, Oliver II, and Peetz Table are direct subsidiaries of ESI, while Logan and PL Interconnect are indirect subsidiaries of ESI.

4. Through its subsidiaries, FPLE owns, develops, constructs, manages, and operates independent power projects that sell energy, capacity, and ancillary services in a number of domestic electricity markets outside of Florida. FPLE indirectly owns and operates over 70 generating facilities that total over 13,000 MW in net generating capacity in 25 states. FPLE’s subsidiaries do not own any transmission facilities other than the limited interconnection facilities needed to connect FPLE’s subsidiaries’ generating facilities to the transmission grid.

5. The FPL Group also owns Florida Power and Light Company (FPL), a franchised electric utility that provides wholesale and retail electric services to customers in Florida. FPL owns and operates 21,000 MW of generation in Florida. FPL’s transmission facilities are primarily in the state of Florida and are administered pursuant to an open access transmission tariff (OATT) on file with the Commission. A division of FPL owns a single transmission asset under the operational control of ISO New England, Inc. (ISO-NE), the Seabrook Substation, which is subject to both a local network system tariff on file with the Commission and the ISO-NE OATT.

**C. Applicants**

6. Mower owns and operates a 98.9 megawatt (MW) wind-powered electric generating facility, located in Mower County, Minnesota, within the footprint of the Midwest Independent Transmission System Operator (MISO). Mower sells the

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<sup>2</sup> Applicants also requested authorization under section 203 of the FPA for the indirect upstream disposition of their jurisdictional facilities in connection with the issuance of new ownership interests in Frontier Wind to Unidentified Investors. On October 26, 2007, the Director, Division of Tariffs and Market Development – West, under 18 C.F.R. § 375.307, issued a letter order approving that request.

electricity produced by its facility pursuant to a long-term power purchase agreement with Northern States Power Company. Mower has market-based rate authority to sell energy, capacity, and ancillary services.

7. Oliver owns and operates a 50.6 MW wind-powered electric generating facility, located in Oliver County, North Dakota, within the footprint of MISO. Under a 25 year term power purchase agreement, Minnesota Power, a division of Attete, Inc., is entitled to all energy and capacity produced by the Oliver facility. Oliver has market-based rate authority to sell energy, capacity, and ancillary services.

8. Oliver II owns and will operate a 48 MW wind-powered electric generating facility in Oliver County. Although the facility is currently under construction, Applicants state that it is expected to achieve commercial operation during the fourth quarter of 2007. Oliver II has entered into a 25 year power purchase agreement with Minnesota Power that entitles Minnesota Power to all energy and capacity produced by the Oliver II facility. Although Oliver II is not currently a public utility, Applicants state that Oliver II will apply market-based authority prior to the closing date of the proposed transaction, which will cause Oliver II to be considered a public utility.

9. Logan will own and operate a wind-powered electric generation facility with capacity up to 201 MW in Oliver County, North Dakota. Although the facility is currently under construction, Applicants state that it is expected to achieve commercial operation during the fourth quarter of 2007. Logan will sell all of the output from its facility to Public Service Company of Colorado (PSCo) under a long-term power purchase agreement. Logan's power will be transmitted to PSCo over an approximately 78 mile transmission line owned by PL Interconnect. Logan has requested market-based rate authority to sell energy, capacity, and ancillary services.

10. Peetz Table will own and operate a wind-powered electric generation facility with capacity up to 199.5 MW in Logan County, Colorado. Although the facility is currently under construction, Applicants state that it is expected to achieve commercial operation during the fourth quarter of 2007. Peetz Table will sell all the output from its facility to PSCo pursuant to a long-term power purchase agreement. Peetz Table's power will be transmitted to PSCo over the transmission line owned by PL Interconnect. Peetz Table has market-based rate authority to sell energy, capacity, and ancillary services.

11. PL Interconnect was formed to develop, own, and operate an approximately 78 mile, 239 kV transmission line, with related equipment and facilities, in Logan, Morgan, and Washington counties in Colorado, that will connect the Logan and Peetz Table facilities to transmission facilities owned by PSCo. PL Interconnect's facility is under construction and is anticipated to be completed and interconnected to PSCo's transmission system. Applicants state that PL Interconnect will file a rate for Peetz Table and Logan to pay for the use of the PL Interconnect facility under section 205 of the FPA

before consummation of the transaction. Accordingly, Applicants state that PL Interconnect is not currently a public utility, but is considered a public utility with jurisdictional facilities for the purpose of obtaining all approvals requested under section 203 in the instant application.

**D. Unidentified Investors**

12. According to the Applicants, the Unidentified Investors will be entities that will not be primarily engaged in energy-related business activities. Applicants represent that the Unidentified Investors will have the following characteristics:

- Each Unidentified Investor will be a bank, bank holding company, financial holding company, finance company, insurance company, or other company that is not an electric utility, or a wholly owned, direct or indirect subsidiary of an electric utility company;<sup>3</sup>
- Such Unidentified Investors will not be primarily engaged in electric or natural gas business activities other than as investors in companies that engage in such activities;<sup>4</sup>
- None of the Unidentified Investors will be a “public utility”;<sup>5</sup> and
- None of such Unidentified Investors or their affiliates will have an interest in electric generation, transmission, and/or distribution facilities in the relevant geographic markets in which the Applicants will operate, other than minority interests or investments that do not comprise 5 percent or more of voting interests or otherwise allow them to exercise control over such facilities.<sup>6</sup>

13. Applicants pledge to inform the Commission of the identity of the Unidentified Investors and to provide confirmation of compliance by the Unidentified Investors with

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<sup>3</sup> FPL Mower County, LLC Application at 14.

<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* Applicants point out that the Commission has approved transactions under section 203 of the FPA involving to-be-identified investors under the condition that such investor(s) meet comparable criteria. *See, e.g., Invenergy TN LLC*, 109 FERC ¶ 62,175 (2004); *Crescent Ridge LLC*, 108 FERC ¶ 62,285 (2004); *Chandler Wind Partners, LLC*, 102 FERC ¶ 62,073 (2003).

the foregoing characteristics when Applicants provide the Commission notice of consummation of the proposed transaction.

**E. Proposed Transaction**

14. The jurisdictional facilities involved in the proposed transaction include Applicants' generation facilities and related transmission interconnection facilities, market-based rate schedules, power purchase agreements, and related books, records, and accounts, plus a transmission line and related equipment and facilities, the transmission rate schedule, and related books, records, and accounts.

15. In the proposed transaction, a series of steps within the FPPE corporate family will be taken such that 100 percent of the upstream ownership interests of each Applicant will be contributed to Frontier Wind, and Frontier Wind, Frontier Funding, and Frontier Holding will be interposed between ESI and Applicants. Frontier Funding will sell to one or more Unidentified Investors 100 percent of the Class B Membership Interests in Frontier Wind. Frontier Funding will hold 100 percent of Class A Membership Interests in Frontier Wind.

16. Applicants anticipate that the above events will occur in two separate closings. At the first closing, interests in Peetz Table, Mower, Oliver, and a 50 percent interest in PL Interconnect will be contributed to Frontier Wind. Simultaneously, the Unidentified Investors will pay cash for the Class B Membership Interests in Frontier Wind, and such Class B Membership Interests will be assigned to the Unidentified Investors. At the second closing, Unidentified Investors will pay cash, and interests in Logan, Oliver II, and the remaining 50 percent interest in PL interconnect will be contributed to Frontier Wind.

17. Since the transaction has not yet been consummated, the agreements for the acquisition of Frontier Wind's Class B Membership Interests by the Unidentified Investors are not final. In lieu of such final agreements, Applicants provide a term sheet setting forth terms of the contemplated acquisition of the Class B Membership Interests in Frontier Wind by the Unidentified Investors.<sup>7</sup> As Class B members, Unidentified Investors will not have voting interests in, or the ability to affect or direct, the day-to-day activities of Frontier Wind or the Applicants. However, Unidentified Investors will have voting rights regarding certain major decisions that could affect their financial

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<sup>7</sup> Applicants state that the final agreements will reflect the terms and conditions contained in the term sheet in all material respects.

investment, such as the sale of the Applicants' facilities, incurring indebtedness exceeding certain dollar thresholds, filing of bankruptcy, or merging with another company.<sup>8</sup>

18. Applicants also state that, based on the facts and circumstances known to the Applicants or that are reasonably foreseeable, the proposed transaction will not result in, at the time of the proposed transaction or in the future: (a) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (b) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (c) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (d) any new affiliate contract between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review under sections 205 and 206 of the FPA.

## **II. Notice and Pleadings**

19. Notice of Applicants' September 24, 2007, filing was published in the *Federal Register*, 72 Fed. Reg. 57,313 (2007), with interventions and protests due on or before October 15, 2007. None was filed.

## **III. Discussion**

20. Applicants request a disclaimer of jurisdiction over the Unidentified Investors, *i.e.*, a determination that they will not be regarded as "public utilities" as defined in section 201 of the FPA. The question presented by this petition is whether, as a result of their involvement in the proposed transaction, the Unidentified Investors will own or operate facilities subject to the Commission's jurisdiction, thereby making them public utilities under section 201 of the FPA.

21. Section 201(b) of the FPA states:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at

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<sup>8</sup> In any vote on such a major decision, the Class A Membership Interests as a group have 75 percent of the vote and the Class B Membership Interests as a group have 25 percent of the vote. *See* FPL Mower County, LLC Application at 17.

wholesale in interstate commerce . . . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy . . . .

22. Section 201(e) of the FPA states:

The term “public utility” . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part . . . .

23. The applicability of these sections to passive owners of jurisdictional facilities has been addressed by the Commission on numerous occasions. In *Pacific Power & Light Company*,<sup>9</sup> the Commission established a two-step analysis for determining whether holding a financial interest in jurisdictional facilities constitutes ownership resulting in public utility status under the FPA. Under that analysis, we must first determine if the investor will operate the facilities. Applicants represent that the Unidentified Investors will not have any decision-making authority concerning the day-to-day operation of the Applicants’ jurisdictional facilities.<sup>10</sup> Second, we must be assured that an investor is not in the business of producing or selling electric power and has a principal business other than that of a public utility. Applicants state that the Unidentified Investors will not be engaged in the business of producing, selling, or transmitting electric power, and that the Unidentified Investors will have principal businesses other than that of a public utility.<sup>11</sup>

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<sup>9</sup> See *Pacific Power & Light Company*, 3 FERC ¶ 61,119 (1978). See also *El Paso Electric Company*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corporation*, 77 FERC ¶ 61,334 (1996).

<sup>10</sup> We note that the Class B Membership Interests to be acquired by the Unidentified Investors will allow the Unidentified Investors to collectively have a 25 percent vote in “major decisions” that “could affect the financial investment, such as the sale of the Applicants’ facilities, incurrence of indebtedness exceeding certain dollar thresholds, filing of bankruptcy or merging with another company” and that this voting power could be used to veto “major decisions.” FPL Mower County, LLC Application at 14 n. 27. As the Commission has previously recognized, however, the retention of veto control over major decisions unrelated to day-to-day operations of jurisdictional facilities does not give rise to the kind of control that would cause the Unidentified Investors here to fall within the Commission’s jurisdiction under the FPA. See *D.E. Shaw Plasma Power, LLC*, 102 FERC ¶ 61,265 at 61,823 (2003).

<sup>11</sup> If this changes so that one or more of the Unidentified Investors operate the facility in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they will become public utilities and will be required to make the appropriate filings under section 205 of the FPA, 16 U.S.C. § 824d (2007). See, e.g., *Unicom Investments, Inc.*, 91 FERC ¶ 61,109 at 61,387 n.9 (2000).

24. Accordingly, we find that the Unidentified Investors will not become public utilities subject to the Commission's jurisdiction under section 201 of the FPA as a result of the proposed transaction. Therefore, we will disclaim jurisdiction over the Unidentified Investors.

The Commission orders:

Applicants' petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.