

150 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

NM Neptune, LLC

Docket No. EL14-83-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued January 22, 2015)

1. On July 14, 2014, NM Neptune LLC (NM Neptune) filed a petition for a declaratory order requesting that the Commission disclaim jurisdiction over NM Neptune under sections 201 and 203(a)(1) of the Federal Power Act (FPA).¹ In this order, we grant the petition, as discussed below.

I. Background

A. Description of Entities

2. NM Neptune states that it is a special-purpose vehicle, which is solely in the business of holding the Class C interests in the Neptune Regional Transmission System, LLC (Neptune).² NM Neptune is a wholly-owned indirect subsidiary of the Northwestern Mutual Life Insurance Company. Neptune is a merchant transmission owner with negotiated rate authority.³

3. According to NM Neptune, Neptune is the owner of a 660 megawatt (MW) high voltage direct current submarine transmission line linking New Jersey and Long Island,

¹ 16 U.S.C. §§ 824, 824b (2012).

² NM Neptune Petition at 4.

³ *Id.* at 1 (citing *Neptune Regional Transmission Sys., LLC*, 96 FERC ¶ 61,147 (2001) (*Neptune Regional*)).

New York. The Neptune transmission line is under the operational control of PJM Interconnection, L.L.C. (PJM) and service on the line is provided pursuant to Neptune's Commission-approved rate schedule under PJM's open access transmission tariff.

B. Description of Membership Interests

4. According to NM Neptune, Neptune has three classes of membership interests: Class A voting interests, Class B non-voting interests, and Class C interests. The Class C interests, according to NM Neptune, were created as part of a financial transaction to obtain the equity funding necessary to construct the Neptune project.

II. NM Neptune's Petition

5. NM Neptune requests that the Commission issue an order disclaiming jurisdiction over NM Neptune under sections 201 and 203(a)(1) of the FPA.⁴

6. According to NM Neptune, the Class C interests are currently held by the California Public Employees' Retirement System (CalPERS) (75 percent) and NM Neptune (25 percent). NM Neptune states that although the Class C interests are passive and confer no control over Neptune's jurisdictional facilities, NM Neptune recently filed for and obtained authorization for the acquisition of its interests under section 203(a)(1)(A).⁵ NM Neptune states that it is now filing this petition to eliminate any uncertainty as to its status as a public utility under the FPA to preclude the need to file any similar applications for authorization under FPA section 203(a)(1) with respect to future transfers of its Class C interests.

7. NM Neptune states that by order dated May 31, 2005, the Commission disclaimed jurisdiction under FPA section 201 over the owners of the Class B interests and the Class C interests.⁶ According to NM Neptune, the Commission based its disclaimer of jurisdiction on representations that the owners of the Class B and Class C interests

⁴ *Id.* at 5.

⁵ *Id.* at 1 (citing *NM Neptune, LLC and Starwood Energy Investors, L.L.C.*, 147 FERC ¶ 62,199 (2014) (*NM Neptune*)) (authorizing the sale of 25 percent of Class C membership interests in Neptune from Starwood Energy Investors, L.L.C. to NM Neptune).

⁶ *Id.* at 3 (citing *Neptune Regional Transmission System*, 111 FERC ¶ 61,306 (2005) (*Neptune Regional*)).

(1) will hold only passive interests in Neptune; and (2) will not own or operate facilities subject to the Commission's jurisdiction.⁷

8. NM Neptune also states that, by order dated January 31, 2012, the Commission disclaimed jurisdiction under FPA section 203(a)(1)(A) over the transfer of 75 percent of the Class C interests in Neptune to the CalPERS (CalPERS Transaction).⁸ According to NM Neptune, the Commission found that the CalPERS Transaction did not constitute a change in control within the meaning of FPA section 203(a)(1)(A) because of the passive nature of the Class C interests.

9. According to NM Neptune, the passive nature of the Class C interests has not changed since the Commission issued the orders in *Neptune Regional* and *Cal. Public*.⁹ NM Neptune asserts that, under NM Neptune's ownership, the Class C interests continue to be non-voting interests that confer no control over Neptune or its operations.

10. NM Neptune requests that the Commission grant expedited treatment and issue an order granting the relief sought in this Petition within 60 days of the date of filing.¹⁰ According to NM Neptune, such expedited action will allow NM Neptune to hold and transfer its Class C interests without the continuing uncertainty of Commission regulation.

A. Disclaimer of Jurisdiction Under FPA Section 201

11. NM Neptune maintains that disclaimer of jurisdiction over NM Neptune under FPA section 201 is appropriate.¹¹ NM Neptune notes that under well-established

⁷ NM Neptune Petition at 3 (citing *Neptune Regional*, 111 FERC ¶ 61,306 at PP 24-25).

⁸ *Id.* (citing *California Public Employees' Retirement Sys.*, 138 FERC ¶ 61,073 (2012) (*Cal. Public*)).

⁹ *Id.* at 4.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 5.

Commission precedent, the Commission has disclaimed jurisdiction under FPA section 201 over entities with passive interests in jurisdictional facilities.¹²

12. NM Neptune states that the Class C interests it currently holds carry the same attributes of passivity examined by the Commission in *Neptune Regional*.¹³ Further, NM Neptune states that it is solely in the business of holding the Class C interests. Therefore, according to NM Neptune, Commission disclaimer of jurisdiction over NM Neptune as a public utility under FPA section 201 is appropriate.

B. Disclaimer of Jurisdiction Under Section 203(a)(1)

13. NM Neptune maintains that the Commission has interpreted section 203(a)(1)(A) to require Commission authorization for any indirect change in control of jurisdictional facilities, such as the transfer of indirect ownership interests in Neptune.¹⁴ However, according to NM Neptune, Commission policy and precedent supports a disclaimer of jurisdiction under FPA section 203(a)(1) over transfers of NM Neptune's Class C interests on a going-forward basis. NM Neptune references the Commission's Supplemental Policy Statement, which provides that "[i]nvestments in public utilities that do not convey control may in some cases be considered to be passive investments not subject to section 203(a)(1)(A)."¹⁵

14. NM Neptune reiterates that the passive nature of the Class C interests has not changed since the Commission issued *Neptune Regional* and *Cal. Public*, and, as a result, NM Neptune has no control over Neptune or its operations.¹⁶ Further, according to NM Neptune, it is solely in the business of holding the Class C interests in Neptune, and is not

¹² NM Neptune Petition at 5 (citing *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996)).

¹³ *Id.* at 6.

¹⁴ *Id.* at 6-7 (citing *Central Vermont Pub. Serv. Corp.*, 39 FERC ¶ 61,295 (1987); *Central Illinois Pub. Serv. Co.*, 42 FERC ¶ 61,073 ((1988); *United Illuminating Co.*, 90 FERC ¶ 62,232 (2000); *Pub. Serv. Co. of New Mexico*, 95 FERC ¶ 62,296 (2001)).

¹⁵ *Id.* (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 54 (2007) (cross-referenced at 120 FERC ¶ 61,060, at P 54 (2007))).

¹⁶ *Id.* at 7-8.

otherwise in the business of producing or selling electric energy at wholesale or transmitting electric energy in interstate commerce. Therefore, NM Neptune concludes that under directly relevant Commission policy and precedent, Commission disclaimer of jurisdiction over NM Neptune's Class C interests under FPA section 203(a)(1) is appropriate.

III. Notice and Responsive Pleadings

15. Notice of NM Neptune's filing was published in the *Federal Register*, 79 Fed. Reg. 42,509 (2014), with protests and interventions due on or before August 13, 2014. None was filed.

IV. Discussion

16. For the reasons discussed below, we grant the requested petition for declaratory order. In *Neptune Regional*, the Commission authorized a disposition of jurisdictional facilities and granted a request for disclaimer of jurisdiction under FPA section 201.¹⁷ In that proceeding, the Applicants¹⁸ requested a disclaimer of jurisdiction over passive investors—i.e., a determination that they will not be regarded as public utilities as that term is defined in section 201 of the FPA. The Commission stated it uses

a two-step analysis for determining whether a financial interest in jurisdictional facilities constitutes sufficient ownership that holding such an interest would result in a finding of “public utility” status under the FPA. Under this precedent, the Commission first determines whether the passive investor will operate the facilities. The Commission then determines whether the passive investor is otherwise in the business of producing or selling electric power. The Commission has concluded that it would be inconsistent with the FPA to label the passive investors in certain financial arrangements as public utilities and subject them to the Commission's jurisdiction where these investors hold only equitable or legal title to the electric facilities and are removed from the operation of the facilities and the sale of power.¹⁹

¹⁷ *Neptune Regional*, 111 FERC ¶ 61,306 at P 1.

¹⁸ Applicants in that case were Neptune on behalf of itself and Atlantic Energy Partners LLC, NewCo, EIF Neptune, LLC, and Starwood Energy Investors, L.L.C.

¹⁹ *Neptune Regional*, 111 FERC ¶ 61,306 at P 24 & n.8 (noting “if there is a change so that the Passive Investors operate the facility in order to make sales of electric

(continued...)

17. The Applicants stated that (1) the passive investors will not own or operate facilities subject to the Commission's jurisdiction; and (2) once all operating control over Neptune is transferred, the passive investors will hold only passive interests and there will be no basis for treating them as public utilities subject to regulation under the FPA. Based on the Applicants' representations and consistent with similar Commission findings, the Commission found that the passive investors are not, because of a financial transaction, subject to the Commission's jurisdiction under section 201 of the FPA.²⁰

18. In *Cal. Public*, the applicant filed a petition for declaratory order seeking a disclaimer of Commission jurisdiction under section 203(a)(1)(A) of the FPA over a transaction in which the previous owners of 75 percent of the Class C interests in Neptune would transfer that ownership interest to CalPERS. The Commission found that the passive nature of the Class C interests had not changed since the Commission's determination in *Neptune Regional* and that the Class C interests would continue to be non-voting interests that confer no control over Neptune or its operations.²¹ Therefore, the Commission found that the transaction did not constitute a change in control of a public utility or jurisdictional facilities within the meaning of section 203(a)(1)(A) of the FPA and thus did not require Commission approval under section 203(a)(1)(A).²²

19. The Commission in *NM Neptune* authorized the sale of 25 percent of the Class C interests from Starwood to NM Neptune.²³ NM Neptune represented that owners of the Class C interests hold only passive interests in Neptune, do not have operational control over Neptune, and are not in the business of producing and selling electric power at wholesale or engaging in transmission in interstate commerce.²⁴

energy at wholesale or to engage in transmission in interstate commerce, they would become public utilities and would be required to make the appropriate filings under section 205 of the FPA.”).

²⁰ *Neptune Regional*, 111 FERC ¶ 61,306 at P 25.

²¹ *Cal. Public*, 138 FERC ¶ 61,073 at P 13.

²² *Id.*

²³ *NM Neptune*, 147 FERC ¶ 62,199 at 64,607.

²⁴ *Id.* at 64,606.

20. As discussed above, the Commission previously has disclaimed jurisdiction under FPA section 201 over the owners of the Class C interests in Neptune and has found that the Class C interests are passive and confer no control over Neptune's jurisdictional facilities. Based on NM Neptune's representations that nothing has changed to warrant a revision in the Commission's determination that the Class C interests are passive and that NM Neptune is solely in the business of holding the Class C interests and not otherwise in the business of producing or selling electric energy at wholesale or transmitting electric energy in interstate commerce, we affirm that NM Neptune is not a public utility under FPA section 201 and that future transfers of NM Neptune's Class C interests would not subject NM Neptune to the Commission's jurisdiction under FPA section 203(a)(1).²⁵

The Commission orders:

The petition for a declaratory order is granted, as discussed in the body of this order.

By the Commission. Commissioner Honorable is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁵ However, we also note that, as we stated in *Neptune Regional*, 111 FERC ¶ 61,306 at n.8, if there is a change so that the owners of the Class C interests operate the facility in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they would become public utilities under FPA section 201 and would be required to make the appropriate filings under section 205 of the FPA.