

154 FERC ¶ 61,036
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Backyard Farms Energy LLC
Devonshire Energy LLC

Docket No. EL15-96-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued January 21, 2016)

1. On August 27, 2015, Backyard Farms Energy LLC (Backyard Farms Energy) and Devonshire Energy LLC (Devonshire Energy) (collectively, MBR Entities) filed a petition for declaratory order (Petition) requesting that the Commission declare that, for the purpose of making required filings under 18 C.F.R. § 35.42,¹ MBR Entities are not affiliates of or under common control² with either (a) the funds and accounts managed by Fidelity Management & Research Company or its affiliates and subsidiaries in the capacity of investment manager (Fidelity Accounts) or (b) the funds and accounts managed by FIL Limited (FIL) or its affiliates and subsidiaries. In the alternative, MBR entities request that the Commission waive any requirement that MBR Entities notify the Commission of a change in status pursuant to 18 C.F.R. § 35.42 in connection with any future “passive” investments that are made by any of the Fidelity Accounts or FIL in the securities of an entity that either (a) owns or controls generation, (b) owns or controls inputs to electric power production (e.g., intrastate natural gas transportation, storage, or distribution facilities), (c) owns, operates or controls transmission facilities, or (d) has a franchised service territory.

2. As discussed below, we deny MBR Entities’ request to not be deemed affiliates or under common control with either the Fidelity Accounts or the funds and accounts managed by FIL or its affiliates and subsidiaries. We also deny MBR Entities’ request

¹ 18 C.F.R. § 35.42 (2015).

² For purposes of 18 C.F.R. § 35.36(a)(9) (2015).

for waiver of the requirement to notify the Commission of a change in status pursuant to 18 C.F.R. § 35.42 in connection with investments made by the Fidelity Accounts or FIL that would ordinarily require a change in status filing by MBR Entities.

I. Background

3. MBR Entities state that Backyard Farms Energy was formed to purchase energy at wholesale for use by its affiliate Backyard Farms LLC, a greenhouse grower of vine-ripened tomatoes in Maine, and that Devonshire Energy was formed to purchase electricity at wholesale for use by its affiliates, including Fidelity Real Estate Company, LLC and other operating companies that are subsidiaries of its parent company FMR LLC (FMR). MBR Entities state that they each obtained market-based rate authority³ to accommodate circumstances in which wholesale electricity purchases were made in excess of the actual needs of Backyard Farms Energy's or Devonshire Energy's affiliates, and would need to be sold back into the regional wholesale market.

4. MBR Entities state that Backyard Farms Energy and Devonshire Energy are each indirect subsidiaries of FMR. As discussed in more detail below, FMR is the parent company for the various financial services and related businesses more commonly known as "Fidelity Investments." MBR Entities are concerned that their possible affiliation with certain Fidelity companies, specifically the Fidelity Accounts and FIL, would require change in status filings under 18 C.F.R § 35.42 if those affiliated companies, in the future, acquired in the aggregate more than 10 percent of the voting securities of an entity that (1) owns or control generation, (2) owns or controls inputs to electric power production, (3) owns, operates or controls transmission facilities, or (4) has a franchised service territory. Accordingly, MBR Entities are requesting that the Commission declare that MBR Entities are not affiliates or under common control with the Fidelity Accounts and FIL; in the alternative, MBR Entities request waiver of the Commission's change in status requirements under 18 C.F.R. § 35.42 in connection with investments made by the Fidelity Accounts and FIL.

FMR

5. MBR Entities state that FMR, a limited liability company organized under the laws of Delaware, is a holding company with direct and indirect subsidiaries, including Fidelity Management & Research Company and its affiliates and subsidiaries that serve as discretionary investment managers or sub-advisers to the Fidelity Accounts

³ *Backyard Farms Energy LLC*, Docket No. ER09-1689-000 (October 28, 2009) (delegated letter order); *Devonshire Energy LLC*, Docket No. ER09-1645-000 (October 26, 2009) (delegated letter order).

(collectively, Fidelity Advisers). According to MBR Entities, members of the family of Edward C. Johnson 3d, including Abigail P. Johnson, are the predominant owners, directly or through trusts, of Series B voting common shares of FMR, representing 49 percent of the voting power of FMR.⁴

Fidelity Advisers and the Fidelity Accounts

6. As stated above, MBR Entities state that the Fidelity Advisers serve as discretionary investment managers or sub-advisers to the Fidelity Accounts. MBR Entities state that the Fidelity Accounts consist of (1) a family of mutual funds (Fidelity Funds), which are investment companies registered with the Securities and Exchange Commission (SEC) under the Securities Act of 1933 and the Investment Company Act of 1940 (Investment Company Act), (2) commingled pools and other institutional accounts, many of which are subject to the Employee Retirement Income Security Act of 1974 and regulations set forth by the U.S. Department of Labor, and (3) multiple other types of managed funds and accounts for institutional and retail clients. MBR Entities state that each of the Fidelity Funds, which collectively comprise the vast majority of assets within the Fidelity Accounts, is organized as a series of a Massachusetts business trust or Delaware statutory trust, and is registered with the SEC as an investment company under the Investment Company Act. MBR Entities also state that each trust has its own legally separate Board of Trustees and that for each trust, a majority of the Board of Trustees is composed of individuals who are independent of FMR for purposes of the Investment Company Act, and each fund engages investment managers under written agreements that are approved by the fund's Board of Trustees on an annual basis.⁵

7. MBR Entities state that FMR is a holding company of the Fidelity Advisers but is not a party to the investment management contracts between the Fidelity Advisers and the Fidelity Accounts and does not participate in the investment decisions of the Fidelity Advisers or the exercise of voting rights relating to securities held by the Fidelity Accounts. MBR Entities contend that the Fidelity Accounts are not direct or indirect

⁴ MBR Entities Petition at 3

⁵ MBR Entities state that the other funds and accounts that make up Fidelity Accounts, not including the Fidelity Funds, include both institutional and retail funds and accounts, and may include pension and profit sharing plans, corporate entities, charitable organizations, state and municipal government entities, non-U.S. mutual funds, privately-offered unregistered investment funds, Canadian mutual funds, discretionary management services for individuals, joint account holders, certain retirement plans, Individual Retirement Accounts, trusts, estates, business entities, and charitable organizations. *Id.* at 3-5.

subsidiaries of FMR; rather, they are managed by Fidelity Advisers in a fiduciary capacity and the Fidelity Accounts themselves are owned by various shareholders, institutions, or other clients of those Fidelity Accounts. MBR Entities state that the Board of Trustees of the various Fidelity Funds have adopted a detailed set of formal written guidelines to govern the exercise of voting rights attached to the Fidelity Funds' portfolio securities and have delegated authority to Fidelity Management & Research Company (included within "Fidelity Advisers") to carry out this voting function in accordance with the written guidelines. MBR Entities argue that Fidelity Management & Research Company does not have the discretion to exercise these voting rights in its own interest and instead must follow the trustee-approved guidelines and exercise such voting rights in the best interest of the fund holding the securities. MBR Entities add that the management of the Fidelity Accounts is independent from management of MBR Entities.⁶

8. In summary, MBR Entities state that both MBR Entities and the Fidelity Advisers are direct or indirect subsidiaries of FMR. According to MBR Entities, the Fidelity Advisers manage the Fidelity Accounts in a fiduciary capacity and have been delegated the ability to exercise voting rights for the Fidelity Funds in some circumstances and FMR is not involved in the day-to-day investment management decisions made for the Fidelity Accounts by the Fidelity Advisers.⁷

FIL Limited

9. MBR Entities state that FIL is a privately owned company based in Hamilton, Bermuda. FIL is the parent company of, among other things, a financial services group specialized in the management, administration and distribution of collective investments, institutional management, and retirement services globally, operating under the trade name Fidelity Worldwide Investment.

10. According to MBR Entities, Pandanus Partners, L.P., which is owned by trusts for the benefit of the members of the family of Edward C. Johnson 3d, owns between 25 percent and 50 percent of the shares of FIL voting stock.⁸ MBR Entities state that the

⁶ *Id.* at 8-10.

⁷ *Id.* MBR Entities stress that the voting rights delegated to the Fidelity Advisers are limited by trustee-approved guidelines and that Fidelity Advisers must exercise such voting rights in the best interest of the fund holding the securities and not in their own interest or as they otherwise may choose. *Id.* at 9-10.

⁸ MBR Entities state that fluctuation of the percentage may occur as a result of changes in the total number of shares of outstanding FIL voting stock. *Id.* at 5.

remainder of FIL voting stock is owned by officers and senior employees of FIL and its subsidiaries.⁹

11. Regarding FIL's connection to FMR, MBR Entities argue that although FIL and FMR currently have two directors and a number of beneficial owners in common, FIL and FMR do not hold shares in each other and there are no common direct owners of shares in both FIL and FMR. MBR Entities state that FIL and FMR maintain separate books and records and have separate distinct business policies. Additionally, MBR Entities state that FIL and FMR maintain arm's length business relationships, including sub-advisory relationships and other service provider relationships. MBR Entities provide additional examples of how FIL and FMR are distinct and separately run companies.¹⁰

12. MBR Entities submit that certain persons in FIL and FMR's respective compliance oversight, operations, and technology teams have access to holdings information relating to the other company in order to provide certain support services to the other party as set forth in various services contracts between the two entities.¹¹ Additionally, MBR Entities state that the sub-advisory agreements and related letter agreements (such as voting authority delegations) that memorialize the sub-advisory arrangements between FIL and FMR generally provide for the exercise of investment discretion by the sub-advisor over shares held in the client portfolios as well as the sub-advisor's exercise of delegated authority over voting rights attached to those shares, but MBR Entities represent that the sub-advisory agreements and/or related letter agreements do not contain any agreements relating to the coordinated acquisition or sales of shares, or the coordinated exercise of voting rights relating to share, by FIL or FMR.¹²

A. Request to Find No Affiliate Relationship

13. MBR Entities request that the Commission find that MBR Entities should not be treated as affiliates or under common control with any of the Fidelity Accounts. MBR Entities argue that the Fidelity Accounts are not direct or indirect subsidiaries of FMR.

⁹ *Id.* at 5, 10-12.

¹⁰ *Id.* at 10-12.

¹¹ *Id.* at 12. MBR Entities state that this access is restricted to only those individuals who require access to perform services on behalf of the other party and that these individuals are subject to strict non-disclosure obligations. *Id.*

¹² *Id.*

Instead, MBR Entities claim that the Fidelity Accounts are managed by the Fidelity Advisers in a fiduciary capacity and the Fidelity Accounts themselves are owned by various shareholders, institutions, or other clients of those Fidelity Accounts. MBR Entities also state that although the Fidelity Advisers and MBR Entities are each directly or indirectly owned by FMR, FMR is not involved in the day-to-day investment management decisions made for the Fidelity Accounts by the Fidelity Advisers, and management of the Fidelity Accounts is independent from management of MBR Entities.¹³

14. Regarding FIL, MBR Entities state that the relationship between FIL and FMR is attenuated and request that the Commission find that MBR Entities should not be treated as affiliates or under “common control” with FIL. MBR Entities acknowledge that FIL and FMR currently have two directors and a number of beneficial owners in common, but state that FIL and FMR do not hold shares in each other and there are no common direct owners of shares in both FIL and FMR.¹⁴

B. Request for Waiver of the Commission’s Reporting Requirements

15. If the Commission does not grant MBR Entities’ first request, in the alternative, MBR Entities request that the Commission waive any requirement that MBR Entities notify the Commission of a change in status pursuant to 18 C.F.R. § 35.42 in connection with any future “passive” investments that are made by any of the Fidelity Accounts or FIL in the securities of an entity that either (a) owns or controls generation, (b) owns or controls inputs to electric power production (e.g., intrastate natural gas transportation, storage, or distribution facilities), (c) owns, operates or controls transmission facilities, or (d) has a franchised service territory.

16. MBR Entities argue that the Commission similarly has provided an exemption from accounting, record-retention, and reporting requirements of the Public Utility Holding Company Act of 2005 (PUHCA 2005)¹⁵ for “passive investors,” including “mutual funds” and “[p]ersons that directly, or indirectly through their subsidiaries and affiliates, buy and sell the securities of public-utility companies in the ordinary course of business as a . . . fiduciary, and not exercising operational control over such companies.”¹⁶ MBR Entities state that they anticipate that each of the Fidelity Accounts

¹³ *Id.* at 9.

¹⁴ *Id.* at 10-12.

¹⁵ 42 U.S.C. § 16451 et seq. (2012).

¹⁶ MBR Entities Petition at 14 (citing 18 C.F.R. § 366.3(b)(2)(i) (2015)).

and FIL investments discussed in their Petition will qualify for the exemption pursuant to 18 C.F.R. § 366.3(b)(2)(i) and, accordingly, request that the Commission grant MBR Entities a waiver from the obligation to report a change in status pursuant to 18 C.F.R. § 35.42 to the extent the underlying change involves an investment by a Fidelity Account or FIL that itself qualifies for the “passive investor” exemption under 18 C.F.R. § 366.3(b)(2)(i). MBR Entities state that investments made by a Fidelity Account or FIL are made on a “passive” basis because voting securities are bought or sold on behalf of each Fidelity Account or FIL in the ordinary course of business without the purpose or effect of influencing the control of the entity in which the investment is made.¹⁷

17. MBR Entities also state that FMR certifies the passive nature of investments made by the Fidelity Advisers on behalf of the Fidelity Accounts by filing a Schedule 13G with the SEC whenever such investments trigger filing requirements under Section 13(d) of the Securities Exchange Act of 1934. MBR Entities state that FIL consistently makes similar Schedule 13G filings with the SEC.¹⁸ MBR Entities argue that the Commission has granted exemptions on both an individual and blanket authorization basis under section 203 of the Federal Power Act (FPA)¹⁹ for investment funds to purchase, acquire, or take any security in a public utility company, public utility holding company, or electric utility operating company in the ordinary course of business and not with the purpose or with the effect of changing control of the company, especially where the investment fund’s purchase qualifies for the filing of a short-form Schedule 13G with the SEC.²⁰

¹⁷ *Id.*

¹⁸ MBR Entities state that Section 13(d) of the Securities Exchange Act of 1934 requires investors in publicly registered companies to file certain information with the SEC once any such investor becomes a beneficial owner of 5 percent or more of a class of voting securities of such a company (Schedule 13D filing), but certain investors that acquire securities of a company in the ordinary course of business, and not with the purpose or effect of changing or influencing control of the company, may certify to this fact in a short-form Schedule 13G filing instead of the more detailed Schedule 13D filing. *Id.* at 15.

¹⁹ 16 U.S.C. § 824b (2012).

²⁰ MBR Entities Petition at 16 (citing *Capital Research and Management Co.*, 140 FERC ¶ 62,156 (2012); *Morgan Stanley*, 134 FERC ¶ 61,234 (2011); *The Goldman Sachs Group, Inc.*, 134 FERC ¶ 61,227 (2011); *Legg Mason, Inc.*, 133 FERC ¶ 62,258 (2010)).

18. MBR Entities request that the Commission grant MBR Entities waiver from the obligation to report a change in status to their respective market-based rate authorization to the extent the underlying change involves an investment made by a Fidelity Account where FMR, the Fidelity Advisers, and/or the Fidelity Account qualify for the exemption under the Public Utility Holding Company Act for “passive investors” or the filing of a Schedule 13G with the SEC, or an investment by FIL where FIL similarly qualifies.²¹

II. Notice of Filing

19. Notice of MBR Entities’ filing was published in the *Federal Register*, 80 Fed. Reg. 53,512 (2015), with interventions and protests due on or before September 28, 2015. None was filed.

III. Discussion

A. Request to Find No Affiliate Relationship

20. The Commission denies MBR Entities’ request to not be deemed affiliates or under “common control” with the Fidelity Accounts or the funds and accounts managed by FIL or its affiliates and subsidiaries. Under the Commission’s regulations, “affiliate” of a specified company means:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company; (ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company; (iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and (iv) Any person that is under common control with the specified company.²²

²¹ *Id.*

²² 18 C.F.R. § 35.36(a)(9) (2015).

For purposes of paragraph (a)(9) of the Commission's regulations, owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.²³

21. From the facts presented, MBR Entities and Fidelity Advisers are both under the common control of FMR, and thus are affiliates. Moreover, regardless of the ownership of the Fidelity Accounts themselves, the fact remains that the Fidelity Advisers manage and control the investments that the Fidelity Accounts make and also exercise voting rights for the Fidelity Funds in some circumstances. The real issue, for purposes of determining affiliation under the market-based rate regulations, therefore, is not whether the Fidelity Accounts are owned by the Fidelity Advisers. Rather, the issue is whether the Fidelity Advisers directly or indirectly own, control, or hold with power to vote, the outstanding voting securities of any public utility or holding company in which the Fidelity Accounts may invest.²⁴

22. The situation with respect to FIL is somewhat more complicated. MBR Entities explain that there is a significant degree of cross ownership of FMR and FIL by members of the Johnson family and trusts created for their benefit, as well as two common directors. At the very least, these factors are indicative of common control. Moreover, MBR Entities have not provided the Commission with sufficient information to support a determination that MBR Entities are not under common control with FIL and the funds and accounts managed by FIL. Among other things, it is unclear from the record who exercises voting control over shares of FMR and FIL that are held in the family trusts, or whether any single family member or trust owns 10 percent or more of the outstanding voting securities of FMR and FIL. Therefore, we deny MBR Entities' request to not be deemed affiliates or under "common control" with the funds and accounts managed by FIL or its affiliates and subsidiaries.

B. Request for Waiver of the Commission's Reporting Requirements

23. We deny MBR Entities' request for waiver of the requirement to notify the Commission of a change in status pursuant to 18 C.F.R. § 35.42 in connection with investments made by the Fidelity Accounts or FIL that would ordinarily require a change

²³ 18 C.F.R. 35.36(a)(9)(v) (2015).

²⁴ In this regard, we note that the Commission has previously rejected an argument that a financial institution that invests in the voting securities of a utility or utility holding company in a fiduciary capacity on behalf of others should not be considered a "holding company" under PUHCA 2005. *See, The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118, PP 17-18 (2006).

in status filing by MBR Entities. The exemption under the Public Utility Holding Company Act for “passive investors” is not applicable in the market-based rate context. As a result, we decline to find that meeting the Public Utility Holding Company Act exemption for “passive investors” relieves an entity’s obligations under 18 C.F.R. § 35.42. Similarly, the filing of a Schedule 13G with the SEC is insufficient to relieve a market-based rate seller of the reporting requirement under 18 C.F.R. § 35.42.

24. MBR Entities cite to situations where the Commission has granted individual and blanket authorizations under section 203 of the FPA for investment funds to purchase, acquire, or take any security in a public utility company, public utility holding company, or electric utility operating company in the ordinary course of business, as fiduciaries, and not with the purpose or with the effect of changing control of the company, especially where the investment fund’s purchase qualifies for the filing of a short-form Schedule 13G with the SEC. We note that those individual and blanket authorizations were granted subject to ongoing reporting requirements and investment limitations proposed by the applicants (e.g., limits on the percentage of voting securities that the entity and its affiliates may acquire in any one utility or holding company). Since Fidelity Advisers, the Fidelity Accounts and FIL have not heretofore sought or obtained any similar authorization under section 203, they are not subject to any similar limitations with respect to their investment activities.²⁵ Thus, it is not clear how the section 203 authorizations MBR Entities cite would provide any basis to grant the relief that they are requesting in this proceeding. For these reasons, we deny MBR Entities’ request for waiver of the reporting requirements under 18 C.F.R. § 35.42.

²⁵ See, e.g., *Goldman Sachs*, 134 FERC ¶ 61,227 at P 15, ordering paras. (F)-(G) (limiting the percentage of voting securities that Goldman Sachs could acquire in any public utility to less than 20 percent of the outstanding voting securities of any public utility per certain reporting groups, and less than 10 percent of the outstanding voting securities of a public utility in any single investment fund or any single individually managed account, and requiring several reporting obligations including a contemporaneous filing with the Commission of the Schedule 13D and 13G filings made with the SEC and quarterly reports with the Commission that show Goldman Sachs’ holdings as a result of liquidation, holdings by specialist entity, and holdings as a fiduciary).

The Commission orders:

MBR Entities' petition for declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.