

119 FERC ¶ 61,285  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Solar One, LLC

Docket Nos. EC07-80-000  
EL07-55-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL  
FACILITIES AND DISCLAIMING JURISDICTION

(Issued June 19, 2007)

1. In this order, we authorize a disposition of jurisdictional facilities and grant a petition for a declaratory order. We find that the disposition is consistent with the public interest and that certain owners of passive interests are not subject to the Commission's jurisdiction under section 201(e) of the Federal Power Act (FPA)<sup>1</sup> as the result of the proposed sale/leaseback transaction we approve here. We find that the proposed transaction will not have an adverse effect on competition, rates, or regulation and thus is consistent with the public interest, and that the proposed transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

**I. The Proposed Transaction**

2. On April 12, 2007, Nevada Solar One, LLC (Nevada Solar One), as updated on May 2, 2007, filed an application pursuant to section 203 of the FPA<sup>2</sup> requesting Commission authorization for the sale and leaseback of a 64 megawatt solar thermal electric generating facility (Facility) located in Clark County, Nevada.<sup>3</sup> In addition, Nevada Solar One requests that the Commission disclaim jurisdiction under section 201(e) of the FPA over certain passive participants in the sale/leaseback transaction.

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<sup>1</sup> 16 U.S.C. § 824(e) (2000), amended by Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, § 1295(a)(2), 119 Stat. 594, 985 (2005).

<sup>2</sup> 16 U.S.C. § 824b (2000), amended by EPAct 2005 § 1289(a), 119 Stat. 982.

<sup>3</sup> The Facility is a qualifying facility under the Public Utility Regulatory Policies Act of 1978, as amended.

3. Nevada Solar One owns the Facility. Nevada Solar One is authorized by the Commission to make sales of energy, capacity, and ancillary services at market-based rates to wholesale purchasers. Acciona Solar Energy LLC (Acciona Solar Energy) owns 97.75 percent of Nevada Solar One. Acciona Solar Energy is a subsidiary of Acciona Energia, S.A., a global renewable energy company headquartered in Spain. Solargenix Energy, LLC owns the remaining 2.25 percent of Nevada Solar One.

4. Nevada Solar One intends to enter into a sale/leaseback arrangement in which Nevada Solar One will sell the Facility and sublease the Facility site to a grantor trust (Owner Lessor) created for the benefit of passive tax equity investors (Owner Participants).<sup>4</sup> The Owner Lessor will lease its interest in the Facility and sublease the Facility site back to Nevada Solar One pursuant to an 18-year lease (Facility Lease).<sup>5</sup> The Owner Lessor will finance the acquisition of its interests in the Facility through a combination of (i) an equity investment made by the Owner Participants and (ii) loans from a group of banks (Lenders, referred to here, collectively with the Owner Lessor and the Owner Participants, as the Passive Participants). Nevada Solar One will be responsible for the operation, management, and maintenance of the leased Facility and for obtaining and maintaining all necessary Commission and other governmental approvals during the term of the Facility Lease.

## **II. Notice and Interventions**

5. Notice of Nevada Solar One's filing was published in the *Federal Register*, 72 Fed. Reg. 23,812 (2007), with protests and interventions due on or before May 14, 2007. None were filed.

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<sup>4</sup> Nevada Solar One leases the real property on which the Facility is located pursuant to a 40-year lease agreement with the City of Boulder City, Nevada. In addition, Nevada Solar One states that the identity of the Owner Lessor(s) and Owner Participant(s) will be known after the transaction documents have been signed. Nevada Solar One states that it will inform the Commission of the identity of those parties when it becomes available. Nevada Solar One expects to consummate the proposed transaction shortly after an order is entered in this docket, and thus commits to either provide this information or an update on status within 30 days of the order.

<sup>5</sup> Nevada Solar One will have the right to renew the Facility Lease for one five-year renewal term.

### **III. Discussion**

#### **A. Transfer of Title**

6. Section 203(a) of the FPA provides that the Commission must approve a transaction if it finds that the transaction “will be consistent with the public interest.”<sup>6</sup> The Commission’s analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition, (2) the effect on rates, and (3) the effect on regulation. EPAAct 2005 amended section 203 to require that the Commission also determine that the transaction will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.<sup>7</sup>

#### **1. Effect on Competition, Rates and Regulation**

7. Nevada Solar One states that the proposed transaction is a financial sale/leaseback arrangement that results in no change in the control over the Facility. Nevada Solar One explains that following the transaction it will continue to have control and decision making authority over the Facility and will provide operating and maintenance services, or direct the entity providing such services, and will continue to sell electric energy at wholesale from the Facility. Nevada Solar One states the transfer of title to the Facility will not create or enhance market power in any relevant market and will not result in Nevada Solar One, its affiliates, or any other entity gaining market power or give any entity the ability or incentive to erect barriers to competitive entry. Nevada Solar One concludes that the proposed transaction raises no generation or transmission market power or affiliate abuse concerns and can have no effect on competition. Since the proposed transaction is a financial sale/lease back arrangement that will not transfer control over the Facility or otherwise alter competitive conditions, the Commission finds that the proposed transaction will have no effect on competition.

8. Nevada Solar One states that the proposed transaction will not adversely affect rates because wholesale sales from the Facility have been, and will continue to be, made at negotiated rates pursuant to its market-based rates tariff on file with the Commission. In addition, Nevada Solar One explains that it does not hold a franchised service territory and has no captive customers. Based on these representations, the Commission finds that the proposed transaction will not adversely affect rates.

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<sup>6</sup> 16 U.S.C. § 824b (2000).

<sup>7</sup> EPAAct 2005 § 1289, 119 Stat. 982-83, *to be codified at* 16 U.S.C. § 824b(a)(4).

9. Nevada Solar One states that the proposed transaction will not adversely affect regulation because it will remain subject to regulation by the Commission following the proposed transaction. The Commission agrees that its regulatory authority will not be impaired by the proposed transaction.

## 2. Cross Subsidization

10. Nevada Solar One asserts that the proposed transaction will not result in the cross-subsidization of a non-utility associate company or in the pledge or encumbrance of utility assets for the benefit of an associate company. It states that the transaction will not result in: (1) transfers of facilities between a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities and an associate company; (2) new issuances of securities by a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities for the benefit of an associate company; or (4) any new affiliate contract between a traditional public utility that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities and a non-utility associate company.<sup>8</sup>

11. Based on the facts presented in the application, we find that the proposed transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.

### B. Disclaimer of Jurisdiction

12. Section 201(e), states, in pertinent part:

The term “public utility” ... means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part....<sup>9</sup>

13. The Commission has on numerous occasions addressed the issue of whether an entity holding a passive interest in a jurisdictional facility is a public utility under

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<sup>8</sup> *Id.* at Ex. M; *see also* Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 at P 45, 49-51.

<sup>9</sup> 16 U.S.C. § 824(e) (2000).

section 201 of the FPA.<sup>10</sup> Under this precedent, the Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of producing or selling electric power or has a principal business other than that of a public utility. Where the participants in certain financing arrangements hold only equitable or legal title to the facilities and are removed from the operation of the facilities and the sale of power, the Commission has concluded that it would be inconsistent with the intent of the FPA to find that the participants are public utilities subject to the Commission's jurisdiction.

14. Nevada Solar One states that absent a default under the Facility Lease, the Passive Participants will not exercise operational control or decision-making authority over the Facility during the term of the Facility Lease.<sup>11</sup> Nevada Solar One asserts that it will continue to have control and decision-making authority over the operation of the Facility during the term of the Facility Lease. In addition, Nevada Solar One asserts that the Passive Participants are not in the business of producing, selling, or transmitting electric power, and each has a principal business other than that of a public utility. Based on these representations, we find that the Passive Participants are not public utilities within the meaning of section 201(e) of the FPA.

The Commission orders:

(A) Nevada Solar One's petition for declaratory order is hereby granted, as discussed in the body of this order.

(B) The proposed disposition of jurisdictional facilities is hereby authorized, as discussed in the body of this order.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

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<sup>10</sup> See *Pacific Power & Light Company*, 3 FERC ¶ 61,119 (1978); *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>11</sup> To the extent that Passive Participants propose to operate the Facility in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, whether as the result of a default or for some other reason, they would first be required to make the appropriate filings with the Commission pursuant to sections 203 and 205 of the FPA.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Nevada Solar One shall make appropriate filings under section 205 of the FPA, as necessary, to implement the transaction.

(G) Nevada Solar One shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

(H) Nevada Solar One shall promptly inform the Commission of the identity of the Owner Lessor(s) and Owner Participant(s) as discussed in the body of this order.

By the Commission. Commissioner Wellinghoff not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.