

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

NRG Energy, Inc.

Docket No. EL05-28-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER AND
DISCLAIMING JURISDICTION

(Issued December 21, 2004)

1. In this order, we grant NRG Energy, Inc.'s (NRG) petition for declaratory order, finding that NRG is not a public utility as defined in section 201(e) of the Federal Power Act (FPA)¹ and is therefore not subject to the requirements relating to the issuance of securities and the assumption of liabilities specified in section 204 of the FPA.²

I. Background

2. On November 22, 2004, NRG filed a petition for a declaratory order, asking that the Commission find that NRG is not a public utility and is therefore not subject to the requirements of section 204 of the FPA. NRG explains that it made this filing because it is currently exploring a number of financing alternatives in institutional loan and capital markets, with the objective to close such financing by December 24, 2004.

¹ 16 U.S.C. § 824 (2000).

² 16 U.S.C. § 824c (2000).

3. NRG states that it is a holding company, which does not itself own generation or transmission facilities and does not engage in interstate sales of power or provide transmission services.³ NRG also states that it does not have any rates on file with the Commission.

4. NRG explains that it indirectly owns and/or operates, through a number of wholly-owned subsidiaries and partnerships, generating facilities located throughout the United States. According to NRG, though, the Commission has granted market-based rate authorization to these subsidiaries. Another wholly-owned subsidiary, NRG Power Marketing, Inc., markets power produced by these power producers, and two other subsidiaries also market power; they all have been granted market-based rate authorization. According to NRG, while it has many subsidiaries engaged in sales of power at wholesale, none of them require prior Commission authorization to issue securities or assume liabilities. NRG states that these subsidiaries consist of merchant generators and power marketers that, in addition to market-based rate authority, have been granted blanket authority under section 204, and also qualifying facilities that are not subject to section 204. NRG explains that not only is it a holding company rather than a public utility itself and does not have rates on file, but that NRG does not have day-to-day decisional control of the individual transactions entered into by its subsidiaries; rather, those subsidiaries retain sole authority and responsibility over their jurisdictional activities.

5. Notice of NRG's petition was published in the *Federal Register*, 69 Fed. Reg. 71,028 (2004), with protests or interventions due on or before December 6, 2004. None were filed.

II. Discussion

6. Section 201(e) of the FPA defines a "public utility" as:

. . . any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part

7. Section 204 of the FPA provides, in part, that:

No public utility shall issue any security . . . unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability.

³ NRG adds that it does directly own two facilities in Minnesota that convert municipal solid waste into fuel. The fuel is then sold to Xcel Energy, Inc. (Xcel).

Based on the representations made by NRG in its petition, the Commission finds that NRG is not a public utility. NRG is not presently engaged in the sale for resale or transmission of electric energy in interstate commerce. Moreover, NRG neither owns nor operates any facilities subject to the jurisdiction of the Commission. NRG also does not have any rates on file with the Commission. Consequently, based on the representations in its filing, NRG is not, at present, a public utility within the meaning of section 201(e) of the FPA. Since section 204 applies only to issuances of securities or assumptions of liability by public utilities, NRG is not subject to the requirements of section 204 of the FPA.

The Commission orders:

NRG's petition for a declaratory order is hereby granted. Based on the representations in its filing, NRG is not a public utility as defined in section 201(e) of the FPA, and is therefore not subject to the requirements of section 204 of the FPA, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.