

111 FERC ¶ 61,306  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Neptune Regional Transmission System, LLC  
Atlantic Energy Partners LLC  
NewCo LLC  
EIF Neptune, LLC  
Starwood Energy Investors, L.L.C.

Docket Nos. EC05-70-000  
and EL05-116-000

ORDER AUTHORIZING DISPOSITION OF JURISDICTIONAL  
FACILITIES AND DISCLAIMING JURISDICTION

(Issued May 31, 2005)

1. In this order, we authorize a disposition of jurisdictional facilities and grant a request for disclaimer of jurisdiction. We find that the disposition is consistent with the public interest under section 203 of the Federal Power Act (FPA), and that certain passive investors are not, because of a financial transaction, subject to the Commission's jurisdiction under section 201 of the FPA.<sup>1</sup> Accordingly, we will approve the proposed disposition of jurisdictional facilities and disclaim jurisdiction, as discussed below.

2. This order benefits customers by approving an indirect disposition of facilities which satisfies the requirements of section 203 of the FPA. The order also benefits customers by facilitating the entry of new participants in the marketplace, which promotes competition.

**I. Introduction**

3. Neptune Regional Transmission System, LLC (Neptune), on behalf of itself and Atlantic Energy Partners LLC (Atlantic Energy Partners), NewCo (NewCo), EIF Neptune, LLC (EIF Neptune) and Starwood Energy Investors, L.L.C. (Starwood) (collectively, Applicants) filed an application under section 203 of the FPA requesting the Commission (1) to authorize the indirect disposition of jurisdictional facilities in connection with Atlantic Energy Partners' issuance of new ownership interests in Neptune to NewCo, EIF Neptune and Starwood, and (2) to find that neither Atlantic

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<sup>1</sup> 16 U.S.C. §§ 824b and 824 (2000) (respectively).

Energy Partners, EIF Neptune nor Starwood will be deemed a “public utility” under the FPA by virtue of their involvement in the proposed transaction or on the basis of Neptune’s new ownership structure.<sup>2</sup> The jurisdictional facilities are Neptune’s regional transmission tariff and related books and records.

## **II. Background**

### **A. Description of the Parties**

4. Neptune is constructing a 660 megawatt (MW) high-voltage direct current submarine cable system linking a GPU/First Energy substation in Sayreville, New Jersey with a Long Island Power Authority (LIPA) substation in Hempstead, New York (Neptune Project).<sup>3</sup> Neptune is a limited liability company and a wholly-owned subsidiary of Atlantic Energy Partners. It was formed for the purpose of owning and operating the Neptune Project. Upon consummation of the proposed transaction, the sole managing member of Neptune will be a to-be-formed limited liability company, which will have 100 percent of the voting rights of Neptune. EIF Neptune and Starwood will be passive members of Neptune holding 100 percent of its passive Class C membership interests.

5. Atlantic Energy Partners, a Maine limited liability company, was originally the sole member of Neptune. Upon consummation of the proposed transaction, Atlantic Energy Partners will hold 100 percent of Neptune’s passive Class B membership interests. Cianbro Development Corporation, a subsidiary of the Cianbro Companies, is the sole managing member of Atlantic Energy Partners.<sup>4</sup>

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<sup>2</sup> Neptune amended its April 18, 2005 Filing on May 18, 2005 to include the filing fee for a petition for declaratory order disclaiming jurisdiction under section 201 of the FPA.

<sup>3</sup> Construction of the Neptune Project is scheduled to begin as early as June 30, 2005 with commercial operation anticipated to begin in the summer of 2007.

<sup>4</sup> The other members of Atlantic Energy Partners are CTSBM Investments LLC, an affiliate of the law firm of Curtis Thaxter Stevens Broder & Micoletau LLC; ESAI Energy Ventures of Wakefield, Massachusetts, a market research and financial analyst firm; Standard Energy Development, Inc. of Halifax, Nova Scotia, an affiliate of William Alexander & Associates Ltd., a Canadian project development firm; Boundless Energy LLC, an affiliate of Tompkins Research and Management Consulting, which provides consulting services to the energy industry; and Charles E. Hewett.

6. NewCo is a to-be-formed limited liability company and will be organized for the purpose of managing and controlling Neptune. Upon consummation of the proposed transaction, NewCo will become the sole manager of Neptune, holding 100 percent of its Class A membership interests. NewCo will be owned directly or indirectly by Edward M. Stern.

7. EIF Neptune is a Delaware limited liability company established for the purpose of investing in Neptune. The sole member of EIF Neptune is United States Power Fund, L.P. (United States Power Fund), a Delaware limited partnership. EIF US Power, LLC (EIF US Power), a Delaware limited liability company, is the general partner of United States Power Fund. Energy Investor Funds Group, LLC (Energy Investor Funds Group) is the sole member of EIF US Power. United States Power Fund is a private equity fund that makes investments in U.S. utility and power assets. It is managed by EIF LLC, a private equity fund manager that invests in the independent power and electric utility industry. EIF LLC is 100 percent management-owned. Starwood is a Delaware limited liability company, the sole members of which are individuals.

### **III. The Proposed Transaction**

8. Neptune is proposing to admit new members as additional owners. The proposed transaction is designed to transfer control of Neptune to NewCo and to obtain the equity funding from EIF Neptune and Starwood necessary to finance construction of the Neptune Project. As a result of the proposed transaction, Neptune will issue membership interests in Neptune to EIF Neptune, Starwood and NewCo, and Atlantic Energy Partners will agree to dilute its current membership interests in Neptune. The issuance and dilution of the membership interests in Neptune will occur simultaneously at the close of the proposed transaction.

9. In addition to authorization to transfer control of Neptune, Atlantic Energy Partners, EIF Neptune and Starwood (Passive Investors) seek disclaimers of jurisdiction under section 201(e) of the FPA. The Passive Investors request a determination that they will not be regarded as “public utilities” as that term is defined in section 201 of the FPA. Applicants state that the Passive Investors: (1) will not own or operate facilities subject to the Commission’s jurisdiction, and therefore do not fall within the definition of a public utility as set forth in section 201(e); and (2) will hold only passive non-voting interests once all operating control over Neptune is transferred to NewCo. As a result, Applicants contend there is no basis for treating the Passive Investors as public utilities subject to regulation under the FPA.

#### **IV. Notice and Interventions**

10. Notice of Applicants' original filing was published in the *Federal Register*, 70 Fed. Reg. 22,304 (2005), with comments, protests, or interventions due on or before May 9, 2005. Gerdau Ameristeel Corporation (Gerdau) and Public Service Electric & Gas Company (PSE&G) filed timely motions to intervene raising no issues. Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (collectively, FirstEnergy) filed a timely motion to intervene opposing Applicants' filing. Notice of Applicants' May 18, 2005 amended filing was published in the *Federal Register*, 70 Fed. Reg. 30,711 (2005), with comments, protests, or interventions due on or before May 27, 2005. None was filed.

11. On May 18, 2005, Applicants filed an answer to FirstEnergy's comments.

#### **V. Discussion**

##### **A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.213(a)(2) (2004), prohibits an answer to a protest unless otherwise permitted by the decisional authority. We will accept Applicants' answer because it provided information that assisted us in our decision-making process.

##### **B. Disposition of Facilities**

###### **1. Standard of Review**

14. Section 203(a) of the FPA provides that the Commission must approve a proposed disposition if it finds that the disposition "will be consistent with the public interest."<sup>5</sup> The Commission's analysis of whether a disposition is consistent with the public interest

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<sup>5</sup> 16 U.S.C. § 824(a) (2000).

generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>6</sup> As discussed below, we will approve the proposed disposition of facilities as consistent with the public interest.

## 2. Effect on Competition

15. Applicants state that the proposed transaction will not have an adverse effect on competition, as the transaction involves the indirect disposition of Neptune's authorization to operate as a merchant transmission provider and to sell transmission rights over its transmission facility, and not the transfer of any physical electric facilities. Applicants assert that the proposed transaction will enhance competition in Northeast power markets by providing wholesale suppliers with greater access to load in transmission-constrained Long Island and thereby provide both economic and reliability benefits. In addition, Applicants note that the Neptune Project will operate under a Commission-approved tariff and within a Commission-approved Regional Transmission Organization.

16. We agree with the Applicants' analysis of the transaction's effect on competition. We note further that no party in this proceeding claims that the proposed transaction will have any adverse effect on competition. Accordingly, we find that the proposed transaction will not adversely affect competition.

## 3. Effect on Rates

17. Applicants state that rates will not be adversely affected by the proposed transaction because NewCo will have no affiliates that own facilities or interests in facilities subject to the Commission's jurisdiction. Applicants state that all rates for service by Neptune will remain subject to the Commission's jurisdiction.

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<sup>6</sup> See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (Dec. 30, 1996), FERC Statutes and Regulations, Regulations Preambles January 1991- June 1996 ¶ 31,044 (1996), *order on reconsideration*, Order No. 592-A, 62 Fed. Reg. 33,341 (June 19, 1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); see also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (Nov. 28, 2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (Mar. 23, 2001), 94 FERC ¶ 61,289 (2001) (Merger Filing Requirements).

18. In its protest, FirstEnergy requests that the Commission set this matter for hearing because the application presents genuine issues of material fact with respect to whether the proposed transaction will have an adverse effect on rates. FirstEnergy contends that the Neptune Project would have such an effect on rates. It asserts that the Neptune Project would be comparable to a large industrial, municipal or native load customer that would place additional burdens on the regional transmission system and demands on the regional power sales market. FirstEnergy points out that \$26.3 million in transmission system upgrades would be required to accommodate the interconnection of the Neptune Project. It argues that deliveries to and withdrawals from the Neptune Project terminal will increase locational marginal prices and congestion costs in the Regional Transmission Organization that could affect the rates paid by other regional transmission and wholesale generation customers.

19. In response, Applicants state that the rates Neptune will charge for sale of transmission capacity are set by their long-term contract with LIPA and will not be affected by the proposed transaction. They argue that FirstEnergy is attacking the Project itself and its right to interconnect with PJM pursuant to PJM's Open Access Transmission Tariff by alleging that the Project would have an adverse effect on rates. Applicants argue that transmission system upgrades and their associated costs are separate issues, and outside the scope of the requested authorization of the proposed transaction in this proceeding. They assert that the proposed transaction in this proceeding only relates to an ownership restructuring for purposes of financing an important addition to the regional transmission network.

20. We agree with Applicants and are not persuaded by FirstEnergy's argument that the proposed transaction will have an adverse effect on rates. We find that the costs associated with the possible transmission system upgrades are not related to the proposed ownership restructuring and are therefore not relevant to the Commission's decision on whether to authorize the disposition of jurisdictional facilities. We find further that the proposed transaction will not change in any way the status quo with respect to either PJM's or Neptune's rates. FirstEnergy did not present any evidence that the rates to Applicants' customers will increase as a result of the proposed transaction. Nor do we see any basis to order a hearing on this issue. We conclude, therefore, that the proposed transaction will not have an adverse effect on rates.

#### **4. Effect on Regulation**

21. With respect to regulation, Applicants note that Neptune does not, and will not, provide services at retail that are subject to state commission jurisdiction, so there will be no loss of state or local regulation. In addition, Applicants state that none of the parties is

subject to Securities and Exchange Commission (SEC) regulation as a public utility holding company, and the transaction does not, and is not intended to, evade any SEC review. Applicants note that they will remain subject to the Commission's regulation after consummation of the proposed transaction.

22. We find that neither state nor federal regulation would be impaired. We note that no party alleges that regulation would be impaired by the proposed transaction.

**C. Disclaimer of Jurisdiction**

23. Applicants request 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.

Section 201(b) of the FPA states that:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce....The Commission shall have jurisdiction over all facilities used for such transmission or sale of electric energy....

Section 201(e) states that:

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

24. The application of section 201 of the FPA to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>7</sup> The Commission 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

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<sup>7</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). See also *PP&L Montana, L.L.C.*, 88 FERC ¶ 61,246 (1999).

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.<sup>8</sup>

25. Applicants state 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 to NewCo, 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 Applicants' representations and consistent with similar Commission findings, we find that the Passive 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 Passive Investors.

#### **D. Miscellaneous**

26. FirstEnergy asserts that the Applicants should have made their request for disclaimer of jurisdiction through a petition for declaratory order, and not as part of their section 203 application. FirstEnergy argues that in order to receive a declaratory order from the Commission, the Applicants are required to file a petition for declaratory order, along with the required filing fee.

27. Applicants state that the Commission may grant requests to disclaim jurisdiction over parties regardless of whether the request is made in a petition for declaratory order, particularly where no substantive issue is raised as to whether it is appropriate to disclaim jurisdiction. Applicants request that the Commission treat the request for disclaimer of jurisdiction with respect to Passive Investors as having been made as a petition for declaratory order. With respect to the required filing, Applicants amended their filing to include the filing fee prescribed by the Commission's regulations for petitions for declaratory order.

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<sup>8</sup> However, we note that, if there is a change so that the Passive Investors 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 and would be required to make the appropriate filings under section 205 of the FPA.

We created an EL docket for Applicants' request for disclaimer of jurisdiction over the Passive Investors after Applicants submitted the required filing fee. We also renoticed the amended filing.<sup>9</sup> We find that these corrective actions address the issue raised by FirstEnergy.

The Commission orders:

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

(B) Applicants' request for disclaimer of jurisdiction over Passive Investors is hereby granted, 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.

(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) Applicants shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.

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<sup>9</sup> See P 9 above.