

138 FERC ¶ 61,073
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

California Public Employees' Retirement System

Docket No. EL12-17-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 31, 2012)

1. On December 21, 2011, the California Public Employees' Retirement System (CalPERS) filed a petition for declaratory order seeking a ruling concerning the transfer of indirect control of Class C non-managing membership interests (Class C Interests) in Neptune Regional Transmission System, LLC (Neptune).
2. CalPERS asks the Commission to disclaim jurisdiction under section 203(a)(1)(A) of the Federal Power Act (FPA)¹ over a transaction in which, pursuant to a Purchase and Sale Agreement dated December 6, 2011, Alerion IV, LLC (Alerion IV) will transfer to CalPERS indirect control of 75 percent of the Class C Interests in Neptune (the Transaction). For the reasons discussed below, we grant CalPERS' petition.

Background

3. CalPERS is a benefit retirement plan established by the State of California. CalPERS states that it is the nation's largest public pension fund, with assets totaling \$219.4 billion as of September 30, 2011, and its investments span domestic and international markets.
4. Neptune is the owner of a 660 MW high voltage direct current submarine transmission line linking New Jersey and Long Island, New York. Neptune's transmission line is under the operational control of PJM Interconnection, L.L.C. (PJM) and service on the line is provided under PJM's open access transmission tariff.
5. CalPERS states that Neptune has three classes of membership interests: Class A voting interests, Class B non-voting interests, and the Class C Interests at issue here. The Class C Interests were created as part of a financial transaction to obtain the equity funding necessary to construct the Neptune project.

¹ 16 U.S.C. § 824b(a)(1)(A) (2006).

6. Great Point Power Neptune LLC (GPP Neptune) currently directly owns 75 percent of the Class C Interests in Neptune. GPP Neptune is a wholly-owned subsidiary of Alerion IV, which is a wholly-owned subsidiary of ArcLight Energy Partners Fund IV, L.P. (ArcLight Fund IV). ArcLight Fund IV is a private equity investment fund with a focus on the independent power sector. ArcLight Capital Partners, LLC manages and controls ArcLight Fund IV.

7. Pursuant to the Transaction, Alerion IV will transfer 100 percent of its ownership interests in GPP Neptune (the holder of the Class C Interests) to CalPERS. As a result, CalPERS will indirectly own 75 percent of the Class C Interests in Neptune. CalPERS states that it is seeking this declaratory order out of an abundance of caution, prior to the closing of the Transaction, and thus requests that the Commission grant expedited treatment to its petition.

8. CalPERS argues that the Commission should disclaim jurisdiction under section 203(a)(1)(A) of the FPA over the Transaction because the Transaction involves only passive, non-voting interests that do not confer control over Neptune or Neptune's jurisdictional facilities. Therefore, according to CalPERS, the Transaction will 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.

9. CalPERS explains that the Commission has already determined that the Class C Interests are passive for purposes of its jurisdiction under section 201 of the FPA.² CalPERS further explains that the passive nature of the Class C Interests has not changed since that determination,³ nor will it change as a result of the Transaction. CalPERS represents that GPP Neptune has no operational control over Neptune and is not otherwise in the business of producing or selling electric energy at wholesale or transmitting electric energy in interstate commerce. Further, CalPERS represents that the Transaction will not affect the rights of the Class C Interests. CalPERS states that under CalPERS' indirect ownership, the Class C Interests will continue to be non-voting interests that confer no control over Neptune or its operations. Under CalPERS' ownership, GPP Neptune will continue not to own or operate any other facilities subject to the Commission's jurisdiction.

² CalPERS Petition at 1, 5 (citing *Neptune Regional Transmission System, LLC, et al.*, 111 FERC ¶ 61,306 (2005)). 16 U.S.C. § 824 (2006).

³ CalPERS Petition at 5. The Neptune Limited Liability Company Agreement describes the consent and other rights of the holders of Class C Interests. *See* Application for Authorization Under Section 203 of the Federal Power Act and Request for Disclaimers of Jurisdiction, Docket No. EC05-70-000, at Exhibit I (filed April 18, 2005).

Notice of Filing

10. Notice of CalPERS' filing was published in the *Federal Register*, 77 Fed. Reg. 790 (2012), with protests and interventions due on or before January 5, 2012. None was filed.

Commission Determination

11. Section 203(a)(1)(A) of the FPA provides that a public utility shall not sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof with a value in excess of \$10,000,000, without the Commission's prior approval.⁴

12. In the Supplemental Policy Statement, the Commission explained that investments 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) (unless there is a sale or lease of the facilities).⁵ The Commission further explained that it has found an investment to be passive if, among other things, (1) the acquired interest does not give the acquiring entity authority to manage, direct or control the day-to-day wholesale power sales activities, or the transmission in interstate commerce activities, of the jurisdictional entity; and (2) the acquired interest gives the acquiring entity only limited rights (e.g., veto and/or consent rights necessary to protect its economic investment interests, where those rights will not affect the ability of the jurisdictional public utility to conduct jurisdictional activities); and (3) the acquiring entity has a principal business other than that of producing, selling, or transmitting electric power.⁶

13. The Commission has previously disclaimed jurisdiction under section 201(e) of the FPA over the original holders of the Class C Interests, finding that, because the Class C Interests in Neptune are passive (i.e., satisfy the criteria specified in the preceding paragraph), the holders of such interests should not be regarded as "public utilities," as that term is defined in section 201 of the FPA.⁷ According to CalPERS, the passive nature of the Class C Interests has not changed since that determination, and that, under CalPERS' indirect ownership, the Class C Interests will continue to be non-voting interests that confer no control over Neptune or its operations.

⁴ 16 U.S.C. § 824b(a)(1)(A) (2006).

⁵ *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 54 (2007) (Supplemental Policy Statement).

⁶ *Id.*

⁷ *Neptune Regional Transmission System, LLC*, 111 FERC ¶ 61,306 at P 25; *see* 16 U.S.C. § 824 (2006).

14. Based on the foregoing, we find that the Transaction does 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 does not require Commission approval under section 203(a)(1)(A).⁸ Accordingly, we will disclaim jurisdiction under section 203(a)(1)(A) with respect to the Transaction.

The Commission orders:

The Commission hereby grants CalPERS' petition for declaratory order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸ In reaching this conclusion, we note that CalPERS states that the "passive nature" of the Class C Interests has not and will not change as a result of the Transaction. We interpret this statement to mean that the consent and other rights of the holders of the Class C Interests, as set forth in the Neptune Limited Liability Company Agreement (*see supra* note 3), have not and will not change as a result of the Transaction.