

145 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PSEG Long Island LLC
Long Island Electric Utility Servco LLC
Long Island Power Authority
Long Island Lighting Company

Docket No. EL13-81-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued October 2, 2013)

1. On August 1, 2013, pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,¹ PSEG Long Island LLC (PSEG LI), Long Island Electric Utility Servco LLC (Servco), the Long Island Power Authority (the Authority), and Long Island Lighting Company (LILCO) (the Authority and LILCO together, LIPA) (collectively, the Petitioners) filed a petition for a declaratory order (Petition) requesting that the Commission disclaim jurisdiction over PSEG LI and Servco under section 201(e) of the Federal Power Act (FPA).² In this order, the Commission grants the Petition.

I. Background

2. Petitioners state that the Authority is a municipal instrumentality of New York State and LILCO is a wholly-owned subsidiary of the Authority; they operate the transmission and distribution system in Nassau and Suffolk Counties and the Rockaways portions of Queens on Long Island, New York. Petitioners state that LIPA's transmission, distribution, and load-serving functions are subject to oversight and authorization by the Authority's Board of Trustees (LIPA Board). Petitioners state that,

¹ 18 C.F.R. § 385.207 (2013).

² 16 U.S.C. § 824 (2006).

pursuant to section 201(f) of the FPA,³ LIPA is exempt from Commission regulation as an agent or instrumentality of the State of New York.⁴ Petitioners state that LIPA voluntarily participates in the transmission system of the New York Independent System Operator, Inc. (NYISO) as a signatory to the NYISO-Transmission Owner Agreement and that the Commission reviews LIPA's revenue requirements for its Transmission Service Charge (TSC) under a formula rate on a comparability basis.⁵ However, they state that LIPA's TSC is separately-invoiced and collected by LIPA and is not incorporated into a NYISO rate or integrated with any rate charged by a public utility.⁶ Petitioners also state that, as a load-serving utility, LIPA sells and purchases energy, capacity, and ancillary services in the NYISO wholesale market.⁷

3. Petitioners state that PSEG LI is a wholly-owned indirect subsidiary of Public Service Enterprise Group Incorporated and was created specifically for the purpose of providing services to LIPA under an operations services agreement first signed in 2011 (2011 Agreement) and described below.⁸ They state that Servco is a newly-created, wholly-owned subsidiary of PSEG LI, created for the same purpose.⁹

II. The Petition

4. Petitioners state that, since 1998, LIPA has used third-party contractors for operation of its transmission and distribution systems and for operational participation in the wholesale markets of NYISO, PJM Interconnection L.L.C., and ISO New England Inc. Petitioners state that LIPA has existing services agreements with National Grid Electric Services LLC (National Grid), effective through 2013, and Consolidated Edison Energy Inc., effective through 2015. Petitioners state that, because LIPA retained control over these contractors under those services agreements, the agreements have not been

³ 16 U.S.C. § 824(f) (2006).

⁴ Petition at 3 (citing *Long Island Lighting Co.*, 82 FERC ¶ 61,129, at 61,461 (1998)).

⁵ *Id.*

⁶ *Id.* at 3-4 (citing *New York Independent Service Operator, Inc.*, 100 FERC ¶ 61,070, at P 3 (2002)).

⁷ *Id.* at 4.

⁸ *Id.* at 6.

⁹ *Id.*

treated as Commission-jurisdictional.¹⁰ Petitioners state that, on December 28, 2011, LIPA and PSEG LI signed the 2011 Agreement under which PSEG LI will, on January 1, 2014, take over roughly the same service contractor role that National Grid currently occupies.

5. Petitioners explain that, in response to electric service outages following Superstorm Sandy in 2012, New York Governor Andrew Cuomo signed the LIPA Reform Act into law to improve service, reliability, and satisfaction for LIPA's retail customers. Petitioners state that the legislation authorizes amendments to the 2011 Agreement, expanding the role of PSEG LI and Servco (Amended Agreement). Petitioners state that the Amended Agreement between LIPA and PSEG LI and Servco reflecting expanded roles for PSEG LI and Servco has not yet been finalized, but one of the conditions precedent to the effectiveness of the Amended Agreement is a Commission order disclaiming jurisdiction over PSEG LI and Servco, which they seek in this instant petition.¹¹

6. Petitioners thus request that the Commission issue a declaratory order disclaiming jurisdiction over PSEG LI and Servco because neither PSEG LI nor Servco will be a public utility, as that term is defined in section 201(e) of the FPA, in their roles as service contractors under the Amended Agreement. Petitioners state that the Commission has determined that service contractors are not public utilities when the owner of the facilities retains ultimate control and decision-making authority over the facilities.¹² Petitioners represent that, under the Amended Agreement, LIPA will retain both ownership and ultimate control and decision-making authority over its transmission and distribution assets.¹³

7. Petitioners also state that the LIPA Board will retain ultimate approval authority to determine rates and charges over LIPA's transmission system, and LIPA will retain authority to decide how its facilities will be used, including with respect to its voluntary participation in NYISO.¹⁴ In this regard, Petitioners state explicitly: "LIPA and the

¹⁰ *Id.* at 4.

¹¹ *Id.* at 8.

¹² *Id.* at 11 (citing *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060, at PP 45, 50 (2007); *Va. Elec. & Power Co.*, 111 FERC ¶ 61,477 (2005); *Duke Energy Corp.*, 97 FERC ¶ 61,177 (2001); *Ogden Martin Sys. of Clark Ltd. P'ship*, 66 FERC ¶ 61,152 (1994); *Puget Sound Power & Light Co.*, 64 FERC ¶ 61,335 (1993); *Bechtel Power Corp.*, 60 FERC ¶ 61,156 (1992)).

¹³ *Id.* at 7.

¹⁴ *Id.* at 12.

LIPA Board will retain ultimate decision-making authority over transmission and distribution rates, budgets, disposition of facilities, retirement of facilities, construction of facilities, and financings.”¹⁵ Petitioners explain further that the LIPA Board (not PSEG LI or Servco) must approve any changes to the formula rate for the calculation of LIPA’s transmission revenue requirement and the approved procedures for calculating LIPA’s TSC rate, while both LIPA’s revenue requirement and its TSC rate will remain subject to this Commission’s review under LIPA’s comparability standard. Petitioners note that LIPA’s TSC rate will continue to be separately invoiced and collected, and will not be combined with the rates of any Commission-jurisdictional public utilities.¹⁶ Petitioners also argue that no policy purpose would be served by asserting jurisdiction in these circumstances because the Commission does not currently exercise jurisdiction over LIPA. Petitioners assert that “there is no reason” for the Commission to assert jurisdiction over LIPA’s service provider, given that LIPA and the LIPA Board will continue to have ultimate control and decision-making authority (and also that LIPA will now be subject to increased New York State oversight and review, including the creation of a special-purpose Long Island branch of the New York Department of Public Service, which will be dedicated specifically to LIPA).¹⁷

III. Notice of Filing and Responsive Pleadings

8. Notice of the Petition was published in the *Federal Register*, 78 Fed. Reg. 48,668 (2013), with interventions and protests due by September 2, 2013. NYISO filed a timely motion to intervene. No protests were filed.

IV. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), NYISO’s timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Commission Determination

10. In evaluating the requested jurisdictional determination, we first refer to the statutory language of section 201 of the FPA.¹⁸ Section 201(b)(1) grants the Commission

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 12-13.

¹⁸ 16 U.S.C. § 824 (2006).

jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce and the facilities used to provide such services.¹⁹ Section 201(e) then defines the term “public utility” to mean “any person who *owns or operates* facilities subject to the jurisdiction of the Commission...” (emphasis added).²⁰ The Commission, in *Bechtel*, interpreted “the word ‘operates’ as referring to the person who has control and decisionmaking authority concerning the operation of the (f)acility – not the person...who merely performs specific services that are ordered and directed by another party.”²¹

11. Based on the specific representations in the Petition,²² we will grant the request for a declaratory order disclaiming jurisdiction over PSEG LI and Servco in their relationship with LIPA. Petitioners represent that, as service contractors and agents of LIPA, PSEG LI and Servco will not own and will not exercise control and decision-making authority over LIPA’s transmission and distribution system and will not be otherwise engaged in the business of selling at wholesale or transmitting electric energy. Petitioners explain, rather, that PSEG LI and Servco will be responsible for day-to-day maintenance operations, management, and emergency response, subject to LIPA and the LIPA Board’s ultimate decision-making authority.

12. Petitioners thus state that it is LIPA and the LIPA Board that will have ultimate decision-making authority over transmission and distribution rates, budgets, disposition of facilities, retirement of facilities, construction of facilities, and financings. Further, Petitioners state that LIPA will remain owner of LIPA’s transmission assets, and the LIPA Board will have ultimate authority to determine all transmission and distribution service rates, and must approve any changes to the formula rate for the calculation of LIPA’s transmission revenue requirement or to the approved procedures for calculating LIPA’s TSC component.

13. In light of the representations in the Petition, we find that PSEG LI and Servco will not own and will not have “control and decisionmaking authority concerning the operation of” jurisdictional facilities and, therefore, will not, by virtue of their work

¹⁹ 16 U.S.C. § 824(b)(1) (2006).

²⁰ 16 U.S.C. § 824(e) (2006).

²¹ *Bechtel Power Corporation*, 60 FERC ¶ 61,156, at 61,572 (1992) (*Bechtel*).

²² We expect that the final version of the Amended Agreement will reflect these specific representations. Should the ultimate agreement and arrangement between LIPA and its service contractors, PSEG LI and Servco, differ from the representations in the Petition, the Petitioners must notify the Commission so that we can revisit the issue of jurisdiction.

for LIPA, be public utilities subject to the jurisdiction of the Commission under section 201(e) of the FPA.

The Commission orders:

Petitioners' request for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.