

152 FERC ¶ 61,062
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

NRG Energy, Inc.
NRG Yield, Inc.

Docket No. EC14-78-002

ORDER AMENDING BLANKET AUTHORIZATION

(Issued July 21, 2015)

1. On May 20, 2015, NRG Energy, Inc. (NRG Energy) and NRG Yield, Inc. (NRG Yield) (together, Applicants), filed, pursuant to section 203 of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² an application notifying the Commission of a change in circumstances relevant to a blanket authorization previously granted by the Commission and requesting that the previously granted blanket authorization be amended to account for the change (Application). We will accept the amended blanket authorization, as discussed below.

I. Background

2. In *NRG Energy, Inc.*,³ the Commission granted Applicants a three-year blanket authorization under FPA section 203 for direct and indirect transfers from NRG Energy to NRG Yield of interests in public utilities that are Exempt Wholesale Generators and/or Qualifying Facilities (Blanket Authorization). As part of its approval of the Blanket Authorization, the Commission imposed certain conditions and restrictions that were proposed by Applicants to ensure that transfers under the Blanket Authorization would not result in changes in control over public utilities and their Commission-jurisdictional

¹ 16 U.S.C. § 824b (2012).

² 18 C.F.R. pt. 33 (2014).

³ 147 FERC ¶ 61,261 (2014) (*NRG Energy*).

facilities,⁴ and to facilitate ongoing Commission oversight.⁵ Specifically, the Blanket Authorization applies only:

when NRG Energy owns at least 55 percent of NRG Yield's outstanding voting securities, and neither NRG Energy nor NRG Yield have actual or constructive notice that any investor, individually or together with its affiliates, owns an amount of NRG Yield's Class A common stock that would equate to 10 percent or more of NRG Yield's outstanding voting securities.⁶

3. In addition, the Commission conditioned the Blanket Authorization on Applicants filing, on a quarterly basis, a report that:

identifies each investor (or affiliated group of investors) that, as of the end of the quarter, owns five percent or more of the outstanding shares of Class A common stock, showing the percentages of Class A shares to (1) the total outstanding shares of Class A common stock and (2) the aggregate number of outstanding shares of Class A and B common stock.⁷

II. The Application

A. Change in Circumstances

4. Applicants state that the change prompting the Application is a stock split whereby shares of two new classes of common stock of NRG Yield were distributed on a one-for-one basis to holders of the shares of NRG Yield's original classes of common stock.⁸

5. Applicants explain that, when the Commission granted the Blanket Authorization, NRG Yield had only two classes of common stock: (1) Class A common stock, the outstanding shares of which were, and are, publicly-traded on the New York Stock

⁴ *Id.* P 24.

⁵ *Id.* P 25.

⁶ *Id.* P 24.

⁷ *Id.* P 25. *See also NRG Energy, Inc.*, 149 FERC ¶ 61,075, at P 7 (2014) (extending the deadline for Applicants to file the quarterly reports required by *NRG Energy* for the first three calendar quarters from 30 days to 60 days after the end of the quarter).

⁸ Application at 1.

Exchange; and (2) Class B common stock, the outstanding shares of which were, and are, held by NRG Energy. Applicants state that, subsequent to the Commission granting the Blanket Authorization, NRG Yield implemented a recapitalization through a stock split, where each share of Class A common stock was split into one share of Class A common stock and one share of new Class C common stock, and each share of Class B common stock was split into one share of Class B common stock and one share of new Class D common stock. Applicants state that each share of Class C common stock has equal economic rights with, and 1/100th of the voting power of, a share of Class A common stock, and that each share of Class D common stock has no economic rights and 1/100th of the voting power of a share of Class B common stock.⁹

6. Applicants explain that the principal purpose of the recapitalization is to provide NRG Yield with additional means of financing acquisitions while minimizing the dilution of voting power. Applicants note that while issuances of additional shares of Class A common stock have been an important tool for financing past acquisitions, such issuances dilute the economic and voting interests of all NRG Yield shareholders. Applicants acknowledge that while the economic dilution can be managed by attempting to ensure that acquisitions “provide value commensurate with that of the additional stock issued,” the dilution of voting power resulting from the issuance of additional Class A common stock could eventually result in NRG Energy ceasing to retain majority voting control over NRG Yield.¹⁰ Applicants state that such an event could trigger change in control provisions in certain financing documents and require counterparty consents, and could reduce NRG Energy’s influence over the management of NRG Yield. Applicants state that the ability to issue Class C shares with 1/100th of the voting power of Class A shares will provide NRG Yield with a new tool for financing acquisitions without the same dilution of voting power.¹¹

B. Amendments to Blanket Authorization

7. Applicants assert that, with modification to two of the conditions of the Blanket Authorization, the change in circumstances described in the Application, i.e. the stock split, will not materially alter the factors upon which the Commission relied in granting the Blanket Authorization in *NRG Energy*.¹²

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5 (citing Attachment A: Proxy Statement at 24-25).

¹¹ *Id.* at 5-6.

¹² *Id.* at 1.

1. Proposed Modification to the Third-Party Investor Condition

8. Applicants state that the stock split did not change the respective economic and voting rights of NRG Energy or any of NRG Yield's other shareholders. According to Applicants, those rights were reallocated between the existing classes of stock and the new classes as follows:¹³

	Approximate Aggregate Voting Power by Class	
	Prior to the Stock Split	Immediately after the Stock Split
Class A shares	44.700%	44.253%
Class C shares	--	0.447%
Combined Class A & C	44.700%	44.700%
Class B shares	55.300%	54.747%
Class D shares	--	0.553%
Combined Class B & D	55.300%	55.300%

9. Applicants explain that, following the stock split, the condition of the Blanket Authorization regarding NRG Energy's ownership continues to operate as intended and continues to be satisfied because NRG Energy still "owns at least 55 percent of NRG Yield's outstanding voting securities."¹⁴ Applicants state, however, that the same is not necessarily true of the condition on the ownership of third-party investors, because, read

¹³ Applicants note that a corresponding allocation of rights also occurred at the individual shareholder level. Applicants explain that a hypothetical Class A shareholder with a 9.99 percent voting interest in NRG Yield prior to the stock split, for example, would still have a 9.99 percent voting interest in NRG Yield following the stock split. According to Applicants, after the stock split the 9.99 percent voting interest previously held solely through ownership of Class A shares would be held through combined ownership of Class A and Class B shares representing 9.8901 percent and 0.0999 percent of the voting power in NRG Yield, respectively. *Id.* at 7.

¹⁴ *Id.* (quoting *NRG Energy*, 147 FERC ¶ 61,261 at P 24).

literally, that condition applies only to ownership of Class A shares.¹⁵ Applicants state that, following the stock split, a hypothetical shareholder with a 9.99 percent voting interest in NRG Yield could acquire additional Class C shares representing 0.01 percent of the voting interests, at which point such shareholder would own 10 percent of NRG Yield's voting securities through ownership of Class A and Class C shares representing 9.8901 and 0.10999 percent of the voting power in NRG Yield, respectively.

10. Accordingly, Applicants request that the condition regarding third-party investor interests in NRG Yield be modified to refer to owning, controlling or holding, with power to vote, an amount of Class A and/or Class C shares that would equate to 10 percent or more of NRG Yield's outstanding voting securities. Applicants state that this modification will ensure that this condition on the Blanket Authorization operates as intended, and that, in combination with the NRG Energy ownership condition, that the Blanket Authorization only applies to transfer of interests in public utilities from NRG Energy to NRG Yield that "will not result in any public utility 'becoming affiliated with any additional entities with which it was not affiliated prior to a transaction' and thus that 'no change in market concentration would occur, and no new vertical combination of assets would be created' by such transfers."¹⁶

2. Proposed Modification to the Quarterly Reporting Requirement

11. Applicants explain that, like the third-party investor condition, the quarterly reporting requirement that was imposed on Applicants in *NRG Energy* was also predicated upon the existence of only one class of publicly-traded stock of NRG Yield. Accordingly, Applicants request that the Commission approve a modification under which they would be required to report on both publicly-traded classes of NRG Yield's stock.¹⁷ Specifically, Applicants request that the Commission approve a modification under which they would:

¹⁵ See P 2, *supra* (the Blanket Authorization applies "when NRG Energy owns at least 55 percent of NRG Yield's outstanding voting securities, and neither NRG Energy nor NRG Yield have actual or constructive notice that any investor, individually or together with its affiliates, *owns an amount of NRG Yield's Class A common stock* that would equate to 10 percent or more of NRG's outstanding voting securities" (emphasis added)).

¹⁶ Application at 8-9 (quoting *NRG Energy*, 147 FERC ¶ 61,261 at P 24).

¹⁷ *Id.* at 9.

be required to file quarterly reports (within 60 days of the end of each calendar quarter) identifying each investor (or affiliated group of investors) that, as of the end of the quarter, owns five percent or more of the outstanding shares of Class A or Class C common stock, showing the percentages of (1) the investor's/investor group's Class A share to the total outstanding shares of Class A common stock, (2) the investor's/investor group's Class C shares to the total outstanding shares of Class C common stock, and (3) the investor's/investor group's Class A and Class C shares to the aggregate number of outstanding shares of Class A, B, C and D common stock.¹⁸

12. Applicants state that the revised reporting requirement will allow the Commission to track significant ownership of both publicly-traded classes of NRG Yield's common stock in the same way that the existing condition allows it to track ownership of the Class A common stock.

III. Notice of Filing

13. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 30,225 (2015), with interventions and protests due on or before June 10, 2015. None was filed.

IV. Discussion

14. In *NRG Energy*, the Commission concluded that, when undertaken pursuant to the terms of the Blanket Authorization and the conditions and restrictions established in that order, the direct or indirect transfers from NRG Energy to NRG Yield of voting interests in public utilities that are Exempt Wholesale Generators and/or Qualifying Facilities would not have an adverse effect on competition, rates, and regulation, or result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.¹⁹ We find that the change in circumstances described in the Application, i.e. the stock split, does not materially alter the facts upon which the Commission relied in *NRG Energy* in granting the Blanket Authorization, provided that the Blanket Authorization and the conditions and restrictions are revised, as proposed by Applicants.

15. First, we agree with Applicants that, in order to remain effective and operate as intended, the third-party investor condition must be revised to account for the newly-

¹⁸ *Id.* at 9.

¹⁹ See *NRG Energy*, 147 FERC ¶ 61,261 at PP 21-34.

created Class C common stock, which is publicly-traded. Accordingly, the Blanket Authorization is amended and will only apply:

when NRG Energy owns at least 55 percent of NRG Yield's outstanding voting securities, and neither NRG Energy nor NRG Yield have actual or constructive notice that any investor, individually or together with its affiliates, owns an amount of NRG Yield's Class A and/or Class C common stock that would equate to 10 percent or more of NRG Yield's outstanding voting securities.

16. Second, we agree with Applicants that the reporting requirement must also be revised to account for the newly-created Class C and Class D common stock. Accordingly, we will require Applicants to file quarterly reports (within 60 days of the end of each calendar quarter) identifying each investor (or affiliated group of investors) that, as of the end of the quarter, owns five percent or more of the outstanding shares of Class A or Class C common stock, showing the percentages of (1) the investor's/investor group's Class A share to the total outstanding shares of Class A common stock, (2) the investor's/investor group's Class C shares to the total outstanding shares of Class C common stock, and (3) the investor's/investor group's Class A and Class C shares to the aggregate number of outstanding shares of Class A, B, C and D common stock.

The Commission orders:

(A) The Blanket Authorization is revised, as discussed in the body of this order, and will only apply to transfers occurring when NRG Energy owns at least 55 percent of NRG Yield's outstanding voting securities, and neither NRG Energy nor NRG Yield have actual or constructive notice that any investor, individually or together with its affiliates, owns an amount of NRG Yield's Class A and/or Class C common stock that would equate to 10 percent or more of NRG Yield's outstanding voting securities.

(B) The quarterly reporting requirement is revised, as discussed in the body of this order. Applicants will file quarterly reports, within 60 days of the end of each calendar quarter, identifying each investor or affiliated group of investors that, as of the end of the quarter, owns five percent or more of the outstanding shares of Class A or Class C common stock, showing the percentages of (1) the investor's/investor group's Class A share to the total outstanding shares of Class A common stock, (2) the investor's/investor group's Class C shares to the total outstanding shares of Class C common stock, and (3) the investor's/investor group's Class A and Class C shares to the aggregate number of outstanding shares of Class A, B, C and D common stock.

(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 costs or any valuation of property claimed or asserted.

(E) Applicants are subject to audit to determine whether they are in compliance with the representations, conditions and requirements upon which the authorizations are herein granted and with applicable Commission rules, regulations and policies. In the event of a violation, the Commission may take action within the scope of its oversight and enforcement authority.

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

(G) Applicants must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in amending the Blanket Authorization within 30 days from the date of the material change in circumstances.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.