

153 FERC ¶ 61,091
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.

UIF GP, LLC

Docket No. EL15-2-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued October 26, 2015)

1. On October 3, 2014, UIF GP, LLC (UIF) filed a petition for a declaratory order requesting that the Commission: (1) disclaim jurisdiction over UIF, which proposes to acquire Class A-1 ownership interests (Class A-1 Interests) and Class B ownership interests (Class B Interests) in Neptune Regional Transmission System, LLC (Neptune), as a public utility under section 201(e) of the Federal Power Act (FPA); and (2) disclaim jurisdiction over future transfers of the Class A-1 Interests or Class B Interests in Neptune under section 203(a)(1) of the FPA.¹ In this order, we grant the petition, as discussed below.

I. Background

A. Description of Entities

2. UIF states that it is an operational investment fund that makes investments in infrastructure businesses that provide essential services to communities, governments and businesses in the United States and Canada.² UIF states that it is a direct, wholly-owned subsidiary of, and is managed by, Ullico Investment Advisors, Inc., a direct, wholly-owned subsidiary of Ullico Inc., a labor-owned insurance and financial services company based in Washington, D.C.

¹ 16 U.S.C. §§ 824, 824b (2012).

² UIF Petition at 3.

3. UIF states that it has an indirect, passive 17.85 percent ownership interest in Kawaihoa Wind LLC (Kawaihoa Wind), which owns and operates a 69 MW wind-powered electricity generating facility located in Haleiwa, Hawaii. UIF states that the Kawaihoa Wind generating facility is a qualifying small power production facility under the Public Utility Regulatory Policies Act of 1978.³

4. According to UIF, Neptune owns a 660 megawatt (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 pursuant to Neptune's Commission-approved rate schedule under PJM's Open Access Transmission Tariff. UIF states that the Commission has granted Neptune negotiated rate authority.⁴

B. Description of Ownership Interests

5. According to UIF, Neptune has three classes of ownership interests: voting Class A interests (Class A Interests), passive, non-voting Class B Interests, and passive Class C interests (Class C Interests).⁵ UIF states that Neptune Power Ventures, LLC (Neptune Power) is the sole manager of Neptune and owns 100 percent of Neptune's voting Class A Interests. UIF also states that several entities and individual persons⁶ own 100 percent of Neptune's Class B Interests, and the Class C Interests are owned by the California Public Employees Retirement System (CalPERS) (75 percent) and NM Neptune Inc. (NM Neptune) (25 percent).

II. UIF's Petition

6. UIF states that, pursuant to a Purchase and Sale Agreement dated July 29, 2014, between Neptune Power and UIF, Neptune Power will convert certain of its Class A Interests in Neptune into passive Class A-1 Interests and will transfer such passive

³ *Id.* (citing *Kawaihoa Wind, LLC*, Notice of Self-Certification of Qualifying Facility Status, Docket No. QF11-480-002 (filed Aug. 21, 2013)).

⁴ *Id.* at 4 (citing *Neptune Regional Transmission Sys., LLC*, 96 FERC ¶ 61,147 (2001)).

⁵ *Id.*

⁶ These individual entities and persons are: Cianbro Development Corporation, Standard Energy Development Inc., CTSBM Investments LLC, and Charles E. Hewett, an individual (collectively, the Class B Interest Sellers), Anbaric Neptune LLC (Anbaric) and Boundless Energy LLC (Boundless). UIF Petition at 4 & n.7.

Class A-1 Interests to UIF.⁷ UIF states that, in a second transaction, pursuant to a Purchase and Sale Agreement dated August 27, 2014 between the owners of the Class B Interests and UIF, the owners of the Class B Interests will transfer 27.8 percent of the passive, non-managing Class B Interests in Neptune to UIF.⁸

7. According to UIF, following the two transactions: (1) Neptune Power will own 100 percent of the Class A Interests in and will continue to be the sole manager of Neptune; (2) UIF will own 100 percent of the passive, non-managing Class A-1 Interests and 27.8 percent of the passive, non-managing Class B Interests in Neptune; and (3) the owners of the Class B Interests, Anbaric, and Boundless will, collectively, own 72.2 percent of the passive, non-managing Class B Interests in Neptune.⁹

8. On May 1, 2015, UIF filed a supplement to its petition for declaratory order and on September 11, 2015, UIF filed a second supplement to provide additional information to support its petition. UIF confirms that the voting and management rights of the Class A-1 interests in the currently effective Limited Liability Operating Agreement of Neptune Regional Transmission System, LLC (LLC Agreement) contained in sections 2.12 “Voting Rights” and section 7.6 “Certain Rights, Duties and Obligations of the Members” of the LLC Agreement are unchanged from the original LLC agreement reviewed by the Commission in 2005 in Docket No. EC05-70-000.¹⁰

9. Section 2.12(b) states that “the Class A-1 Members as a class shall have no voting rights in the Company.” Section 2.12(c) states that “the Class B Members as a class shall have no voting rights in the Company.” Section 7.6(a) states:

Except as otherwise specifically contemplated by this Agreement, none of the Class A-1 Members as Class A-1 Members in the Company, the Class B Members as Class B Members in the Company nor the Class C Members

⁷ *Id.*

⁸ UIF, Neptune Power and the Class B Interest Sellers filed an application for Commission authorization of these transactions under section 203(a)(1) of the FPA. An order authorizing these transactions was issued on November 3, 2014. *UIF GP, LLC*, Docket No. EC15-1-000 (Nov. 3, 2014) (delegated letter order).

⁹ UIF states that it will subsequently transfer the Class A-1 Interests and the Class B Interests in Neptune to a to-be-created subsidiary, Ullico Infrastructure Neptune Holdco, LLC, that will be formed solely for the purpose of owning the Class A-1 Interests and the Class B Interests in Neptune.

¹⁰ UIF Second Supplement at 1-2.

as Class C Members in the Company shall participate in the control, management, direction or operation of the business activities or affairs of the Company, and none of the Class A-1 Members, the Class B Members nor the Class C Members shall have any power to act for or to bind the Company.¹¹

A. Disclaimer of Jurisdiction Under FPA Section 201

10. UIF states that the Commission has disclaimed jurisdiction under section 201 of the FPA over the current owners of Neptune's Class B Interests.¹² According to UIF, the Commission based its disclaimer of jurisdiction on representations that the owners of the Class B Interests: (1) will hold only passive interests in Neptune (i.e., will have no operational control over Neptune); and (2) are not otherwise in the business of producing or selling electric power at wholesale or engaging in transmission in interstate commerce.¹³

11. UIF states that the passive nature of the Class B Interests to be acquired by UIF has not changed since the Commission issued *Neptune Regional*, and the Class A-1 Interests to be held by UIF are similarly passive.¹⁴ UIF asserts that the Class A-1 Interests and the Class B Interests in Neptune to be acquired by UIF, like the Class C Interests, are passive, non-managing interests that will not give UIF control over Neptune or its operations; rather, UIF will only have limited consent or veto rights necessary to protect its economic investment interests.¹⁵ Furthermore, UIF maintains that it is solely in the business of making investments in infrastructure businesses, and is not otherwise engaged in the business of producing or selling electric power at wholesale or engaging in the transmission of electricity in interstate commerce.¹⁶ On this basis, UIF asks the Commission to disclaim jurisdiction over UIF as a public utility under section 201 of the FPA.

¹¹ *Id.* at Attachment A.

¹² UIF Petition at 6 (citing *Neptune Regional Trans. Sys., LLC*, 111 FERC ¶ 61,306, at P 25 (2005) (*Neptune Regional*)); *see also*, UIF Second Supplement at Attachment A.

¹³ UIF Petition at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 6-7.

B. Disclaimer of Jurisdiction Under FPA Section 203(a)(1)

12. According to UIF, Commission policy and precedent support disclaimer of jurisdiction under FPA section 203(a)(1) over future transfers of UIF's and Ullico Infrastructure Neptune's Class A-1 Interests and Class B Interests.

13. UIF maintains that the Commission stated in its FPA section 203 Supplemental Policy Statement that investments in public utilities that do not convey control may be passive investments not subject to section 203(a)(1).¹⁷ UIF maintains that the Commission further stated that it has found an investment to be passive if: (1) the investor does not have authority to manage, direct, or control the jurisdictional activities of the public utility; (2) the investor has only limited rights necessary to protect its investment, which do not affect the ability of the public utility to conduct jurisdictional activities; and (3) the investor is not otherwise engaged in the business of producing, selling or transmitting electric power.¹⁸

14. According to UIF, the Commission previously has granted requests for disclaimer of jurisdiction under section 203 of the FPA with respect to transfers of passive interests similar to the Class A-1 Interests and Class B Interests to be acquired by UIF¹⁹ and, furthermore, previously has disclaimed jurisdiction under section 203(a)(1) of the FPA over the transfer of 75 percent of the passive Class C Interests in Neptune to CalPERS.²⁰ UIF states that under the LLC Agreement, which was filed with the Second Supplement, Class A-1, Class B, and Class C Members have no voting rights in UIF and these Members generally do not participate in the control, management, direction, or operation of the business activities of UIF or have the power to act for or bind UIF.

¹⁷ *Id.* at 8 (citing *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 54 (2007) (Supplemental Policy Statement), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008)).

¹⁸ *Id.* (citing Supplemental Policy Statement, FERC Stats. & Regs. ¶ 31,253 at P 54 (citing *Metropolitan Life Insurance Co.*, 113 FERC ¶ 61,300, at P 6 (2005))).

¹⁹ *Id.* (citing *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265, at PP 19-20 (2003) and *Solios Power, LLC*, 114 FERC ¶ 61,161 (2006)).

²⁰ *Id.* (citing *Cal. Public Employees' Retirement Sys.*, 138 FERC ¶ 61,073 (2012) (*Cal. Public*)).

III. Notice and Responsive Pleadings

15. Notice of UIF's filing was published in the *Federal Register*, 79 Fed. Reg. 61,637 (2014) with protests and interventions due on or before November 3, 2014. None was filed.

16. Notice of UIF's second supplemental filing was published in the *Federal Register*, 80 Fed. Reg. 56,455 (2015) with protests and interventions due on or before September 24, 2015. None was filed.

IV. Discussion

17. For the reasons discussed below, we grant the requested petition for declaratory order. In *Neptune Regional*, the Commission authorized a disposition of jurisdictional facilities and granted a request for disclaimer of jurisdiction under FPA section 201.²¹ In that proceeding, the applicants requested 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. The Commission stated that it 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 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.²²

18. UIF asserts that the Class A-1 Interests and the Class B Interests in Neptune to be acquired by UIF, like the Class C Interests addressed in *Cal. Public*, are passive, non-managing interests that will not give UIF control over Neptune or its operations; rather,

²¹ *Neptune Regional*, 111 FERC ¶ 61,306 at P 1.

²² *Id.* P 24 & n.8 (noting “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.”).

UIF will only have limited consent or veto rights necessary to protect its economic investment interests.²³ Further, according to UIF, UIF is solely in the business of making investments in infrastructure businesses that provide essential services to communities, and is not otherwise in the business of producing or selling electric energy at wholesale or transmitting electric energy in interstate commerce.

19. In *Cal. Public*, the applicant filed a petition for declaratory order seeking a disclaimer of Commission jurisdiction under section 203(a)(1)(A) of the FPA over a transaction in which the previous owners of 75 percent of the Class C Interests in Neptune would transfer that ownership interest to CalPERS. The Commission found that the passive nature of the Class C Interests had not changed since the Commission's determination in *Neptune Regional* and that the Class C Interests would continue to be non-voting interests that confer no control over Neptune or its operations.²⁴ Therefore, the Commission found that the transaction did 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 did not require Commission approval under section 203(a)(1)(A).²⁵

20. The Commission in *NM Neptune* authorized the sale of 25 percent of the Class C Interests from Starwood to NM Neptune.²⁶ NM Neptune represented that owners of the Class C Interests hold only passive interests in Neptune, do not have operational control over Neptune, and are not in the business of producing and selling electric power at wholesale or engaging in transmission in interstate commerce.²⁷

21. As discussed above, the Commission previously has disclaimed jurisdiction under FPA section 201 over the owners of the Class C Interests in Neptune and has found that the Class C Interests are passive, and confer no control over Neptune's jurisdictional facilities. However, the Commission has not yet made such a finding with respect to the Class A-1 and Class B Interests. UIF represents that the Class A-1 Interests and Class B Interests are passive, like the Class C Interests, and that the holders of such interests, the Class A-1 Members, Class B Members, and Class C Members, have no voting rights and cannot participate in the control, management, direction or operation of the business,

²³ UIF Petition at 9.

²⁴ *Cal. Public*, 138 FERC ¶ 61,073 at P 13.

²⁵ *Id.*

²⁶ *NM Neptune LLC*, Docket No. EC14-86-000 (Jun. 11, 2014) (delegated letter order).

²⁷ *Id.*

activities or affairs of UIF, act for, or bind UIF. UIF also represents that UIF is solely in the business of making investments in infrastructure businesses that provide essential services to communities, and is not otherwise in the business of producing or selling electric energy at wholesale or transmitting electric energy in interstate commerce. Based on these representations, we affirm that UIF is not a public utility under FPA section 201 and that future transfers of UIF's Class A-1 Interests and Class B Interests would not subject UIF to the Commission's jurisdiction under FPA section 203(a)(1).²⁸

The Commission orders:

The petition for a declaratory order is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁸ However, we also note that, as we stated in *Neptune Regional*, 111 FERC ¶ 61,306 at n.8, if there is a change so that the owners of the Class A-1 Interest or Class B Interests 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 under FPA section 201 and would be required to make the appropriate filings under section 205 of the FPA.