

154 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

8point3 Energy Partners LP

Docket No. EL16-2-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued January 21, 2016)

1. On October 5, 2015, 8point3 Energy Partners LP (8point3 Partners), pursuant to Rules 207 and 212 of the Commission's Rules of Practice and Procedure,¹ submitted a petition for declaratory order requesting that the Commission disclaim jurisdiction under section 203 of the Federal Power Act (FPA)² over: (i) the sale and purchase of outstanding Class A limited partnership interests in 8point3 Partners (Class A Shares); and (ii) the future public offering, sale, and purchase of additional Class A Shares (Subsequent Issuances), regardless, in either case, of the amount of Class A Shares sold or acquired (Petition).³ As discussed below, we grant the Petition.

¹ 18 C.F.R. §§ 385.207, 385.212 (2015).

² 16 U.S.C. § 824b (2012).

³ 8Point3 Partners states that, despite the lack of limitation on the acquisition of Class A Shares, the Partnership Agreement of 8point3 Partners (Partnership Agreement) provides that "any owner of Class A Shares that together with its affiliates acquires 20% or more of the limited partnership interests in 8point3 Partners, without approval of 8point3 Partners' general partner or related parties, will be prohibited from exercising any voting rights in 8point3 Partners." Petition n.5 (citing Partnership Agreement at § 13.13(c)).

I. Background

A. Description of Entities

2. 8point3 Partners states that, on June 5, 2015 the Commission issued an order approving a transaction in which: (i) First Solar, Inc. and SunPower Corporation (together, the Sponsors) contributed certain electric generation project companies to 8point3 Operating Company, LLC (OpCo); (ii) 8point3 Partners acquired economic and controlling interests in OpCo; and (iii) 8point3 Partners sold Class A Shares to the public through an initial public offering (203 Transaction).⁴ As a result of the 203 Transaction, OpCo now indirectly owns active and passive ownership interests in approximately 393 megawatts (MW) in aggregate of solar electric generating capacity in the California Independent System Operator Corporation and PJM Interconnection, L.L.C. markets, and the Imperial Irrigation District balancing authority area. OpCo also owns 39 MW of behind the meter, residential rooftop solar facilities located in nine states. According to 8point3 Partners, the jurisdictional facilities in which OpCo holds interests are all either qualifying facilities under the Public Utility Regulatory Policies Act⁵ or directly owned by public utilities subject to Commission jurisdiction under Part II of the FPA. 8point3 Partners further states that OpCo intends to acquire interests in additional solar electric generation facilities from the Sponsors and from non-affiliates.⁶

3. According to 8point3 Partners, it owns a minority economic interest in OpCo through the holding of “common unit interests” and controls OpCo through the ownership of a non-economic, managing member interest. Additionally, the Sponsors indirectly hold the majority economic interests in OpCo through the ownership of common units and subordinated units.⁷

⁴ *Id.* at 1 (citing *8point3 Energy Partners LP*, Docket No. EC15-129-000 (June 5, 2015) (delegated letter order)).

⁵ 16 U.S.C. § 2601, *et seq.* (2012).

⁶ Petition at 3-4. 8point3 Partners states that the appropriate applicants will file an application under FPA section 203 for the acquisition of additional generation facilities from the Sponsors. *Id.* n.6.

⁷ *Id.* at 4. According to 8point3 Partners, for a specified period, the subordinated units are not entitled to receive cash distributions from OpCo unless the OpCo common units have received certain minimum cash distributions. However, the subordinated units will convert to common units at a later time. *Id.* n.4.

4. Additionally, 8point3 Partners notes that the Sponsors indirectly own 8point3 Holdings Company, LLC (Holdings) on a “50/50 basis.” Holdings, in turn, holds incentive distribution rights that entitle Holdings to receive increasing distributions of available cash from OpCo after certain minimum and target distributions of cash to the common unit and subordinated unit holders (8point3 Partners and the Sponsors) are met. 8point3 General Partners, LLC (8point3 GP), a wholly owned subsidiary of Holdings, controls 8point3 Partners for all purposes except for certain limited voting rights held by its limited partners, as described below.⁸

B. Description of Membership Interests

5. 8point3 Partners explains that there are two classes of limited partnership interests in 8point3 Partners: Class A Shares and Class B Shares. The Class A Shares: (i) are publicly traded on the NASDAQ Global Select Market; (ii) are entitled to 100 percent of the economic interest in 8point3 Partners; and (iii) represent a minority of the limited voting rights in 8point3 Partners. The Class B Shares, on the other hand, are currently held by the Sponsors, do not carry any economic interest, and represent a majority of the limited voting rights in 8point3 Partners.⁹

II. 8point3 Partners’ Petition

6. 8point3 Partners asks the Commission to issue a declaratory order finding that, “under the conditions specified in this Petition, the Class A Shares are passive, non-voting securities such that: (i) the sale and purchase of Class A Shares; and (ii) the future public offering, sale and purchase of additional Class A Shares . . . , will not require Commission approval pursuant to FPA section 203, regardless in either case of the amount of Class A Shares sold or acquired.”¹⁰ 8point3 Partners argues that, due to their limited voting rights, the owners of the Class A Shares do not, and will not, control 8point3 Partners. In support of this position, 8point3 Partners first notes that the Partnership Agreement states that 8point3 GP:

shall conduct, direct and manage all activities of [8point3 Partners]. Except as otherwise expressly provided in [the Partnership] Agreement . . . all management powers over the business and affairs of [8point3 Partners] shall be exclusively vested in [8point3 Partners], and no Shareholder in its

⁸ *Id.* at 4.

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 2.

capacity as such shall have any management power over the business and affairs of [8point3 Partners].¹¹

8point3 Partners further states that 8point3 GP is managed by a board of directors, which the Sponsors indirectly elect, and by officers, who are elected by 8point3 GP's board of directors. Thus, according to 8point3 Partners, 8point3 GP controls all of 8point3 Partners' day-to-day management functions and operations.

7. Second, 8point3 Partners explains that the owners of Class A Shares have only very limited voting rights in 8point3 Partners that relate strictly to the preservation of their investments. These consist of voting on the following matters:

- i. Amendment of the Partnership Agreement (subject, however, to 8point3 GP's or a successor general partner's right to amend the Partnership Agreement unilaterally for various purposes);¹²
- ii. Consent to, or approval of, any matters relating to OpCo that require the consent or approval of 8point3 Partners under OpCo's limited liability company agreement, including any amendment of such agreement;¹³
- iii. Approval of the merger of 8point3 Partners with or into another entity or sale or other disposition of all or substantially all of its assets;¹⁴
- iv. Dissolution of 8point3 Partners and continuation of its business upon dissolution;¹⁵ and
- v. Withdrawal or removal of the 8point3 GP or any successor to 8point3 GP as general partner or transfer of the general partnership interest in 8point3 Partners.¹⁶

¹¹ *Id.* at 5 (quoting Partnership Agreement § 7.1).

¹² *Id.* at 6 (citing Partnership Agreement at §§ 13.2, 13.1(g)).

¹³ *Id.* (citing Partnership Agreement at § 7.4(b)).

¹⁴ *Id.* (citing Partnership Agreement at § 7.4(a)).

¹⁵ *Id.* (citing Partnership Agreement at § 12.1(b)).

¹⁶ *Id.* (citing Partnership Agreement at § 11.2).

8. Third, 8point3 Partners states that these limited Class A Share voting rights are further restricted in most instances through the Class B Shares issued to the Sponsors because the number of Class B Shares held by each of the Sponsors tracks and is equal to the number of common units it holds in OpCo.¹⁷ To illustrate this principle, 8point3 Partners states that, because the Sponsors currently own 72 percent of the OpCo common units, they hold the number of Class B Shares equal to approximately 72 percent of the total number of outstanding Class A Shares and outstanding Class B Shares combined (collectively, the Outstanding Shares).¹⁸

9. 8point3 Partners states that the Class B Shares have the effect of limiting or entirely negating Class A Shares' voting power, depending upon vote timing and the number of Class B Shares retained by the Sponsors. On this point, 8point3 Partners explains that the Class B Shares entitle the Sponsors to vote on most matters upon which Class A Share owners are entitled to vote, either together with the Class A Shares or as a separate class. 8point3 Partners states that, except for those votes that require a super-majority (including removal of 8point3 GP as general partner), most matters upon which the Class A Shares and Class B Shares are entitled to vote are decided by "Share Majority."¹⁹

10. Finally, 8point3 Partners explains that the removal of 8point3 GP as general partner requires: (i) majority approval of the holders of not less than $66\frac{2}{3}$ percent of the Class A Shares and Class B Shares, voting together as a single class; and (ii) the receipt by 8point3 Partners of an opinion of counsel regarding continuing limited liability of its limited partners. Moreover, removal of 8point3 GP also requires the approved appointment of a successor by a Share Majority.²⁰ Thus, according to 8point3 Partners, because the Sponsors currently hold Class B Shares representing approximately 72 percent of the combined number of outstanding Class A and Class B Shares, they can block the removal of 8point3 GP. Additionally, they will retain this ability unless and until Subsequent Issuances cause the Sponsors' Class B Shares to decrease to $33\frac{1}{3}$ percent or less of the voting power of the Outstanding Shares.

¹⁷ *Id.* (citing Partnership Agreement at § 5.3).

¹⁸ *Id.* at 6-7.

¹⁹ According to 8point3 Partners depending upon vote timing, Share Majority means either: (i) a majority vote of both the outstanding Class A Shares (excluding any held by the Sponsors and their affiliates) and the Class B Shares voting as separate classes; or (ii) a majority vote of the outstanding Class A Shares and the Class B Shares voting together as a single class. *Id.* at 7.

²⁰ *Id.* at 8 (citing Partnership Agreement at § 11.2).

11. 8point3 Partners argues that Commission precedent supports the requested disclaimer of jurisdiction. 8point3 Partners states that, in *NextEra Energy Partners, LP*,²¹ the Commission determined that the publicly traded limited partnership interests of NextEra Energy Partners, LP, an entity similar to 8point3 Partners, were passive securities and disclaimed jurisdiction over them under FPA section 203(a)(1). 8point3 Partners argues that the Partnership Agreement is substantially identical to the partnership agreement in *NextEra*. Relying on this precedent, 8point3 Partners contends that the Commission should conclude that the Class A Shares “are similarly non-jurisdictional” to the limited partnership interests involved in *NextEra*.²²

12. 8point3 Partners notes further that the focus of FPA section 203 is “the disposition of control of jurisdictional facilities” and that control is exercised through ownership or control of voting securities.²³ 8point3 Partners asserts that the Commission typically does not concern itself with non-voting securities and that, in distinguishing between voting and non-voting securities, the Commission has made clear that the ability to vote on limited matters related to asset preservation does not mean that the securities in question should be considered “voting securities” that may convey control.²⁴ In support of this point, 8point3 Partners notes that, in *AES Creative*, the Commission explained the distinction between voting and non-voting securities as the distinction between “rights that give an investor the ‘authority to manage, direct, or control the activities’ of a company and rights that give investors ‘only those limited rights necessary to protect their . . . investments,’” which “do not confer control over a public utility or allow the holder to participate in the public utility’s day-to-day operations.”²⁵

²¹ 150 FERC ¶ 61,071 (2015) (*NextEra*).

²² Petition at 8.

²³ *Id.* (citing *Enova Corp.*, 79 FERC ¶ 61,107, at 61,490 (1997)).

²⁴ *Id.* at 9 (citing *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200, at P 144 (2005) (“the purchase of [non-voting] securities generally does not convey control and hence does not grant the purchasing holding company additional market power, harm competitive markets, or otherwise disadvantage captive customers.”), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006); *AES Creative Res., L.P.*, 129 FERC ¶ 61,239, at P 25 (2009) (*AES Creative*)).

²⁵ *AES Creative*, 129 FERC ¶ 61,239 at PP 25-26 (quoting *Solios Power LLC*, 114 FERC ¶ 61,161, at PP 9-10 (2006)).

13. Based on these principles, 8point3 Partners explains that: (i) the owners of Class A Shares have no rights whatsoever in the day-to-day management or operations of 8point3 Partners or OpCo; (ii) the owners of Class A Shares have significantly fewer voting rights than other passive ownership interests that the Commission has found to be non-voting securities; and (iii) with the exception of the potential right to remove 8point3 GP, all of the matters upon which the Class A Share owners may vote have previously been found by the Commission to be consistent with passive, non-voting status.²⁶

14. Additionally, while 8point3 Partners concedes that an unrestricted right to remove 8point3 GP as general partner could allow the Class A Share owners indirectly to control OpCo's generation assets, the 8point3 Partners states that the Class A Share owners cannot remove 8point3 GP if the Sponsors' Class B Shares exceed 33 $\frac{1}{3}$ percent of the Outstanding Shares' voting power. For this reason, the 8point3 Partners proposes to condition the request for declaratory order upon: (i) no material change in the rights and obligations of the owners of Class A Shares, the Sponsors, and their affiliates, as described in the Petition; and (ii) the Class B Shares held by the Sponsors not being reduced below the greater than 33 $\frac{1}{3}$ percent threshold that would enable the Sponsors to block any removal of 8point3 GP.²⁷

III. Notice

15. Notice of the Petition was published in the *Federal Register*, 80 Fed. Reg. 61,801 (2015) with protests and interventions due on or before November 4, 2015. None was filed.

IV. Discussion

16. FPA section 203(a)(1) requires prior Commission approval if a "public utility seeks to sell, lease, or otherwise dispose of jurisdictional facilities."²⁸ The Commission has interpreted the "or otherwise dispose" language, now in section 203(a)(1)(A), to include indirect dispositions of jurisdictional facilities through the sale or transfer of upstream direct or indirect ownership interests in a public utility.²⁹ Nevertheless, while

²⁶ Petition at 10.

²⁷ *Id.* at 11.

²⁸ 18 U.S.C. § 824b (2012); *see also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 45 (2007) (*Supplemental Policy Statement*).

²⁹ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 45.

section 203 applies to such changes or transfers of ownership interests in a public utility, the Commission has recognized that not all such transactions involve a change in control of a public utility.³⁰ Thus, as noted by the 8point3 Partners, in *NextEra*, the Commission disclaimed jurisdiction under FPA section 203(a)(1)(A) over the future public offering and sale of limited partnership interests with limited voting, or consent, rights similar to those of the Class A Shares described in the Petition. The Commission found that such securities did not provide the holders with the “authority to manage, direct, or control the day-to-day activities of NextEra Partners or any of its subsidiaries, or its jurisdictional facilities.”³¹

17. As 8point3 Partners notes, the limited voting rights of the holders of the Class A Shares and those of the limited partners in *NextEra* are essentially the same. Moreover, 8point3 Partners’ proposal to condition its request for declaratory order upon: (i) no material change in the rights and obligations of the owners of Class A Shares, the Sponsors, and their affiliates, as described in the Petition; and (ii) the Class B Shares held by the Sponsors not being reduced below the greater than 33 $\frac{1}{3}$ percent threshold that would enable the Sponsors to block any removal of 8point3 GP, allays any concern we might otherwise have that the owners of the Class A Shares could indirectly exercise control over OpCo’s jurisdictional facilities. The facts presented, therefore, support the conclusion that the Class A Shares do not provide the holders thereof with the authority to manage, direct, or control the day-to-day activities of 8point3 Partners, any of its subsidiaries (including OpCo), or of OpCo’s jurisdictional facilities, and that the sale and purchase of Class A Shares will not result in any disposition of OpCo’s jurisdictional facilities requiring approval under section 203(a)(1). Consequently, as requested, we disclaim jurisdiction under FPA section 203(a)(1) over: (i) the sale and purchase of outstanding Class A Shares; and (ii) Subsequent Issuances of Class A Shares. Our findings are conditioned upon commitments set forth in the Petition to: (i) make no material change in the rights and obligations of the owners of Class A Shares, the Sponsors, and their affiliates, as described in the Petition; and (ii) the Class B Shares held by the Sponsors not being reduced below the greater than 33 $\frac{1}{3}$ percent threshold. These conditions will ensure that 8point3 GP maintains control of 8point3 Partners.

³⁰ *Id.* P 47.

³¹ *NextEra*, 150 FERC ¶ 61,071 at P 30 (citing *D.E. Shaw*, 102 FERC ¶ 61,265, at PP 19-20 (2003); *Solios Power LLC*, 114 FERC ¶ 61,161 at PP 9-10 (2006)); *see also Starwood Energy Group Global, L.L.C.*, 153 FERC ¶ 61,332, at PP 16-19 (2015).

The Commission orders:

The Petition is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.