

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

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Ad Hoc Renewable Energy Financing Group

Docket No. EL17-26-000

ORDER GRANTING
PETITION FOR DECLARATORY ORDER

(Issued October 4, 2017)

1. On December 9, 2016, the Ad Hoc Renewable Energy Financing Group¹ (Petitioners) filed a petition for declaratory order (Petition) requesting that the Commission: (1) find that the tax equity interests in public utilities or public utility holding companies identified in *AES Creative Resources, L.P., et al.*² do not constitute voting securities for purposes of section 203 of the Federal Power Act (FPA);³ (2) confirm that, because such interests do not constitute voting securities, the issuance or transfer of such interests does not constitute a transfer of control with respect to the public utility and does not require advance authorization from the Commission pursuant to FPA section 203(a)(1); and (3) confirm that the acquisition of such interests by a holding company qualifies under FPA section 203(a)(2) for the blanket authorization established in section 33.1(c)(2)(i)⁴ of the Commission's regulations. The Commission grants the request for declaratory order, as discussed below.

¹ The Ad Hoc Renewable Energy Financing Group is an informal group of companies that includes JPM Capital Corporation, Bankers Commercial Corporation, Enel Green Power North America, Inc., Firstar Development, LLC, State Street Bank and Trust Company, BAL Investment & Advisory, Inc., Wells Fargo Bank, N.A., and FTP Power LLC.

² 129 FERC ¶ 61,239 (2009) (*AES Creative Resources*).

³ 16 U.S.C. § 824b (2012).

⁴ 18 C.F.R. § 33.1(c)(2)(i) (2017).

I. Petition

2. Petitioners state that they are investors in, and/or sponsors of, renewable energy projects, and that they obtain or provide “tax equity” financing for companies engaged in the generation of electric energy from renewable resources.⁵ Petitioners state that they, or their affiliates, have all participated, and/or expect to participate, in transactions involving the issuance or transfer of non-voting securities in public utilities engaged in electric generation from renewable resources (or holding companies with respect to such public utilities).⁶

3. Petitioners state that the interests involved in these transactions are passive in nature, but have routinely been the subject of abundance of caution applications filed with the Commission for authorization under FPA section 203. They argue that they would benefit from Commission action to relieve them from the burden of filing such applications and complying with the corresponding reporting requirements under the Commission’s market-based rate regulations triggered by such applications.⁷ Petitioners argue that this result can be accomplished through the Commission extending its holding in *AES Creative Resources*, which addressed whether certain tax equity interests constituted voting securities for purposes of FPA section 205,⁸ to apply for purposes of FPA section 203. Petitioners ask the Commission “to find that securities having the characteristics of the securities at issue in *AES Creative Resources* do not constitute ‘voting securities’ for purposes of Section 203 of the FPA.”⁹

4. Petitioners state that, in *AES Creative Resources*, the Commission held that certain tax equity interests in public utilities did not constitute voting securities for purposes of the Commission’s market-based rate regulations under FPA section 205 because such interests did not entitle their holders “to vote in the direction or management of the affairs” of the public utilities.¹⁰ Petitioners state that, as a result, the Commission held

⁵ Petition at 2, 4. Petitioners explain that these investments are referred to as tax equity investments because they meet Internal Revenue Service standards necessary for non-managing equity investors to receive a substantial portion of the tax benefits available to renewable energy projects. *Id.* at 21.

⁶ *Id.* at 4.

⁷ *Id.* at 3-4.

⁸ 16 U.S.C. § 824d (2012).

⁹ Petition at 3.

¹⁰ *Id.* at 2 (quoting *AES Creative Resources*, 129 FERC ¶ 61,239 at P 28).

that the investors holding such interests were not considered to be affiliates of the public utilities in which they invested for purposes of FPA section 205.

5. Petitioners explain further that, consistent with the transactions that were the subject of *AES Creative Resources*, transactions pursuant to which tax equity investments are made are typically documented in equity capital contribution agreements or membership interest purchase agreements under which the non-managing investor becomes a member of a limited liability company.¹¹ According to Petitioners, the limited liability company is managed by one or more managing members, but the non-managing investors are granted certain voting/consent rights. These rights include actions that the managing member may take only if the managing member obtains the vote/consent from the holders of non-managing securities. Petitioners summarize and list a variety of the consent rights described in *AES Creative Resources* and in the supplemental filing submitted by the parties in that case, including: incurring certain types of indebtedness; selling or transferring assets; making capital expenditures above a certain threshold; and changing the purpose of the company.¹² Additionally, Petitioners note that, in *AES Creative Resources*, the non-managing members had the right to remove the managing member in certain limited circumstances, including for fraud, willful misconduct or gross negligence, in the event of a bankruptcy, or if the managing member no longer holds membership interests.

6. Petitioners state that the voting/consent rights held by tax equity investors in transactions typically engaged in by such investors are substantially similar to the voting/consent rights that were held by the tax equity investors in *AES Creative Resources*. Notwithstanding those consent rights, Petitioners note that the Commission still concluded in that case that the tax equity interests at issue did not constitute voting securities for purposes of FPA section 205. Petitioners assert that the Commission's FPA section 203 precedent, while not addressing these types of interests directly, indicates that the issuance or transfer of securities that confer these types of consent rights does not constitute a change in control for purposes of triggering the requirements of FPA section 203.¹³

7. Petitioners cite additional Commission precedent to support the Petition, including the Commission's decision in *D.E. Shaw Plasma Power, L.L.C.*¹⁴ Petitioners note that,

¹¹ According to Petitioners, this company can either be a project company or holding company that wholly owns and controls the project company. *Id.* at 21.

¹² *Id.* at 21-24.

¹³ *Id.* at 24-25.

¹⁴ 102 FERC ¶ 61,265 (2003) (*D.E. Shaw*).

in *D.E. Shaw*, the Commission disclaimed jurisdiction under FPA section 203 “over ‘acquisitions, sales, or other dispositions of Passive Investor interests’ in a jurisdictional public utility.”¹⁵ Petitioners also point to the recent Commission decision in *Starwood Energy Group, LLC*,¹⁶ where the Commission determined that certain limited partnership interests in public utilities did not constitute voting securities for purposes of FPA section 203. Petitioners state that the Commission also provided guidance in Order No. 669¹⁷ as to what veto rights could be retained by holders of non-voting securities without such securities being considered to convey control, noting the Commission’s evaluation of “Regional Transmission Organization” independence and the Securities and Exchange Commission’s (SEC) “no action” letters under the Public Utility Holding Company Act of 1935.¹⁸

8. In addition to requesting that the Commission extend the holding in *AES Creative Resources* to the FPA section 203 context to find that the interests identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203, and thus the transfer of such interests does not require advance Commission authorization under FPA section 203, Petitioners also request that the Commission confirm that holding companies purchasing such interests qualify for the blanket authorization under section 33.1(c)(2)(i) for non-voting securities.¹⁹

¹⁵ Petition at 10 (quoting *D.E. Shaw*, 102 FERC ¶ 61,265 at P 16).

¹⁶ 153 FERC ¶ 61,332 (2015) (*Starwood Energy*).

¹⁷ *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *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).

¹⁸ Petition at 13.

¹⁹ *Id.* at 17-18. Section 33.1(c)(2)(i) states:

Any holding company in a holding company system that includes a transmitting utility or an electric utility is granted a blanket authorization under section 203(a)(2) of the Federal Power Act to purchase, acquire, or take:

(i) Any non-voting security (that does not convey sufficient veto rights over management actions so as to convey control) in a transmitting utility, an electric utility company, or a holding company in a holding company system that includes

(continued ...)

9. Petitioners state that they have also filed comments in the Commission's Notice of Inquiry proceeding in Docket No. RM16-21-000, but request that the Commission not delay action on the Petition pending any new regulations.²⁰

II. Notice of Filing and Responsive Filings

10. Notice of the Petition was published in the *Federal Register*, 81 Fed. Reg. 91,158 (2016), with protests and interventions due on or before January 9, 2017. American Municipal Power, Inc. filed a motion to intervene. NextEra Energy Resources, LLC (NextEra) filed a motion to intervene and comments.

11. In its comments, NextEra states that it strongly supports the Petition. NextEra states that there are a large number of unnecessary FPA section 203 applications filed with the Commission that are costly to filers and cause harmful delay. NextEra notes that parties to transactions will never escape the need to make their own factual determination as to whether their circumstances are similar to *AES Creative Resources*, but NextEra argues that granting the petition would go a long way towards resolving the present unsatisfactory situation.²¹

III. Discussion

A. Procedural issues

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2017), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Commission Determination

13. We grant the Petition. Under FPA section 203, prior Commission authorization is required if "a public utility seeks to sell, lease, or otherwise dispose of jurisdictional

a transmitting utility or an electric utility company.

²⁰ Petition at 29.

²¹ NextEra Comments at 4.

facilities.”²² The Commission has held that the “or otherwise dispose” language of section 203(a)(1) includes transfers of control of jurisdictional facilities.²³ However, the Commission has recognized that some investments are passive and do not convey control as regulated by FPA section 203.²⁴ The Commission listed in the *Supplemental Policy Statement* several circumstances under which an investment was found to be passive:

- (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.²⁵

14. As the Commission noted, “circumstances that convey control in [FPA] section 203 analysis vary depending on a variety of factors, including the transaction structure, the nature of voting rights and/or contractual rights and obligations conveyed in the transaction.”²⁶ Ultimately, the Commission stated that the determination of whether a transaction conveyed control was a factual one, and the burden remained upon the entities involved in a transaction to determine whether they needed to seek authorization.²⁷

15. In *AES Creative Resources*, the Commission reviewed tax equity investments in several utilities by the Goldman Sachs Group, Inc. (Goldman Sachs) and JP Morgan Chase & Co. (JP Morgan) to determine whether those investments made the utilities affiliates of Goldman Sachs and JP Morgan for purposes of the Commission’s market-based regulations under FPA section 205. The Commission distinguished between

²² *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253, at P 45 (2007) (*Supplemental Policy Statement*).

²³ *Id.*

²⁴ *Starwood Energy*, 153 FERC ¶ 61,332 at P 16.

²⁵ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 54.

²⁶ *Id.* P 55.

²⁷ *Id.* P 56.

ownership rights that give investors 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.”²⁸ In *AES Creative Resources*, the Commission determined that power to manage the company was fully vested in the managing member. The Commission found that, for the purposes of the Commission’s market-based rate regulations under FPA section 205, the ownership interests held by the tax equity investors did not confer control or allow the holder to participate in the public utility’s day-to-day operations.²⁹

16. Although the determination in *AES Creative Resources* was made under FPA section 205 rather than FPA section 203, the issue under both provisions of the Federal Power Act is the same: do the interests at issue give the holders control over the activities of the company, or are the interests passive in nature? As a result, because the Commission found, on the basis of the specific facts presented, that the tax equity interests at issue in *AES Creative Resources* constituted non-voting securities that did not transfer control for purposes of FPA section 205, we see no reason not to apply those findings for purposes of FPA section 203.

17. Accordingly, we grant the Petition and find that the tax equity interests in public utilities or public utility holding companies identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203.³⁰ We also confirm that, because such interests do not constitute voting securities for purposes of FPA section 203, the issuance or transfer of them does not constitute a transfer of control with respect to the public utility and does not require advance authorization from the Commission pursuant to FPA section 203(a)(1). In addition, we confirm that, since the

²⁸ *AES Creative Resources*, 129 FERC ¶ 61,239 at P 25 (quoting *Solios Power LLC*, 114 FERC ¶ 61,161, at P 9-10 (2006)).

²⁹ *Id.* PP 26-28.

³⁰ We note that our granting of the Petition is limited to the securities addressed in *AES Creative Resources*, as requested. Petition at 3 (“Petitioners respectfully ask that the Commission extend its holding in *AES Creative Resources* to apply also for purposes of [FPA section 203], *i.e.* to find that securities having the characteristics of the securities at issue in *AES Creative Resources* do not constitute ‘voting securities’ for purposes of [FPA section 203].”). To the extent a future tax equity investor is considering whether securities with characteristics that vary from those presented in *AES Creative Resources* constitute non-voting securities, it remains the investor’s responsibility to make a determination as to whether prior Commission approval for transactions involving such securities is necessary. See *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 54.

Docket No. EL17-26-000

- 8 -

interests identified in *AES Creative Resources* do not constitute voting securities for purposes of FPA section 203, the acquisition of such interests by a holding company qualifies for the blanket authorization set forth in section 33.1(c)(2)(i) of the Commission's regulations.³¹

The Commission orders:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³¹ 18 C.F.R. § 33.1(c)(2)(i) (2017).

Document Content(s)

EL17-26-000.DOCX.....1-8