

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

**Interstate Power and Light Company :
and ITC Midwest LLC :
: :
Joint Petition For Approval Of Sale of :
Utility Assets Pursuant To Section 7- :
102; Transfer of Franchises, Licenses, :
Permits or Rights to Own Pursuant to :
Section 7-203; Transfer of Certificates :
of Convenience and Necessity :
pursuant to Section 8-406; Approval :
of the Discontinuance of Service :
Pursuant to 8-508; and the Granting :
of All Other Necessary and :
Appropriate Relief. :**

Docket No. 07- 0246

**JOINT PETITIONERS' VERIFIED REPLY IN SUPPORT
OF THEIR MOTION IN LIMINE**

REQUESTING A RULING CONFIRMING THAT:

- (1) THE FEDERAL ENERGY REGULATORY COMMISSION HAS EXCLUSIVE
JURISDICTION OVER ITC MIDWEST'S ISSUANCE OF SECURITIES AND RELATED
FINANCING ISSUES, AND**
- (2) ITC MIDWEST IS NOT REQUIRED TO SUBMIT FOR APPROVAL IN THIS
PROCEEDING ANY POTENTIAL AFFILIATED INTEREST AGREEMENTS**

**Petition of Neptune Regional Transmission System, LLC, Case No. 05-E-0669 (Nov. 30, 2005)
New York Public Service Commission**

EXHIBIT C

Re **Neptune Regional Transmission System, LLC**
Case 05-E-0669

New York Public Service Commission
November 30, 2005

BY THE COMMISSION:

*1 BACKGROUND

By petition filed June 6, 2005 (and supplemented October 4, 2005), Neptune Regional Transmission System, LLC (Neptune or petitioner) seeks a declaratory ruling declining jurisdiction over it as the provider of interstate electric transmission capacity. In the alternative, petitioner requests establishment of a lightened regulatory regime for it as a merchant electric corporation pursuant to the Public Service Law (PSL). [FN1]

Neptune is a Delaware limited liability company authorized to do business in New York. Three classes of members hold ownership interests in Neptune: Neptune Power Ventures LLC (NPV), the Class A member, is the managing member and has all voting rights; Atlantic Energy Partners LLC (AEP), the sole Class B member, is a passive owner; and EIF Neptune, LLC (EIF) and Starwood Energy Investors, LLC (Starwood), the Class C members, are also passive owners. [FN2] Petitioner has commenced construction of, and will own, operate and manage, a submarine-underground electric transmission facility from a substation in Sayerville, New Jersey to a Long Island Power Authority (LIPA) substation in the Town of Hempstead, New York. [FN3]

A notice of the petition was published in the State Register on June 22, 2005 in conformance with [§ 202 of the State Administrative Procedure Act](#) (SAPA). No response to the notice was received within the [SAPA § 202\(1\)\(a\)\(ii\)](#) comment period, which expired on August 8, 2005.

THE PETITION

Petitioner explains that, pursuant to orders of the Federal Energy Regulatory Commission (FERC) and a contract between it and LIPA, Neptune will sell to LIPA point-to-point, non-interruptible transmission capacity over its facility. Under certain circumstances, it retains limited rights to resell transmission capacity in the secondary markets; however, it will not sell electricity at either wholesale or retail. [FN4]

According to the petition, the transmission of electricity over Neptune's facility will be entirely interstate in character. Neptune claims that FERC has exclusive jurisdiction over regulation of merchant transmission companies engaged in interstate electric transmission and, in this instance, has authorized Neptune to enter into its contract with LIPA for long-term firm transmission capacity. Moreover, because its facility is designed to transmit power exclusively at the 345 kV level, and therefore cannot provide electric service at retail levels, Neptune contends that the Commission has no jurisdiction over its market-based rates. Petitioner asserts, similarly, that FERC's exclusive authority over Neptune's business operation and business structure preempts the Commission's regulation of its financial and organizational activities. Other than the public health, safety and environmental concerns addressed through PSL Article VII, Neptune argues,

the Commission has no other interests to protect or advance through regulating the ownership, operation or financing of the Neptune transmission facility.

*2 Neptune asserts, in the alternative, that the Commission has determined that merchant electric corporations like it proposing to operate facilities to further competition in the wholesale markets qualified for lightened regulation. According to petitioner, it will be an electric corporation engaging in the transmission of electricity within the meaning of PSL § § 2(13) and 5(1)(b), even though it is structured as a limited liability company. Petitioner states that it is not affiliated with a power marketer.

DISCUSSION AND CONCLUSION

Neptune concedes that we have jurisdiction over it pursuant to PSL Article VII. [FN5] Petitioner also admits that it will be an 'electric corporation' as defined in PSL § 2(13) engaged in the conveying and transportation of electricity within the meaning of PSL § 5(1)(b). [FN6] Petitioner's allegations that FERC has exclusive jurisdiction over it are conclusory and not borne out by careful examination. Consideration of Neptune's alternative request, or the extent of our jurisdiction over it, is thus in order.

In interpreting the PSL, we have asked what reading best carries out the Legislature's intent and advances the public interest. In the AES and Carr Street Orders, [FN7] it was concluded that new forms of electric service providers participating in wholesale markets would be lightly regulated.

Under this realistic appraisal approach, PSL Article 1 adheres to Neptune, because it meets the definition of an electric corporation under PSL § 2(13) and is engaged in the conveying or transportation of electricity under PSL § 5(1)(b). [FN8]

Nothing in the Federal Power Act contravenes this conclusion. All of Article 2 is restricted by its terms to the provision of service to retail residential customers, and so is inapplicable to entities, like Neptune, that operate in wholesale electric markets. Certain provisions of Article 4 are also restricted to retail service. [FN9]

It was decided in the AES and Carr Street Orders that other provisions of Article 4 would pertain to wholesale generators. [FN10] Application of these provisions was deemed necessary in light of obstacles to entry into the generation market. The Article 4 provisions, however, were implemented in a fashion that limited their impact in a competitive market, with the extent of scrutiny afforded a particular transaction reduced to the level the public interest required. Moreover, wholesale generators were allowed to fulfill their PSL § 66(6) obligation to file an annual report by duplicating the report they were required to file under federal law.

Our jurisdiction over an entity transmitting electricity in interstate commerce is more limited than that over wholesale generators of electricity. FERC's jurisdiction over transmission tariffs and rates preempts state rate jurisdiction. [FN11] The preemptive effect of FERC's jurisdiction over the issuance of securities, the acquisition of ownership interests and the transfer of property is somewhat less clear; however, given FERC's primary jurisdiction over the transmission of electricity in interstate commerce and the similarity of 16 U.S.C. § § 824b and 824c to PSL § § 70 and 69, respectively, our jurisdiction in these areas seems preempted. [FN12] We therefore will not assert § § 69, 69-a and 70 jurisdiction over Neptune.

*3 Other PSL Article 4 provisions are not preempted. They include the [PSL § 66\(6\)](#) obligation to file an annual report, which we allow Neptune to meet by duplicating the report required to be filed under federal law, and the provisions of [PSL § 66\(9\) and \(10\)](#), which provide us access to records and reports. Indeed, [16 U.S.C. § 824\(g\)](#) explicitly preserves our jurisdiction in this regard. Moreover, the provisions of [PSL § 66\(2\) and \(5\)](#), which give us jurisdiction to order reasonable improvements in the methods employed by, and the acts and practices of, electric corporations transmitting electricity, [FN13] and [PSL § 66\(8\)](#), which provides for the inspection of the property of electric corporations, are not preempted. In fact, [16 U.S.C. § 824o\(i\)\(3\)](#) [FN14] explicitly recognizes our jurisdiction to take action to ensure the safety, adequacy and reliability of electric service in New York.

Turning to PSL Article 6, several of its provisions that adhere to the rendition of retail service do not pertain to Neptune because it is engaged solely in the transmission of electricity in interstate commerce. [FN15] Application of [PSL § 115](#), on requirements for the competitive bidding of utility purchases, is discretionary and will not be imposed on petitioner. In contrast, [PSL § 119-b](#), on the protection of underground facilities from damage by excavators, adheres to all persons, including entities operating in wholesale electric markets.

The remaining provisions of Article 6 need not be imposed on those solely engaged in the business of transmitting electricity in interstate commerce. [FN16] These provisions were intended to prevent financial manipulation or unwise financial decisions that could adversely impact rates that monopoly providers charge to captive retail customers. Moreover, imposing these requirements could interfere with the plans of entities operating in wholesale electric markets for structuring the financing and ownership of their facilities. Such interference could discourage entry into the wholesale transmission market, adversely affecting the public interest.

Neptune is not affiliated with a power marketer. Therefore, no market power concerns are raised. In the event such issues do arise, [PSL § 110\(1\)](#), on the reporting of ownership interests, and [PSL § 110\(2\)](#), on access to books and records and the filing of reports, would pertain to Neptune. [FN17]

Consequently, we will not impose the requirements of Article 6 on Neptune, except for [§ 119-b](#), and except that we conditionally impose [§ 110\(1\) and \(2\)](#), as discussed above. Petitioner is reminded, however, that it remains subject to the PSL with respect to matters such as enforcement, investigation, safety, reliability, and system improvement, and the other requirements of PSL Articles 1 and 4, to the extent discussed above.

The Commission orders:

1. Neptune Regional Transmission System, LLC shall comply with the Public Service Law in conformance with the requirements set forth in the body of this Order.

*4 2. This proceeding is closed.

FOOTNOTES

FN1 The petition was filed pursuant to 16 NYCRR Part 8, which relates to declaratory rulings; however, the alternative request described in the

petition is that a decision be made granting relief, rather than simply declaring entitlement to such relief.

FN2 The members holding direct or indirect ownership interests in NPV, EIF and Starwood are individuals and institutional investors.

FN3 Neptune was authorized to construct and operate the New York portion of the facility, pursuant to PSL Article VII. Case 02-T-0036, Neptune Regional Transmission System, LLC, Opinion and Order Adopting Joint Proposal and Granting Certificate of Environmental Compatibility and Public Need for a Transmission Facility from New Jersey to Long Island (issued January 23, 2004). The Certificate was subsequently amended by Orders issued October 28, 2004, June 16, 2005 and August 26, 2005 in Case 02-T-0036.

FN4 During the 20-year base period of the contract, Neptune will provide LIPA with 660 megawatts of non-interruptible continuous transfer capacity over its transmission facility.

FN5 Neptune is a 'person' within the meaning of [PSL § 120\(3\)](#) authorized to construct and operate a 'major utility transmission facility' as defined in [PSL § 120\(2\)\(a\)](#).

FN6 According to [PSL § 5-b](#), any jurisdiction we have over Neptune as an electric corporation adheres even before property is acquired or business is transacted.

FN7 Case 99-E-0148, AES Eastern Energy, L.P. and AES Creative Resources, L.P., Order Providing for Lightened Regulation (issued April 23, 1999); Case 98-E-1670, Carr Street Generating Station, L.P., Order Providing for Lightened Regulation (issued April 23, 1999).

FN8 The [PSL § 18-a](#) assessment is applied against gross retail revenues. As long as Neptune remains exclusively a seller of electric transmission capacity in interstate commerce, there will be no electric retail revenues, so no electric assessment will be collected.

FN9 See, e.g., [PSL § § 66\(12\)](#), regarding the filing of tariffs (which are required at our option); [66\(21\)](#), regarding storm plans (which are submitted by retail service electric corporations); [67](#), regarding inspection of meters; [72](#), regarding hearings and rate proceedings; [75](#), regarding excessive charges; and [76](#), regarding rates charged religious bodies and others.

FN10 [PSL § 68](#) provides for the prior approval of construction of new electric plant, unless such plant is reviewed pursuant to PSL Article VII. [PSL § § 69, 69-a and 70](#) provide for the review of security issuances, reorganizations, and transfers of ownership interests, works or systems.

FN11 [California ex rel. Lockyer v. Dynegey, Inc., 375 F.3d 831 \(9th Cir. 2004\)](#), cert. denied [125 S.Ct. 1836 \(2005\)](#); and [Appalachian Power Co. v. Public Service Com., 630 F Supp 656 \(S.D.W.Va 1986\)](#), aff'd [812 F.2d 898 \(4th Cir. 1987\)](#).

FN12 [Duke Energy Trading & Mkt. L.L.C., v. Davis, 267 F.3d 1042, 1056 \(9th Cir. 2001\)](#), cert. den. [535 U.S. 1112 \(2002\)](#), citing [Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 377 \(1988\)](#) (Scalia J. concurring: 'it is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.')

FN13 [PSL § 65\(1\)](#) requires, inter alia, electric corporations to provide such 'facilities as shall be safe and adequate and in all respects just and reasonable.'

FN14 Federal Power Act § 215(i)(3).

FN15 E.g., [PSL § § 112](#), regarding enforcement of rate orders; 113, regarding reparations and refunds; 114, regarding temporary rates; 114-a, regarding exclusion of lobbying costs from rates; 116, regarding discontinuance of water service; 117, regarding consumer deposits; 118, regarding payment to an authorized agency; 119-a, regarding use of utility poles and conduits; and 119- c, regarding recognition of tax reductions in rates.

FN16 These requirements include approval of: loans under § 106; the use of utility revenues for non-utility purposes under § 107; and corporate merger and dissolution certificates under § 108; contracts between affiliated interests under [§ 110\(3\)](#); and, electric, gas, and water purchase contracts under [§ 110\(4\)](#).

FN17 See [16 U.S.C. § 824\(g\)](#) discussed above.

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