

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**Bonneville Power Administration**            )  
**Petitioner**    )

**Docket No. EL04-\_\_-000**

**PETITION FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION AND FOR EXEMPTION FROM FILING FEE AND  
REQUEST FOR EXPEDITED CONSIDERATION**

Bonneville Power Administration (“BPA” or “Petitioner”) hereby petitions the Federal Energy Regulatory Commission (the “Commission”) to disclaim jurisdiction under Section 201 of the Federal Power Act (“FPA”)<sup>1</sup> (the “Petition”) over the owner lessor and indenture trustee (collectively, the “Passive Participants”) in the proposed lease financing of certain electric transmission facilities, including a new 500 kilovolt transmission line in central Washington (the “Facility”). BPA is a federal power marketing administration within the U.S. Department of Energy that markets wholesale electrical power and operates transmission facilities in the Pacific Northwest. The Facility, the construction of which has not yet commenced, will be installed in central Washington and will connect BPA’s Schultz substation near the City of Ellensburg, Washington and its Wautoma substation in the City of Hanford, Washington. Such a disclaimer of jurisdiction is appropriate under Commission precedent because the Passive Participants (1) will not operate or control the operation of the Facility and (2) will not be otherwise engaged in the business of producing, selling or transmitting electric power.

Petitioner requests an expedited determination by January 15th, 2004, so that the proposed transaction can be consummated and construction of the Facility can begin by early

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<sup>1</sup> See 16 U.S.C. § 824 (2000).

February, 2004. Accordingly, Petitioner also requests an abbreviated notice and comment period.

## COMMUNICATIONS

The following persons are authorized to receive service and communications regarding this Petition:

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### I. BACKGROUND

Under the proposal, the Facility will be acquired, constructed and installed by BPA on behalf of the Owner Lessor (as defined below) pursuant to a Construction Contract between BPA and the Owner Lessor. The Facility will include a new 500 kilovolt transmission line and may include fixtures installed to upgrade existing transmission lines also located in central Washington. BPA will construct the Facility on real property easements held by BPA on land that is owned by a variety of parties, both private and governmental.

The Facility will be owned by a special purpose entity, a Delaware corporation (the "Owner Lessor"), which will be formed expressly for the purpose of arranging for the acquisition and financing of the Facility (the "Transaction"). All of the capital stock of the Owner Lessor will be owned by J H Holdings, not individually but acting solely in its capacity as trustee under a trust agreement between J. H. Management Corporation, a Massachusetts corporation ("JHM"), as grantor, and J H Holdings Corporation, a Massachusetts corporation ("JHH"), as trustee. All

of the capital stock of JHM and JHH is owned by The 1960 Trust, an independent charitable support organization qualified under Section 501(c)(3) of the Internal Revenue Code, which is operated for the benefit of Harvard University. The Owner Lessor will not engage in any business other than the Transaction that is the subject of this Petition. The Owner Lessor will finance the acquisition and construction of the Facility by issuing bonds to the public (the “Bonds”). The Bonds will be a non-recourse obligation of the Owner Lessor, payable solely from payments made by BPA under the Facility Lease, as described below.

At or before the time the Bonds are issued, the Owner Lessor will lease its undivided interest in the Facility to BPA under a Lease Agreement, pursuant to which BPA will acquire possession of the Facility from the Owner Lessor for a period of approximately 30 years (the “Facility Lease”). As security in support of its obligation, the Owner Lessor will assign as collateral security all of its rights under the Facility Lease to a bank or trust company (the “Indenture Trustee”), other than its right to receive compensation for participating in the Transaction and its right to indemnification by BPA.

Under the Facility Lease, BPA will make lease payments to the Owner Lessor intended to be sufficient to pay (a) debt service to the Bonds, (b) the fees of the Indenture Trustee for the Bonds, (c) all fees of third parties relating to administrative tasks of carrying and repaying the Bonds and (d) all costs of the Owner Lessor related to the Transaction and a fee to the Owner Lessor for participating in the Transaction. BPA also will agree in the Facility Lease that it will operate and maintain the Facility in the same manner as it operates and maintains its other transmission facilities. To this end, the Passive Participants will have no operating responsibilities or control rights with respect to the Facility under the Facility Lease or any other agreement. Moreover, the Facility Lease will not impede the ability of BPA to transfer

operational control over the Facility to a regional transmission organization. It is anticipated that the Facility Lease will become effective on or about January 29, 2004. The final Facility Lease will be substantially in the form of the draft Facility Lease attached hereto as Attachment 1.

## II. REQUEST FOR DISCLAIMER OF JURISDICTION

BPA requests a disclaimer of jurisdiction over the Passive Participants under Section 201 of the FPA.<sup>2</sup> Based on established Commission precedent, BPA submits that the Passive Participants should not be considered a “public utility,” as defined under Section 201(e) of the FPA.<sup>3</sup>

The Commission has disclaimed jurisdiction over entities taking title to jurisdictional facilities through a sale and leaseback transaction. In 1978, the Commission established a two-step test in *Pacific Power & Light Company* for determining whether an entity with a passive investment interest in a facility falls within the Commission’s jurisdiction under the FPA.<sup>4</sup> The first step is to determine whether the participant’s interest constitutes ownership as contemplated by Section 201(e).<sup>5</sup> The second step is to determine whether the participant is in the business of producing or selling electrical power and has a principal business other than that of a public utility.<sup>6</sup>

The Commission applied this two-step test in *Oglethorpe Power Corporation*, where it considered a request for a disclaimer of jurisdiction with respect to the long term lease and leaseback by Oglethorpe Power Corporation (“Oglethorpe”) of its ownership interest in a hydroelectric project and associated step-up substations to the trustees of owner trusts on behalf

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<sup>2</sup> See 16 U.S.C. § 824.

<sup>3</sup> 16 U.S.C. § 824(e) (defining “public utility” as “any person who owns or operates facilities subject to the jurisdiction of the Commission . . .”).

<sup>4</sup> 3 FERC ¶ 61,119, 61,337 (1978).

<sup>5</sup> See *id.* at 61,337.

<sup>6</sup> See *id.*

of three equity investors (owner participants).<sup>7</sup> In its petition, Oglethorpe represented that the impetus for the equity investors' participation in the transaction was to obtain tax benefits.<sup>8</sup> The participants would "not operate the facilities or have any voice in decisions regarding the operation of the facilities."<sup>9</sup> In addition, Oglethorpe explained that the passive participants were not in the business of producing, selling or transmitting electric power, and that each of their principal businesses was other than that of a public utility. In light of these facts, the Commission concluded that the participants' role in the transaction was "not such that they should be deemed public utilities for the purpose of Section 201(e) of the Act."<sup>10</sup> Therefore, the Commission granted the request to disclaim jurisdiction over the participants in the proposed sale and leaseback transaction.

Likewise, in *City of Vidalia*, the Commission considered a request for disclaimer of jurisdiction with respect to the sale and leaseback of a hydroelectric project and associated step-up transformers.<sup>11</sup> In the *Vidalia* transaction, Catalyst Old River Hydroelectric Limited Partnership ("Catalyst") sold the facilities to an owner trustee, acting on behalf of four owner participants, and Catalyst leased back the facilities from the owner trustee.<sup>12</sup> Neither the owner trustee nor the owner participants had any responsibility for, or control over, operation of any facilities.<sup>13</sup> Also, neither the owner trustee nor the owner participants were engaged in the business of producing or selling electric energy.<sup>14</sup> The sale was for the purpose of permitting the owner participants to become beneficial owners of the facilities in order to be able to take

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<sup>7</sup> 77 FERC ¶ 61,334, 62,490 (1996).

<sup>8</sup> *See id.* at 62,491.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 52 FERC ¶ 61,199 (1990), *modified*, 61 FERC ¶ 61,255 (1992) ("*Vidalia*").

<sup>12</sup> *Id.* at 61,725.

<sup>13</sup> *Id.* at 61,728.

<sup>14</sup> *Id.*

advantage of certain tax benefits. Under the lease, Catalyst was responsible for operating and maintaining the facilities. Based on these facts, the Commission concluded:

The Owner Trustee and Owner Participants will not operate or have a voice in the operation of the project, and are not in the business of producing, selling or transmitting electric power. Catalyst Old River's right and obligation to operate the facilities appears unaffected by the proposed transaction. In view of these circumstances and in light of the Commission's previous holdings, the Commission finds that the Owner Trustee and Owner Participants will not become public utilities subject to the Commission's jurisdiction under Section 201 of the FPA as a result of the proposed sale and leaseback of the project.<sup>15</sup>

Similarly, in the present case, neither the Owner Lessor nor the Indenture Trustee will operate, have a voice in the operation of or hold any control rights in the Facility under the Facility Lease or any other agreement. During the term of the Facility Lease, the Owner Lessor will have a mere passive interest in the Facility. Although the Owner Lessor will own legal title to the Facility and remain a passive owner, BPA will have dominion and control over the Facility during the Facility Lease term. Additionally, neither the Passive Participants nor their affiliates will be in the business of producing, selling or transmitting electric power, either from the Facility or otherwise.

At the conclusion of the Facility Lease, BPA may either (a) purchase the Facility for \$10.00, (b) renew the Facility Lease for a term of one or more years for a nominal annual rental payment or (c) remove the Facility from the Facility site at its own expense. Upon the expiration of the Facility Lease term Owner Lessor would not reacquire possession of the Facility; rather, the Owner Lessor would have its interests in the Facility terminated in the event BPA purchases

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<sup>15</sup> *Id.*; see also, *Baltimore Refuse Energy Sys. Co.*, 40 FERC ¶ 61,366, 62,119 (1987) ("*Baltimore Refuse*") (approving the request for a disclaimer of jurisdiction as "it would be inconsistent with the intent of the FPA to label the parties public utilities and include them within the Commission's jurisdiction because the parties merely held either equitable or legal title to the subject facilities and were clearly removed from the actual operation of the facilities and the sale of power"); and *El Paso Elec. Co.*, 36 FERC ¶ 61,055, 61,119 (1986) (disclaiming FPA jurisdiction over the lessors and equity investors involved in a financing transaction).

or removes the Facility or merely retain its passive interest in the event BPA renews the Facility Lease.

Under certain circumstances, the Indenture Trustee may take possession of the Facility upon the occurrence of certain events of default by BPA. However, in prior cases the Commission has not considered such default provisions to be a present assignment of rights for purposes of Section 201 jurisdiction.<sup>16</sup> Here, too, the Commission should find that such default provisions do not subject either the Owner Lessor or the Indenture Trustee to Commission jurisdiction under Section 201 of the Federal Power Act.

### **III. REQUEST FOR EXPEDITED CONSIDERATION**

Completion of construction of the Facility, which is necessary to improve reliability on BPA's system, is scheduled to occur by the winter of 2005. To meet that schedule, the proposed transaction must be consummated and construction of the Facility must commence by early February, 2004. In order for that to occur, Petitioner requests that the Commission act on the Petition no later than January 15th, 2004.

### **IV. PETITION FOR FEE WAIVER**

BPA is engaged in the official business of the Federal government. Therefore, pursuant to 18 C.F.R § 381.108, BPA requests an exemption in lieu of the filing fee otherwise required by 18 C.F.R § 381.302.

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<sup>16</sup> See, e.g., *Vidalia*, 52 FERC at 61,728 n.31; *Hennepin Energy Resources Co., L.P.*, 48 FERC ¶62,244, 63,326 (1989); *Baltimore Refuse*, 40 FERC at 62,120 n.11.

**V. CONCLUSION**

For the foregoing reasons, Bonneville Power Administration requests that the Commission (1) disclaim jurisdiction over the Passive Participants during the term of the Facility Lease, and all renewals thereof; and (2) grant the petition for exemption from the filing fee pursuant to 18 C.F.R. § 381.108 that would otherwise be applicable to this Petition.

Respectfully submitted,

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Dated: December 23, 2003

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Bonneville Power Administration

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Docket No. EL04-\_\_\_\_-000

NOTICE OF FILING

\_\_\_\_\_, 2003

Take notice that on December 23, 2003, the Bonneville Power Administration, a federal power marketing administration within the U.S. Department of Energy, filed a Petition for Declaratory Order requesting a finding that, under the circumstances described in the Petition, the passive participants in a lease financing of certain electric transmission facilities will not be considered public utilities under Section 201 of the Federal Power Act.

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. §§ 385.211 and 385.214 (2003)). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's web site at <http://www.ferc.gov> using the "eLibrary" link, select "Docket #" and follow the instructions (call 202-208-2222 for assistance). Protests and interventions may be filed electronically via the Internet in lieu of paper; see 18 C.F.R. § 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link.

Comment Date: \_\_\_\_\_, 200\_

Magalie R. Salas  
Secretary