

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of)	DOCKET UE-070494
)	
BONNEVILLE POWER)	
ADMINISTRATION)	ORDER 01
)	
For a Declaratory Order Disclaiming)	
Jurisdiction)	DECLARATORY ORDER
)	
.....)	

1 *Synopsis: The Commission enters an order declaring that the Owner Lessor of certain electrical transmission facilities to be acquired, constructed and/or installed by the Bonneville Power Administration, on the facts presented, would not be a public service company under Washington law and consequently would not be subject to regulation as a public service company.*

PROCEDURAL BACKGROUND

2 The Bonneville Power Administration (Bonneville) filed with the Washington Utilities and Transportation Commission (Commission) on March 12, 2007, a petition for declaratory order, seeking a determination that the Owner Lessor of certain electrical transmission facilities would not be subject to Commission regulation and asking the Commission to disclaim jurisdiction.

3 The Commission served notice of the request on March 16, 2007, to persons and entities that would or might have an interest in such a declaratory order pursuant to RCW 34.05.240(3). The Commission requested that interested persons who wished to be heard in this docket present a statement of fact and law by April 6, 2007, upon the matters alleged in the petition, including the applicability of Washington statutes and Commission rules to the issues presented. The Commission received one response from Avista Corporation (Avista), a public service company providing electrical service in portions of eastern Washington State.

THE FACTS PRESENTED

- 4 **The Petitioner.** The Bonneville Power Administration is an agency of the United States government. It is a federal power marketing administration within the Department of Energy that markets wholesale and interstate electrical transmission services. It operates electrical power transmission facilities in the Pacific Northwest, including facilities in the State of Washington.
- 5 **The project.** Bonneville proposes to acquire, construct and/or install various, as yet undetermined, transmission facilities. These will include system replacements, upgrades and additions to be put into service over time. The facilities will affect primarily existing transmission infrastructure ranging from 69kV to 1000kV. Some of the facilities will be located in Washington and all of the facilities will be used exclusively by Bonneville to provide interstate transmission service.
- 6 **The financing.** The facilities will be financed by a special purpose entity, the Owner Lessor, which will be formally known as Northwest Infrastructure Financing Corporation II, a Delaware corporation to be formed expressly for the purpose of arranging for the acquisition and financing of the facilities. All of the capital stock of the Owner Lessor will be owned by JH Holdings Corporation, a Massachusetts corporation (JHH), solely in its capacity as trustee under a trust agreement between JHH and J.H. Management Corporation (JHM), a Massachusetts corporation, acting as grantor. All of the capital stock of JHH and JHM will be owned by The 1960 Trust, an independent charitable support organization qualified under Section 501(c)(3) of the Internal Revenue Code and operated for the benefit of Harvard University.
- 7 The Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the facilities. The Owner Lessor will initially finance the acquisition and construction of facilities through one or more bank loans. The Owner Lessor's sole source of funds to repay the loans will be payments made by Bonneville under the lease of the facilities to Bonneville.

- 8 **Lease.** The Owner Lessor and Bonneville will execute a master lease (Lease) that will govern and incorporate from time to time separate individual lease commitments between Bonneville and the Owner Lessor for related facilities. Under the Lease, the Owner Lessor will lease its undivided interest in each of the facilities to Bonneville at the time each such facility is acquired, installed and/or constructed. Bonneville will acquire a leasehold interest in and possession of the facilities for a term of seven years from the date that the master lease and the first lease commitment are executed.
- 9 Bonneville will agree in the Lease to operate and maintain the facilities in the same manner it operates and maintains its other transmission facilities. The Owner Lessor will have no operating responsibilities or control rights with respect to the facilities under the Lease or any other agreement.
- 10 The Lease will not impede the ability of Bonneville to transfer operational control over the facilities to a regional transmission organization.
- 11 The Owner Lessor's interest in the facilities is passive and neither the Owner Lessor nor its affiliates will be in the business of producing, selling or transmitting electric power, either from the facilities or otherwise.
- 12 At the end of the Lease term, Bonneville may do any of the following:
- a. Purchase each facility by paying the Owner Lessor the amount necessary to enable the Owner Lessor to pay off the outstanding loans used to finance the construction, installation and/or acquisition of the facilities.
 - b. Renew the Lease for a one-year term for a nominal annual rental payment.
 - c. Remove the facilities at its own expense.
 - d. Execute a new lease if and to the extent the Owner Lessor assigns the lease to another passive owner.

DISCUSSION

13 **Proposed issues for resolution.** Bonneville’s petition presents two issues. Our
interest is in the question whether the Commission should enter a declaratory order
“disclaiming jurisdiction over the Owner Lessor under title 80 RCW ... where, under
Washington law, the Owner Lessor is not a ‘public service company.’”¹

14 The other issue Bonneville raises is whether the Commission should enter a
declaratory order based upon the asserted exclusive jurisdiction of the Federal Energy
Regulatory Commission (FERC) over the proposed facility.

15 The Commission concludes, as discussed below, that resolving the first issue will
permit entry of a declaratory order disclaiming jurisdiction. It is therefore
unnecessary to, and we do not address the second issue.²

16 **Propriety of an order.** The petitioner has demonstrated that the requirements of
RCW 34.05.240(1) are met.³ The petition shows there is uncertainty necessitating
resolution. The Owner Lessor could be seen to fall within the definition of “public
service company” as an “electrical company” (any person and any person’s trustee
owning “electric plant” for hire in Washington; “electric plant” includes all fixtures
used for the transmission of electricity for hire).⁴

¹ Bonneville Petition, ¶ 4.1.

² We note that the federal Court of Appeals decided in *Detroit Edison v. Federal Energy Regulatory Commission*, 333 F.3d 48 (D.C. Cir. 2003) that states retain exclusive jurisdiction over the distribution portion of unbundled delivery service. Again, however, we will not reach the question of exclusive federal jurisdiction in this order.

³ The statute reads in relevant part as follows:

(1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show: (a) That uncertainty necessitating resolution exists; (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion; (c) That the uncertainty adversely affects the petitioner; (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested;

⁴ RCW 80.04.010.

17 The petition demonstrates an actual controversy, showing that resolution of the issue concerning jurisdiction is needed before participants in the financing mechanism are likely to enter the various agreements. The petition demonstrates that the uncertainty significantly and adversely affects the petitioner, as it could be unable to complete the financing for the projects without an order. The information of record shows no adverse effect on others or the general public that might arise to outweigh the adverse effect of uncertainty on the petitioner.⁵

18 Finally, the Commission is authorized by RCW 80.04.015 to make the determinations of fact, and to enter the appropriate orders, necessary to answer the question of whether the Owner Lessor is, or will be under the facts presented, conducting business subject to regulation under Title 80 RCW.

19 **Regulatory Jurisdiction over the Owner Lessor.** Bonneville’s petition asks the Commission to disclaim jurisdiction over the Owner Lessor under Title 80 RCW because the Owner Lessor is not a “public service company” within the meaning of the law. Bonneville cites the Washington State Supreme Court decisions in *West Valley Land Co. v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986), and *Inland Empire Rural Electric, Inc., v. Department of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939).

20 In the *Inland Empire* case, the court determined that a corporation formed to generate, manufacture, purchase, acquire, and distribute electricity over transmission lines only to its members is not a public service company. The Court said,

A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out,

⁵ Avista called attention to concerns and possible adverse consequences if we were to rely on Bonneville’s asserted ground based on federal preemption. As stated above, we do not reach that question. No comments identified any potential adverse consequences from relying on the Washington statutes that define the entities subject to Commission regulation.

expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

199 Wash, 527, at 537. The more recent *West Valley* decision, 107 Wn.2d 359, at 365, quotes this statement from *Inland Empire* with approval. In *West Valley*, the court found that a corporation providing water service to over 3,700 shareholder-members did not come within the Commission's regulatory jurisdiction because it served only its own members and did not hold itself out as serving or ready to serve the general public.

21 The undisputed facts presented to us are that the Owner Lessor does not propose to dedicate or devote any facility to public use. Instead, Bonneville will have exclusive authority and responsibility for operation and use of the facilities. Moreover, the Owner Lessor will not make the facilities for transmission services available to the public as a class, or for use by that portion of the public that can be served. Instead, Bonneville will have sole, exclusive possession of the project under the Lease.

22 **Conclusion.** The Commission concludes and declares on the facts presented that because the Owner Lessor will not dedicate electric plant to a public use the Owner Lessor is not subject to regulation as a public service company under the provisions of Title 80 RCW.

FINDINGS OF FACT

23 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested with the authority to regulate electric companies, in the public interest.

24 (2) The Bonneville Power Administration is a federal power marketing administration within the Department of Energy that markets wholesale and interstate electrical transmission services. It operates electrical power transmission facilities in the Pacific Northwest, including facilities within the State of Washington.

- 25 (3) Bonneville plans to meet its need for additional electrical transmission capacity by acquiring, constructing and/or installing various as yet undetermined transmission facilities, including system replacements, upgrades and additions to be put into service over time. The facilities will affect primarily existing transmission infrastructure ranging from 69kV to 1000kV. Some of the facilities will be located in Washington and all of the facilities will be used exclusively by Bonneville to provide interstate transmission service.
- 26 (4) To finance the proposed transmission facility, a special purpose entity, the Owner Lessor, has been created that will have the limited purposes of financing the facility through the issuance of debt and leasing the facility to Bonneville.
- 27 (5) The 1960 Trust, an independent charitable support organization under the Internal Revenue Code, operated for the benefit of Harvard University, owns all of the capital stock of J H Holdings Corporation (JHH) and J H Management Corporation (JHM). JHH holds all of the capital stock of the Owner Lessor as trustee under a trust agreement between it and JHM. Bonneville and the special purpose entity will enter a seven-year master lease agreement, with the special purpose entity as lessor of the transmission facility and Bonneville as lessee.
- 28 (6) The Owner Lessor will have no control over and no obligations related to the operation, maintenance, repair or replacement of any facility. Bonneville will accept those responsibilities under the master lease agreement and will operate and maintain the facilities in the same manner it operates and maintains facilities that it owns. The Owner Lessor will provide the facility for use only by Bonneville and will not provide service to the public.

- 29 (7) Uncertainty and an actual controversy exist over whether the Owner Lessor will be subject to the Commission's regulatory jurisdiction on the facts presented in the petition for declaratory order. The uncertainty has an adverse effect on Bonneville by presenting a potential barrier to completion of the facilities. The record before the Commission demonstrates no adverse effect on others or the general public from entry of a declaratory order resolving the uncertainty and controversy.

CONCLUSIONS OF LAW

- 30 (1) The Washington Utilities and Transportation Commission has the authority to enter a declaratory order that determines, on specified facts, whether an owner of electrical plant is a public service company and subject to the regulatory jurisdiction of the Commission. *RCW 34.05.240; RCW 80.04.015*
- 31 (2) The proposed transmission facilities are electric plant. The Owner Lessor meets the definition of an electrical company, which includes any person and any person's trustee owning any electrical plant for hire within Washington State. *RCW 80.04.010*.
- 32 (3) The Owner Lessor will not, on the facts presented, offer electrical service to the public. The Owner Lessor, in that circumstance, is not a public service company. *RCW 80.04.010; West Valley Land Co. v. Nob Hill Water Association, 107 Wn.2d 359, 729 P.2d 42 (1986); Inland Empire Rural Electric, Inc., v. Department of Public Service, 199 Wash. 527, 92 P.2d 258 (1939)*.
- 33 (4) The Commission should enter an order declaring that the actions of the Owner Lessor, under the facts presented in the petition for declaratory order, do not fall within the Commission's regulatory jurisdiction.

VI. ORDER

THE COMMISSION DECLARES AND ORDERS:

- 34 The actions of the Owner Lessor as discussed in the body of this Order do not fall within the Commission's regulatory jurisdiction on the facts presented to the Commission.

DATED at Olympia, Washington, and effective May 15,2007.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.