January [ ], 2004

Ms. Catherine A. Fisher, Director
Division of Investment Management
Office of Public Utility Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Bonneville Power Administration

Dear Ms. Fisher:

We are acting as special counsel for Bonneville Power Administration ("BPA") in connection with 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. For the reasons described below, we respectfully request that the Staff issue a no-action letter (i) confirming that neither the Owner Lessor nor the Indenture Trustee (as such terms are herein defined), will as a result of this transaction, be an electric utility company within the meaning of Section 2(a)(3) of the Public Utility Holding Company Act of 1935, as amended (the "Act"),[1] and (ii) stating that it will not recommend any enforcement action to the Securities and Exchange Commission (the "Commission") under the Act against the Owner Lessor or Indenture Trustee for engaging in the lease transaction described herein.

A. 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.

[1] 15 U.S.C. § 79b(a)(3).

The Facility will be owned by a special purpose entity, Northwest Infrastructure Financing Corp., a Delaware corporation (the "Owner Lessor"), formed expressly and solely 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" and, together with the Owner Lessor, the "Passive Participants"), 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 February 12, 2004. The final Facility Lease will be substantially in the form of the draft Facility Lease attached hereto as Attachment 1.

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 or removes the Facility or merely retain its passive interest in the event BPA renews the Facility Lease. Under certain circumstances, although highly unlikely, the Indenture Trustee may take possession of the Facility upon the occurrence of certain events of default by BPA.[2]

B. Analysis

In 1973, the Commission adopted Rule 7(d), which created a safe harbor for the owner/lessors in certain lease transactions by recognizing that those passive owners of leased facilities need not be treated as "owners" under Section 2(a)(3) of the Act.[3] The requirements of

[2] In that circumstance the facts relevant to this request for a no-action letter would no longer apply and all regulatory approvals necessary for the possession or operation of the Project would be obtained.

[3] Rule 7(d) provides, in pertinent part, that a company will not be deemed to be an electric utility company or a gas utility company under the Act even though it owns facilities specified in Sections 2(a)(3) and 2(a)(4) when

> such company owns the facility as a company, as a trustee, or as holder of a beneficial interest under a trust, or as a purchaser or assignee of any of the foregoing; and
>
> (A) such facility is leased under a net lease directly to a public utility company either as a sole lessee or joint lessee with one or more other public utility companies, and such facility is or is to be employed by the lessee in its operations as a public utility company; and
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> (B) such company is otherwise primarily engaged in one or more businesses other than the business of a public-utility company, or is a company all of whose equity interest is owned by one or more companies so engaged, either directly or through subsidiary companies; and
>
> (C) the terms of the lease have been expressly authorized or approved by a regulatory authority having jurisdiction over the rates and service of the public-utility company which leases the facility; and
>
> (D) the lease of the facility extends for an initial term of not less than 15 years, except for termination of the lease upon events therein set forth, unless the owner shall state in the initial certificate filed pursuant to paragraph (d)(5) that a shorter term specified in the lease is not less than two-thirds of the expected useful life of the facility; and
>
> (E) the rent reserved under the lease shall not include any amount based, directly or indirectly, on revenues or income of the public-utility company, or any part thereof.

17 C.F.R. § 250.7(d).

Rule 7(d), however, were fashioned to address lease transactions where the lessee was a traditional state-regulated public utility. In this case, the lessee is a governmental entity created by Congress. As a result, the Transaction will not comply with the strict requirements of Rule 7(d). Nonetheless, the Commission Staff, on numerous occasions, has concurred with the conclusion that, when a lease transaction broadly satisfies the policies embodied in Rule 7(d) and an exemption would conform with the policies and intent of the Act, a no-action position may be taken even though the particular facts and circumstances of the lease vary from the strict requirements of the rule.[4]

a. Rule 7(d)(1)(A)

Rule 7(d)(1)(A) requires that the leases be net leases to a public utility company of facilities to be employed in the operations of that public utility company. The Facility Lease will be a net lease of facilities used to provide service to BPA's customers, all of which is consistent with paragraph (1)(A). The Facility Lease, however, will not be to a "public utility company" because of the operation of Section 2(c) of the Act.[5] Nevertheless, because BPA will be operating the leased Facility to transmit power on behalf of, and to make sales of electricity to, its customers, the policies underlying the requirement of Rule 7(d)(1)(A) are satisfied. The Staff has reached a no-action position in similar situations regarding the lessors of generating facilities to an exempt wholesale generator that is itself exempt from the Act. In that case, the lessors, despite holding legal title to the generating facilities, would not be subject to regulation under the Act because it would be illogical to regulate the lessors when the lessee is itself exempt.[6]

In this case, moreover, BPA is a governmental entity that does not operate on a for profit basis and has no shareholders. Thus, as Congress recognized in exempting governmental entities pursuant to Section 2(c), BPA's ratepayers do not require protection under the Act and the goal of protecting shareholders is inapplicable in this case.

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[4] *See, e.g., City of Gainesville,* SEC No-Action Letter (Nov. 30, 1998) (noting non-compliance with paragraphs (1)(A) and (1)(C); *GE Capital Corp.,* SEC No-Action Letter (Jan. 11, 1996) (citing a number of no-action letters where the terms of the lease transaction varied from the technical requirements of Rule 7(d)).

[5] Section 2(c) states, in pertinent part, that "[n]o provision of this title shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing . . . ."

[6] *Indeck-Olean Limited Partnership,* SEC No-Action Letter (May 24, 1999). *See, also, New York State Electric & Gas Corp.,* SEC No-Action Letter (May 11, 1999). The Staff has addressed an analogous situation when considering entities that operate facilities on behalf of entities that are exempt under Section 2(c), concurring with the conclusion that an operator of facilities on behalf of such an entity would not itself be subject to the Act. *See, e.g., LG&E Energy Corp.,* SEC No-Action Letter (July 13, 1998); *Louis Dreyfus Electric Power,* SEC No-Action Letter (April 8, 1996).

b. Rule 7(d)(1)(B)

Rule 7(d)(1)(B) requires the owner of the leased facility to be primarily engaged in one or more businesses other than the business of a public utility company. The Owner Lessor satisfies this requirement because it is a special purpose entity that is indirectly owned by a charitable support organization. It will not be making sales of electricity or gas.

c. Rule 7(d)(1)(C)

Rule 7(d)(1)(C) requires the terms of the lease to have been authorized or approved by a regulatory authority. Because BPA is not a traditional state-regulated public utility, the Facility Lease will not be reviewed and approved by local utility regulators. Similarly, while the Federal Energy Regulatory Commission ("FERC") has limited jurisdiction over BPA's rates under the Pacific Northwest Electric Power Planning and Conservation Act,[7] FERC does not have authority under that statute to review the Facility Lease. Nonetheless, because Congress allowed BPA to lease facilities to supply electricity to its customers without regulatory approval of those leases, the requirements of Rule 7(d)(1)(C) should be deemed to have been satisfied. Further, BPA, as noted, is a governmental entity that has no shareholders and does not operate on a for profit basis. BPA thus has no incentive to enter into a lease arrangement on terms that would disadvantage its ratepayers. Approval of the terms of the lease, therefore, is not necessary for the protection under the Act of either ratepayers or shareholders.

d. Rule 7(d)(1)(D)

Rule 7(d)(1)(D) requires the lease term to extend for 15 years or two-thirds of the useful life of the leased equipment. Because the Facility Lease will have a term of approximately 30 years, this requirement is satisfied.

e. Rule 7(d)(1)(E)

Rule 7(d)(1)(E) requires that the rent not include any amount based on revenues or income of the lessee. The Facility Lease will set periodic rents that are unrelated to the income or revenues of the lessee (*i.e.* BPA).

Conclusion.

The Commission Staff has, on a number of occasions, concurred with the conclusion that, when a lease transaction broadly satisfies the policies embodied in Rule 7(d) and an exemption

[7] 16 U.S.C. Chapter 12H (1994 & Supp. I 1995).

would conform with the policies and intent of the Act, a no-action position may be taken even though the particular facts and circumstances of the lease vary from the strict requirements of the rule. The Commission Staff also has concurred that the owner of facilities leased to others who are exempt, and operators of facilities on behalf of entities that are otherwise exempt, would not be subject to the Act. We believe that both of those conclusions are warranted here with respect to the proposed Transaction.[8] We therefore request that the Commission Staff issue a no-action letter (i) confirming that neither of the Passive Participants, will as a result of the Transaction, be an electric utility company within the meaning of the Act, and (ii) stating that it will not recommend any enforcement action to the Commission under the Act against the Passive Participants for engaging in the proposed Transaction.

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 by early February, 2004. In order for that to occur, BPA requests that your response be furnished no later than February 4, 2004.

If you have any questions concerning this letter, please contact the undersigned at (202) 339-8461. If for any reason you do not concur with any of the views expressed in this letter, we respectfully request an opportunity to confer with you prior to any written response.

Very truly yours,

Michael D. Hornstein

[8] In addition, we note that paragraph (7) of Rule 7(d) under the Act states, in part, that the "provisions of paragraphs (d)(1) and (5). . . shall not apply if the facilities therein specified are in possession of and operated by one or more governmental bodies or instrumentalities specified in section 2(c) of the Act." In the Transaction, the Facility will be in the possession of, and operated by, BPA, an entity specified in Section 2(c) of the Act, under the terms of the Subleases. We believe that Rule 7(d)(7) may be construed to provide that neither the Owner Lessor nor the Indenture Trustee would be deemed an "electric utility company" within the meaning of Section 2(a)(3) of the Act without (i) the provisions of the Lease complying with the provisions of Rule 7(d)(1), and (ii) meeting the filing requirements of Rule 7(d)(5). The Staff has taken a no-action position not inconsistent with this interpretation. In General Electric Capital Corporation, SEC No-Action Letter (January 11, 1996), the Staff did not dispute the assertion made by General Electric Capital Corporation ("GECC") that in the case of any lease between GECC and one or more government-owned utilities, GECC and any related lessors and equity participants would be entitled to rely on Rule 7(d)(7) under the Act whether or not such lease complied with Rule 7(d)(1). In any event, we do not rely on this interpretation for the "no-action" position sought by this letter.