

BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

In the matter of the Petition of

Bonneville Power Administration  
for Declaratory Order  
Disclaiming Jurisdiction

Docket No. U

BONNEVILLE'S PETITION FOR  
DECLARATORY ORDER  
DISCLAIMING JURISDICTION

**1. Petitioner**

1.1 The Petitioner is Bonneville Power Administration ("Bonneville"). Bonneville is a federal power marketing administration within the Department of Energy of the United States of America that markets wholesale electrical power and interstate transmission services and operates transmission facilities in the Pacific Northwest.

Petitioner:

Robb F. Roberts  
Bonneville Power Administration  
Office of General Counsel  
Routing LC-7  
905 Northeast 11th Avenue  
P.O. Box 3621  
Portland, Oregon 97232  
Telephone: (503) 230-4201  
Facsimile: (503) 230-7405  
Email: rfroberts@bpa.gov

Petitioner's attorneys:

Marc R. Greenough  
Orrick, Herrington & Sutcliffe LLP  
719 Second Avenue, Suite 900  
Seattle, Washington 98104  
Telephone: (206) 839-4365  
Facsimile: (206) 839-4301  
Email: mgreenough@orrick.com

Michael D. Hornstein  
Orrick, Herrington & Sutcliffe LLP  
Washington Harbour  
3050 K Street, N.W.  
Washington, D.C. 20007  
Telephone: (202) 339-8461  
Facsimile: (202) 339-8500  
Email: mhornstein@orrick.com

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BONNEVILLE'S PETITION FOR DECLARATORY ORDER  
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ORRICK, HERRINGTON & SUTCLIFFE LLP  
719 Second Avenue, Suite 900  
Seattle, Washington 98104  
(206) 839-4365

## 2. Statutes and Rules in Issue

### 2.1 Federal statutes

Federal Power Act, 16 U.S.C. § 824.

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79.

### 2.2 State statutes

RCW 34.05.240.

RCW 80.04.010.

RCW 80.04.015.

### 2.3 State rules

WAC 480-07-930.

## 3. Relief Requested

3.1 Bonneville petitions the Washington Utilities and Transportation Commission (the “Commission”) under RCW 34.05.240 and WAC 480-07-930 for a declaratory order disclaiming jurisdiction under title 80 RCW over the owner lessor and the indenture trustee in Bonneville’s proposed lease financing of certain electric transmission facilities to be used exclusively in interstate commerce, including a new transmission line in central Washington (the “Facility”).

## 4. Statement of Facts

### 4.1 The Facility

4.1.1 The Facility will be used exclusively by Bonneville to provide interstate transmission service and will not be available for use for bundled retail service. Declaration of Brian L. Silverstein (“Silverstein Decl.”), ¶ 11.

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4.1.2 Bonneville has completed design of the Facility, which is defined to consist solely of fixtures, primarily transmission lines and towers associated with a new 64-mile-long 500-kV transmission line. Silverstein Decl., ¶4. Bonneville expects the design, construction and acquisition of the Facility to cost approximately \$110 million. Silverstein Decl., ¶4.

4.1.3 The line will connect Bonneville's existing Schultz Substation near Ellensburg to a new substation to be called the Wautoma Substation, which will be built two miles south of State Route 24 in Benton County. Silverstein Decl., ¶5. The line will run through the middle of the Columbia River Basin, cross the Hanford Reach National Monument and cross the U.S. Army's Yakima Firing Range. Silverstein Decl., ¶5.

4.1.4 The Facility is designed to relieve transmission congestion on Bonneville's network transmission grid including the North-of-Hanford Path in central Washington and in the heavily populated Interstate 5 corridor during spring and summer. Silverstein Decl., ¶6.

4.1.5 The Facility is expected to add approximately 400-600 MW of transfer capacity to the North-of-Hanford path. Silverstein Decl., ¶7.

4.1.6 The Facility reduces over-reliance on Remedial Actions Schemes, especially for single contingencies, and it also provides resiliency and margin to the grid, which provides flexibility to take maintenance outages. Silverstein Decl., ¶8.

4.1.7 Bonneville's infrastructure program is intended to prevent events such as the crippling blackout of August 14, 2003, that affected an estimated 50 million people in the United States and Canada. Silverstein Decl., ¶9.

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4.1.8 In addition, the Facility will assist Bonneville in providing firm transmission service to proposed new generators locating in the Interstate 5 corridor. Silverstein Decl., ¶ 10.

4.1.9 The Facility will be constructed on real property easements or similar rights held by Bonneville on land that is owned by a variety of parties, both private and governmental. Silverstein Decl., ¶ 12.

#### 4.2 The SPE

4.2.1 A special purpose entity (Northwest Infrastructure Financing Corp., the “SPE”) has been established as a Delaware corporation and, with the inclusion of forthcoming amendments to the SPE’s articles of incorporation, will have the limited purposes of: (a) acquiring, constructing and equipping the Facility; (b) leasing the Facility to Bonneville; (c) financing the Facility through the issuance of debt; and (d) taking all actions reasonably necessary or convenient to consummate a construction agency agreement with Bonneville, the lease and any related bond indentures. Declaration of Robb F. Roberts (“Roberts Decl.”), ¶ 4.

4.2.2 All of the capital stock of the SPE is 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. Roberts Decl., ¶5. 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, and is operated for the benefit of Harvard University. Roberts Decl., ¶5.

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#### 4.3 The Construction Agency Agreement

4.3.1 Bonneville and the SPE will enter into a Construction Agency Agreement under which Bonneville will construct the Facility on behalf of the SPE. Roberts Decl., ¶ 6. The proposed form of Construction Agency Agreement is attached to the Documents Declaration as Exhibit A.

4.3.2 Bonneville awarded a contract for major Facility construction work in January 2004, with construction scheduled to start in Spring 2004, to be completed by Winter 2005 and energized by Spring 2006. Silverstein Decl., ¶ 13.

#### 4.4 The Lease

4.4.1 Bonneville and the SPE will enter into a lease agreement (the "Lease") with the SPE as lessor and Bonneville as lessee of the Facility. Roberts Decl., ¶ 7. The proposed form of Lease is attached to the Documents Declaration as Exhibit B.

4.4.2 Under the Lease, Bonneville will make specified lease payments to the SPE. Lease, § 2.3.

4.4.3 The stated term of the Lease will be 30 years. Lease, § 2.2.

4.4.4 The SPE will have no control over and no obligation with respect to the Facility, including the operation, maintenance, repair, replacement or use of the Facility. Lease, § 3.2.

4.4.5 Bonneville will pay all costs of maintaining the Facility and will maintain the Facility in the same manner in which Bonneville maintains similar facilities that it owns. Lease, § 3.3.

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4.4.6 Bonneville may suspend or terminate operation of the Facility in its discretion. Lease, § 3.2.

4.4.7 The SPE will suspend, delay or terminate construction of the Facility at the direction of Bonneville and will not suspend, delay or terminate construction of the Facility other than at the direction of Bonneville. Lease, § 3.1.

4.4.8 The SPE has waived all rights to exclude Bonneville from possession of the Facility if Bonneville defaults under the Lease (other than in its payments under the Lease). Lease, § 6.2.

4.4.9 If Bonneville defaults in its payments under the Lease, Bonneville has agreed to surrender use and possession of the Facility. Lease, §6.3. However, the SPE's remedies against Bonneville are limited to remedies available under federal law; federal law provides that the exclusive remedy for breach of contract by Bonneville is a judgment for money damages. Lease, § 6.8.

4.4.10 Upon the termination of the Lease, Bonneville may purchase the Facility for \$10, renew the Lease for a term of one or more years for a nominal annual rental payment or remove the Facility from the Facility site at its own expense. Lease, § 7.1.

#### 4.5 The Trustee

4.5.1 The SPE will enter into an indenture of trust (the "Indenture") with a commercial trust bank, as trustee, authorized to conduct business in Washington (the "Trustee"). Roberts Decl., ¶ 8.

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4.6 The Indenture

4.6.1 The proposed form of Indenture is attached to the Documents Declaration as Exhibit C.

4.6.2 Under the Indenture, the SPE will pledge the “Trust Estate” to the Trustee. Indenture, p. 2. The “Trust Estate” consists primarily of the SPE’s interest in the Lease (including the SPE’s right to receive payments under the Lease) and in the Facility. Indenture, p 2.

4.6.3 Bonneville has full authority to cure any of the SPE’s defaults under the Indenture, and the Trustee has agreed to accept such performance by Bonneville as performance by the SPE. Indenture, § 8.01.

4.7 The Bonds

4.7.1 Under the Indenture, the SPE will issue bonds (the “Bonds”) secured by the Trust Estate. Indenture, § 2.02.

4.7.2 The Bonds will be non-recourse obligations of the SPE, payable solely from payments made by Bonneville under the Lease. Indenture, § 7.01.

4.7.3 The proceeds of the Bonds will be used by Bonneville to pay costs of designing, constructing and acquiring the Facility and to pay costs of issuing the Bonds. Indenture, § 5.02.

4.7.4 Bonneville is required to make payments under the Lease sufficient to repay the Bonds. Lease, § 2.3.

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4.7.5 Bonneville has the option at any time to purchase all or any portion of the Facility by making a purchase option payment equal to the amount necessary to redeem the applicable portion of outstanding Bonds. Lease, § 7.1.

4.7.6 Bonneville may terminate the Lease only by redeeming or providing for the payment of all the outstanding Bonds. Lease, § 7.2.

## **5. Statement of Issues**

5.1 Whether the Commission should enter a declaratory order disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW where, under federal law, the Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce.

5.2 Whether the Commission should enter a declaratory order disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW where, under Washington law, neither the SPE nor the Trustee is a “public service company.”

## **6. Evidence Relied Upon**

6.1 Bonneville relies upon this petition, the Declaration of Brian L. Silverstein, the Declaration of Robb F. Roberts and the Documents Declaration of Marc R. Greenough, including all attached exhibits.

## **7. Grounds for Entry of Declaratory Order**

7.1 Entry of a Declaratory Order is Proper Under RCW 34.05.240.

7.1.1 Bonneville may petition the Commission for a declaratory order with respect to the applicability to the circumstances specified in this petition of statutes enforceable by the Commission. RCW 34.05.240(1). This petition sets forth facts and reasons to show

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(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;<sup>1</sup> (c) that the uncertainty adversely affects Bonneville; (d) that the adverse effect of uncertainty on Bonneville outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and (e) that this petition complies with requirements established by the Commission. *See* RCW 34.05.240(1).

7.1.2 The uncertainty that must be resolved is whether the Commission may assert jurisdiction over the SPE and the Trustee. The Commission has jurisdiction over “public service companies” under title 80 RCW. “Public service company” includes any “electrical company.” RCW 80.04.010. “Electrical company” includes any person and any person’s trustee owning any “electric plant” for hire within Washington. RCW 80.04.010. “Electric plant” includes all fixtures to be used for the transmission of electricity for hire. RCW 80.04.010. Under these definitions, the SPE’s ownership of the Facility and the Trustee’s acceptance of the Trust Estate under the Indenture arguably subject them to the jurisdiction of the Commission. The Commission should resolve this uncertainty.

7.1.3 This uncertainty gives rise to an actual controversy, such that the declaratory order requested would not be merely an advisory opinion. The SPE and the Trustee are unlikely to enter into the various agreements required to finance the Facility if there is any

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<sup>1</sup> For purposes of a declaratory judgment action under chapter 7.24 RCW, a justiciable controversy is: (1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive. *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

uncertainty that they will be subject to the jurisdiction of the Commission with respect to the Facility. Roberts Decl., ¶ 9.

7.1.4 This uncertainty adversely affects Bonneville because Bonneville will be unable to proceed with the proposed lease transaction and have the Facility financed in the manner desired by Bonneville unless the SPE and the Trustee enter into the proposed agreements. Roberts Decl., ¶ 10.

7.1.5 The adverse effect of this uncertainty on Bonneville as well as on the general public is significant: Bonneville will not be able to achieve the desired reduction in transmission congestion and provision of firm transmission service. This adverse effect far outweighs any adverse effects on others or on the general public that could arise from the Commission disclaiming jurisdiction over the SPE and the Trustee, which have no control over the operation, maintenance, repair, replacement or use of the Facility.

7.2 Entry of a Declaratory Order is Proper Under RCW 80.04.015.

7.2.1 The question of whether or not the SPE and the Trustee will be conducting business subject to regulation under title 80 RCW is a question of fact to be determined by the Commission. RCW 80.04.015. The Commission is authorized and directed to issue necessary orders declaring activities to be subject to or not subject to the provisions of title 80 RCW. RCW 80.04.015.

7.3 The Commission should enter a declaratory order disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW because, under federal law, FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce.

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7.3.1 Under Section 201 of the Federal Power Act, FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce:

(b) Use or sale of electric energy in interstate commerce.

(1) **The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce** and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824 (emphasis supplied).

7.3.2 The Facility will be used by Bonneville to provide interstate transmission service and will not be available for use for bundled retail service. Silverstein Decl., ¶11. Under the Federal Power Act, FERC has exclusive jurisdiction over such transmission and therefore sole jurisdiction over the Facility. *See* 16 U.S.C. § 824(b). The Commission should therefore disclaim jurisdiction over the SPE and the Trustee with respect to the Facility.

7.3.3 Bonneville has petitioned FERC for a disclaimer of jurisdiction over the SPE and the Trustee. Roberts Decl., ¶ 11. The form of the petition is attached to the Documents Declaration as Exhibit D. As set forth in the FERC petition, FERC has disclaimed jurisdiction over entities taking title to jurisdictional facilities through a sale and leaseback transaction where the entities have no operational control over the facilities. Based on FERC precedent, neither the

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SPE nor the Trustee should be considered a “public utility” as defined under Section 201(e) of the Federal Power Act, 16 U.S.C. § 824(e). Similarly, the Commission should disclaim jurisdiction over the SPE and Trustee with respect to the Facility, as they have no control over the operation, maintenance, repair, replacement or use of the Facility.

7.3.4 Bonneville is also requesting that the Securities and Exchange Commission (the “SEC”) staff confirm that neither the SPE nor the Trustee is an “electric utility company” within the meaning of Section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79. Roberts Decl., ¶ 12. The form of the request is attached to the Documents Declaration as Exhibit E. As set forth in the request, SEC staff have found that lessors of generating facilities that have no operational control over the facilities, despite holding legal title to the facilities, would not be subject to regulation under the Public Utility Holding Company Act of 1935. Similarly, the Commission should disclaim jurisdiction over the SPE and Trustee with respect to the Facility, as they have no control over the operation, maintenance, repair, replacement or use of the Facility.

7.4 The Commission should enter a declaratory order disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW because, under Washington law, neither the SPE nor the Trustee is a “public service company.”

7.4.1 The Supreme Court has established the following long-standing test to determine whether a corporation is subject to the jurisdiction of the Commission:

A corporation becomes a public service corporation, subject to the 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, expressly or impliedly, to supply its service or product for use

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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.

*West Valley Land Co. v. Nob Hill Water Ass'n*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986) (citing *Inland Empire Rural Elec., Inc. v. Department of Pub. Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939)).

7.4.2 In *West Valley*, the Court found that under a literal application of the definitions set forth in RCW 80.04.010, a water corporation with over 3,700 shareholder members would come within the regulatory provisions in title 80 RCW as a “water company.” 107 Wn.2d at 364. However, the Court determined that the “water company” in question had not held itself out as serving, or ready to serve, the general public. 107 Wn.2d at 366.

7.4.3 In *Inland Empire*, the Court held that a corporation formed to generate, manufacture, purchase, acquire and distribute electricity over transmission lines to its members was not a public service corporation. 199 Wash. at 539. The Court found that the members of the corporation did not stand in the relation of members of the public needing the protection of the public service commission in the matter of rates and service supplied by an independent corporation. 199 Wash. at 539.

7.4.4 Neither the SPE nor the Trustee proposes to dedicate or devote the Facility to a public use. On the contrary, under the Lease, Bonneville will have exclusive authority and responsibility for operation, maintenance, repair, replacement and use of the Facility. Lease, § 3.2. Nor will the SPE or the Trustee supply the Facility for use either by the public as a class or by that portion of the public that can be served. Instead, Bonneville will have sole and exclusive possession of the Project under the Lease. Lease, § 2.1.

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Seattle, Washington 98104  
(206) 839-4365

## 8. Conclusion

8.1 For the reasons set forth above, Bonneville requests that the Commission disclaim jurisdiction over the SPE and the Trustee under title 80 RCW.

Respectfully submitted,

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Marc R. Greenough, WSBA No. 24427  
Orrick, Herrington & Sutcliffe LLP  
719 Second Avenue, Suite 900  
Seattle, Washington 98104  
Telephone: (206) 839-4365  
Facsimile: (206) 839-4301  
E-mail: mgreenough@orrick.com

Michael D. Hornstein  
Orrick, Herrington & Sutcliffe LLP  
Washington Harbour  
3050 K Street, N.W.  
Washington, D.C. 20007  
Telephone: (202) 339-8461  
Facsimile: (202) 339-8500  
E-mail: mhornstein@orrick.com

*Attorneys for Bonneville Power Administration*

Dated: January \_\_\_\_\_, 2004

BEFORE THE WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION

In the matter of the Petition of

Docket No. U

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following documents upon all parties of record in this proceeding, by legal messenger:

1. Bonneville's Petition for Declaratory Order Disclaiming Jurisdiction.
2. Declaration of Brian L. Silverstein.
3. Declaration of Robb F. Roberts.
4. Documents Declaration of Marc R. Greenough.
5. This Certificate of Service.

Dated at Seattle, Washington, this \_\_\_\_\_ day of January, 2004.

\_\_\_\_\_  
Cheryl Eaton

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ORRICK, HERRINGTON & SUTCLIFFE LLP  
719 Second Avenue, Suite 900  
Seattle, Washington 98104  
(206) 839-4365