

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
)	DOCKET NO. UE-051439
SEA BREEZE PACIFIC JUAN DE)	
FUCA CABLE, LP, OLYMPIC)	ORDER NO. 01
CONVERTER CORPORATION, AND)	
VICTORIA CONVERTER, NSULC,)	
)	DECLARATORY ORDER
For a Declaratory Order Disclaiming)	
Jurisdiction)	
.....)	

1 ***Synopsis:** The Commission enters an order declaring that the owners of a merchant transmission line to be operated between Port Angeles, Washington, and near Victoria, British Columbia, on the facts presented, would not be public service companies under Washington law and consequently would not be subject to regulation under Title 80 RCW as public service companies.*

I. **PROCEDURE**

2 On September 26, 2005, Sea Breeze Pacific Juan de Fuca Cable, LP, Olympic Converter Corporation, and Victoria Converter, NSULC (“Petitioners”), filed with the Washington Utilities and Transportation Commission (“Commission”) a petition for declaratory order, seeking a determination that the Petitioners, who plan to construct electrical transmission facilities between Port Angeles, Washington, and Victoria, British Columbia, would not be subject to Commission regulation, and asking the Commission to disclaim jurisdiction.

3 The Commission served notice of the request 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 received no responses.

II. THE FACTS PRESENTED

- 4 **The Petitioners.** Sea Breeze Pacific Juan de Fuca Cable, LP (“Sea Breeze”), is a limited partnership organized under Delaware law for the special and sole purpose of financing and developing the Juan de Fuca Project, described below. Olympic Converter Corporation will own all U.S. facilities and permits for the project, while Victoria Converter, NSULC, will own all Canadian facilities and permits. Olympic and Victoria are Sea Breeze subsidiaries.
- 5 **The project.** The Juan de Fuca Cable Project, or “JdF Project,” that Petitioners plan to construct will consist of a 22-mile long 540-MW, direct-current (“DC”) submarine cable extending below the Strait of Juan de Fuca, from a DC/alternating current (“AC”) converter station to be built in or near Port Angeles, Washington, across the international border to a DC/AC converter station near Victoria, British Columbia. The JdF Project will use High Voltage Direct Current (HVDC) Light technology to transmit the electric current through underground and submarine cables.
- 6 After the DC current is converted to AC current at the converter stations, the JdF Project will connect with the Bonneville Power Administration’s (BPA) transmission network at a substation in Port Angeles and the British Columbia Transmission Commission’s (BCTC) transmission network at a substation near Victoria at a voltage of 230 KV. The Petitioners intend that the JdF Project augment the two existing electrical interconnections between Canada and the United States in western North America. The Petitioners assert that the Project may help solve existing transmission constraints BPA faces on the Olympic Peninsula, along the I-5 transmission corridor, and north of Seattle, as well as transmission constraints affecting the reliability of electrical service on Vancouver Island.

- 7 **The financing.** The JdF Project is financed through investments by Boundless Energy NW, Inc., a Delaware corporation, Sea Breeze Juan de Fuca Holding Company, a Canadian Corporation, and United States Power Fund, L.P., a limited partnership that invests in energy projects. None of these entities will operate or maintain the Project.
- 8 **Project operation.** The Petitioners intend to own the JdF Project, but do not intend to operate or maintain the JdF Project after it is completed. Petitioners intend to contract with or lease the Project to a responsible third-party operator, e.g., a network transmission owner such as BPA or BCTC, which have Open-Access Transmission Tariffs in place. While the third-party operator has not yet been determined, the lease or contract arrangement would be comparable to that described in a declaratory order in Docket No. UE-040088.¹
- 9 Petitioners intend to operate the Project as a portal to the international market for electric energy. Petitioners do not intend to offer transmission services beyond the Project termini. To that end, Petitioners have applied for interconnection to the BPA and BCTC network, but have not applied for transmission service from either BPA or BCTC. BPA is currently finalizing an interconnection study of the JdF Project. The Project's transmission capacity would be made available under the third-party operator's Open-Access Transmission Tariff.
- 10 **Current status of Project.** The Petitioners have applied to the U.S. Department of Energy for a Presidential Permit for the JdF Project.² The Petitioners have also applied for a Certificate of Public Convenience and Necessity from the National

¹ In Docket No. UE-040088, the Commission entered a declaratory order disclaiming jurisdiction over certain electrical transmission facilities owned by a special purpose entity and leased to BPA, where the owner would have no control or obligations relating to operation, maintenance or repair of the facilities. *In the Matter of the Petition of Bonneville Power Administration for a Declaratory Order Disclaiming Jurisdiction*, Docket No. UE-040088, Order No. 01, Declaratory Order (Feb. 20, 2004), ¶¶ 5-9.

² 70 Fed. Reg. 8350-51 (Feb. 18, 2005).

Energy Board of Canada. Anticipating an open-access transmission obligation as a condition of the Presidential Permit, the Petitioners filed with the Federal Energy Regulatory Commission ("FERC") an Application for Authority to Sell Transmission Rights at Negotiated Rates in FERC Docket No. ER0 5-1228-000. FERC granted the Petitioners' application on September 15, 2005, allowing Petitioners to sell transmission under an Open-Access Transmission Tariff, or the tariff of a third-party operator. A Regional Plan Study is underway to satisfy the Western Electricity Coordinating Council's standards regarding path rating, reliability, and impact on the regional grid.

- 11 In addition to the interconnection study, BPA apparently is preparing an Environmental Impact Statement to address requirements of the National Environmental Policy Act (NEPA). The necessary evaluation under the Washington State Environmental Policy Act is being coordinated with the NEPA process. The Petitioners are also seeking municipal approvals for building permits, Coastal Zone Management Act compliance, rights-of-way and road openings.
- 12 The Petitioners expect all major permitting activities to be completed by the summer of 2006.

III. DISCUSSION

- 13 **Proposed issues for resolution.** The petition for a declaratory order identifies three issues for resolution.
- 14 The first issue is whether the Commission should enter a declaratory order disclaiming jurisdiction over the Petitioners and the JdF Project facilities, operations and services under Title 80 RCW where, under Washington law, none of the Petitioners is, or will become, a "public service company."

15 The second issue is whether the Commission should enter a declaratory order based upon the conclusion that jurisdiction over the proposed project rests exclusively with the U.S. Department of Energy (“DOE”).

16 The third issue is whether the Commission should enter a declaratory order disclaiming jurisdiction over Petitioners and the JdF project because the project will be used exclusively in foreign or interstate commerce.

17 The Commission finds that resolving the first issue will permit entry of a declaratory order, and that it therefore need not address the second or third issues.

18 **Propriety of an order.** The Petitioners have demonstrated that the requirements of RCW 34.05.240(1) are met. The statute reads in relevant part:

(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;

19 The petition demonstrates that there is uncertainty necessitating resolution, in that the Petitioners could be seen to fall within the definitions of public service company (includes any electrical company, RCW 80.04.010), electrical company (any person and any person’s trustee owning electric plant for hire in Washington, *Id.*), and electric plant (includes all fixtures used for the

transmission of electricity for hire, *Id.*). The petition demonstrates an actual controversy, showing that resolution of the issue is needed to avoid regulatory confusion and disrupting the financing of the project. Petitioners assert that a finding of Commission jurisdiction may conflict with federal open-access transmission requirements imposed by the DOE. The petition demonstrates that the uncertainty significantly and adversely affects the Petitioners, as it could threaten the Petitioners' ability to finance the JdF Project without an order disclaiming jurisdiction; and 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.

20 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 Petitioners would be conducting business subject to regulation under Title 80 RCW.

21 **Regulatory Jurisdiction over the Petitioners.** The petition asks the Commission to disclaim jurisdiction over the Petitioners and the JdF Project facilities, operations, and services under Title 80 RCW because none of the Petitioners is a "public service company" within the meaning of the law, citing *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).

22 In *Inland Empire*, the court determined that a corporation formed to generate, manufacture, purchase, acquire, and distribute electricity over transmission lines to its members only 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, 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 court in *West Valley* 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 members and did not hold itself out as serving or ready to serve the general public. *107 Wn.2d at 365, citing Inland Empire, 199 Wash. at 537.*

23 The undisputed facts are that neither the Petitioners, nor any person or entity operating or maintaining the JdF Project facilities, propose to dedicate or devote the facility to public use, *i.e.*, transmit the electricity, or own, operate or maintain any electric plant, for hire. Nor do the Petitioners intend to operate or maintain the Project, but, rather, intend to transfer authority or control to a third party, such as the BPA, who will have exclusive authority and responsibility for operation and use of the facility. Moreover, neither Petitioners nor a third-party operator will supply the facility for transmission services to the public, except under terms and conditions established under an Open-Access Transmission Tariff. Such transmission services include only wholesale wheeling from one transmission system to another under the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") and would not include direct service to end-user customers who purchase electricity at rates regulated by the

Commission. Finally, end-user customers take service from systems using alternating-current, not the direct-current transmission proposed by Petitioners.

24 **Conclusion.** Based on the facts presented, we conclude that the Petitioners are not subject to regulation as a public service company under the provisions of Title 80 RCW because they will not own, operate, or maintain electric plant as defined in RCW 80.04.010, or operate as an electrical company as defined in RCW 80.04.010 by transmitting electricity for a public use or “for hire.” If the lease or contract with the future third-party operator proceeds as the Petitioners have presented, i.e., where the third-party operator will be a network transmission owner or other operator with an Open-Access Transmission Tariff in place, such that the operator will transmit direct-current electricity and will not supply the facility for transmission services directly to the public, but will provide wholesale wheeling under FERC jurisdiction, the third-party operator will not be subject to regulation as a public service company under the provisions of Title 80 RCW.

IV. FINDINGS OF FACT

- 25 (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.
- 26 (2) Sea Breeze is a limited U.S. partnership organized for the special and sole purpose of financing and developing the Juan de Fuca Project. Together with Olympic Converter Corporation and Victoria Converter, NSULC, it will own all U.S. and Canadian facilities and permits for the project.
- 27 (3) Petitioners plan to construct a merchant transmission project, the Juan de Fuca Cable Project, consisting of a 22-mile long 540-MW, DC submarine

cable extending below the Strait of Juan de Fuca, from a DC/AC converter station to be built in or near Port Angeles, Washington, across the international border to a DC/AC converter station near Victoria, British Columbia.

28 (4) The JdF Project is currently financed through private investments by U.S. and Canadian corporations.

29 (5) Petitioners intend to contract with or lease the Project to a third-party operator, such as BPA or BCTC, that would have an Open-Access Transmission Tariff in place. Under the intended lease or contract, the Petitioners would have no control or obligations relating to operation, maintenance or repair of the facilities. Neither the Petitioners, nor the Project under a future lessee, intend to provide service to the public, but to serve only as a portal to the international market for wholesale (i.e. sales-for-resale) electric energy.

30 (6) Uncertainty and an actual controversy exist over whether Petitioners 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 Petitioners by presenting a potential barrier to financing and completion of the Project. 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.

V. CONCLUSIONS OF LAW

31 (1) The Washington Utilities and Transportation Commission has the authority to enter a declaratory order that determines, on specified facts, whether an owner or operator of electrical plant is a public service

company and subject to the regulatory jurisdiction of the Commission.
RCW 34.05.240; RCW 80.04. 010; RCW 80.04.015.

- 32 (2) While the facilities Petitioners plan to construct will be “real estate, fixtures, and personal property operated, owned, used or to be used for or in connection with ... transmission ... of electricity” under RCW 80.04.010, Petitioners will not use the facilities to transmit electricity “for hire” or public use. The Project facilities do not meet the definition of “electric plant” under RCW 80.04.010, nor do Petitioners meet the definition of “electrical company” or “public service company” under RCW 80.04.010.
- 33 (3) On the facts presented, neither the Petitioners nor a future third-party operator will offer electrical service directly to the public. The Petitioners and the future third-party operator, in those circumstances, are not public service companies. *RCW 80.04.010. 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).*
- 34 (4) The actions of the Petitioners, under the facts presented in the petition for declaratory order, do not fall within the regulatory jurisdiction of the Commission.

VI. ORDER

35 The Commission declares and orders as follows:

The actions of Sea Breeze Pacific Juan de Fuca Cable, LP, Olympic Converter Corporation, and Victoria Converter, NSULC, related to the ownership, financing, construction, operation, and maintenance of the proposed Juan de

Fuca Project direct-current merchant transmission cable between Port Angeles, Washington, and Victoria, British Columbia, do not fall within the regulatory jurisdiction of the Commission on the facts presented to the Commission.

DATED at Olympia, Washington, and effective this 3rd day of November, 2005.

WASHINGTON 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.