

UNITED STATES OF AMERICA 106 FERC ¶ 61,076
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

U.S. Department of Energy,
Bonneville Power Administration

Docket No. EL04-44-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
AND DISCLAIMING JURISDICTION

(Issued January 29, 2004)

1. On December 23, 2003, the Bonneville Power Administration (BPA) filed a petition for a declaratory order disclaiming Commission jurisdiction under Section 201 of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000), over passive participants (the Owner Lessor and Indenture Trustee) in a proposed sale and leaseback transaction.¹ BPA states that 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.

2. In this order, we find that the role of the passive participants, as contemplated in the proposed sale/leaseback arrangement, is limited to that of passive investors that will not exercise control or decision-making authority over the leased facilities. Accordingly, none of the participants, to the extent that they operate in a manner consistent with the representations in BPA's application, will be a public utility within the meaning of Section 201(e) of the FPA by virtue of the proposed sale/leaseback transaction.

3. This order benefits customers because it will allow BPA to finance the construction of a facility that will be used to provide its customers with reliable transmission services.

BACKGROUND

4. BPA proposes to construct certain electric transmission facilities, including a new 500 kilovolt transmission line in central Washington, that will connect BPA's Schultz substation near the City of Ellensburg, Washington and its Wautoma substation in the

¹ BPA supplemented the December 23, 2003 filing on December 24, 2003 to include the draft lease agreement between BPA and Northwest Infrastructure Financing Corporation.

City of Hanford, Washington (the Facility). According to BPA, the Facility will be owned by Northwest Infrastructure Financing Corporation (Owner Lessor), a special purpose entity formed expressly for the purpose of arranging for the acquisition and financing of the transaction. BPA states that all of the stock will be owned by J H Holdings acting in its capacity as trustee under a trust agreement between J.A. Management Corporation, and J H Holdings Corporation.² BPA states further that the Owner Lessor will finance the acquisition and construction of the facility by issuing bonds to the public. According to BPA, the bonds will be a non-recourse obligation of the Owner Lessor, payable solely from payments made by BPA under the Facility lease.

5. BPA asserts that, at or before the time the bonds are issued, the Owner Lessor will lease its undivided interest in the Facility to BPA under a 30-year lease agreement to become effective on or about January 29, 2004, pursuant to which BPA will acquire possession of the Facility. 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 lease agreement, BPA will make lease payments to the Owner Lessor sufficient to pay all associated debt service, fees and costs associated with the Facility. BPA states further that the passive participants will not have any operating responsibilities or control rights with respect to the Facility under the facility lease or any other agreement. BPA points out that the Facility lease will not prevent BPA from transferring operational control over the Facility to a regional transmission organization.

6. The Facility lease also has provisions dealing with defaults and expiration of the lease. According to BPA, under certain circumstances, the Indenture Trustee may take possession of the Facility upon the occurrence of certain events of default by BPA.³ At the end of the Facility lease, BPA may: (1) purchase the Facility, (2) renew the Facility lease for a term of one or more years for a nominal annual rental payment, or (3) remove the Facility from the Facility site at its own expense.⁴ BPA states further that, upon expiration of the Facility lease term, the 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 retain its passive interest in the event BPA renews the Facility lease.

² All of the capital stock of these two entities is owned by The 1960 Trust, an independent charitable support organization which is operated for the benefit of Harvard University.

³ The specific events of default and the rights the passive participants may exercise if default occurs are described in Article 6 of the lease agreement.

⁴ The specific options at the end of the Facility lease are described in Article 7 of the lease agreement.

7. Notice of BPA's filing was published in the Federal Register, 68 Fed. Reg. 1,581 (2004), with comments, protests, and interventions due on or before January 8, 2004. None was filed.

DISCUSSION

8. The question presented by BPA's application is whether the passive participants will own or operate facilities subject to the Commission's jurisdiction, thereby becoming public utilities under Section 201(e) of the FPA.⁵ Section 201(b)(1) of the FPA⁶ states in pertinent part:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . . . The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy. . . .

Section 201(e) of the FPA⁷ states, in pertinent part:

The term "public utility" . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. . . .

The applicability of these sections to passive owner/lessors of jurisdictional facilities has been addressed by the Commission on numerous occasions.⁸

9. In Pacific Power, the Commission established a two-step analysis for determining whether holding a financial interest in jurisdictional facilities constitutes ownership resulting in public utility status under the FPA. Under that analysis, we must determine first whether the passive participants in this case will operate the facilities. BPA states that the passive participants will not operate, have a voice in the operation of, or hold any control rights in the Facility. Second, we must be assured that the passive participants are not in the business of producing or selling electric power and have a principal business other than that of a public utility. BPA states that the passive participants are not in the

⁵ 16 U.S.C. § 824 (2000).

⁶ 16 U.S.C. § 824(b)(1) (2000).

⁷ 16 U.S.C. § 824(e) (2000).

⁸ See Pacific Power & Light Company, 3 FERC ¶ 61,119 (1978) (Pacific Power); see also Oglethorpe Power Corporation, 77 FERC ¶ 61,334 at 62,490 (1996); TIFD VIII-H Inc., 69 FERC ¶ 61,042 at 61,174 (1994); City of Vidalia, 52 FERC ¶ 61,119 (1990) (Vidalia).

business of producing, selling, or transmitting electric power, and that the passive participants have a principal business other than that of a public utility.

10. In view of the facts presented by BPA, and in light of our previous holdings on this subject, the Commission finds that the passive participants will not become public utilities subject to the Commission's jurisdiction under Section 201(e) of the FPA as a result of the proposed sale/leaseback transaction. Therefore, we will disclaim jurisdiction over the passive participants, as requested by BPA.⁹

11. As to the default provision, BPA states that this provision does not represent a present assignment of rights and, therefore, should not subject the passive participants to jurisdiction under Section 201 of the FPA, citing Commission precedent.¹⁰ We agree that the lease provisions, as presented in the petition, are not a present assignment of rights to the passive participants that would subject them to jurisdiction under Section 201 of the FPA.¹¹

The Commission orders:

BPA's request that the Commission disclaim jurisdiction over the passive participants in the proposed sale/leaseback transaction, based on the facts presented by BPA in its filing, is hereby granted.

By the Commission.

Magalie R. Salas
Secretary.

⁹ If this changes so that the passive participants operate the facilities in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they will become public utilities and will be required to make appropriate filings pursuant to Section 205 of the FPA. 16 U.S.C. § 824d (2000). *See, e.g.*, Unicom Investments, Inc., 91 FERC ¶ 61,109 at 61,387, n.9 (2000).

¹⁰ *Vidalia*, 52 FERC at 61,728 n.31; *Hennepin Energy Resources Co., L.P.*, 48 FERC ¶ 62,244 at 63,326 (1989); *Baltimore Refuse Energy System Co.*, 40 FERC ¶ 61,366 at 62,120 n.11 (1987).

¹¹ *See Wisconsin Energy Corporation, Wisconsin Electric Power Company, W.E. Power LLC and Port Washington Generating Station LLC*, 105 FERC ¶ 61,029 at P 14 (2003); *PPL Large Scale Distributed Generation II, LLC*, 96 FERC ¶ 61,239 at 61,956 (2001); *Dynegy Danskammer, L.L.C.*, 94 FERC ¶ 61,136 at 62,189 (2001).