

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	DOCKET NO. UE-040088
)	
BONNEVILLE POWER)	ORDER NO. 01
ADMINISTRATION)	
)	
For a Declaratory Order Disclaiming)	DECLARATORY ORDER
Jurisdiction)	
.....)	

1 **Synopsis:** *The Commission enters an order declaring that the Owner Lessor and Indenture Trustee of a specified electrical transmission line to be operated by the Bonneville Power Administration, on the facts presented, would not be public service companies under Washington law and consequently would not be subject to regulation as public service companies.*

I. PROCEDURE

2 The Bonneville Power Administration on January 21, 2004, filed with the Washington Utilities and Transportation Commission a petition for declaratory order, seeking a determination that the Owner and the Trustee of certain electrical transmission facilities would not be subject to Commission regulation in a proposed financing arrangement, 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 three responses: one from the Washington State Department of Community and Economic Development, and one from Avista Corp., a public service company providing electrical service to portions of eastern Washington State, and one from PacifiCorp, a public service company providing electrical service to portions of southern Washington State.

II. THE FACTS PRESENTED

- 4 The Bonneville Power Administration (“Bonneville”) 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 within the State of Washington.
- 5 **The project.** Bonneville proposes to construct a new facility, a 64-mile-long, 500 kV transmission line, linking Bonneville’s existing Schultz Substation near Ellensburg, to a planned Wautoma Substation, to be constructed near State Route 24 in Benton County. The facility is designed to relieve transmission congestion on Bonneville’s network transmission grid, including the North-of-Hanford path in central Washington, where it is expected to add approximately 400 to 600 MW of transfer capacity, and in the Interstate Highway 5 corridor during congestion in spring and summer months. Construction of the facility will improve reliability of the existing grid and will assist in providing firm transmission to proposed new electrical generation facilities in the I-5 corridor.
- 6 **The financing.** A special purpose entity (SPE) has been created, called Northwest Infrastructure Financing Corp., incorporated under the laws of Delaware. It will have the limited purposes of (a) acquiring, constructing, and equipping the proposed facility; (b) leasing the facility to Bonneville; (c) financing the facility through the issuance of debt; and (d) taking actions that may be reasonably necessary to consummate a construction agency agreement with Bonneville, the lease, and any related bond indentures.
- 7 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 SPE as trustee under a trust agreement between it and JHM.

8 **Construction Agency Agreement.** Bonneville will enter into a construction agency agreement, under which it will construct the proposed facility on behalf of the SPE. Bonneville has already awarded a contract for major construction work. It plans to have the line completed and energized by Spring 2006.

9 **Lease.** Bonneville and the SPE will enter a 30-year lease agreement, with the SPE (holder of the facility) as lessor and Bonneville as lessee. The SPE will have no control over and no obligations related to the operation, maintenance, repair or replacement of the facility. Bonneville will accept those responsibilities under the lease and will operate and maintain the facility in the same manner as it operates and maintains facilities that it owns. In the event Bonneville defaults on its obligations, Bonneville will surrender use and possession of the facility, and the SPE's remedy is limited to securing a judgment for money damages. On termination of the lease, Bonneville may purchase the facility for a nominal sum, or may renew the lease for one or more years, or may remove the facility.

10 **The Trust.** The SPE will enter into an indenture of trust with a commercial trust bank authorized to conduct business in Washington State.

11 The SPE will issue bonds under the indenture. The bonds will be non-recourse obligations, payable solely from Bonneville's payments to the SPE under the lease. Bonneville will use the bond proceeds to pay costs of designing, constructing, and acquiring the facility and to pay the costs of bond issuance. Bonneville has the option to purchase all or any portion of the facility by making a purchase option payment in the amount needed to redeem the applicable portion of the outstanding bonds.

12 Under the indenture, the SPE will pledge the trust estate (consisting primarily of
the SPE's interest in the lease, including its right to receive payments under the
lease) to the trustee. Bonneville retains the authority to cure any defaults of the
SPE under the indenture.

III. DISCUSSION

13 **Proposed issues for resolution.** The petition for a declaratory order identifies
two issues for resolution.

14 The first issue is 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.'"

15 The second issue is whether the Commission should enter a declaratory order
based upon the exclusive jurisdiction of the Federal Energy Regulatory
Commission (FERC) over the proposed facility.

16 The Commission finds that resolving the first issue will permit entry of a
declaratory order, and that it therefore need not address the second.¹

17 **Propriety of an order.** The petitioner has demonstrated that the requirements of
RCW 34.05.240(1) are met.² The petition demonstrates that there is uncertainty

¹ We note that the federal Court of Appeals has recently 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, and believe that it is inappropriate to resolve the question posed to us on the basis of preemptive federal jurisdiction.

² 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

necessitating resolution, as the trustee and the owner could be seen to fall within the definition of electrical company (any person and any person’s trustee owning electric plant for hire in Washington, RCW 80.04.010; electric plant including 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 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 project without an order; 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.³

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 SPE or the Indenture Trustee is conducting business subject to regulation under Title 80 RCW.

19 **Regulatory Jurisdiction over the Trustee and the SPE.** Bonneville’s petition asks the Commission to disclaim jurisdiction over the SPE and the Indenture Trustee under Title 80 RCW because neither entity is a “public service company” within the meaning of the law. It 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).

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; . . .

³ Two of the three entities filing comments, Avista and PacifiCorp, called attention to concerns and possible adverse consequences of reliance on Bonneville’s ground of federal preemption. No comments identified any potential adverse consequences from reliance on the ground relating to the statutes defining the entities that are subject to Commission regulation.

20 In the *Inland Empire* case, 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 more recent *West Valley* decision, *107 Wa.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 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 neither the Trustee nor the SPE proposes to dedicate or devote the facility to public use. Instead, Bonneville will have exclusive authority and responsibility for operation and use of the facility. Moreover, neither the SPE nor the Indenture Trustee will supply the facility for transmission services 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 that because neither the Trustee nor the SPE will dedicate electric plant to a public use, neither entity, on the facts presented, is subject to regulation as a public service company under the provisions of Title 80 RCW.

IV. 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 constructing a 64-mile-long, 500 kV transmission line, linking Bonneville's existing Schultz Substation near Ellensburg, and a planned Wautoma Substation, to be constructed near State Route 24 in Benton County.
- 26 (4) To finance the proposed transmission facility, a special purpose entity (SPE) has been created that will have the limited purposes of (a) acquiring, constructing, and equipping the proposed facility; (b) leasing the facility to Bonneville; (c) financing the facility through the issuance of debt; and (d) taking actions that may be reasonably necessary to consummate a construction agency agreement with Bonneville, the lease, and any related bond indentures.

- 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 SPE as trustee under a trust agreement between it and JHM. Bonneville and the SPE will enter a 30-year lease agreement, with the SPE as lessor of the transmission facility and Bonneville as lessee.
- 28 (6) The SPE and the Indenture Trustee will have no control over and no obligations related to the operation, maintenance, repair or replacement of the facility. Bonneville will accept those responsibilities under the lease and will operate and maintain the facility in the same manner as it operates and maintains facilities that it owns. The SPE and the Trustee 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 SPE and the Trustee 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 facility. 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

- 30 (1) The Washington Utilities and Transportation Commission has the authority to enter a declaratory order that determines, on specified facts, whether an owner or trustee 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 facility constitutes electric plant, fixtures to be used for the transmission of electrical energy for hire. The Special Purpose Entity and the Indenture Trustee fall within 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 Special Purpose Entity and Indenture Trustee will not, on the facts presented, offer electrical service to the public. The SPE and the Trustee, 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).*
- 33 (4) The Commission should enter an order declaring that the actions of the Special Purpose Entity and the Trustee, under the facts presented in the petition for declaratory order, do not fall within the regulatory jurisdiction of the Commission.

VI. ORDER

34 The Commission declares and orders as follows:

The actions of the Special Purpose Entity and the Trustee related to the financing, construction, and operation of the proposed transmission line linking Bonneville's existing Schultz Substation near Ellensburg, and the planned Wautoma Substation do not fall within the regulatory jurisdiction of the Commission on the facts presented to the Commission.

DATED at Olympia, Washington, and effective this 20th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, 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.