

107 FERC ¶ 61, 100  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

KeySpan Ravenswood, LLC

Docket No. EL04-95-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued May 3, 2004)

1. In this order, we grant a petition for a declaratory order, finding that certain passive lessors are not, because of a lease financing transaction, subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).<sup>1</sup>

**BACKGROUND**

2. On February 27, 2004, as amended on March 29, 2004,<sup>2</sup> KeySpan-Ravenswood LLC (Ravenswood) filed a petition for a declaratory order disclaiming Commission jurisdiction, under section 201 of the FPA, over certain Owner-Participants (Passive Lessors) of leased generation facilities and associated transmission facilities.<sup>3</sup>

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<sup>1</sup>16 U.S.C. § 824 (2000).

<sup>2</sup>The Commission notes that, while the initial February 27, 2004 filing included a request for a declaratory order disclaiming jurisdiction pursuant to section 201 of the FPA and a request for Commission authorization for disposition of jurisdictional transmission facilities pursuant to section 203 of the FPA, Ravenswood did not include the appropriate filing fee for the section 201 petition for a declaratory order. Ravenswood subsequently filed the filing fee along with a second request for a declaratory order on March 29, 2004. The March 29, 2004 filing was assigned Docket No. EL04-95-000, but was not noticed a second time in the Federal Register because the notice for the February 27, 2004 filing referred to both the section 201 and the section 203 requests.

<sup>3</sup>Ravenswood's February 27, 2004 filing seeking Commission approval of the disposition of the jurisdictional transmission facilities under section 203 of the FPA was assigned and noticed in Docket No. EC04-68-000. The Director of the Office of Markets, Tariffs and Rates will act on the section 203 application separately pursuant to  
(continued...)

3. The sale-leaseback transaction in this case relates to a new 250 megawatt combined cycle generating facility, in Long Island City, New York (the Ravenswood project). The jurisdictional facilities are transformers, generator leads, and books and records. In the transaction involved here, the jurisdictional facilities are proposed to be sold to a group of Owner-Participants, as arranged by the Royal Bank of Scotland.
4. The multi-step Ravenswood Transaction begins when the Passive Lessors acquire the Ravenswood Project. The Owner Participants will simultaneously lease the Ravenswood Project to Ravenswood pursuant to an operating lease with an initial term equal to seventy-five percent of the estimated useful life of the Ravenswood Project, which will be determined upon closing the transaction. At the end of the term of the lease, Ravenswood will have multiple renewal options, as well as rights of first offer and first refusal relating to the Owner Participants' disposition of the facility. The lease also has provisions dealing with defaults and expiration of the lease. If certain events of default occur, the Owner Participants have the right to terminate the lease and take possession of the facility. KeySpan Corporation will execute an unconditional guarantee in favor of the Owner Participants to secure the performance of Ravenswood under the lease.
5. Notice of Ravenswood's February 27, 2004 filing was published in the Federal Register, with comments, protests and interventions due on or before March 18, 2004. None were filed.

## DISCUSSION

6. Applicants request a disclaimer of jurisdiction over Passive Lessors, *i.e.*, a determination that they will not be regarded as "public utilities" as defined in section 201 of the FPA.
7. Section 201(b) of the FPA states that:

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 used for such transmission or sale of electric energy. . . .

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authority delegated under § 375.304 of the Commission's regulations. See 18 C.F.R. § 375.304 (2003).

8. Section 201(e) states that:

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

9. The application of section 201 of the FPA to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>4</sup> The Commission uses a two-step analysis to determine whether a financial interest in jurisdictional facilities constitutes sufficient ownership to make the entity a “public utility” under the FPA. The Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of producing or selling electric power or has a principal business other than that of a public utility. The Commission has concluded that it would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities and subject them to the Commission’s jurisdiction where these participants hold only equitable or legal title to the electric facilities and are removed from the operation of the facilities and the sale of power.

10. Applicants state that the Passive Lessors: (1) will not own, operate, or control operation of the jurisdictional facilities that are the subject of the lease financing transaction; and (2) will not be entities otherwise engaged in the business of producing, selling or transmitting electric power. In light of the facts presented in the petition and consistent with Commission precedent, we find that the role of the Passive Lessors, as contemplated in the proposed lease financing arrangement, is limited to that of passive investors that do not exercise control or decision-making authority over the leased facilities. Accordingly, neither of the Passive Lessors, to the extent they operate in a manner consistent with the representations in the application, would, as a result of the transaction described above, be a public utility within the meaning of section 201(e) of the FPA.<sup>5</sup>

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<sup>4</sup>See *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996).

<sup>5</sup>If this changes so that the Passive Lessors 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).

Docket No. EL04-95-000

- 4 -

The Commission orders:

Applicants' request that the Commission disclaim jurisdiction over the Passive Lessors in this proceeding, based on the facts presented by Applicants in their petition, is hereby granted.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.