

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CCFC Development Company LLC
Blue Spruce Energy Center, LLC
Fox Energy Company LLC
Calpine Fox LLC

Docket No. EL04-127-000

ORDER DISCLAIMING JURISDICTION

(Issued October 14, 2004)

I. Introduction

1. In this order, we grant a petition for a declaratory order disclaiming jurisdiction, under section 201(e) of the Federal Power Act (FPA),¹ over Fox OP and Fox Energy Company, LLC (Fox OL) (collectively Companies), since they are a beneficial owner and passive participant, respectively. This order benefits customers because it allows a new participant to enter the energy market.

II. Background

2. On August 23, 2004, CCFC Development Company LLC (CCFC), Blue Spruce Energy Center, LLC (Blue Spruce), Fox OL and Calpine Fox LLC (Calpine Fox) (collectively, Applicants) filed a request that we disclaim jurisdiction over the Companies under section 201(e) of the FPA.²

¹ 16 U.S.C. § 824(e) (2000).

² In the same filing, Applicants requested approval for the disposition of jurisdictional facilities under section 203 of the FPA. The Director of the Office of Markets, Tariffs, and Rates, pursuant to authority granted to the Director under § 375.304 of the Commission's regulations, will act on this request in a separate delegated order. *See* 18 C.F.R § 375.307(l)(1) (2004).

3. CCFC, an indirect, wholly-owned subsidiary of Calpine Corporation (Calpine), owns 95 percent of the membership interest of Fox OL. Blue Spruce, also an indirect, wholly-owned subsidiary of Calpine, owns the remaining five percent of Fox OL.
4. Fox OL, an indirect, wholly-owned subsidiary of Calpine, owns the Fox Energy Center (Facility), a 600 megawatt natural gas-fired electric generating facility in Wisconsin. The Facility, which includes transmission facilities, will be interconnected with the transmission system of the American Transmission Company, LLC (ATC), and is expected to become operational in June 2005. Fox OL has market-based rate authority and has entered into a tolling agreement with the Wisconsin Public Service Corporation (Wisconsin Corporation) for the sale of a portion of the power generated by the Facility.
5. Fox OP is an indirect, wholly-owned subsidiary of General Electric Company (General Electric). General Electric, a diversified technology and services company, is a passive owner/lessor in a number of electric facilities. General Electric's ownership is passive, because title to the facilities is held solely for financial benefit; the actual operation of the facilities is conducted by a lessee. Neither General Electric nor its affiliates sell power or provide transmission service from any of these facilities.
6. Applicants propose that CCFC and Blue Spruce sell their membership interests in Fox OL to Fox OP. At the time this proposed transaction occurs, Calpine Fox, also an indirect, wholly-owned subsidiary of Calpine, will become the principal construction agent for Fox OL and will be responsible for completing construction of the Facility. Before the first sale of test power from the Facility, Calpine Fox intends to file for market-based rate authority.³ When the Facility achieves commercial operation, Calpine Fox will lease the Facility from Fox OL; at which time, Fox OL will assign the tolling agreement with the Wisconsin Corporation to Calpine Fox. If the Commission disclaims jurisdiction over the Companies, grants market-based rate authority to Calpine Fox and the tolling agreement has been assigned to Calpine Fox, Fox OL plans to submit notice of surrender of its market-based rate schedule.

III. Notice and Interventions

7. Notice of this filing was published in the *Federal Register*, 69 FR 53,428, with comments, protests, and interventions due on or before September 13, 2004. None was filed.

³ On August 23, 2004, Calpine Fox filed for market-based rate authority in Docket No. ER04-1148. Calpine Fox has since been granted market-based authority by the Commission.

IV. Discussion

8. Applicants request that we determine that Fox OL, as a passive participant, and Fox OP, as a beneficial owner, are not public utilities as defined in section 201 of the FPA. Section 201(b)(1), 16 U.S.C. § 824(b)(1) (1994), 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. . . .

9. Section 201(e), 16 U.S.C. § 824(e) (1994), states, in pertinent part:

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

10. After the proposed transactions, the Companies will neither transmit nor sell electric energy or transmission service in interstate commerce. Therefore, the Companies do not come under Commission jurisdiction by virtue of section 201(b).

11. Next, it must be determined if the Companies are subject to jurisdiction under section 201(e). In *Pacific Power & Light Co.*, the Commission established a two-prong test for determining whether holding a financial interest in jurisdictional facilities constitutes ownership.⁴

12. The first prong is whether Fox OL or Fox OP operates the facility.⁵ During the construction phase, Calpine Fox, as the principal construction agent, will have complete control over the day-to-day construction and testing of the Facility. Additionally, Calpine Fox will make all sales of the test power and will receive all the revenues from such sales. During this phase, neither Fox OP nor Fox OL will operate the facility. After construction and during the lease, possession of the Facility will be transferred to Calpine Fox, which will have complete control over the Facility. Fox OL will have only a passive

⁴ *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978) (*Pacific Power*). See also *Wisconsin Energy Corp.*, 105 FERC ¶ 61,029 (2003) (where passive owners of the Project Company, who owned the Facility, were deemed to not be public utilities).

⁵ *Pacific Power* at 61,337.

interest as the lease holder, and Fox OP will have only a passive interest as the beneficial owner of Fox LP. Thus, at no point will the Companies have operational control over the Facility.

13. The second prong is whether the Companies are engaged in the business of producing or selling electrical power and whether they have a principal business other than that of a public utility.⁶ Applicants state that neither Fox OP nor any of its affiliates “has interests in or control of electric generating transmission or distribution facilities in the ATC market.”⁷ Further, Applicants aver that: upon granting of disclaimer of jurisdiction over the Companies, authorization of market-based rate authority to Calpine Fox, and assignment of the tolling agreement to Calpine Fox, Fox OL will surrender its market-based rate schedule and will no longer be a public utility under the FPA. Lastly, Applicants state that the Companies are “not an electric utility company, a holding company or an affiliate of a holding company as defined by section 2 of the Public Utility Holding Company Act of 1935, as amended.”⁸

14. Lastly, labeling the Companies as public utilities under these circumstances would be contrary to the intent of the FPA. As explained in *Pacific Power*, the intention of the FPA is not to label entities as public utilities if they only hold legal or equitable title but do not have operational control.⁹

15. Based on Applicants’ statements, including the commitment to file a notice of surrender of market-based rate authority, the Commission finds that the Companies would not be public utilities as defined by section 201(e) of the FPA and therefore we will disclaim jurisdiction upon the effective date of the notice of surrender of market-based rate authority.

⁶ *Id.*

⁷ Joint Application for Authorization Under section 203 of the Federal Power Act and Petition for Disclaimer of Jurisdiction, filed on August 23, 2004 in Docket No. EC04-150 and EL04-127, at 17.

⁸ *Id.*

⁹ *Pacific Power* at 61,337.

The Commission orders:

Applicants' request that the Commission disclaim jurisdiction over the Companies 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.