

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Suedeem G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

U.S. Department of Energy  
Bonneville Power Administration

Docket No. EL07-36-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION

(Issued March 23, 2007)

1. On February 14, 2007, Bonneville Power Administration (BPA) filed a petition for a declaratory order disclaiming Commission jurisdiction pursuant to section 201 of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000), over the owner lessor (Owner Lessor) in a proposed sale and leaseback transaction. BPA states that the Owner Lessor: (1) will not operate or control the operation of the facility at issue, and (2) will not be otherwise engaged in the business of producing, selling, or transmitting electric energy.
2. In this order, we find that the Owner Lessor, as contemplated in the proposed sale/leaseback arrangement, will be a passive investor that will not exercise control or decision-making authority over the leased facilities at issue, and will not otherwise be engaged in the business of selling or transmitting electric energy. Accordingly, the Owner Lessor, to the extent that it operates in a manner consistent with the representations in BPA's application, will not be a public utility within the meaning of section 201(e) of the FPA by virtue of the proposed sale/leaseback transaction.

**Background**

3. BPA proposes to construct certain electric transmission facilities, as yet undetermined, primarily ranging from 69 kV to 1000 kV, to be located in the states of Washington, Oregon, Idaho, California, Wyoming, Nevada, and Montana (the Facilities). According to BPA, the Facilities 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 of the Owner Lessor will be owned by J H Holdings acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation and J H Holdings Corporation.<sup>1</sup>

4. BPA states that the Owner Lessor will finance the acquisition and construction of the Facilities through one or more bank loans (the Loans), and will use lease payments made by BPA to the Owner Lessor under a master lease agreement to repay the Loans. BPA asserts that at or before the time the first advance under the Loans is requested, the Owner Lessor and BPA will execute a seven-year master lease agreement under which the Owner Lessor will lease its undivided interest in each Facility to BPA as each Facility is acquired, installed and/or constructed, and pursuant to which BPA will acquire possession of each Facility. BPA further states that it will agree in the master lease agreement that it will operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities.

5. BPA states that the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities, nor is the Owner Lessor or its affiliates engaged in the business of producing, selling, or transmitting electric energy. BPA asserts that, accordingly, the Owner Lessor should not be considered a “public utility,” as defined under section 201(e) of the FPA.

6. The master lease agreement also has provisions dealing with defaults and expiration of the lease. According to BPA, under certain circumstances, the Owner Lessor may take possession of the Facilities upon the occurrence of certain events of default by BPA.<sup>2</sup> BPA asserts that, previously, the Commission had not considered such default provisions to be a present assignment of rights for purposes of section 201 jurisdiction.

7. At the end of each Facility’s lease term, BPA may either: (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.<sup>3</sup> BPA

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<sup>1</sup> 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.

<sup>2</sup> The specific events of default and the rights the passive participants may exercise if default occurs are described in Article 6 of the master lease agreement.

<sup>3</sup> The specific options at the end of the Facility lease are described in Article 7 of the master lease agreement.

states that, upon expiration of the Facility lease term, 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.

### **Notice Of Filing**

8. Notice of BPA's filing was published in the *Federal Register*, 72 Fed. Reg. 10,193 (2007), with protests and interventions due on or before March 5, 2007. On March 9, 2007, NorthWestern Corporation (NorthWestern) filed a motion to intervene out-of-time and a request for a technical conference. NorthWestern states that it does not oppose BPA's petition, but it would like to understand more fully: (1) how the proposed facilities impact the regional transmission grid, BPA's rates, and NorthWestern's customers; and (2) the identity of the Owner Lessor and any other transmission facilities it may own.

### **Discussion**

9. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2006), the Commission will grant NorthWestern's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. BPA seeks a disclaimer of jurisdiction over the Owner Lessor of the Facilities, *i.e.*, a determination that the Owner Lessor will not be regarded as a public utility as defined in section 201 of the FPA.

11. Section 201(b)(1)<sup>4</sup> of the FPA 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 used for such transmission or sale of electric energy. . . .

Section 201(e)<sup>5</sup> states that "[t]he term 'public utility' . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . ."

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<sup>4</sup> 16 U.S.C. § 824(b)(1) (2000).

<sup>5</sup> 16 U.S.C. § 824(e) (2000).

12. 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>6</sup> The Commission employs a two-step analysis for determining whether a financial interest in jurisdictional facilities constitutes sufficient ownership that holding such interests would result in a finding of “public utility” status under the FPA. Under this precedent, 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 selling or transmitting electric energy. 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 facilities, and are removed from the operation of the facilities and the sale or transmission of electric energy.

13. In the instant case, BPA states that the Owner Lessor: (1) will have no operating responsibilities or control rights with respect to the facilities at issue and (2) will not be an entity otherwise engaged in the business of producing, selling, or transmitting electric energy. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Owner Lessor, as contemplated in the proposed lease financing arrangement, will be a passive investor that does not exercise control or decision-making authority over the leased facilities, and is not otherwise in the business of selling or transmitting electric energy. Accordingly, we will disclaim jurisdiction over the Owner Lessor, as requested by BPA.<sup>7</sup>

14. As to the default provision, BPA argues that this provision does not represent a present assignment of rights and, therefore, should not subject the Owner Lessor to jurisdiction under section 201 of the FPA. We agree that the lease provisions, as

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<sup>6</sup> See, e.g., *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); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 106 FERC ¶ 61,076 (2004)

<sup>7</sup> If the facts change so that the passive participant operates the facilities in order to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, it will become a public utility 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).

presented in the petition, are not a present assignment of rights to the Owner Lessor that would subject it to jurisdiction under section 201 of the FPA.<sup>8</sup>

15. With respect to NorthWestern's request for a technical conference, we do not find this to be an appropriate proceeding in which to schedule a technical conference to respond to NorthWestern's questions and thus, we deny the request.

The Commission orders:

BPA's request that the Commission disclaim jurisdiction over the Owner Lessor in this proceeding, based on the facts presented by BPA in its petition, is hereby granted.

By the Commission.

( S E A L )

Philis J. Posey,  
Acting Secretary.

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<sup>8</sup> See, e.g., *Wisconsin Energy Corp.*, 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, LLC*, 94 FERC ¶ 61,136 at 62,189 (2001).