

119 FERC ¶ 61,171
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstEnergy Generation Corp.

Docket No. EL07-53-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued May 18, 2007)

1. In this order, the Commission grants FirstEnergy Generation Corp.'s (FirstEnergy) petition for a declaratory order disclaiming jurisdiction under section 201 of the Federal Power Act (FPA).¹ We find that certain investors in a proposed sale and leaseback transaction will be passive and will not exercise control or decision-making authority over the leased facility at issue, and will not otherwise be engaged in the business of selling or transmitting electric energy. Thus, they will not be public utilities within the meaning of section 201(e) of the FPA.²

Background

2. FirstEnergy filed a petition for a declaratory order disclaiming Commission jurisdiction under section 201 for the passive owner participants in a proposed sale and leaseback transaction of the Bruce Mansfield Generating Plant (Mansfield Facility).³

¹ 16 U.S.C. § 824 (2000).

² 16 U.S.C. § 824(e) (2000).

³ FirstEnergy states that it is an indirect, wholly-owned subsidiary of FirstEnergy Corp. that owns and operates various electric generation facilities, including a controlling interest in the Mansfield Facility. That Facility consists of three generating units and is located in Shippingport, Pennsylvania. The Commission issued a delegated order under section 203 of the FPA (16 U.S.C. § 824b (2000), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1289, 119 Stat. 594 (2005)), authorizing the disposition of jurisdictional facilities resulting from the proposed sale and leaseback transaction of FirstEnergy's 93.5 percent interest in Unit 1 of the Mansfield Facility. See *FirstEnergy Generation Corp.*, 118 FERC ¶ 62,204 (2007). The Commission later issued another

FirstEnergy later clarified the petition, requesting that the Commission disclaim jurisdiction over all entities associated with the proposed sale and leaseback transaction, including “the Lessors, Owner Participants, equity owners of the Owner Participants, Owner Trusts, Lenders, holders of the lessor notes and holders of the pass-through certificates (collectively ‘Passive Participants’).”⁴

3. FirstEnergy explains that on the closing date, it will sell its interest in Unit 1 of the Mansfield Facility to one or more trusts or other arrangement (each an Owner Trust) in respect of yet-unknown Owner Participants, each of which will be a party to the lease transaction. FirstEnergy explains that a bank or trust company will act as the Owner Trustee for each Owner Trust. Also, the Owner Trusts will enter simultaneously into a facility lease by which they will lease back to FirstEnergy the interest in Unit 1 in exchange for fixed rental payments for a lease term expected to be 33 years.

4. FirstEnergy states that the Owner Participants will fund the purchase price for the interest in Unit 1 through an equity investment of up to 20 percent of the purchase price and through the proceeds of non-recourse debt issuances. FirstEnergy also states that the Owner Participants will secure the debt with the rental payments under the lease. FirstEnergy states that the debt issuances may take the form of notes or pass-through certificates purchased by institutional lenders (Lenders).

5. FirstEnergy requests a disclaimer of jurisdiction over the Passive Participants under section 201 of the FPA, as FirstEnergy submits that none of the Passive Participants should be considered a public utility as defined in FPA section 201(e). It states that the Passive Participants will be special purpose entities formed for the purpose of owning or financing ownership interests in Unit 1 and leasing such interests back to FirstEnergy. FirstEnergy states that the Passive Participants will not operate or maintain, or have any decision-making authority with regard to the operation or maintenance of, and will not have control over the output from, Unit 1; and their involvement with Unit 1 will be limited to passive financing. It states that the Passive Participants will not be energy producers, generators, or suppliers by reason of their participation in the ownership or the financing of ownership of Unit 1. FirstEnergy states that it commits to inform the Commission of the identities of the Passive Participants once they are known, asserting that the Commission has authorized this approach in similar sale and leaseback transactions.⁵ Lastly, FirstEnergy states that, as lessee, it will have full operational

delegated order, authorizing the disposition of jurisdictional facilities resulting from the proposed sale and leaseback transaction of up to the remaining 6.5 percent interest in Unit 1. *See FirstEnergy Generation Corp.*, 119 FERC ¶ 62,125 (2007).

⁴ FirstEnergy clarification letter dated April 13, 2007 at 2. We will also refer to these entities as the Passive Participants.

⁵ FirstEnergy cites to *EME Homer City Generation L.P.*, 97 FERC ¶ 61,110

authority over and control of the use and sale of electricity from Unit 1, and the Commission will have jurisdiction over FirstEnergy and its sales of power from Unit 1.

Notice of Filing

6. Notice of FirstEnergy's filing was published in the *Federal Register*,⁶ with protests and interventions due on or before April 20, 2007. None was filed.

Discussion

7. FirstEnergy seeks a disclaimer of jurisdiction over the Passive Participants involved in the proposed sale and leaseback of Unit 1, *i.e.*, a determination that the Passive Participants will not be regarded as public utilities as defined in section 201 of the FPA.

8. Section 201(b)(1)⁷ 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. . . .

Section 201(e) states that “[t]he term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . .”

9. The Commission has addressed the application of section 201 to entities with a passive interest in jurisdictional facilities on numerous occasions.⁸ The Commission uses a two-step analysis for determining whether a financial interest in jurisdictional facilities makes the entity a “public utility” 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

(2001); *Dynegy Danskammer, L.L.C.*, 94 FERC ¶ 61,316 (2001); and *AES Eastern Energy, L.P.*, 87 FERC ¶ 61,048 (1999).

⁶ 72 Fed. Reg. 17,886 (2007).

⁷ 16 U.S.C. § 824(b)(1) (2000).

⁸ 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); *U.S. Dep't of Energy-Bonneville Power Admin.*, 118 FERC ¶ 61,240 (2007).

of selling or transmitting electric energy. 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.

10. Here, FirstEnergy states that the Passive Participants: (1) will not operate or maintain, or have any decision-making authority with regard to the operation or maintenance of, and will not have control over the output from Unit 1; and (2) will not be energy producers, generators, or suppliers by reason of their participation in the ownership and financing of the facility at issue. The Passive Participants will be formed specifically for purposes of the sale and leaseback transaction, so they are not otherwise engaged in the business of selling or transmitting electric energy. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Passive Participants, as contemplated in the proposed sale and leaseback transaction, will be passive investors that do not exercise control or decision-making authority over the leased facilities, and are not otherwise in the business of selling or transmitting electric energy. Accordingly, we will disclaim jurisdiction over the Passive Participants, as requested by FirstEnergy.⁹

The Commission orders:

FirstEnergy's request that the Commission disclaim jurisdiction over the Passive Participants in this proceeding, based on the facts presented by FirstEnergy in the petition, is hereby granted.

By the Commission.

(S E A L)

Philis J. Posey,
Deputy Secretary.

⁹ If the facts change so that a Passive Participant operates Unit 1 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 filings under 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).