

133 FERC ¶ 61,177
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Alta Wind Holdings, LLC

Docket No. EL10-85-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued November 24, 2010)

1. In this order, the Commission grants Alta Wind Holdings, LLC's (Alta Wind) petition for a declaratory order disclaiming jurisdiction under section 201 of the Federal Power Act (FPA).¹ We find that certain investors in the sale and leaseback transactions described by Alta Wind will be passive and 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. Thus, they will not be public utilities within the meaning of section 201(e) of the FPA.²

I. Background

2. Alta Wind is the indirect parent company of Alta Wind II, LLC (Alta II), Alta Wind III, LLC (Alta III), Alta Wind IV, LLC (Alta IV), and Alta Wind V, LLC (Alta V) (individually, an Alta Project Company, and collectively, the Alta Project Companies). Alta Wind states that the Alta Project Companies are special purpose companies that are constructing and will lease and operate four wind energy projects (Alta Projects) that will be located at the Alta Wind Energy Center in Kern County, California.³

3. According to Alta Wind, Alta II, Alta III, Alta IV, and Alta V will each enter into a sale and leaseback transaction related to its respective Alta Project, once construction of

¹ 16 U.S.C. § 824 (2006).

² 16 U.S.C. § 824(e) (2006).

³ The Alta II and Alta III projects are approximately 150 MW each, the Alta IV project is approximately 102 MW, and the Alta V project is approximately 168 MW. These projects are scheduled to commence operation as early as December 2010 through June 2011. Alta Wind Petition at 1-2.

the project is complete.⁴ Under these transactions, each Alta Project Company will sell or transfer undivided interests in its respective Alta Project to various statutory trusts (Owner Lessors) whose beneficial interests will be held by financial institutions or other investors (Owner Participants). Alta Wind represents that 100 percent of each of the Alta Projects will be sold or transferred in the transactions. Each Alta Project Company then will enter into a long-term lease with each Owner Lessor with respect to that Owner Lessor's interest in the applicable Alta Project. Alta Wind states that Citibank, N.A. (Citibank) and statutory trusts, whose beneficial interests are held by Citibank, have committed, subject to certain conditions precedent, to act, respectively, as Owner Participant and Owner Lessor with respect to each Alta Project. Citibank retains the right to arrange for additional Owner Lessors and Owner Participants to assume all or a portion of its commitments to participate in the sale and leaseback transactions.⁵

4. Alta Wind represents that the Owner Lessors and Owner Participants will have the following characteristics:

- (1) None of the Owner Lessors or Owner Participants will operate the Alta Projects during the term of the respective leases;
- (2) None of the Owner Lessors or Owner Participants will be in the business of producing or selling electric power other than perhaps through similar passive arrangements or other equity investments that do not involve management or operational control; and
- (3) Each of the Owner Lessors and the Owner Participants will have a principal business other than that of a public utility.

5. Alta Wind requests that the Commission disclaim jurisdiction over the initial Owner Lessor and Owner Participant for each Alta Project, as well as any additional future Owner Lessors and Owner Participants. Alta Wind submits that none of the Owner Lessors or Owner Participants should be considered a public utility as defined in FPA section 201(e) because the Owner Lessors and Owner Participants will not operate

⁴ The Commission issued a delegated order under section 203 of the FPA (16 U.S.C. § 824b (2006)), authorizing the disposition of jurisdictional facilities resulting from the sale and leaseback transactions. *See Alta Wind II, LLC, et al.*, 132 FERC ¶ 62,208 (2010).

⁵ Alta Wind states that, while Citibank and statutory trusts whose beneficial interests are held by Citibank will be the initial Owner Participant and Owner Lessor, it will notify the Commission of the identity of any additional Owner Lessors and Owner Participants for each of the Alta Projects once the proposed transactions have been consummated. Alta Wind Petition at 3.

or have any decision-making authority regarding the operation or maintenance of or control of the output from the Alta Projects. Instead, the Owner Lessors and Owner Participants will have only passive interests in the respective Alta Projects, and their involvement with the Alta Projects will be limited to passive financing activity. In contrast, during the lease, each Alta Project Company will have sole authority to control, operate, maintain, and manage its respective Alta Project, as well as the exclusive right to all of the power output from its respective Alta Project. Thus, Alta Wind contends that the Alta Project Companies, as lessees, will have full operational authority over and control of the use and sale of electricity from its respective Alta Project.

II. Notice of Filing

6. Notice of the filing was published in the *Federal Register*, 75 Fed. Reg. 55,323 (2010), with interventions and comments due on or before September 30, 2010. None was filed.

III. Discussion

7. Section 201(b)(1)⁶ 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. . . .”

8. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.⁷ 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 or control the operation of the jurisdictional facilities. The Commission then determines whether the

⁶ 16 U.S.C. § 824(b)(1) (2006).

⁷ 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); *FPL Energy Mower County, LLC, et al.*, 121 FERC ¶ 61,252 (2007).

passive participant is otherwise engaged in the business of selling or producing electric energy or has a principal business activity other than that of a public utility. The Commission has found that it would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities, and thereby 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.⁸

9. Here, Alta Wind states that the Owner Lessors and Owner Participants will have no control over the operations of the Alta Projects or the sales of output from the Alta Projects. In addition, as described by Alta Wind, the Owner Lessors and Owner Participants will not be engaged in the business of selling or producing electric energy and will have a principal business activity other than that of a public utility. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Owner Lessors and Owner Participants, as contemplated in the 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 producing electric energy. Accordingly, we will disclaim jurisdiction over the Owner Lessors and Owner Participants, as requested by Alta Wind.⁹

The Commission orders:

Alta Wind's request that the Commission disclaim jurisdiction over the Owner Lessors and Owner Participants in this proceeding, based on the facts presented by Alta Wind in the petition, is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁸ *Pacific Power & Light Co.*, 3 FERC ¶ 61,119, at 61,337-338.

⁹ If the facts change so that an Owner Lessor or Owner Participant operates an Alta Project 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 (2006)). See, e.g., *Unicom Investments, Inc.*, 91 FERC ¶ 61,109, at 61,387 n.9 (2000).