

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

R.W. Beck Plant Management, Ltd.

Docket No. EL04-93-000

ORDER ON REQUEST FOR DECLARATORY ORDER

(Issued December 21, 2004)

1. On March 29, 2004, R.W. Beck Plant Management, Ltd. (Beck or Applicant) filed a request for a declaratory order (Request) disclaiming jurisdiction under section 201 of the Federal Power Act (FPA)¹ over Beck in connection with its activities as Manager of Central Mississippi Generating Company, LLC (Central Mississippi), a public utility.² Alternatively, if the Commission determines to assert jurisdiction, Beck seeks an order granting certain waivers of and blanket authorizations under the Commission's regulations.³ Beck also requests that the Commission clarify that a prior order,

¹ 16 U.S.C. § 824(b)(1) (2000).

² Staff issued a deficiency letter on July 1, 2004, questioning certain aspects of the application. Beck filed a response on July 27, 2004 (July 27 Response).

³ The regulations for which waiver/blanket authorization are sought include the following: 18 C.F.R., Part 35, Subparts B and C, except for sections 35.12(a), 35.13(b), 35.15 and 35.16; Parts 34, 41, 45 and 101; and Part 141, except for sections 141.14 and 141.15.

Central Mississippi Generating Company, LLC (January 6 Order),⁴ does not require Beck to obtain approval under section 203 of the FPA in connection with its activities as Manager of Central Mississippi. The January 6 Order made no jurisdictional determination concerning Beck but stated that if Beck does not intend to be considered a public utility, it may seek a declaratory order for such a determination.

2. The Commission denies Beck's Request, finding that Beck is operating jurisdictional facilities in its role as Manager of Central Mississippi and is, therefore, a public utility. This finding benefits customers by delineating the degree to which an entity's involvement in the operations of a jurisdictional facility will constitute operational control, thereby warranting a determination that the entity is a public utility.

I. **Background**

A. **Structure, Management and Operation of Central Mississippi and the Facility**

3. Beck manages Central Mississippi pursuant to the Professional Services Agreement, within the framework of Central Mississippi's Limited Liability Company Agreement (LLC Agreement), and the Authorization Policy appended to the LLC Agreement. Central Mississippi has no employees and no board of directors. Beck has negotiated and executed on Central Mississippi's behalf several agreements with non-affiliated entities that govern structure and management of Central Mississippi, management and operation of the Facility and sale of the Facility's output. The significant provisions of these agreements are summarized as follows.

- a. The Limited Liability Company Agreement (LLC Agreement) between the Trustee (as sole member of Central Mississippi) and Beck (as Manager for Central Mississippi) sets out the purpose and the powers of Central

⁴ *Central Mississippi Generating Company, LLC*, 106 FERC ¶ 61,006 (2004) (January 6 Order). In Docket Nos. EL04-17-000 and EC04-16-000, a group of passive owners (Passive Owners) of an Attala, Mississippi generation facility and associated jurisdictional interconnection and transmission facilities (Facility) sought a disclaimer of jurisdiction of public utility status for themselves and a trustee (Trustee). The Passive Owners also sought authorization pursuant to section 203 of the FPA for the disposition of the Facility to Central Mississippi. Central Mississippi is an entity created by the Trustee on behalf of the Passive Owners. The Commission granted the disclaimer of jurisdiction over the Passive Owners and the Trustee and authorized the disposition of the Facility. Central Mississippi also received authorization to charge market-based rates in Docket No. ER04-180-000 in a letter order dated December 30, 2003.

Mississippi, the powers of the member (Trustee), and the powers of the Manager (Beck). Beck's responsibilities, functions and duties include oversight of all aspects of Central Mississippi's management. The LLC Agreement provides that, except for certain powers reserved to the Trustee, Beck has complete authority to manage, control and make all decisions affecting the business and affairs of Central Mississippi, as explained further in the Authorization Policy.⁵ The Authorization Policy, which is virtually identical to sections 5.1, 6.1 and 6.2 of the LLC Agreement, also provides that, in the ordinary course of business, Beck may not take actions that have an impact of greater than \$1 million.

b. The Professional Services Agreement (PSA) between Beck and Central Mississippi provides that Beck, who is an independent contractor and not an employee, will perform the role of Manager as described in the LLC Agreement. As such, Beck has the authority to negotiate and sign the Professional Services Agreement on behalf of Central Mississippi. According to Beck, its compensation is not affected by the operation of, or sale of power from, the Facility.

c. The Operation and Maintenance Agreement (O&M Agreement) between Central Mississippi and North American Energy Company (NAES) provides for NAES to conduct day-to-day operations and maintenance at the Facility. Beck negotiated and executed the O&M Agreement on Central Mississippi's behalf.

d. The Capacity and Tolling Agreement (Tolling Agreement) between Central Mississippi and Entergy provides for Entergy to purchase the full output of the Facility.⁶ Beck negotiated and executed the Tolling Agreement on Central Mississippi's behalf.

⁵ LLC Agreement, sections 5.1, 6.1 and 6.2. The reserved powers principally relate to the sale, dissolution, merger or reorganization of the company or its assets, voting of the company's assets.

⁶ The Facility is interconnected with the Entergy transmission system. The Tolling Agreement replaces an Energy Management Agreement between Central Mississippi and Tenaska Power Services, Co., no longer in effect.

e. The Management Services Agreement between Central Mississippi and Kelson Attala, LLC (Kelson Attala) provides that Kelson Attala will serve as Asset Manager for Central Mississippi. Kelson Attala will be responsible for the detailed day-to-day business operations of Central Mississippi, including financial, technical, environmental, insurance and reporting activities. Kelson Attala is not directly involved in the negotiation or execution of wholesale agreements, but prepares quarterly reports sent to the Commission regarding wholesale power sales from the Facility. Beck negotiated and executed the Management Services Agreement on Central Mississippi's behalf.

B. Beck's Request for a Non-Jurisdictional Determination

4. In support of a disclaimer of jurisdiction, Beck claims that it: 1) owns no jurisdictional assets; 2) does not sell power at wholesale; 3) does not take title to the power produced at the Facility at any point in its production or distribution; and 4) does not receive payment for any power generated by or sold from the Facility.⁷ Rather, sales of power are made by Central Mississippi, which owns the Facility and holds authorization to sell power at wholesale at market-based rates.

5. Beck states that the Authorization Policy limits the actions it can take without the member's (Trustee's) approval to actions having an impact of less than \$1 million. Actions having an impact of \$1 million or more require the Trustee's approval. Beck states that this limitation means that Beck does not have independent authority to cause Central Mississippi to engage in wholesale sales and Beck avers that it will not do so. In this regard, Beck states that it negotiated and executed the Tolling Agreement on Central Mississippi's behalf, with the Trustee's approval. Beck states that any agreement it negotiates to sell the Facility will be subject to the Trustee's approval. Beck argues that no regulatory purpose would be served by asserting jurisdiction over it, and that its involvement in power sales transactions is limited to "serving as a consultant to a purchaser or a supplier."⁸

⁷ Beck also asserts that its relationship to Central Mississippi is akin to an employer – employee relationship. According to Beck, it would not be a public utility "if Central Mississippi were to hire an employee, who in turn retained Beck for additional support." Request at 2, 12. However, the resolution of this case does not depend on whether the relationship can or cannot be characterized as an employer-employee relationship, but whether, given Beck's responsibilities and actions, Beck meets the statutory definition of a public utility.

⁸ Request at 8.

6. In short, Beck asserts that it neither owns, controls nor operates jurisdictional facilities and thus should not be found to be a jurisdictional entity.

II. Notice and Comments

7. Notice of Beck's filing was published in the *Federal Register*, 69 Fed. Reg. 18,894 (2004), with motions to intervene and protests due on or before April 14, 2004. Central Mississippi filed a timely motion to intervene in support of Beck's filing, and Entergy Services, Inc. (Entergy), on behalf of the Entergy operating companies, filed a motion to intervene raising no substantive issues.

III. Commission Precedent

8. As set forth in section 201(e) of the FPA, a public utility is "any person who owns or operates facilities subject to the jurisdiction of the Commission" under Part II of the FPA.⁹ Section 201(b) of the FPA provides for Commission jurisdiction over all facilities for the transmission of electric energy in interstate commerce and wholesale sales of electric energy in interstate commerce, with certain exceptions not relevant here.¹⁰

9. Two seminal Commission cases, *Bechtel* and *Shaw*,¹¹ provide insight into the question of whether Beck should be considered an operator of jurisdictional facilities and thus should be deemed a public utility. In *Bechtel*, the issue was whether the entity (Bechtel) that was contractually engaged to provide operation and maintenance services was an "operator" of jurisdictional facilities. The Commission found that Bechtel's contract with the owner of the jurisdictional facilities called for it to perform specific services that were ordered and directed by another party (in that case the owner of the facilities). Consequently, the Commission determined that Bechtel had no control or decision-making authority over the operations of the facilities. In essence, Bechtel was functioning merely as the owner's agent with respect to the operation of jurisdictional facilities. The Commission found that the owner, as the entity with the power to make all significant decisions and approve Bechtel's actions and activities, was the operator of the facilities, and not Bechtel. The Commission added that because Bechtel had no control

⁹ 16 U.S.C. § 824(e) (2000).

¹⁰ 16 U.S.C. § 824(b) (2000).

¹¹ *Bechtel Power Corporation*, 60 FERC ¶ 61,156 (1992) (*Bechtel*); *D.E. Shaw Plasma Power, L.L.C.*, 102 FERC ¶ 61,265 (2003) (*Shaw*).

or decision-making authority over the sale of electric energy, no regulatory purpose would be served by asserting jurisdiction over Bechtel. Thus, the Commission declined to assert jurisdiction over Bechtel.

10. In *Shaw*, the issue was whether a power marketer's "investment advisor" affiliate should be declared a public utility where the investment advisor had the sole discretion to determine the trades to be entered into by the power marketer, as well as the power to execute the contracts. The Commission noted that the ownership and use of the intellectual property on which power trade decisions were based belonged solely to the investment advisor affiliate. Consequently, the Commission found that, under these circumstances, the investment advisor affiliate could not be deemed to be acting purely as an agent of the owner. The Commission found that the affiliate had control over decisions to enter into contracts and independent discretion to enter into contracts. The Commission recognized that it had not previously conferred public utility status on an entity because it had been delegated the authority to perform many activities that otherwise would have been performed by the public utility. The Commission had also recognized that an entity acting as an agent for a public utility would not be found to be a public utility itself merely because it was acting as an agent. However, the Commission noted that "power sales are a basic jurisdictional activity and are the essence of activities to be performed ... by Shaw, pursuant to a market-based tariff" ¹² The Commission drew from *Bechtel* that "if decision-making authority with respect to the operation of a jurisdictional facility or activity had been delegated to Bechtel, even if by contract, Bechtel would or could have been deemed to be a public utility. The Commission elaborated that where unilateral decisions to enter into trades pursuant to a market-based rate tariff are delegated to an entity, it is reasonable to view that entity as an 'operator' of jurisdictional facilities." ¹³

IV. **Commission Determination**

11. In light of this precedent, the Commission finds that Beck's management activities with respect to Central Mississippi and the Facility cause Beck to be an "operator" of jurisdictional facilities and, hence, a public utility. This finding rests on indications that 1) Beck effectively governs the physical operation of the Facility and the operations of Central Mississippi itself as Central Mississippi's monitor of Kelson Attala's, NAES' and

¹² *Shaw*, 102 FERC ¶ 61,265 at P 34.

¹³ *Id.*

Entergy's compliance with the terms of their respective agreements; and 2) Beck effectively serves as the decision-maker in the sales of wholesale power both on a short-term and long-term basis.

12. The Commission's analysis begins with the recognition that Central Mississippi owns the jurisdictional transmission facilities and holds the market-based rate tariff and thus is a public utility. However, Central Mississippi has no other assets except the Facility, no employees and no company personnel responsible for the management of the Facility or Central Mississippi itself. Central Mississippi's sole member is the Trustee, a bank engaged by the Passive Owners to protect their interests in the Facility while attempts are made to sell the Facility.

13. Beck states that it may be involved in "helping to negotiate certain wholesale sales from the Attala Facility or the sale of the Attala Facility itself."¹⁴ According to Beck, the \$1 million limitation on its actions deprives it of the authority to enter into wholesale power sales agreements and facility sale agreements on Central Mississippi's behalf without the Trustee's approval. Beck asserts that this limitation on its discretion means that it lacks the ultimate control over the jurisdictional activities or assets that the Commission considered necessary in both *Bechtel* and *Shaw* to warrant an assertion of jurisdiction over an entity.

14. However, even though Beck's actions are subject to the ultimate approval of the Trustee for matters involving more than \$1 million, the circumstances attendant to the Request indicate that the substantive decision-making relating to the jurisdictional assets, the market-based rate tariff and the Tolling Agreement has been and will continue to be conducted by Beck. Beck, as an engineering consulting firm, was engaged by the Trustee to assume the responsibility for restoring the Facility to an operational state in order to enhance the economic attractiveness of the Facility to potential buyers. To achieve that objective, Beck is responsible for negotiating and executing agreements affecting the physical operation of the jurisdictional facilities, including any agreements to replace those currently in effect, and effectuating jurisdictional sales of power generated from the Facility. Beck is also responsible for ensuring that the on-going jurisdictional activities and sales of power are conducted pursuant to the terms of such agreements.

15. Therefore, notwithstanding that some of Beck's actions are ultimately subject to the approval of the Trustee (matters involving more than \$1 million), Beck's role is, we believe, tantamount to that of an "operator" of jurisdictional facilities. Unlike the operation and maintenance services provider in *Bechtel*, Beck does not merely perform

¹⁴ July 27 Response at 3.

specific services at the direction of the owner of jurisdictional facilities. Rather, Beck has a generalized mandate to see that specific services necessary for sales to be made are performed and to that end contracted on Central Mississippi's behalf with other entities. As was the case in *Shaw*, Beck is the principal if not sole decision-maker in determining the wholesale sales to be made from the Facility, a basic jurisdictional activity. Jurisdictional facilities have an "operator;" someone must operate them. Though Central Mississippi may be a public utility by virtue of its ownership of jurisdictional facilities and the holder of the market-based rate tariff, it is not the operator. Neither the Trustee nor the Passive Owners, whose role is assertedly passive, operates the jurisdictional facilities. In these circumstances, Beck is the operator of the jurisdictional facilities. Therefore, the Commission finds that Beck is a jurisdictional public utility, and that Beck must file for market-based rate authority, if it wishes to make market-based wholesale power sales.

16. The Commission will grant Beck's request for clarification that it need not file an application under section 203 of the FPA in connection with the activities it performs under the Professional Services Agreement.¹⁵ Beck entered into the Professional Services Agreement with Central Mississippi on November 6, 2003. However, the earliest point at which Beck could be deemed to be a public utility as an operator of jurisdictional facilities under that agreement would coincide with the date that Central Mississippi was authorized in Docket No. ER04-180-000 to engage in wholesale sales at market-based rates - - January 6, 2004. Therefore, given that Beck only became a public utility effective January 6, 2004, notwithstanding any implication or suggestion made in our January 6 Order that Beck should seek section 203 approval, we conclude that section 203 authorization is not required in connection with Beck's activities under the Professional Services Agreement.

V. **Request for Waivers and Blanket Authority**

17. If the Commission does not grant Beck's Request and instead determines that Beck is a jurisdictional public utility, Beck requests that the Commission grant it "such waivers and blanket authorizations as the Commission has granted ... to other non-franchised entities," including:

¹⁵ The January 6 Order noted that Central Mississippi, Beck and Tenaska had not filed for a transfer of control of Central Mississippi's jurisdictional facilities to Beck or Tenaska nor had they filed a request for disclaimer of jurisdiction under section 203. The January 6 Order stated that it should not be construed as having authorized a transfer of control to Beck or Tenaska.

1. Subparts B and C of Part 35, regarding the filing of rate schedules, except for sections 35.12(a), 35.13(b), 35.15 (which requires applicant to file a Notice of Cancellation or Termination when it ceases its marketing activities), and 35.16 (which requires applicant to file a notice of succession whenever its name or operational control is changed);
2. Part 41, regarding accounts, records, and memoranda;
3. Part 45, pertaining to interlocking directors, except to the extent of filing abbreviated statements by an officer or director of the holding (or proposing to hold) interlocking positions;
4. Part 101, regarding the Uniform System of Accounts;
5. Part 141, regarding statements and reports, with the exception of 18 C.F.R. §§ 141.14, .15; and
6. Blanket authorization under FPA section 204 (regarding issuance of securities and assumptions of liabilities).

Beck claims that waiver of these regulations and blanket authorization under section 204 of the FPA are routinely granted to electric generators and marketers. In fact, Central Mississippi was granted these waivers and blanket authorization in a letter order in Docket No. ER04-180-000.

18. While the Commission holds Beck to be a public utility as an operator of jurisdictional facilities, we recognize that Beck's role is intended to be transitional. Furthermore, imposing the full panoply of the Commission's regulations on Beck could impair the efforts of passive owners to acquire capable management resources to help restore financially troubled merchant facilities to the marketplace and/or to recover their investments. Either result could deter the addition of new generation to the market, thus affecting service reliability and prices. Therefore, in this context the Commission will grant the waivers and authorizations requested by Beck.

The Commission orders:

- (A) Beck's Request for a declaratory order finding that Beck is not jurisdictional is hereby denied, as discussed in the body of this order.
- (B) Beck's request for clarification that it is not required to file an application under section 203 of the FPA in connection with the activities it performs under the Professional Services Agreement is hereby granted, as discussed in the body of this order.
- (C) Within 30 days of the date of issuance of this order, any person desiring to be heard or to protest the Commission's blanket approval of issuances of securities or assumptions of liabilities by Beck should file a motion to intervene or protest with the

Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. sections 385.211 and 385.214 (2003).

(D) Absent a request to be heard within the period set forth in Ordering Paragraph (C) above, Beck is hereby authorized to issue securities and assume obligations or liabilities as guarantor, endorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of Beck, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(E) Until further order of this Commission, the requirements of Part 45 of the Commission's regulations, except as noted below, are hereby waived with respect to any person now holding or who may hold an otherwise proscribed interlocking directorate involving Beck. Any such person, instead, shall file a sworn application providing the following information: 1) his or her full name and business address; and 2) all jurisdictional interlocks, identifying the affected companies and the positions held by that person.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Beck's issuances of securities or assumptions of liabilities, or by the continued holding of any affected interlocks.

(G) Beck's request for waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.