

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Alliant Energy Generation, Inc.
Sheboygan Power, LLC

Docket No. EL05-110-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued June 24, 2005)

1. In this order, we grant a petition for declaratory order disclaiming jurisdiction over Sheboygan Power, LLC (Sheboygan Power), as passive owner-lessor of Commission-jurisdictional generator interconnection facilities, and Alliant Energy Generation, Inc. (Alliant Generation), as passive owner of Sheboygan Power, finding that neither will be a public utility under section 201(e) of the Federal Power Act (FPA)¹ because of a lease financing transaction. This order benefits customers by ensuring that purely passive entities are not treated as public utilities with regulatory responsibilities to the Commission.

Background

2. On May 6, 2005, Alliant Generation and Sheboygan Power (collectively, Applicants) filed a petition for a declaratory order disclaiming Commission jurisdiction under section 201 of the FPA. Applicants explain that Sheboygan Power, a wholly-owned direct subsidiary of Alliant Generation,² is developing and will lease to its affiliate

¹ 16 U.S.C. § 824(e) (2000).

² Alliant Generation is Sheboygan's sole member.

Wisconsin Power and Light Company (Wisconsin Power) a new approximately 300 megawatt (MW) generating facility (Facility),³ in Wisconsin, under Wisconsin's Leased Generation Law.⁴

3. Applicants state that Sheboygan Power is engaged exclusively in the business of developing and owning, but not operating (other than temporarily) the Facility.⁵ Alliant Generation is an indirect wholly-owned subsidiary of Alliant Energy Corporation (Alliant Energy),⁶ engaged in the business of developing and owning, through subsidiaries, generating facilities.

4. Wisconsin Power, a wholly-owned direct subsidiary of Alliant Energy, serves native load retail customers in eastern Wisconsin under rates regulated by the Public Service Commission of Wisconsin and a number of Wisconsin wholesale municipal and cooperative customers under cost-based rate wholesale power sales tariffs on file with the Commission.

5. Applicants explain that Alliant Generation agreed to buy the Facility from another entity that had started development of the Facility through acquisition of the membership interests in Sheboygan Power.

³ Applicants' application requesting authorization, under section 203 of the FPA, 16 U.S.C. § 824b (2000), for Sheboygan Power to transfer the Facility to Wisconsin Power's control by lease was accepted by the Commission in *Sheboygan Power, LLC*, 111 FERC ¶ 62,218 (2005).

⁴ This law allows an unregulated affiliate of a Wisconsin utility to develop a generating facility and lease it to the utility as an alternative to the utility developing the generating facility itself. Petition at 3.

⁵ Sheboygan Power will temporarily operate the Facility for testing purposes before transferring it to Wisconsin Power's control by lease. Sheboygan Power filed a short-term Test Power Rate Schedule in Docket No. ER05-869-000 to allow it to make short-term sales of test power to Wisconsin Power during the testing phase of Facility development and the schedule will terminate when Sheboygan Power transfers the Facility to Wisconsin Power's control. Applicants request that the Commission disclaim jurisdiction over them as public utilities for the period following Sheboygan Power's transfer of the Facility to Wisconsin Power's control.

⁶ Alliant Energy is a registered holding company under the Public Utility Holding Company Act of 1935 and is the parent of Alliant Generation and Sheboygan.

6. Under a lease agreement between Sheboygan Power and Wisconsin Power (Lease Agreement), Sheboygan Power will transfer control over the Facility to Wisconsin Power on a long-term basis. Wisconsin Power will pay monthly rents to Sheboygan Power and will assume all responsibility for the Facility. It will operate the Facility as if it owned it and will be responsible for procuring fuel and performing all operations and maintenance requirements. At the conclusion of the Lease Agreement, Wisconsin Power may renew the lease, buy the Facility from Sheboygan Power, or return the Facility to Sheboygan Power's control. The Lease Agreement also has default and termination provisions that could cause the Facility to revert back to Sheboygan Power's control upon occurrence of certain triggering events.⁷

7. Applicants state that both Sheboygan Power and Alliant Generation will satisfy the Commission's criteria for disclaimer of jurisdiction as public utilities under the FPA once Sheboygan Power transfers the Facility to Wisconsin Power's control by the Lease Agreement.⁸ At that time, Sheboygan Power's role with respect to the Facility will be limited to that of passive owner and lessor and Alliant Generation's role will be as sole member and owner of Sheboygan Power. Applicants state that: (1) neither Alliant Generation nor Sheboygan Power will control or operate the Commission-jurisdictional interconnection facilities; (2) neither will otherwise be engaged in the business of directly selling electricity or engaging in any other jurisdictional activities; and (3) both will have a principal business other than that of a public utility.

8. Applicants also assert that the Commission has granted similar disclaimers of jurisdiction over the owner/lessors of several other generating facilities developed under the Wisconsin Leased Generation Law.⁹ Applicants explain that, in those cases, each owner was the direct or indirect passive owner (but not the operator) of a generating facility and associated generator interconnection facilities that had been developed and transferred by lease to the operational control of an affiliated Wisconsin utility.

9. Notice of Applicants' May 5, 2005 petition was published in the *Federal Register*, 70 Fed. Reg. 28,931 (2005), with interventions or protests due on or before May 23, 2005. None was filed.

⁷ Petition at 5.

⁸ Applicants state that Sheboygan Power intends to transfer the Facility to Wisconsin Power's control by the Lease Agreement upon receipt of required regulatory approvals and the completion of Facility testing in late May 2005.

⁹ Petition at 6 n.14 (*citing MGE Energy, Inc.*, 109 FERC ¶ 61,175 (2004) (*MGE*); *W.E. Power LLC.*, 107 FERC ¶ 61,297 (2004); *Madison Gas and Electric Company*, 106 FERC ¶ 61,098 (2004); *Wisconsin Energy Corporation*, 105 FERC ¶ 61,029 (2003)).

Discussion

10. Applicants request a disclaimer of jurisdiction over Sheboygan Power, as passive owner-lessor of the Facility, and Alliant Generation, as sole member and owner of Sheboygan Power, *i.e.*, a determination that they will not be regarded as public utilities as that term is defined in section 201 of the FPA.

11. Section 201(b)(1)¹⁰ 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...

12. Section 201(e) of the FPA states that:

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

13. The application of section 201 to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.¹¹ In these cases, 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 electric power. 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 electric facilities, and are removed from the operation of the facilities and the sale of power.

14. Applicants state that they: (1) will not operate or control operation over jurisdictional facilities; and (2) will not sell electric energy or engage in any other jurisdictional activities. In light of the facts presented in the petition and consistent with

¹⁰ 16 U.S.C. § 824(b)(1)(2000).

¹¹ See *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978) (*Pacific Power*); *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); *MGE*, 109 FERC ¶ 61,175; *Calpine Eastern Corporation*, 109 FERC ¶ 61,265 (2004).

Commission precedent, we find that the role of Sheboygan Power, as passive owner-
lessor, and Alliant Generation, as passive owner of Sheboygan Power, will be limited to
that of passive investors that do not exercise control or decision-making authority over
the leased Facility once the lease transfers control to Wisconsin Power. Accordingly,
neither Sheboygan Power nor Alliant Generation, as long as they operate in a
manner consistent with the representations in the petition, will, as a result of the
transaction described above, be a public utility within the meaning of section 201(e) of
the FPA.¹²

15. Moreover, the provisions in the Lease Agreement regarding what may occur in the
event of default and lease expiration do not change the conclusion that Applicants are not
public utilities under section 201(e) of the FPA.¹³ These lease provisions, as represented
in the petition, are not a present assignment of rights to the passive lessors that would
subject them to jurisdiction under section 201.

The Commission orders:

Applicants' request that the Commission disclaim jurisdiction over the passive
investors is hereby granted, based upon the facts presented by Applicants in their petition.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹² If this changes so that the passive lessor/owners operate the Facility to make
sales of electric energy at the wholesale level, or engage in transmission in interstate
commerce, they will become public utilities and will be required to make appropriate
filings pursuant to section 205 of FPA, 16 U.S.C. § 824d (2000). *See, e.g., Unicom
Investments, Inc.*, 91 FERC ¶ 61,109 at 61,387 n.9 (2000).

¹³ *MGE*, 109 FERC ¶ 61,175 at P 16 (finding that passive lessors in a similar long-
term lease transaction, with similar default and lease expiration provisions, were passive
investors and not public utilities under section 201).