

144 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Catalina Solar, LLC

Docket No. EL13-77-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued August 22, 2013)

1. In this order, the Commission grants Catalina Solar, LLC's (Catalina Solar) July 16, 2013 petition for a declaratory order disclaiming jurisdiction under section 201(e) of the Federal Power Act (FPA).¹ We find, on the basis of the facts and circumstances presented, that Catalina Solar, as the owner-lessor in the sale and leaseback transaction described in the petition, 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, Catalina Solar will not be a public utility within the meaning of section 201(e) of the FPA.

I. Background

2. Catalina Solar states that it is a Delaware limited liability company that owns a 110 MW capacity solar-powered generating facility in Kern County, California (Facility),² and that San Diego Gas & Electric Company (SDG&E) will purchase all of the Facility's output pursuant to a long-term power purchase agreement. Catalina Solar has received authorization to sell energy, capacity, and ancillary services at market-based rates.³

¹ 16 U.S.C. § 824(e) (2006).

² According to Catalina Solar, the Facility consists of "photovoltaic solar panels feeding direct-current-to-alternating-current inverters and generation lead line facilities necessary to connect Southern California Edison Company's Whirlwind substation and the transmission system operated by the California Independent System Operator Corporation." Catalina Solar July 16, 2013 Petition at 2. Catalina Solar further states that the generation lead line facilities "include co-ownership with Catalina Solar affiliates of segments of the Antelope Valley line, a generation tie line located between the Facility and the Whirlwind substation." *Id.*

³ *Catalina Solar, LLC*, Docket No. ER13-675-001 (Apr. 3, 2013) (delegated letter order).

3. Pursuant to a November 20, 2012 delegated order, an entity formed as a Delaware statutory trust (Owner Participant) received authorization pursuant to FPA section 203⁴ to acquire Catalina Solar in a two-step structured lease financing transaction (Transaction) from EDF-Renewable Development, Inc. (EDF-RD), which is wholly owned by EDF Renewable Energy, Inc. (EDF-RE).⁵ Catalina Solar states that, in the first step of the Transaction, which has been consummated, the Owner Participant acquired and now holds 50.5 percent of the ownership interests in Catalina Solar, and that EDF-RD holds the remaining 49.5 percent of the ownership interests.⁶ Catalina Solar further states that, in the second step of the Transaction, which will be consummated in late summer of 2013 once the Facility is completed and commercial operation begins, the Owner Participant will acquire EDF-RD's remaining 49.5 percent interest in Catalina Solar contemporaneously with the lease of the Facility from Catalina Solar to Catalina Solar Lessee (Lessee), a Delaware limited liability company with its principal place of business in Kern County, California, which is indirectly wholly owned by EDF-RE.

4. Catalina Solar states that Lessee has been created to manage and operate the Facility after the Transaction is completed so that operational control of the Facility will be retained by EDF-RE. Catalina Solar explains that, during the term of the lease, Lessee will assume responsibility to sell the Facility's full output to SDG&E pursuant to the long-term power purchase agreement.⁷ Catalina Solar states that Lessee has received authorization to sell energy, capacity, and ancillary services at market-based rates and that Lessee has filed a self-certification of exempt wholesale generator status.⁸ Catalina Solar explains that, upon the lease's commencement, Catalina Solar will cancel its market-based rate tariff and become the Facility's passive owner and lessor.⁹

⁴ 16 U.S.C. § 824b (2006).

⁵ *Catalina Solar, LLC*, 141 FERC ¶ 62,120 (2012). The beneficiaries of the Owner Participant are Bankers Commercial Corporation, Metropolitan Life Insurance Company, Citibank, N.A., and EFS Catalina Solar, LLC, an indirect, wholly-owned subsidiary of General Electric Company. The Applicants in the 203 proceeding stated that none of the beneficiaries of the Owner Participant is primarily engaged in energy-related business activities or directly owns or controls any electric generating or transmission assets or generation output in the United States. *Id.* at n.4.

⁶ Petition at 2.

⁷ *Id.* at 3.

⁸ *Catalina Solar Lessee, LLC*, Docket No. ER13-1562-000 (July 11, 2013) (delegated letter order); Catalina Solar Lessee, LLC May 24, 2013 Notice of Self-Certification of Exempt Wholesale Generator Status (Docket No. EG13-36-000).

⁹ Contemporaneously with filing its petition, Catalina Solar filed a notice of cancellation of its market-based rate tariff in Docket No. ER13-1987-000. In that proceeding, Catalina Solar is requesting that the notice of cancellation become effective on the lease commencement date.

5. Catalina Solar explains that the Transaction's form differs from other sale/leaseback financing structures only in that the Transaction is structured as a sale of the project company (i.e., Catalina Solar) rather than as a sale of the Facility. Catalina Solar further explains that, in this structure, Lessee is a new entity created specifically to control and operate the Facility, rather than being the Facility's original owner-operator, as in the typical structure. Catalina Solar explains that the Transaction's structure will allow the involved entities to avoid the difficulties associated with transferring Catalina Solar's underlying agreements and interests to a separate entity. Otherwise, according to Catalina Solar, the Transaction has been structured to be functionally the same as traditional sale/leaseback transactions that the Commission has found to be financing vehicles.¹⁰

6. In addition, Catalina Solar states that the Transaction is structured so that Lessee will be the "public utility" subject to the Commission's jurisdiction, and that Catalina Solar, as owner-lessor under the Facility lease, will not have operational control or decision-making authority over the Facility during the term of the lease, but will have only a passive interest in the Facility. Upon the cancellation of its market-based rate tariff, Catalina Solar contends that it will no longer be a public utility and will have no authority to sell electricity.¹¹ Instead, Lessee will operate the Facility and make all electricity sales of the Facility's output to SDG&E. Finally, according to Catalina Solar, the Owner Participant owner(s) of Catalina Solar will be passive investors that will not have operational or managerial control over the Facility and will not be in the business of producing or selling power or have a principal business as a public utility.¹²

7. Catalina Solar requests that the Commission disclaim jurisdiction over Catalina Solar under FPA section 201(e) once the Transaction is consummated and its market-based rate tariff is cancelled.¹³ Catalina Solar contends that upon the occurrence of these events, it: (1) will not operate or control the Facility's operation during the lease's term; (2) will not otherwise be engaged in the business of selling or producing electric energy; and (3) will have a principal business other than that of a public utility.¹⁴ Catalina Solar also states that the Commission has previously disclaimed jurisdiction over the owner-lessor in sale/leaseback transactions similar to the Transaction proposed here.¹⁵

¹⁰ Petition at 4

¹¹ *Id.*

¹² *Id.* at 4-5.

¹³ *Id.* at 5.

¹⁴ *Id.* at 6.

¹⁵ *Id.* at 5 (citing *Alta Wind I, LLC*, 133 FERC ¶ 61,240 (2010); *Alta Wind Holdings, LLC*, 133 FERC ¶ 61,177 (2010)); see also *Shiloh III Wind Project, LLC*, 138 FERC ¶ 61,064 (2012).

8. Catalina Solar requests that the Commission issue an order granting the petition by August 23, 2013 to enable the Transaction to close once the Facility commences commercial operation. It asserts that expedited approval is appropriate because the Transaction is scheduled to close in late summer of 2013, and the expedited consideration will enable Catalina Solar to ensure that the financing is completed by that date.¹⁶

II. Notice of Filing

9. Notice of the filing was published in the *Federal Register*, 78 Fed. Reg. 45,523 (2013), with interventions and comments due on or before August 15, 2013. No interventions or comments were filed.

III. Discussion

10. Section 201(b)(1) 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”¹⁷ Section 201(e) states that the term “public utility” means “any person who owns or operates facilities subject to the jurisdiction of the Commission” under Part II of the FPA.¹⁸

11. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.¹⁹ As the Commission has previously stated:

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 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

¹⁶ Petition at 6-7.

¹⁷ 16 U.S.C. § 824(b)(1) (2006).

¹⁸ 16 U.S.C. § 824(e) (2006).

¹⁹ See, e.g., *Shiloh III Wind Project, LLC*, 138 FERC ¶ 61,064; *Alta Wind I, LLC*, 133 FERC ¶ 61,240; *Alta Wind Holdings, LLC*, 133 FERC ¶ 61,177; *FPL Energy Mower County, LLC, et al.*, 121 FERC ¶ 61,252 (2007); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 118 FERC ¶ 61,240 (2007); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 106 FERC ¶ 61,076 (2004); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *City of Vidalia, Louisiana and Catalyst Old River Hydroelectric Limited Partnership*, 52 FERC ¶ 61,199 (1990); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978).

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.²⁰

12. Here, Catalina Solar states that, during the term of the lease, it will have no control over the Facility's operation, will not otherwise be engaged in the business of selling or producing electric energy, and will have a principal business other than that of a public utility.²¹ In addition, Catalina Solar states that the Owner Participant owner(s) will be passive investors that will not have operational or managerial control over the Facility and will not be engaged in the business of selling or producing electric energy or have a principal business as a public utility.

13. In light of the facts presented in the petition and consistent with Commission precedent, we find that, upon completion of the Transaction and cancellation of Catalina Solar's market-based rate tariff, Catalina Solar will be a passive owner and lessor of the Facility. Accordingly, we will disclaim jurisdiction over Catalina Solar under section 201 of the FPA, as requested in the petition.²²

²⁰ *Alta Wind I, LLC*, 133 FERC ¶ 61,240 at P 10 (citing *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 at 61,337-38).

²¹ As noted above, unlike the more typical sale/leaseback financing structure, which involves the transfer of ownership of a facility to an entity organized to act as owner-lessor, which will then lease the facility back to the transferor, the Transaction in this case involves the sale of the ownership interests in the project company to a non-affiliate, which will then lease the facility back to a different entity owned by the previous owner of the project company. The Commission's two-step FPA analysis applies irrespective of this difference in financial structure.

²² If the facts change so that the Catalina Solar operates the Facility to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, Catalina Solar will become a public utility and will be required to make filings under section 205 of the FPA (16 U.S.C. § 824d). *See, e.g., Unicom Investments, Inc.*, 91 FERC ¶ 61,109, at 61,387 n.9 (2000).

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.