

133 FERC 61,240
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 I, LLC

Docket No. EL11-6-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued December 20, 2010)

1. In this order, the Commission grants Alta Wind I, LLC's (Alta Wind I) 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 I 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

I. Background

2. Alta Wind I³ is a wholly-owned subsidiary of Alta Wind I Holding Company, LLC, which is a wholly-owned subsidiary of California Highwind Power, LLC, an indirect, wholly-owned subsidiary of Terra-Gen Power, LLC (Terra-Gen). Alta Wind I is a special purpose company that is constructing and will lease and operate an approximately 150 megawatt wind energy project located at the Alta Wind I Energy Center in Kern County, California (Project).⁴

¹ 16 U.S.C. § 824e (2006).

² *Id.*

³ Alta Wind I states that it is an exempt wholesale generator with authority to sell electric energy, capacity and ancillary services at market-based rates. Alta Wind I Petition at 3.

⁴ *Id.* at 1.

3. Alta Wind I states that it will enter into sale/leaseback transactions related to the Project (Transactions), wherein it will sell or transfer undivided interests in the Project to statutory trusts or limited liability companies (Owner Lessors), whose beneficial interests will be held by financial institutions or other investors (Owner Participants).⁵ Alta Wind I explains that it will enter into a long-term lease with each Owner Lessor with respect to that Owner Lessor's interest in the Project.

4. Alta Wind I states that, under the term sheet provided by Terra-Gen, General Electric Capital Corporation, a wholly-owned subsidiary of General Electric Co. and Bankers Commercial Corporation, a wholly-owned subsidiary of UnionBanCal Corporation, as well as statutory trusts or limited liability companies whose beneficial interests are held by General Electric Capital Corporation and Bankers Commercial Corporation, would act, respectively, as initial Owner Participants and initial Owner Lessors with respect to the Project.⁶ Alta Wind I maintains that the initial Owner Participants have the right, subject to certain restrictions, to arrange for additional Owner Lessors and Owner Participants to assume all or a portion of their rights to participate in the Transactions. Finally, Alta Wind I submits that it will provide the names of any additional Owner Lessors and Owner Participants to the Commission once the Transactions have been consummated.⁷

5. Alta Wind I represents that 100 percent of the Project will be sold or transferred in the Transactions. In addition, Alta Wind I asserts that the Owner Lessors and Owner Participants will have the following characteristics:

- (1) The Owner Lessors and Owner Participants will not operate the Project during the term of the respective leases;
- (2) The Owner Lessors and Owner Participants will not 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) The Owner Lessors and Owner Participants will have a principal business other than that of a public utility.⁸

⁵ Alta Wind I anticipates that on or before the commercial operation date, December 2010, it will enter into the sale/leaseback transactions. *Id.*

⁶ The initial Owner Participants may be wholly-owned subsidiaries of General Electric Co. and Bankers Commercial Corporation. *Id.* at 2.

⁷ *Id.*

⁸ *Id.* at 5.

6. Alta Wind I requests that the Commission disclaim jurisdiction over the Owner Lessors and Owner Participants under section 201 of the FPA.⁹ Alta Wind I submits that none of the Owner Lessors or Owner Participants should be considered a public utility as defined in section 201(e) of the FPA,¹⁰ because none of the Owner Lessors or Owner Participants will operate or have any decision-making authority regarding the operation or maintenance of or control of the output from the Project. Alta Wind I provides that the Owner Lessors' and Owner Participants' involvement with the Project will be limited to passive financing activities. In contrast, Alta Wind I explains that, as lessee, it will have full operational authority over and control of the sale of electricity from the Project.¹¹

7. Alta Wind I requests that the Commission disclaim jurisdiction over Owner Lessors and Owner Participants by December 20, 2010. Alta Wind I asserts that expedited approval is appropriate because the commercial operation date for the Project is scheduled to occur in December 2010, and applicants intend to complete the Transactions on or immediately before the commercial operation date.¹²

II. Notice of Filing

8. Notice of the filing was published in the *Federal Register*, 75 Fed. Reg. 76,455 (2010), with interventions and comments due on or before December 8, 2010. No interventions or comments were filed.

III. Discussion

9. Section 201(b)(1)¹³ 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. . . .

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ Alta Wind I explains that it will have sole authority to control, operate, maintain, and manage the Project during the duration of each lease. *Id.*

¹² *Id.* at 5.

¹³ 16 U.S.C. § 824b(1) (2006).

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. . . .”¹⁴

10. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.¹⁵ 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 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.¹⁶

11. Here, Alta Wind I states that the Owner Lessors and Owner Participants will have no control over the operations of the Project. In addition, as described by Alta Wind I, 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 Transactions, 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 under section 201 of the FPA, as requested by Alta Wind I.¹⁷

¹⁴ 16 U.S.C. § 824e.

¹⁵ 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).

¹⁶ *Pacific Power & Light Co.*, 3 FERC at 61,337-338.

¹⁷ If the facts change so that an Owner Lessor or Owner Participant operates the 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). See, e.g., *Unicom Investments, Inc.*, 91 FERC ¶ 61,109, at 61,387 n.9 (2000).

The Commission orders:

Alta Wind I'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 I in the petition, is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.