138 FERC ¶ 61,064
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Shiloh III Wind Project, LLC — Docket No. EL12-15-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued January 30, 2012)

1. In this order, the Commission grants Shiloh III Wind Project, LLC's (Shiloh III) 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 in the petition, that Shiloh III, 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, Shiloh III will not be a public utility within the meaning of section 201(e) of the FPA.

I. Background

2. Shiloh III is a wholly-owned subsidiary of enXco Development Corporation (eDC), which is a wholly-owned subsidiary of enXco, Inc. (enXco). Shiloh III is a limited liability company that has constructed an approximately 100 megawatt wind energy project located in Solano County, California (Facility) that, at the time of the filing of the petition, was scheduled to begin commercial operation in December 2011.[2]

3. Shiloh III states that, to implement the sale-leaseback transaction described in the petition (Transaction),[3] eDC will transfer 100 percent of the membership interests in Shiloh III to an entity (Owner Participant) owned by Banco Santander, S.A. (Santander).

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[1] 16 U.S.C. § 824(e) (2006).

[2] Shiloh III Petition at 1.

[3] In a separate order in Docket No. EC12-49-000, being issued concurrently with this order, Shiloh III and Shiloh III Lessee, LLC, have been authorized pursuant to section 203(a)(1) of the FPA, 16 U.S.C. § 824b(a)(1) (2006), to implement the Transaction. *Shiloh III Wind Project, LLC*, 138 FERC ¶ 62,066 (2012).

Shiloh III states that Santander, which is based in Madrid, Spain, provides a range of banking and financial products including corporate banking, treasury, and investment banking activities. Shiloh III further states that, although Santander has a number of other subsidiaries that own various indirect, passive, non-controlling and non-managing interests in electric generation facilities, Santander is not primarily engaged in energy-related business activities and does not directly own or control any electric generating or transmission assets or generation output in the United States.[4]

4. Shiloh III notes that, prior to or after the consummation of the Transaction, Santander may transfer some of its ownership interest in the Owner Participant to other investors, which have not yet been identified. Shiloh III states that any such investors would be statutory trusts or limited liability companies that would have a principal business other than that of a public utility, and would not be in the business of producing or selling electric power other than through similar passive arrangements or equity investments that do not involve management or operational control.[5]

5. As part of the Transaction, Shiloh III states that it will lease the Facility to a newly created entity, Shiloh III Lessee, LLC (Shiloh III Lessee). According to Shiloh III, Shiloh III Lessee is a limited liability company that is wholly-owned by eDC and indirectly-owned by enXco. Shiloh III states that Shiloh III Lessee has been created to manage and operate the Facility after consummation of the Transaction, so that operational control will be retained by enXco. Shiloh III Lessee has filed a self-certification of exempt wholesale generator (EWG) status[6] and, contemporaneously with this petition, it has filed for authority to sell power at market-based rates.[7]

6. Shiloh III states that upon the Transaction's consummation, during the term of the lease, Shiloh III Lessee will operate and control the Facility and will assume the responsibility to sell the Facility's full output to Pacific Gas & Electric Company (PG&E) under an existing power purchase agreement. Upon the lease commencement date, Shiloh III's market-based rate tariff will be cancelled, and Shiloh III will become a passive owner and lessor of the Facility.[8]

[4] Shiloh III Petition at 2.

[5] *Id.* at 2 n.2.

[6] *Id.* at 3 (citing *Shiloh III Lessee, LLC*, Docket No. EG12-20-000 (filed December 13, 2011)).

[7] *See Shiloh III Lessee, LLC*, Docket No. ER12-610-000 (filed December 15, 2011).

[8] Contemporaneously with this petition, Shiloh III filed a notice of cancellation of its market-based rate tariff in Docket No. in ER12-61-000. Shiloh III requested that the notice of cancellation become effective on the lease commencement date.

7. Shiloh III explains that the Transaction's form only differs from the usual sale/leaseback financing structure because the Transaction is structured as a sale of the project company rather than as a sale of the facility. In this structure, Shiloh III Lessee, which will control and operate the Facility, is a newly created entity, rather than the original owner operator of the Facility, as in the typical structure. Shiloh III claims that the Transaction has been structured in this manner due to difficulties in transferring underlying agreements and interests held by Shiloh III to a separate entity. Otherwise, according to Shiloh III, the Transaction has been structured to be functionally the same as traditional sale/leaseback transactions that the Commission has found to be financing vehicles.[9]

8. Shiloh III states that the Transaction is structured to ensure that Shiloh III Lessee will be the "public utility" subject to the Commission's jurisdiction. Shiloh III states that Shiloh III, 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, and will have only a passive interest in the Facility. Upon the effectiveness of the cancellation of Shiloh III's market-based rate tariff, Shiloh III states that it will no longer be a public utility and will not have authority to sell electricity. As a result, Shiloh III Lessee will operate the Facility and make all electricity sales of the output of the Facility to PG&E. Finally, according to Shiloh III, the Owner Participant owner(s) of Shiloh III 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.[10]

9. Shiloh III requests that the Commission disclaim jurisdiction over Shiloh III under section 201 of the FPA once the Transaction is consummated.[11] Shiloh III submits that, in its capacity as owner-lessor under the Facility lease, it should not be considered a public utility as defined in section 201(e) of the FPA after the Transaction is consummated, because it: (1) will not operate or control the operation of the Facility during the term of the lease, (2) will not be in the business of producing or selling electric energy, and (3) will have a principal business other than that of a public utility.[12] Shiloh III also states that the Commission has previously disclaimed jurisdiction over the owner-lessor in sale/leaseback transactions similar to the Transaction proposed here.[13]

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[9] As noted in footnote 3 *supra*, in an order being issued concurrently with this order, the Commission has authorized the Transaction.

[10] Shiloh III Petition at 4.

[11] *Id*. at 4-5.

[12] *Id.*

[13] *Id.* at 5 (citing *Alta Wind I, LLC*, 133 FERC ¶ 61,240 (2010); *Alta Wind Holdings, LLC*, 133 FERC ¶ 61,177 (2010)).

10. Shiloh III requests that the Commission issue an order granting the petition by January 30, 2012, to enable the Transaction to close at the scheduled time. Shiloh III states that expedited approval is appropriate because the Transaction is scheduled to occur by the end of January 2012 and the expedited consideration will enable the petitioners to ensure that the financing is completed at the appropriate time.[14]

II. Notice of Filing

11. Notice of the filing was published in the *Federal Register*, 76 Fed. Reg. 81,927 (2011), with interventions and comments due on or before January 20, 2012. No interventions or comments were filed.

III. Discussion

12. Section 201(b)(1)[15] 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. . . ."[16]

13. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.[17] 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

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[14] *Id.* at 6.

[15] 16 U.S.C. § 824(b)(1) (2006).

[16] 16 U.S.C. § 824(e).

[17] *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 and Catalyst Old River Hydroelectric Limited Partnership*, 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); *Alta Wind I, LLC*, 133 FERC ¶ 61,240; *Alta Wind Holdings, LLC*, 133 FERC ¶ 61,177).

> 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.[18]

14. Here, Shiloh III states that Shiloh III and the Owner Participant(s) will have no control over the operations of the Facility.[19] In addition, as described by Shiloh III, Shiloh III and Owner Participant(s) 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 Shiloh III and Owner Participant(s), as contemplated in the 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 Shiloh III under section 201 of the FPA, as requested by Shiloh III.[20]

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

[19] As explained in the petition, 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.

[20] If the facts change so that the Shiloh III or Owner Participant(s) operate the Facility in order to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, Shiloh III 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).

<u>The Commission orders</u>:

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.