

136 FERC ¶ 61,127
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.

Edison Mission Huntington Beach, LLC

Docket No. EL11-35-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued August 25, 2011)

1. In this order, the Commission grants Edison Mission Huntington Beach, LLC's (EMHB) petition for a declaratory order disclaiming jurisdiction under section 201 of the Federal Power Act (FPA).¹ We find that EMHB will be a passive owner of two generating units located at Huntington Beach, California, and will not operate or exercise control or decision-making authority over them, or otherwise be engaged in the business of producing or selling electricity. Thus, EMHB will not be a public utility within the meaning of section 201(e) of the FPA.

I. Background

2. EMHB states that it is an indirect, wholly-owned subsidiary of Edison Mission Energy (Edison Mission). EMHB states that it is not a public utility and does not own any equipment or facilities subject to the Commission's jurisdiction. Further, according to EMHB, it does not produce, buy, sell, or transmit electric capacity, energy, or ancillary services at wholesale or retail.²

3. EMHB states that Edison Mission is a holding company whose subsidiaries and affiliates are engaged in the business of developing, acquiring, owning or leasing, operating, and selling energy and capacity for independent power production facilities. Edison Mission also engages in hedging and energy trading activities through its subsidiary, Edison Mission Marketing & Trading, Inc. EMHB explains that, as of December 31, 2010, Edison Mission's subsidiaries and affiliates owned or leased

¹ 16 U.S.C. § 824e (2006).

² EMHB Petition at 2.

interests in 39 power generation facilities, with an aggregate capacity of 10,979 megawatts (MW), of which Edison Mission's ownership was 9,852 MW.³

4. EMHB states that Edison Mission is a subsidiary of Edison Mission Group, Inc., a holding company that acts through numerous subsidiaries to manage the competitive power generation business and other unregulated subsidiaries of Edison International. Further, EMHB states that Edison International is the parent company of Southern California Edison Company, a public utility with franchised service territory in Southern California.⁴

5. EMHB states that it was formed for the sole purpose of acquiring ownership of two of the four generating units at AES Huntington Beach, LLC's (AES Huntington Beach) Huntington Beach, California, generating station (the Units), as described below, and then leasing the Units back to AES Huntington Beach in a sale and leaseback transaction between EMHB and AES Huntington Beach.⁵ EMHB further states that, as a result of acquisition of the Units from AES Huntington Beach, Walnut Creek Energy will be able to utilize certain environmental offset exemptions associated with the retirement of the Units to facilitate its acquisition of needed environmental permits for a new generating facility (the Walnut Creek Facility).⁶ Finally, EMHB states that its ownership of the Units will be entirely passive and that it will not exercise control or decision-making authority over them. According to EMHB, AES Huntington Beach will have sole authority to control, operate, maintain and manage the Units. Moreover, EMHB states that it will not otherwise be engaged in the business of producing, buying, selling, or transmitting electric capacity, energy, or ancillary services at wholesale or

³ *Id.* at 3. EMHB also states that Edison Mission's subsidiary, Walnut Creek Energy, LLC (Walnut Creek Energy), is developing a 500 MW generating facility that will be located in the California Independent System Operator Corporation's balancing authority area.

⁴ *Id.*

⁵ In a letter dated May 6, 2011, in Docket No. EC11-52-000, AES Huntington Beach notified the Commission that its sale-leaseback transaction was finalized on May 4, 2011, as authorized by the Commission in *AES Huntington Beach, LLC*, 135 FERC ¶ 62,049 (2011).

⁶ EMHB Petition at 3, n.3. The application submitted in EC11-52-000 provides additional information about the sale-leaseback transaction between AES Huntington Beach and EMHB. *AES Huntington Beach, LLC*, *supra* note 5.

retail. EMHB also states that it will not own any transmission facilities and will not be engaged in the business of providing transmission service.⁷

6. EMHB states that AES Huntington Beach's Huntington Beach Facility is a four-unit generating facility with a total generating capacity of approximately 904 MW. The Units are comprised of boilers, steam turbines and related equipment of Units 3 and 4 of the AES Huntington Beach Facility, and have a combined generating capacity of approximately 452 MW.⁸

7. According to EMHB, AES Huntington Beach will operate the Units under a lease agreement until an agreed-upon shutdown date for the Units. EMHB states that the shutdown date is expected to be up to two years after the commencement of the lease, after which the Units will be retired and dismantled. Further, EMHB states that AES Huntington Beach will retain ownership of the land on which the Units are situated, as well as their foundations and interconnection facilities, and all other facilities and equipment other than the Units' boilers, steam turbines, emission controls, and related equipment.⁹

8. EMHB requests that the Commission determine that EMHB is not a public utility as defined under section 201(e) of the FPA because it will be a passive owner and lessor of the Units and it will not exercise control or decision-making authority over the Units. EMHB represents that AES Huntington Beach will have sole authority to control, operate, maintain and manage the Units.¹⁰ Further, EMHB states that it will not otherwise be engaged in the business of producing, buying, selling, or transmitting electric capacity, energy, or ancillary services at wholesale or retail.

II. Notice of Filing

9. Notice of the filing was published in the *Federal Register*, 76 Fed. Reg. 28,025 (2011), with interventions and comments due on or before May 27, 2011. No interventions or comments were filed.

⁷ EMHB Petition at 2.

⁸ *Id.* at 3.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 5.

III. Discussion

10. Section 201(b)(1)¹¹ 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. . . .”¹²

11. The Commission has addressed the application of section 201 to entities with passive ownership interests in jurisdictional facilities on numerous occasions.¹³ 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 those 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.¹⁴

¹¹ 16 U.S.C. § 824b(1) (2006).

¹² 16 U.S.C. § 824e.

¹³ See, e.g., *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Elec. 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).

¹⁴ *Pacific Power & Light Co.*, 3 FERC at 61,337-338; *KeySpan-Ravenswood, LLC*, 124 FERC ¶ 61,133 (2008).

12. Here, EMHB states that it will have no control over the operation of the Units based on the terms and conditions of its sale leaseback agreement with AES Huntington Beach. Moreover, as noted above,¹⁵ as a result of this transaction, EMHB will acquire the environmental offset exemptions associated with the retirement of the Units, which then can be used by Walnut Creek Energy to facilitate its acquisition of necessary environmental permits for a new generating facility (the Walnut Creek Facility). In addition, EMHB represents that it will not otherwise be engaged in the business of selling or producing electric capacity, energy, or ancillary services at wholesale or retail. In view of the representations made by the petitioner, and consistent with Commission precedent,¹⁶ we find that EMHB will have only a passive ownership interest in the Units, will not exercise control or decision-making authority over the Units, and is not otherwise engaged in the business of selling or producing electric energy. Accordingly, we will disclaim jurisdiction over EMHB as a “public utility” under section 201(e) of the FPA, as requested.¹⁷

The Commission orders:

EMHB’s request that the Commission disclaim jurisdiction over EMHB as a “public utility”, based upon the facts presented and representations made by EMHB, is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁵ See *supra* P 5 and note 6.

¹⁶ See *supra* P 11 and note 13.

¹⁷ If the facts change so that EMHB operates or takes control of the operation of the Units or otherwise engages in the business of selling or producing electric energy, it will become a public utility and will be required to make filings under section 205 of the FPA (16 U.S.C. § 824d).