

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

W. E. Power LLC  
Elm Road Generating Station Supercritical, LLC

Docket No. EL04-96-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER AND  
DISCLAIMING JURISDICTION

(Issued June 22, 2004)

1. In this order, we grant a petition for a declaratory order, finding that certain passive lessors are not, because of a lease financing transaction, subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).<sup>1</sup>

**BACKGROUND**

2. On April 7, 2004, W.E. Power LLC (W.E. Power), and Elm Road Generating Station Supercritical, LLC (Project Company) (collectively, Applicants) filed a petition for a declaratory order disclaiming Commission jurisdiction, under section 201 of the FPA, over W.E. Power and the Project Company (Passive Lessors) as passive lessors of two generating units and associated transmission facilities. Applicants also request that the Commission find that W.E. Powers' and the Project Company's rights upon termination of the leasing agreements will not alter this conclusion.

3. W.E. Power, a wholly-owned subsidiary of Wisconsin Energy Corporation (Wisconsin Energy)<sup>2</sup>, directly owns a 100 percent interest in the Project Company and in Port Washington Generating Station LLC (Port Washington). W.E. Powers will own

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<sup>1</sup>16 U.S.C. § 824 (2000).

<sup>2</sup> Wisconsin Energy is an exempt public utility holding company under the Public Utility Holding Company Act of 1935. Wisconsin Energy does not directly own, operate, or control any facilities used for the distribution, generation, or transmission of electric energy. Wisconsin Energy owns a 100 percent interest in the following energy subsidiaries: Wisconsin Electric, Wisconsin Gas Company, Edison Sault Electric Company, and Wisvest Corporation.

indirect, passive financial interests in two 615 megawatts (MW) super critical pulverized coal generating units (Elm Road Units) as a result of owning the Project Company. Also, W. E. Powers will own indirect, passive financial interest in two 545 MW gas-fired, combined cycle generating units and associated interconnection facilities as a result of owning Port Washington.

4. The Project Company is a direct wholly-owned subsidiary of W. E. Power formed to develop, construct, and own all or a portion of the ownership interests in the Elm Road Units in Oak Creek, Wisconsin. The Project Company will lease the Elm Road Units under two long-term leases to its corporate affiliate, Wisconsin Electric Power Company. The Project Company will own a direct, passive financial interest in the Elm Road Units.

5. The Elm Road Transaction is the second phase of Wisconsin Energy's commitment to improve the supply and reliability of electricity in the State of Wisconsin. The Elm Road Transaction, like the first phase, Port Washington Transaction, will use a leased generation arrangement authorized under Wisconsin's Leased Generation Law.<sup>3</sup> Applicants state that the leased generation arrangement for the Elm Road Transaction is the same used in the Port Washington Transaction.<sup>4</sup> The two long-term facility leases, one applicable to each Elm Road Unit (the Facility Leases) provide the terms and conditions under which the Project Company will construct the Elm Road Units. Upon completing the construction and satisfying certain conditions of the Facility Leases, the Project Company will lease its ownership interests in the Elm Road Units to Wisconsin Electric for a term of 30 years. Consequently, Wisconsin will make lease payments in the Project Company in return for the right to possess and operate the Elm Road Units. Wisconsin Electric will be responsible for the operations, maintenance, and fuel costs for the facilities.

6. As part of the Elm Road Transaction, there will be certain interconnection facilities constructed and owned by the Project Company which will be leased to Wisconsin Electric and/or American Transmission Company, LLC. According to Applicants, neither W. E. Power nor the Project Company will operate or control the Elm Street Units or the associated transmission facilities.

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<sup>3</sup> According to Applicants, the Elm Road Transaction's long-term lease structure is authorized under a recent Wisconsin law, the "Leased Generation" law, which permits a public utility to acquire generating resources through an affiliate as an alternative to building the facilities itself.

<sup>4</sup> A declaratory order relating to the Port Washington Transaction was granted by Commission order issued October 6, 2003, in Docket No. EL03-218-000.

7. The leases also have provisions dealing with defaults and expiration of the leases. If certain events of default occur, the Project Company would have the right to terminate the applicable lease and take possession of the facilities. At the end of the terms of the leases, Wisconsin Electric may renew them, buy the unit(s) from the Project Company, or return the unit(s) to the Project Company.

8. Applicants state that they will seek approval of the Elm Road Transaction under section 203 of the FPA, if once the details associated with the interconnection facilities are finalized, any jurisdictional facilities will be transferred.

9. Notice of Applicants' April 7 filing was published in the Federal Register, 69 Fed. Reg. 21522 (2004), with comments, protests and interventions due on or before April 26, 2004. None was filed.

## **DISCUSSION**

10. Applicants request a disclaimer of jurisdiction over Passive Lessors, 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) 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) states that:

The term "public utility" . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part...

13. The application of section 201 of the FPA to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>5</sup> In those cases, the Commission employed 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

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<sup>5</sup>See 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).

operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of producing or selling electric power or has a principal business other than that of a public utility. 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 the Passive Lessors: (1) will not operate or control operation of the jurisdictional facilities or the associated transmission facilities that are the subject of the lease financing transaction; and (2) will not be entities otherwise engaged in the business of producing, selling or transmitting electric power. In light of the facts presented in the petition and consistent with Commission precedent, we find that the role of the Passive Lessors, as contemplated in the proposed lease financing arrangement, is limited to that of passive investors that do not exercise control or decision-making authority over the leased facilities. Accordingly, neither of the Passive Lessors, to the extent they operate in a manner consistent with the representations in the application, would, as a result of the transaction described above, be a public utility within the meaning of section 201(e) of the FPA.<sup>6</sup>

15. As to the default and lease expiration provisions, Applicants state that these provisions do not change the conclusion that the Passive Lessors are not public utilities, citing Commission precedent.<sup>7</sup> We agree that the 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.<sup>8</sup>

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<sup>6</sup>If this changes so that the Passive Lessors operate the facilities in order to make sales of electric energy at wholesale or to engage in transmission in interstate commerce, they will become public utilities and will be required to make appropriate filings pursuant to section 205 of the FPA, 16 U.S.C. § 824d (2000). See, e.g., Unicom Investments, Inc., 91 FERC ¶ 61,109 at 61,387, n.9 (2000).

<sup>7</sup>PPL Large Scale Distributed Generation II, LLC, 96 FERC ¶ 61,239 at 61,956 (2001); Dynegy Danskammer, L.L.C., 94 FERC ¶ 61,316 at 62,189 (2001).

<sup>8</sup>See, e.g., PPL Large Scale, 96 FERC at 61, 956, citing Vidalia, at p. 61,728, n.31.

The Commission orders:

Applicants' request that the Commission disclaim jurisdiction over the Passive Lessors in this proceeding, based on the facts presented by Applicants in their petition, is hereby granted.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.