

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Springerville Unit 3 Holding LLC

Docket No. EL04-12-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
AND DISCLAIMING JURISDICTION

(Issued December 23, 2003)

1. In this order we grant a petition for a declaratory order, finding that certain passive participants are not, because of a lease financing transaction, subject to the Commission's jurisdiction under Section 201 of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000). This order benefits customers by encouraging a broader array of entities to provide capital for public utility infrastructure additions.

**I. Background**

2. On October 20, 2003, Springerville Unit 3 Holding LLC (Springerville) filed a petition for a declaratory order disclaiming Commission jurisdiction, under Section 201 of the FPA, over Springerville; Springerville Unit 3 OP LLC (Owner Participant); Springerville Unit 3 Partnership LP (Partnership); General Electric Capital Corporation (General Electric Capital); Wilmington Trust Company (Wilmington) as depository bank, indenture trustee, and pass-through trustee; Credit Suisse First Boston, LLC (Credit Suisse); and Wells Fargo Delaware Trust Company (Wells Fargo) (collectively Passive Participants). Springerville also requests that the Commission find that Springerville's and Wilmington's rights to assume operation of the Springerville Generating Station Unit 3 (Facility) if there is a default will not alter this conclusion.<sup>1</sup>

3. Springerville is a Delaware limited liability company whose sole asset is the Facility. Springerville intends to lease the Facility to Tri-State Generation and

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<sup>1</sup> Springerville cites to Baltimore Refuse Energy Systems Company, 40 FERC ¶ 61,366 at 62,118 n.11 (1987).

Transmission Association, Inc. (Tri-State), a generation and transmission cooperative. The sole member of Springerville is the Owner Participant. Wells Fargo is the sole manager of both Springerville and the Owner Participant. The sole member of the Owner Participant is the Partnership whose general partner is General Electric Capital. Wilmington, Credit Suisse, and Wells Fargo (collectively Financing Parties) provide construction and lease financing to facilitate the construction, lease, and operation of the Facility.

4. Before the Facility is completed, Tri-State will lease it from Springerville for a term of 34 years with two renewal terms and an early buy-out option. The lease contains customary “event of default” protections which may allow Springerville (and, as long as the lien in favor of Wilmington has not been released, Wilmington) to take over operation of the Facility. In addition, Springerville will assign its interests in a Power Purchase Agreement with Salt River Project and contracts for construction, testing, operation, and maintenance of the Facility to Tri-State. Under these contracts, Tri-State will have the sole right to receive the Facility’s output and to retain the revenues from any power sales. Tri-State will use the Facility’s energy and capacity to supply its member cooperatives and sell the excess to wholesale buyers.<sup>2</sup>

5. Both Springerville and the Owner Participant have applied to the Commission to obtain exempt wholesale generator (EWG) status.<sup>3</sup> Springerville contends that neither these applications nor their acceptance will alter the conclusion that the Passive Participants, specifically Springerville and the Owner Participant, should not become public utilities under the FPA as a result of the proposed transaction.

6. Notice of Springerville’s petition was published in the Federal Register, 66 Fed. Reg. 62,449 (2003), with comments, protests, and interventions due on or before November 19, 2003. Tri-State filed a timely motion to intervene.

## **II. Discussion**

7. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motion to intervene serves to make the entity that filed it a party to this proceeding.

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<sup>2</sup> Because Tri-State is a borrower from the Rural Utilities Service, it is not a public utility pursuant to section 201 of the FPA.

<sup>3</sup> Docket Nos. EG04-5-000 and EG04-6-000, respectively.

8. Springerville requests a disclaimer of jurisdiction over the Passive Participants. Specifically, it seeks a determination that they will not be regarded as “public utilities” as that term is defined in Section 201 of the FPA.

9. Section 201(b)(1), 16 U.S.C. § 824(b)(1), 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 for such transmission or sale of electric energy . . . .

Section 201(e), 16 U.S.C. § 824(e), states that:

The term “public utility” . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . .

10. 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>4</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 an interest would result in finding of “public utility” status under the FPA. Under this precedent, the Commission first determines whether the passive participant will 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.

11. Applying that analysis here, we conclude that it would be inconsistent with the FPA to label the Passive Participants in this case as public utilities and subject them to the Commission’s jurisdiction. Springerville states that the Passive Participants: (1) will not own, operate, or control operation of the jurisdictional 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 Participants, as contemplated in the proposed lease financing arrangement,

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<sup>4</sup> See Pacific Power & Light Company, 3 FERC ¶ 61,119 (1978); El Paso Electric Company, 36 FERC ¶ 61,055 (1986); City of Vidalia, 52 FERC ¶ 61,199 (1990) (Vidalia); Oglethorpe Power Corporation, 77 FERC ¶ 61,334 (1996).

is limited to that of passive investors that do not exercise control or decision-making authority over the leased facility. Accordingly, none of the Passive Participants, to the extent they operate in a manner consistent with the representations in Springerville's application, would, as a result of the transaction described above, be a public utility within the meaning of Section 201 of the FPA.<sup>5</sup>

12. As to the default and termination provisions, Springerville states that these provisions do not change the conclusion that the Passive Participants are not public utilities, citing Commission precedent.<sup>6</sup> We agree that the lease provisions, as represented in the petition, are not a present assignment of rights to the Passive Participants that would subject them to jurisdiction under Section 201 of the FPA at this time.<sup>7</sup>

13. Springerville also contends that its application to become an EWG should not result in its being regulated as a public utility under Section 201 of the FPA. In TIFD VIII-H Inc.,<sup>8</sup> the Commission stated that although Section 32 of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (PUHCA)<sup>9</sup> states that the lease of an eligible facility to a public utility "shall be treated as a sale of electric energy at wholesale for purposes of Section 205 and 206 of the Federal Power Act," this does not mean that the Commission will exert jurisdiction under the FPA over the lessor. Neither the language of Section 32(a)(2)(B), nor any other provision of the Energy Policy Act of 1992, made any change to the FPA definition of the term "public utility." Thus, while Springerville may attain EWG status, this will not subject it to Commission jurisdiction.

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<sup>5</sup> If this changes so that the Passive Participants operate the Facility 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 the 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>6</sup> Dynegy Danskammer, L.L.C., 40 FERC ¶ 61,366 at 62,118 n.11 (1987).

<sup>7</sup> See, e.g., PPL Large Scale Distributed Generation II, 96 FERC ¶ 61,239 at 61,956 (2001).

<sup>8</sup> TIFD VIII-H Inc., 69 FERC ¶ 61,042 at 61,174 (1994) (TIFD).

<sup>9</sup> 15 U.S.C. § 79z-5a (2000).

The Commission orders:

Springerville's request that the Commission disclaim jurisdiction over the Passive Participants in the proposed construction and lease financing transaction, based on the facts presented by Springerville in its petition, is hereby granted.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.