

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

201 EAST CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON
W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL*
JOHN B. INGELSTROM
DANIEL C. GREEN**
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
ERIC L. OLSEN
CONRAD J. AIKEN***
RICHARD A. HEARN, M.D.†
DAVID E. ALEXANDER††
LANE V. ERICKSON**
PATRICK N. GEORGE**
SCOTT J. SMITH
STEPHEN J. MUHONEN
BRENT L. WHITING
JUSTIN R. ELLIS
JOSHUA D. JOHNSON‡
JONATHAN S. BYINGTON
DAVE BAGLEY
CAROL TIPPI VOLYN‡‡
THOMAS J. BUDGE
CANDICE M. MCHUGH***

BOISE OFFICE

101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE

477 SHOUP AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

*ALSO MEMBER WY & IL BARS
**ALSO MEMBER UT BAR
***ALSO MEMBER CO BAR
†ALSO MEMBER D. C. BAR
††ALSO MEMBER MO BAR
‡ALSO MEMBER IL BAR
‡‡ALSO MEMBER WA BAR

April 5, 2007

OVERNIGHT MAIL/UPS:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 W. Washington Street
Boise, Idaho 83702

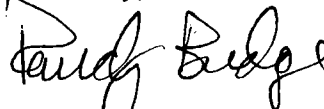
Re: *Petition for a Declaratory Order of Bonneville Power Administration*
IPC-E-07-01
BPA-

Dear Mrs. Jewell:

Enclosed please find for filing the original and seven copies of a Petition we are filing on behalf of the Bonneville Power Administration for a Declaratory Order Disclaiming Jurisdiction. Please file the same and place this matter on the Commission's agenda.

Given the nature of this matter as described in the Petition, we would respectfully request that the Commission consider processing this matter by Modified Procedure. If you have any questions or if I can be of further assistance, please don't hesitate to contact me.

Sincerely,



RANDALL C. BUDGE

RCB:rr
Enclosures
cc: Service List

2007 APR -6 10:10:06
Idaho Public Utilities Commission

Randall C. Budge, ISB No. 1949
RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED
P.O. Box 1391; 201 E. Center Street
Pocatello, Idaho 83204-1391
Phone: 208-232-6101
Fax: 208-232-6109
E-mail: rcb@racinelaw.net

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

| | | |
|-----------------------------|---|--|
| |) | BPA- |
| IN THE MATTER OF A PETITION |) | CASE NO. IPC -E-07- <u>01</u> |
| FILED BY BONNEVILLE POWER |) | |
| ADMINISTRATION FOR A |) | PETITION FOR A |
| DECLARATORY ORDER |) | DECLARATORY ORDER |
| DISCLAIMING JURISDICTION |) | OF BONNEVILLE POWER |
| |) | ADMINISTRATION |
| _____ |) | |

COMES NOW Bonneville Power Association (“BPA” or “Petitioner”) and, pursuant to the Idaho Public Utility Commission’s (the “Commission”) Rule of Procedure 101, Idaho Administrative Code § 31.01.01.101 (2006) (“IAC”), hereby petitions the Commission to issue a Declaratory Order finding that the passive owner lessor in a proposed lease financing of various electric transmission facilities to be used exclusively in interstate commerce is not a public utility and therefore is not subject to the jurisdiction of and regulation by the Commission.

PETITIONERS REPRESENTATIVES

Petitioner’s representatives in this matter are:

Robb F. Roberts
Bonneville Power Administration
Office of General Counsel
Routing LC-7
905 Northeast 11th Avenue
P.O. Box 3621
Portland, Oregon 97232
Telephone: (503) 230-4201
Facsimile: (503) 230-7405
Email: rfroberts@bpa.gov

Randall C. Budge, ISB No. 1949
Racine, Olson, Nye, Budge & Bailey
P.O. Box 1391; 201 E. Center Street
Pocatello, Idaho 83204-1391
Phone: (208) 232-6101
Facsimile: 208-232-6109
Email: rcb@racinelaw.net

PETITIONER AND PETITIONER'S INTEREST IN THE MATTER

BPA is a federal power marketing administration within the U.S. Department of Energy that markets wholesale electrical power and operates transmission facilities in the West and Pacific Northwest. BPA proposes to enter into a lease financing transaction for the acquisition, construction and/or installation of various, as of yet undetermined, transmission facilities, including system replacements, upgrades, and additions, to be put into service over time and primarily affecting existing transmission infrastructure ranging from 69 kV to 1000 kV (the "Facilities"). Some of the Facilities will be located in Idaho and all of the Facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service.

The Facilities will be financed by a special purpose entity owner lessor (the "Owner Lessor") and acquired, constructed and/or installed by BPA pursuant to a construction agency agreement between the Owner Lessor and BPA. The Owner Lessor is unlikely to enter into the various agreements required to finance the Facilities if there is any uncertainty that it will be subject to the jurisdiction of the Commission with respect to the Facilities. BPA will be unable to proceed with the proposed lease transaction and

have the Facilities financed in the manner desired by BPA unless the Owner Lessor enters into the proposed agreements. BPA therefore has significant interests in this matter.

DECLARATORY RULING SOUGHT BY BPA

BPA hereby petitions the Commission for a Declaratory Order disclaiming jurisdiction under Title 61 of the Idaho Code, and, specifically Sections 61-129 and 61-501, over the owner lessor BPA's proposed lease financing for the construction, acquisition and/or installation of certain electric transmission facilities to be used exclusively in interstate commerce, including new transmission facilities to be located in Idaho, as part of its infrastructure program. The Commission has jurisdiction over this request under Idaho Code § 61-501 and *Utah Power & Company v. Idaho PUC*, 112 Idaho 10, 730 P.2d 930 (1986). Moreover, the Commission has the authority to consider the Petition for Declaratory Order pursuant to Rule 101 of the Commission's Rules of Procedure, IDAPA 31.01.01.101.

CONTROLLING LAW

The statute, order, rule or other controlling law relied on by BPA to support this Petition are:

1. Idaho Code Ann. § 61-129;
2. Idaho Code Ann. § 61-119;
3. Idaho Code Ann. § 61-118;
4. *Humbird Lumber Co. v. Public Utilities Commission of State of Idaho, et al.*, 39 Idaho 505, 228 P. 271 (1924);
5. *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921); and

6. *LLP Power Generation, LLC*, IPUC Order No. 28793 at p. 3 (Jul. 25, 2001).

BACKGROUND AND RELEVANT FACTS

As stated above, BPA proposes to enter into a lease financing arrangement under which it would acquire, construct and/or install the Facilities for the purposes of enhancing West and Northwest transmission grid (“Grid”) reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the Grid and managing Grid congestion.

While the Facilities will not be in support of distribution service, it is possible that certain facilities lower than 69 kV may be financed in cases of voltage step-ups of generation and station service to generating stations. BPA will install or construct the Facilities on real property, real property easements or similar rights held by BPA on land that is owned by a variety of parties, both private and governmental.

The Facilities will be owned by the Owner Lessor, special purpose entity Northwest Infrastructure Financing Corporation II, a Delaware corporation, which will be formed expressly for the purpose of arranging for the financing of the Facilities. All of the capital stock of the Owner Lessor will be owned by JH Holdings, not individually but acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation, a Massachusetts corporation (“JHM”), as grantor, and JH Holdings Corporation, a Massachusetts corporation (“JHH”), as trustee. All of the capital stock of JHM and JHH will be owned by The 1960 Trust, an independent charitable support organization qualified under Section 501(c)(3) of the Internal Revenue Code and

operated for the benefit of Harvard University. The Owner Lessor will not engage in any business other than arranging for the acquisition and financing of the Facilities.

The Owner Lessor will initially finance the construction of the Facilities through one or more bank loans. The Owner Lessor's sole source of funds to repay the loans will be payments made by BPA under the lease of the Facilities to BPA. The Owner Lessor and BPA will execute a master lease that will govern and incorporate from time to time separate individual lease commitments between BPA and the Owner Lessor for related Facilities (collectively, the "Lease"). Under the Lease, the Owner Lessor will lease its undivided interest in each of the Facilities to BPA at the time each such Facility is acquired, installed and/or constructed.

Pursuant to the Lease, BPA will acquire a leasehold interest in and possession of the Facilities from the Owner Lessor. The term of the Lease will be seven (7) years from the date that the master lease and the first lease commitment are executed. BPA will agree in the Lease to operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities. To this end, the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities under the Lease or any other agreement.

Moreover, the Lease will not impede the ability of BPA to transfer operational control over the Facilities to a regional transmission organization. The final Lease will be substantially in the form of the draft Lease attached hereto as Exhibit 1.

GROUNDS FOR DISCLAIMING JURISDICTION

The Commission should issue a declaratory order disclaiming jurisdiction over the Owner Lessor under title 61 of the Idaho Code because, under Idaho law, the Owner Lessor is not a “public utility.” The definition of “public utility” set out in Section 61-129 of the Idaho Code includes electrical corporations, which, under Section 61-119 of the Code include every person owning, operating, controlling, or managing any electric plant for compensation in the State. An electric plant is any property used to facilitate the production, generation, transmission, delivery or furnishing of electricity. Idaho Code Ann. § 61-118. Corporations declared to be public utilities are subject to the jurisdiction, control and regulation of the Commission. Idaho Code Ann. § 61-129.

Section 61-129 of the Code also establishes a two-part test for determining when a utility corporation, such as an electrical corporation, is to be considered a “public utility.” First, a public utility must provide utility services directly or indirectly to the public or some portion thereof. Idaho Code Ann. § 61-129. Second, the utility service must be provided for compensation. *Id.* In construing the first part of this test, the Idaho Supreme Court has held that satisfaction of the first prong depends on whether the company has held itself out as ready, able and willing to serve the “public” with utility service. *See Humbird Lumber Co. v. Public Utilities Commission of State of Idaho, et al.*, 39 Idaho 505, 228 P. 271, 274 (1924). The Idaho Supreme Court has also determined that furnishing utility service to one or a limited number of customers does not constitute the delivery of utility service to the public or some portion thereof. *Id.*; *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921).

The Commission applied these Idaho Supreme Court precedents in *LLP Power Generation, LLC*, IPUC Order No. 28793 at p. 3 (Jul. 25, 2001). In that case, the Commission found that the leasing of locomotive engines to third parties for the purpose of generating power for sale in the regional wholesale market would not subject the lessor to the Commission's regulatory jurisdiction. *LLP Generation* at p. 1. Specifically, the Commission sided with the Commission Staff, which concluded that LLP's leasing of locomotive engines did not constitute the provision of utility services to the "public," observing that LLP's sole activity would be the leasing of locomotive equipment to others; the lessees would site the locomotives to generate power for sale. *Id.* at p. 2.

As in *LLP Generation*, the Owner Lessor's sole activity will be leasing the Facilities to BPA. It is BPA that will site and operate the Facilities in order to transmit power. The Owner Lessor therefore will not dedicate or devote the Facilities to a public use. On the contrary, under the Lease, BPA will have exclusive authority and responsibility for the operation, maintenance, repair, replacement and use of the Facilities. Therefore, because the Owner Lessor will not serve the public as required by Section 61-129 of the Idaho Code, BPA respectfully requests that the Commission find the Owner Lessor is not a public utility subject to Commission jurisdiction under Idaho law.

Moreover, the Washington Utilities and Transportation Commission ("WUTC") disclaimed jurisdiction over a nearly identical transaction involving BPA in 2004. In that case, the WUTC issued an Order declaring that the neither the owner lessor nor the indenture trustee of an electric transmission line to be operated by BPA would be public

service companies under Washington law and consequently neither would be subject to WUTC regulation.¹ Given the similarity of the instant facts to those established in the 2004 WUTC case, as well as the similarity of Washington's and Idaho's classification and regulation of public utilities, the WUTC case provides additional support for a finding that the Owner Lessor is not "public utility" under Idaho law.²

CONCLUSION

WHEREFORE, BPA respectfully requests that the Commission issue a declaratory order disclaiming jurisdiction under title 61 of the Idaho Code over the passive owner lessor in BPA's proposed lease financing for the construction of certain electric transmission facilities to be used exclusively in interstate commerce, including new transmission facilities to be located in Idaho, as part of its infrastructure program.

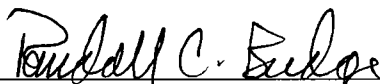
BPA further respectfully requests the Commission process this Petition under Modified Procedure by written submission rather than hearing pursuant to IDAPA 31.01.01.201-204.

¹ In the Matter of the Petition of the Bonneville Power Administration For a Declaratory Order Disclaiming Jurisdiction, Docket No. UE-040088, Order No. 01, p.1 (Feb. 20, 2004) (attached hereto as Exhibit B).

² FERC likewise found that the Owner Lessor in this BPA lease financing transaction was not public utility under the Federal Power Act because it would be a solely passive investor in the power projects and would have no control over the operation of the proposed facilities. U.S. Dept. of Energy, Bonneville Power Administration, Order Granting Petition for Declaratory Order Disclaiming Jurisdiction, 118 FERC ¶ 61,240 (2007) (attached hereto as Exhibit C). The Commission should also disclaim jurisdiction over the Owner Lessor with respect to the Facilities, as the Owner Lessor will be a solely passive investor in and owner of, and will have no control over the operation, maintenance, repair, replacement or use of, the Facilities.

DATED this 5th day of April, 2007.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED



RANDALL C. BUDGE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of April, 2007, I mailed a true and complete copy of the foregoing document, postage prepaid, to each of the following:

Jean Jewell, Secretary (Overnight Mail)
Idaho Public Utilities Commission
472 W. Washington Street
Boise, Idaho 83702

Randy Lobb
IPUC Staff
P.O. Box 83720
Boise, Idaho 83720-0074

Robb F. Roberts
Bonneville Power Administration
Office of General Counsel, Routing LC-7
P.O. Box 3621
Portland, Oregon 97232

Michael D. Hornstein
Orrick, Herrington & Sutcliffe LLP
3050 K Street, NW
Washington, DC 20007



RANDALL C. BUDGE

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

| | | |
|-------------------------------------|---|----------------------|
| In the Matter of the Petition of |) | DOCKET NO. UE-040088 |
| |) | |
| BONNEVILLE POWER |) | ORDER NO. 01 |
| ADMINISTRATION |) | |
| |) | |
| For a Declaratory Order Disclaiming |) | DECLARATORY ORDER |
| Jurisdiction |) | |
| |) | |

1 **Synopsis:** *The Commission enters an order declaring that the Owner Lessor and Indenture Trustee of a specified electrical transmission line to be operated by the Bonneville Power Administration, on the facts presented, would not be public service companies under Washington law and consequently would not be subject to regulation as public service companies.*

I. PROCEDURE

2 The Bonneville Power Administration on January 21, 2004, filed with the Washington Utilities and Transportation Commission a petition for declaratory order, seeking a determination that the Owner and the Trustee of certain electrical transmission facilities would not be subject to Commission regulation in a proposed financing arrangement, and asking the Commission to disclaim jurisdiction.

3 The Commission served notice of the request to persons and entities that would or might have an interest in such a declaratory order pursuant to RCW 34.05.240(3). The Commission received three responses: one from the Washington State Department of Community and Economic Development, and one from Avista Corp., a public service company providing electrical service to portions of eastern Washington State, and one from PacifiCorp, a public service company providing electrical service to portions of southern Washington State.

II. THE FACTS PRESENTED

- 4 The Bonneville Power Administration ("Bonneville") is an agency of the United States government. It is a federal power marketing administration within the Department of Energy that markets wholesale and interstate electrical transmission services. It operates electrical power transmission facilities in the Pacific Northwest, including facilities within the State of Washington.
- 5 **The project.** Bonneville proposes to construct a new facility, a 64-mile-long, 500 kV transmission line, linking Bonneville's existing Schultz Substation near Ellensburg, to a planned Wautoma Substation, to be constructed near State Route 24 in Benton County. The facility is designed to relieve transmission congestion on Bonneville's network transmission grid, including the North-of-Hanford path in central Washington, where it is expected to add approximately 400 to 600 MW of transfer capacity, and in the Interstate Highway 5 corridor during congestion in spring and summer months. Construction of the facility will improve reliability of the existing grid and will assist in providing firm transmission to proposed new electrical generation facilities in the I-5 corridor.
- 6 **The financing.** A special purpose entity (SPE) has been created, called Northwest Infrastructure Financing Corp., incorporated under the laws of Delaware. It will have the limited purposes of (a) acquiring, constructing, and equipping the proposed facility; (b) leasing the facility to Bonneville; (c) financing the facility through the issuance of debt; and (d) taking actions that may be reasonably necessary to consummate a construction agency agreement with Bonneville, the lease, and any related bond indentures.
- 7 The 1960 Trust, an independent charitable support organization under the Internal Revenue Code, operated for the benefit of Harvard University, owns all of the capital stock of J H Holdings Corporation (JHH) and J H Management

Corporation (JHM). JHH holds all of the capital stock of the SPE as trustee under a trust agreement between it and JHM.

- 8 **Construction Agency Agreement.** Bonneville will enter into a construction agency agreement, under which it will construct the proposed facility on behalf of the SPE. Bonneville has already awarded a contract for major construction work. It plans to have the line completed and energized by Spring 2006.
- 9 **Lease.** Bonneville and the SPE will enter a 30-year lease agreement, with the SPE (holder of the facility) as lessor and Bonneville as lessee. The SPE will have no control over and no obligations related to the operation, maintenance, repair or replacement of the facility. Bonneville will accept those responsibilities under the lease and will operate and maintain the facility in the same manner as it operates and maintains facilities that it owns. In the event Bonneville defaults on its obligations, Bonneville will surrender use and possession of the facility, and the SPE's remedy is limited to securing a judgment for money damages. On termination of the lease, Bonneville may purchase the facility for a nominal sum, or may renew the lease for one or more years, or may remove the facility.
- 10 **The Trust.** The SPE will enter into an indenture of trust with a commercial trust bank authorized to conduct business in Washington State.
- 11 The SPE will issue bonds under the indenture. The bonds will be non-recourse obligations, payable solely from Bonneville's payments to the SPE under the lease. Bonneville will use the bond proceeds to pay costs of designing, constructing, and acquiring the facility and to pay the costs of bond issuance. Bonneville has the option to purchase all or any portion of the facility by making a purchase option payment in the amount needed to redeem the applicable portion of the outstanding bonds.

12 Under the indenture, the SPE will pledge the trust estate (consisting primarily of
the SPE's interest in the lease, including its right to receive payments under the
lease) to the trustee. Bonneville retains the authority to cure any defaults of the
SPE under the indenture.

III. DISCUSSION

13 **Proposed issues for resolution.** The petition for a declaratory order identifies
two issues for resolution.

14 The first issue is whether the Commission should enter a declaratory order
"disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW where,
under Washington law, neither the SPE nor the Trustee is a 'public service
company.'"

15 The second issue is whether the Commission should enter a declaratory order
based upon the exclusive jurisdiction of the Federal Energy Regulatory
Commission (FERC) over the proposed facility.

16 The Commission finds that resolving the first issue will permit entry of a
declaratory order, and that it therefore need not address the second.¹

17 **Propriety of an order.** The petitioner has demonstrated that the requirements of
RCW 34.05.240(1) are met.² The petition demonstrates that there is uncertainty

¹ We note that the federal Court of Appeals has recently decided in *Detroit Edison v. Federal Energy Regulatory Commission*, 333 F.3d 48 (D.C. Cir. 2003) that states retain exclusive jurisdiction over the distribution portion of unbundled delivery service, and believe that it is inappropriate to resolve the question posed to us on the basis of preemptive federal jurisdiction.

² The statute reads in relevant part as follows:

(1) Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show: (a) That uncertainty necessitating resolution exists; (b) That there

necessitating resolution, as the trustee and the owner could be seen to fall within the definition of electrical company (any person and any person's trustee owning electric plant for hire in Washington, RCW 80.04.010; electric plant including all fixtures used for the transmission of electricity for hire, *Id.*). The petition demonstrates an actual controversy, showing that resolution of the issue is needed before participants in the financing mechanism are likely to enter the various agreements. The petition demonstrates that the uncertainty significantly and adversely affects the petitioner, as it could be unable to complete the financing for the project without an order; and the information of record shows no adverse effect on others or the general public that might arise to outweigh the adverse effect of uncertainty on the petitioner.³

18 Finally, the Commission is authorized by RCW 80.04.015 to make the determinations of fact, and to enter the appropriate orders, necessary to answer the question of whether the SPE or the Indenture Trustee is conducting business subject to regulation under Title 80 RCW.

19 **Regulatory Jurisdiction over the Trustee and the SPE.** Bonneville's petition asks the Commission to disclaim jurisdiction over the SPE and the Indenture Trustee under Title 80 RCW because neither entity is a "public service company" within the meaning of the law. It cites the Washington State Supreme Court decisions in *West Valley Land Co. v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986), and *Inland Empire Rural Electric, Inc., v. Department of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939).

is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion; (c) That the uncertainty adversely affects the petitioner; (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested;

³ Two of the three entities filing comments, Avista and PacifiCorp, called attention to concerns and possible adverse consequences of reliance on Bonneville's ground of federal preemption. No comments identified any potential adverse consequences from reliance on the ground relating to the statutes defining the entities that are subject to Commission regulation.

20 In the *Inland Empire* case, the court determined that a corporation formed to generate, manufacture, purchase, acquire, and distribute electricity over transmission lines to its members only is not a public service company. The Court said,

A corporation becomes a public service corporation, subject to regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility, or whether, on the contrary, it merely offers to serve only particular individuals of its own selection.

199 Wash, 527, at 537. The more recent *West Valley* decision, *107 Wa.2d. 359, at 365*, quotes this statement from *Inland Empire* with approval. In *West Valley*, the court found that a corporation providing water service to over 3,700 shareholder-members did not come within the Commission's regulatory jurisdiction because it served only members and did not hold itself out as serving or ready to serve the general public.

21 The undisputed facts presented to us are that neither the Trustee nor the SPE proposes to dedicate or devote the facility to public use. Instead, Bonneville will have exclusive authority and responsibility for operation and use of the facility. Moreover, neither the SPE nor the Indenture Trustee will supply the facility for transmission services to the public as a class, or for use by that portion of the public that can be served. Instead, Bonneville will have sole, exclusive possession of the project under the lease.

22 **Conclusion.** The Commission concludes and declares that because neither the
Trustee nor the SPE will dedicate electric plant to a public use, neither entity, on
the facts presented, is subject to regulation as a public service company under the
provisions of Title 80 RCW.

IV. FINDINGS OF FACT

23 (1) The Washington Utilities and Transportation Commission is an agency of
the State of Washington vested with the authority to regulate electric
companies, in the public interest.

24 (2) The Bonneville Power Administration is a federal power marketing
administration within the Department of Energy that markets wholesale
and interstate electrical transmission services. It operates electrical power
transmission facilities in the Pacific Northwest, including facilities within
the State of Washington.

25 (3) Bonneville plans to meet its need for additional electrical transmission
capacity by constructing a 64-mile-long, 500 kV transmission line, linking
Bonneville's existing Schultz Substation near Ellensburg, and a planned
Wautoma Substation, to be constructed near State Route 24 in Benton
County.

26 (4) To finance the proposed transmission facility, a special purpose entity
(SPE) has been created that will have the limited purposes of (a) acquiring,
constructing, and equipping the proposed facility; (b) leasing the facility
to Bonneville; (c) financing the facility through the issuance of debt; and
(d) taking actions that may be reasonably necessary to consummate a
construction agency agreement with Bonneville, the lease, and any related
bond indentures.

- 27 (5) The 1960 Trust, an independent charitable support organization under the Internal Revenue Code, operated for the benefit of Harvard University, owns all of the capital stock of J H Holdings Corporation (JHH) and J H Management Corporation (JHM). JHH holds all of the capital stock of the SPE as trustee under a trust agreement between it and JHM. Bonneville and the SPE will enter a 30-year lease agreement, with the SPE as lessor of the transmission facility and Bonneville as lessee.
- 28 (6) The SPE and the Indenture Trustee will have no control over and no obligations related to the operation, maintenance, repair or replacement of the facility. Bonneville will accept those responsibilities under the lease and will operate and maintain the facility in the same manner as it operates and maintains facilities that it owns. The SPE and the Trustee will provide the facility for use only by Bonneville and will not provide service to the public.
- 29 (7) Uncertainty and an actual controversy exist over whether the SPE and the Trustee will be subject to the Commission's regulatory jurisdiction on the facts presented in the petition for declaratory order. The uncertainty has an adverse effect on Bonneville by presenting a potential barrier to completion of the facility. The record before the Commission demonstrates no adverse effect on others or the general public from entry of a declaratory order resolving the uncertainty and controversy.

V. CONCLUSIONS OF LAW

- 30 (1) The Washington Utilities and Transportation Commission has the authority to enter a declaratory order that determines, on specified facts, whether an owner or trustee of electrical plant is a public service company and subject to the regulatory jurisdiction of the Commission. *RCW 34.05.240; RCW 80.04.015*

- 31 (2) The proposed transmission facility constitutes electric plant, fixtures to be used for the transmission of electrical energy for hire. The Special Purpose Entity and the Indenture Trustee fall within the definition of an electrical company, which includes any person and any person's trustee owning any electrical plant for hire within Washington State. RCW 80.04.010.
- 32 (3) The Special Purpose Entity and Indenture Trustee will not, on the facts presented, offer electrical service to the public. The SPE and the Trustee, in those circumstances, are not public service companies. RCW 80.04.010. *West Valley Land Co. v. Nob Hill Water Association*, 107 Wn.2d 359, 729 P.2d 42 (1986), and *Inland Empire Rural Electric, Inc., v. Department of Public Service*, 199 Wash. 527, 92 P.2d 258 (1939).
- 33 (4) The Commission should enter an order declaring that the actions of the Special Purpose Entity and the Trustee, under the facts presented in the petition for declaratory order, do not fall within the regulatory jurisdiction of the Commission.

VI. ORDER

- 34 The Commission declares and orders as follows:

The actions of the Special Purpose Entity and the Trustee related to the financing, construction, and operation of the proposed transmission line linking Bonneville's existing Schultz Substation near Ellensburg, and the planned Wautoma Substation do not fall within the regulatory jurisdiction of the Commission on the facts presented to the Commission.

DATED at Olympia, Washington, and effective this 20th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.

118 FERC ¶ 61,240
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

U.S. Department of Energy
Bonneville Power Administration

Docket No. EL07-36-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued March 23, 2007)

1. On February 14, 2007, Bonneville Power Administration (BPA) filed a petition for a declaratory order disclaiming Commission jurisdiction pursuant to section 201 of the Federal Power Act (FPA), 16 U.S.C. § 824 (2000), over the owner lessor (Owner Lessor) in a proposed sale and leaseback transaction. BPA states that the Owner Lessor: (1) will not operate or control the operation of the facility at issue, and (2) will not be otherwise engaged in the business of producing, selling, or transmitting electric energy.
2. In this order, we find that the Owner Lessor, as contemplated in the proposed sale/leaseback arrangement, will be a passive investor that will not exercise control or decision-making authority over the leased facilities at issue, and will not otherwise be engaged in the business of selling or transmitting electric energy. Accordingly, the Owner Lessor, to the extent that it operates in a manner consistent with the representations in BPA's application, will not be a public utility within the meaning of section 201(e) of the FPA by virtue of the proposed sale/leaseback transaction.

Background

3. BPA proposes to construct certain electric transmission facilities, as yet undetermined, primarily ranging from 69 kV to 1000 kV, to be located in the states of Washington, Oregon, Idaho, California, Wyoming, Nevada, and Montana (the Facilities). According to BPA, the Facilities will be owned by Northwest Infrastructure Financing Corporation (Owner Lessor), a special purpose entity formed expressly for the purpose of arranging for the acquisition and financing of the transaction. BPA states that all of the

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stock of the Owner Lessor will be owned by J H Holdings acting solely in its capacity as trustee under a trust agreement between J.H. Management Corporation and J H Holdings Corporation.¹

4. BPA states that the Owner Lessor will finance the acquisition and construction of the Facilities through one or more bank loans (the Loans), and will use lease payments made by BPA to the Owner Lessor under a master lease agreement to repay the Loans. BPA asserts that at or before the time the first advance under the Loans is requested, the Owner Lessor and BPA will execute a seven-year master lease agreement under which the Owner Lessor will lease its undivided interest in each Facility to BPA as each Facility is acquired, installed and/or constructed, and pursuant to which BPA will acquire possession of each Facility. BPA further states that it will agree in the master lease agreement that it will operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities.

5. BPA states that the Owner Lessor will have no operating responsibilities or control rights with respect to the Facilities, nor is the Owner Lessor or its affiliates engaged in the business of producing, selling, or transmitting electric energy. BPA asserts that, accordingly, the Owner Lessor should not be considered a "public utility," as defined under section 201(e) of the FPA.

6. The master lease agreement also has provisions dealing with defaults and expiration of the lease. According to BPA, under certain circumstances, the Owner Lessor may take possession of the Facilities upon the occurrence of certain events of default by BPA.² BPA asserts that, previously, the Commission had not considered such default provisions to be a present assignment of rights for purposes of section 201 jurisdiction.

7. At the end of each Facility's lease term, BPA may either: (1) purchase the Facility, (2) renew the Facility lease for a term of one or more years for a nominal annual rental payment, or (3) remove the Facility from the Facility site at its own expense.³ BPA

¹ All of the capital stock of these two entities is owned by The 1960 Trust, an independent charitable support organization which is operated for the benefit of Harvard University.

² The specific events of default and the rights the passive participants may exercise if default occurs are described in Article 6 of the master lease agreement.

³ The specific options at the end of the Facility lease are described in Article 7 of the master lease agreement.

states that, upon expiration of the Facility lease term, the Owner Lessor would have its interests in the Facility terminated in the event BPA purchases or removes the Facility, or retain its passive interest in the event BPA renews the Facility lease.

Notice Of Filing

8. Notice of BPA's filing was published in the *Federal Register*, 72 Fed. Reg. 10,193 (2007), with protests and interventions due on or before March 5, 2007. On March 9, 2007, NorthWestern Corporation (NorthWestern) filed a motion to intervene out-of-time and a request for a technical conference. NorthWestern states that it does not oppose BPA's petition, but it would like to understand more fully: (1) how the proposed facilities impact the regional transmission grid, BPA's rates, and NorthWestern's customers; and (2) the identity of the Owner Lessor and any other transmission facilities it may own.

Discussion

9. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2006), the Commission will grant NorthWestern's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

10. BPA seeks a disclaimer of jurisdiction over the Owner Lessor of the Facilities, *i.e.*, a determination that the Owner Lessor will not be regarded as a public utility as defined in section 201 of the FPA.

11. Section 201(b)(1)⁴ of the FPA states in pertinent part:

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)⁵ states that "[t]he term 'public utility'. . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . ."

⁴ 16 U.S.C. § 824(b)(1) (2000).

⁵ 16 U.S.C. § 824(e) (2000).

