

DONOVAN E. WALKER
DEPUTY ATTORNEY GENERAL
IDAHO PUBLIC UTILITIES COMMISSION
P.O BOX 83720
BOISE, IDAHO 83720-0074
PHONE: 208-334-0357
FAX: 208-334-3762
IDAHO BAR NO. 5921

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Street Address for Express Mail:
472 W. WASHINGTON
BOISE, IDAHO 83702-5983

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF)
BONNEVILLE POWER ADMINISTRATION) CASE NO. BPA-E-07-01
FOR A DECLARATORY ORDER)
DISCLAIMING JURISDICTION.) COMMENTS OF THE
) COMMISSION STAFF
)

On April 25, 2007, the Commission issued a Notice of Petition and Modified Procedure in this matter. Order No. 30308. In its Order, the Commission sought comments on Bonneville Power Administration's Petition seeking a Declaratory Order disclaiming Commission jurisdiction and regulation in a proposed lease financing arrangement for the construction of various electric transmission facilities within the State of Idaho. These comments are submitted pursuant to the Commission's Order No. 30308.

BPA's PETITION

On April 6, 2007, Bonneville Power Administration (BPA) Petitioned the Commission for a Declaratory Order disclaiming Commission jurisdiction and regulation of the Owner/Lessor in a proposed lease financing arrangement for the construction of various electric transmission facilities within the State of Idaho. BPA states that it 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. Petition at 2. BPA proposes to enter into a lease financing arrangement under which it would acquire, construct, and/or install various, and as of yet undetermined, transmission facilities (Facilities) for the purposes of enhancing transmission grid reliability, ensuring compliance with mandatory

reliability standards, enabling the integration of new generation, and managing grid congestion. *Id.* Some of the Facilities will be located in Idaho and all Facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service. *Id.*

Construction of the Facilities will be financed by a special purpose entity (SPE) that is the Owner/Lessor. *Id.* The Facilities will be owned by the SPE, Northwest Infrastructure Financing Corporation II, which will be formed expressly for the purpose of arranging for the financing of the Facilities. *Id.* at 4. All of the capital stock of the SPE will be owned by JH Holdings, acting solely as trustee under a trust agreement between J.H. Management Corporation (JHM) as grantor, and JH Holdings Corporation (JHH) as trustee. *Id.* All of the capital stock of JHM and JHH will be owned by the 1960 Trust, an independent charitable support organization operated for the benefit of Harvard University. *Id.* at 4-5. The SPE will not engage in any business other than arranging for the acquisition and financing of the Facilities. *Id.* at 5.

The SPE will finance the construction of the Facilities through one or more loans. The SPE's sole source of funds to repay the loan(s) will be payments made by BPA under the lease of the Facilities to BPA. *Id.* The SPA will lease its undivided interest in each of the Facilities to BPA at the time each such Facility is acquired, installed, and/or constructed. *Id.* The term of the lease will be seven (7) years from the date that the master lease and the first lease commitment is executed. *Id.* 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. *Id.* The SPE will have no operating responsibilities or control rights with respect to the Facilities. *Id.* A draft of the lease agreement was filed with the Petition.

BPA requests that the Commission issue a Declaratory Order disclaiming jurisdiction over the Owner/Lessor SPE in the proposed lease financing for the construction of the transmission facilities. *Id.* at 8.

STAFF COMMENTS

The Commission is vested with the power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of Title 61, *Idaho Code*. *Idaho Code* § 61-501. *Idaho Code* § 61-129 defines the term "public utility" and states that entities meeting that definition will be subject to the jurisdiction, control, and regulation of the Commission.

The term “**public utility**” when used in this act includes every . . . **electrical corporation** . . . as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and the provisions of this act: provided, that the term “public utility” as used in this act shall cover cases both where the service is performed and the commodity delivered directly **to the public or some portion thereof**, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity **to or for the public or some portion thereof**.

Idaho Code § 61-129 (emphasis added).

The term “**electrical corporation**” when used in this act includes every corporation or person, their lessees, trustees, receivers or trustees, appointed by any court whatsoever, owning, controlling, operating or managing any **electric plant** for compensation within this state . . .

Idaho Code § 61-119 (emphasis added). A corporation does not include a municipal corporation, a mutual nonprofit or cooperative, or any other public utility organized and operated for service at cost and not for profit. *Idaho Code* § 61-104.

The term “**electric plant**” when used in this act includes all real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity . . .

Idaho Code § 61-118 (emphasis added).

Consequently, an electrical corporation (as defined above) is a public utility subject to the jurisdiction, control, and regulation of the Commission where the service is performed and the commodity delivered to the public or some portion thereof for compensation within the state of Idaho. *Idaho Code* § 61-129.

There have been a number of cases dealing with the Commission’s jurisdiction and *Idaho Code* § 61-129. In *Humbird Lumber v. Idaho PUC*, 39 Idaho 505, 228 P. 271 (1924), the Idaho Supreme Court explained that the test for determining whether a company was a public utility depends on whether the company has held itself out as ready, able and willing to serve the public. In that case, the Lumber Company had constructed and installed complete water systems at its plants for use in its operations and for fire protection. *Humbird Lumber*, 39 Idaho 505, 228 P. 271, 272 (1924). Northern Pacific Railway Company had its own depots, roundhouses, cattle

pens, office, and other facilities adjoining to the plants of the Lumber Company. *Id.* The Railroad had its own water system installed, and received its water from the Sandpoint Water & Light Company, a public utility. *Id.* The Railroad discontinued its service from Sandpoint Water & Light and connected its system with that of the Lumber Company. *Id.* The Lumber Company thereafter supplied the Railroad with water under contract. *Id.* It was stipulated that the Lumber Company never furnished water to any other person, company, or corporation, did not intend to engage in the utility business, and did not offer to and did not intend to offer to engage in the utility business in any manner whatsoever. *Id.* The Court concluded that: (1) the evidence did not justify the conclusion that the lumber company was “operating” its water system “for compensation” because the primary purpose was always to provide fire protection for its sawmills, and the supply to the Railroad was incidental to that primary purpose; and (2) furnishing water to one person or corporation, under contract, does not constitute a delivery of water to the public or some portion thereof. *Id.*, 228 P. at 272-73.

In another early Idaho case, our Supreme Court observed that a corporation becomes a utility “only when and to the extent that the business of such corporation becomes devoted to a public use.” *Stoehr v. Natatorium Company*, 34 Idaho 217, 221, 200 P. 132 (1921). In this latter case, a water corporation sold surplus water to a limited number of residents in Boise. Even though the company received compensation for the sale of its water, it did not serve all customers that applied. See also *Public Utilities Commission v. Natatorium Company*, 36 Idaho 287, 211 P. 533 (1922). Similar to the stipulation in *Humbird Lumber*, it was stipulated in *Natorium* that:

The said hot water was not developed and acquired for the purpose of sale to the general public, and neither the Natatorium Company nor any of its predecessors in interest have ever held it open to use or purchase by the general public but at all times since its original discovery it was, and now is, intended for use primarily for the said natatorium for sanitary and bathing purposes.


34 Idaho at 218, 200 P. at 133. The primary purpose of the Natatorium’s water was to supply itself with natural hot springs water for bathing and sanitary service, and like *Humbird Lumber*, the limited service was never intended or held out to be a utility. The people who received hot water at their homes for heating did not rely upon the Natatorium’s service for potable, drinking water.

The Commission has applied these Idaho Supreme Court precedents in a similar declaratory ruling context in the case of *LLP Power Generation, LLC*, Case No. GNR-E-01-01, Order No. 28793 (July 25, 2001). In that case, the Commission ruled that the lease of locomotive engines to third parties so that they could generate electricity within Idaho for sale on the wholesale market did not subject the lessor to the Commission's regulatory authority pursuant to *Idaho Code*, Title 61. Order No. 28793.

Applying the facts set out in the Petition to the relevant sections of Title 61, as well as the holdings of the cases noted above, leads the Staff to conclude that BPA's proposed lease financing arrangement for the construction of various electric transmission facilities within the State of Idaho does not subject the Owner/Lessor, special purpose entity (SPE), Northwest Infrastructure Financing Corporation II, to the Commission's jurisdiction and regulation. The SPE's leasing of transmission facilities to BPA does not constitute the provision of utility service to the public. According to the Petition, the SPE will be formed expressly for the purpose of arranging for the financing of the transmission facilities, and will lease its undivided interest in the transmission facilities to BPA. BPA will operate and maintain the Facilities in the same manner as it operates and maintains its other transmission facilities, and the SPE will have no operating responsibilities or control rights with respect to the Facilities. Additionally, the Facilities will be used exclusively by BPA to provide interstate transmission service and will not be available for use for bundled retail service. Petition at 2. Consequently, Staff believes, based upon the representations made in the Petition, the SPE, Owner/Lessor, would not be subject to the Commission's regulation.

In summary, based upon the facts presented in BPA's Petition, the Staff believes that the SPE's leasing of transmission facilities to BPA does not subject the SPE to the Commission's regulatory jurisdiction under Idaho Code, Title 61. The Staff further recommends that the requested Declaratory Order be limited to the facts as set forth in BPA's Petition.

Respectively submitted this 16th day of May 2007.


DONOVAN E. WALKER
Deputy Attorney General

Technical Staff: Terri Carlock

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 16TH DAY OF MAY 2007, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. BPA-E-07-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

ROBB F. ROBERTS
BPA / GENERAL COUNSEL
ROUTING LC-7
PO BOX 3621
PORTLAND OR 97232

RANDALL C BUDGE
RACINE OLSON ET AL
PO BOX 1391
POCATELLO ID 83204



SECRETARY