

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR ____

In the matter of the Petition for Declaratory)	PETITION FOR
Ruling Disclaiming Jurisdiction by)	DECLARATORY RULING
Bonneville Power Administration)	
)	

Bonneville Power Administration (“BPA” or “Petitioner”) respectfully petitions the Public Utility Commission of Oregon (“Commission”) for a declaratory ruling, pursuant to Section 756.450 of the Oregon Revised Statutes (“ORS”), that the owner lessor in a proposed lease financing of the construction, installation and/or acquisition of certain electric transmission facilities to be used exclusively in interstate commerce, including new transmission facilities to be located in Oregon, as part of BPA’s infrastructure program is not a public utility subject to regulation by the Commission under ORS Title 57, Chapters 756 and 757. In support of this Petition, BPA states as follows:

1. 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 Pacific Northwest. The Petitioner’s name and address and its attorneys are as follows:

Petitioner:

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

Petitioner's attorneys:

Michael D. Hornstein
J.S. Gebhart
Orrick, Herrington & Sutcliffe LLP
Washington Harbour
3050 K Street, N.W.
Washington, D.C. 20007
Telephone: (202) 339-8461
Facsimile: (202) 339-8500
Email: mhornstein@orrick.com

2. The proposed financing would be 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 infrastructure ranging from 69 kV to 1000 kV (the "Facilities"). Some of the Facilities will be located in Oregon 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.

3. 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.

4. The Facilities will be constructed, installed and/or acquired for the purposes of enhancing Northwest transmission grid ("Grid") reliability, ensuring compliance with mandatory reliability standards, enabling the integration of new generation into the Grid and managing Grid congestion.

5. 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.

6. The Facilities will be constructed on real property or real property easements or similar rights held by BPA on land that is owned by a variety of parties, both private and governmental.

7. The Facilities will be owned by the Owner Lessor, special purpose entity Northwest Infrastructure Financing Corporation II, will be a Delaware corporation formed expressly for the purpose of arranging for the acquisition and financing of the Facilities.

8. 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.

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

10. The Owner Lessor will initially finance the acquisition and 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.

11. 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 the Facilities 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.

12. 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.

13. The final Lease will be substantially in the form of the draft Lease attached hereto as Exhibit A.

14. During the term of the Lease, the Owner Lessor will have a mere passive interest in the Facilities. Although the Owner Lessor will own legal title to the Facilities and remain a passive owner, BPA will have dominion and control over the Facilities during the Lease term. Additionally, the Owner Lessor and/or its affiliates will not be in the business of producing, selling or transmitting electric power, either from the Facilities or otherwise.

15. At the conclusion of the Lease, BPA may (a) purchase each Facility by paying the Owner Lessor the amount necessary to enable the Owner Lessor to pay off the outstanding loans used to finance the construction, installation and/or acquisition each Facility, (b) renew the Lease

for a term of one or more years for a nominal annual rental payment, (c) remove the Facilities at its own expense, or (d) execute a new lease if and to the extent the Owner Lessor assigns the Lease to another passive owner. Upon the expiration of the Lease term, the Owner Lessor would not reacquire possession of the Facilities; rather, the Owner Lessor would have its interests in the Facilities terminated in the event BPA purchases or removes the Facilities, or would merely retain its passive interest in the event BPA renews the Lease.

16. Pursuant to ORS 756.450 and Section 137-002-0010 of the Oregon Administrative Code, it is proper for the Commission to issue a ruling in this matter. Upon the petition of any party, the Commission may issue a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by the Commission. ORS 756.450. BPA seeks a declaratory ruling with respect to the applicability of ORS Chapters 756 and 757 to the Owner Lessor.

17. The Commission has jurisdiction over “public utilities” under ORS Title 57. The statute defines a “public utility” as any:

corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city.

ORS 757.005(1)(a)(A).

18. First, the Commission should issue a declaratory ruling disclaiming jurisdiction

over the Owner Lessor under ORS Chapters 756 and 757 because, under federal law, the Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce. Section 201 of the Federal Power Act, 16 U.S.C. § 824, as amended (“FPA”), states that FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce:

(b) Use or sale of electric energy in interstate commerce.

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. **The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy**, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.¹

Because the Facilities will be used by BPA to provide interstate transmission service and will not be available for use for bundled retail service, under FPA § 201 FERC has exclusive jurisdiction over such transmission and therefore sole jurisdiction over the Facilities. The Commission should therefore disclaim jurisdiction over the Owner Lessor with respect to the Facilities.

19. Additionally, the Commission should issue a declaratory ruling disclaiming jurisdiction over the Owner Lessor under ORS Chapters 756 and 757 because, under Oregon

¹ Emphasis supplied.

law, the Owner Lessor is not a “public utility.” This State’s Supreme Court has established the following long-standing test to determine whether a corporation is subject to the jurisdiction of the Commission: “the essential feature of a public use [is] that it shall not be confined to privileged individuals, but open to the indefinite public” *Central Oregon Irr. Co. v. Public Serv. Comm’n*, 101 Or. 442, 463, 196 P. 832, 838 (1921) (citing *Thayer v. California Dev. Co.*, 164 Cal. 117, 127, 128 P. 21 (1912)). In *Central Oregon*, the Court found that a company did not come within the definition of “public utility” where the company was not engaged in furnishing or selling water to or for the public, but only to such parties as the company selected. 101 Or. at 462, 196 P. at 838 (citing *De Pauw Univ. v. Public Serv. Comm’n*, 247 F. 183, 186 (D. Or. 1917)²). Thus, an irrigation company supplying water for irrigation and domestic use for over 84,000 acres of land did not come within the jurisdiction of the Commission. Here, the Owner Lessor is required under its articles of incorporation and the Lease to lease the Facilities to BPA, thereby preventing the Owner Lessor from furnishing transmission services to the public. Thus, under *Central Oregon*, the Owner Lessor is not a “public utility.”

20. The Supreme Court has also consistently held that utility services provided pursuant to contract rather than to the public at large are not subject to the jurisdiction of the Commission. For example, a city selling water beyond the city limits pursuant to contracts for

² “[I]t is clear . . . that [the Public Utilities Act] can only apply to such companies as are engaged in the general sale or rental of water to all who may apply for it within a given area, and not to a private corporation that has no dealings with the public, but which merely undertakes to furnish water in fulfillment of private contracts made with certain individuals selected by it. That is all the Luse Company or its predecessor was doing or offering to do. They were not selling or offering to sell water to all who might apply therefor, and who could be served by their system, and did not hold themselves out as ready or willing to do so. They were engaged in selling certain lands owned by them, and incident thereto agreeing to furnish water to their purchasers and no others. This did not make them a public service corporation and subject to the jurisdiction of the Public Service Commission.” *De Pauw*, 247 F. at 185.

fixed periods of time was not acting as a public utility. *Richards v. City of Portland*, 121 Or. 340, 350-51, 255 P. 326, 329-30 (1927). “[When a municipality is authorized to] supply water to premises located outside the corporate limits, . . . its obligation is a matter of voluntary contract, and such authorization does not impose upon it the duties of a public service corporation in the territory which it undertakes to serve.” 121 Or. at 349, 255 P. at 329 (citing *Childs v. City of Columbia*, 87 S.C. 566, 70 S.E. 296 (1911)). Here, the Owner Lessor is leasing the Facilities to BPA pursuant to a contract, and is not providing any transmission service to the public at large. Lease, § 3.2. Under *Richards*, therefore, the Owner Lessor is not a “public utility.”

21. 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 owner lessor and indenture trustee of an electric transmission line to be operated by BPA would not be public service companies under Washington law and consequently would not be subject to WUTC regulation.³ Given the similarity of the instant facts to those established in the 2004 WUTC case, as well as the similarity of Washington’s and Oregon’s classification and regulation of public utilities, the

³ 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).

WUTC case provides additional support for a finding that the Owner Lessor is not “public utility” under Oregon law.⁴

WHEREFORE, based on the facts stated in this Petition and applicable Oregon law, BPA respectfully requests that the Owner Lessor in BPA’s proposed lease financing of the construction, installation and/or acquisition of certain electric transmission facilities to be used exclusively in interstate commerce is not a public utility subject to regulation by the Commission under ORS Title 57, Chapters 756 and 757.

Respectfully submitted,

/s/

Michael D. Hornstein
J.S. Gebhart
Orrick, Herrington & Sutcliffe LLP
Washington Harbour
3050 K Street, N.W.
Washington, D.C. 20007
Telephone: (202) 339-8461
Facsimile: (202) 339-8500
E-mail: mhornstein@orrick.com

Attorneys for Bonneville Power Administration

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⁴ FERC has also found that the passive owner lessor in identical 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). Similarly, the Commission should 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.

