

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 39

In the Matter of the Petition for Declaratory)
Ruling Disclaiming Jurisdiction by) MEMORANDUM
Bonneville Power Administration)

DISPOSITION: DEADLINE SET FOR FILING COMMENTS

On March 26, 2007, Bonneville Power Administration (BPA) filed a “Petition for Declaratory Ruling” pursuant to ORS 756.450 requesting that this Commission declare that the Owner Lessor in the proposed lease financing of the construction, installation and/or acquisition of certain electric transmission facilities is not a public utility subject to regulation by this Commission.¹ BPA requests that the Commission issue the requested declaratory order no later than May 18, 2007.

In its petition, BPA explains that 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... (A)ll 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.”

BPA explains that the facilities will be owned by the Owner Lessor, a special purpose entity formed expressly for the purpose of arranging for the acquisition and financing of the facilities. All of the capital stock of the Owner Lessor will be owned by JH Holdings Corporation, acting on behalf of The 1960 Trust, an independent charitable support organization operated for the benefit of Harvard University.

The Owner Lessor will lease its undivided interest in each of the facilities to BPA at the time the facility is acquired, installed and/or constructed. The term of the lease is seven years. BPA agrees to operate and maintain the facilities in the same manner as it operates and maintains its other transmission facilities. The Owner Operator will have no operating responsibilities or control rights with respect to the facilities.

¹ On April 10, 2007, BPA filed an amendment to its petition to clarify the specific declaration sought from the Commission.

At the conclusion of the lease, BPA may purchase each facility by paying off any outstanding loans, renew the lease for a term of one or more years, remove the facilities at its own expense, or execute a new lease if and to the extent the Owner Lessor assigns the lease to another passive owner.

In support of its petition, BPA argues that the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce. According to BPA, because the facilities will be used to provide interstate transmission service and will not be available for use for bundled retail service, FERC has exclusive jurisdiction over the facilities.

BPA further argues that the Owner Lessor is not a “public utility” within the meaning of Oregon law. According to BPA, “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. Because the Owner Lessor must lease it the facilities, BPA claims that the Owner Lessor cannot furnish transmission service to the public. BPA also cites case law that holds that utility services provided pursuant to a contract, rather than to the public at large, are not subject to the jurisdiction of the Commission.

Finally, BPA states that the Washington Utilities and Transportation Commission (WUTC) disclaimed jurisdiction over a nearly identical transaction involving BPA in 2004. According to BPA, in that case the WUTC declared that the owner lessor and indenture trustee of an electric transmission line to be operated by BPA would not be subject to WUTC regulation.

Proceedings

At its public meeting on April 10, 2007, the Commission received a Staff Report recommending that the Commission open this investigation to determine whether the special purpose entity described in the petition should be declared a public utility subject to the Commission’s jurisdiction. The Commission instituted this investigation, pursuant to ORS 756.450.

In light of the deadline announced by BPA and in view of the legal nature of the issue presented, the Commission will expedite its disposition of this matter. Rather than first convening a prehearing conference, in this Memorandum I adopt a schedule for filing of comments by any interested person, with the right of BPA to reply to any comments.

EVENT	DATE
Comments due	April 27, 2007
BPA Reply (if any)	May 4, 2007

Any person that files comments must serve their comments electronically on BPA. The email addresses provided by BPA in its petition are: rfr Roberts@bpa.gov and mhornstein@orrick.com. Because there is no service list, parties are advised to check this Commission's website (www.puc.state.or.us) to review any filings. Persons may also obtain copies of BPA's petition via the Commission's eDockets feature on its website.

Any person who files comments will be deemed a party to this proceeding. The rule requiring that parties must file petitions to intervene is waived in this proceeding.

Dated at Salem, Oregon, this 11th day of April, 2007.

Patrick Power
Administrative Law Judge