

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 39

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

**DISPOSITION: DECLARATORY RULING ISSUED;
JURISDICTION DECLINED**

I. INTRODUCTION

On March 26, 2007, Bonneville Power Administration (BPA) filed a Petition for Declaratory Ruling requesting that the Public Utility Commission of Oregon (Commission) declare that the Owner Lessor in a 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.

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. The Commission instituted this investigation pursuant to ORS 756.450.

By ruling issued April 11, 2007, the Administrative Law Judge indicated that the Commission would expedite its review of this matter. Interested persons were invited to file comments no later than April 27, 2007, with BPA allowed to file a reply by May 4, 2007.

II. BACKGROUND

In its petition, BPA explains that the proposed financing “(W)ould 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.”

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

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, 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 Lessor will have no operating responsibilities or control rights with respect to the facilities.

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.

III. GROUNDS FOR RELIEF

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 and over the Owner Lessor.

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 the facilities to BPA, 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.

IV. COMMENTS

Comments were received from Staff. Staff agrees that the entity conducting the enterprise, as described in BPA’s petition, is not a “public utility” under Oregon law.

V. DISCUSSION

We agree that the enterprise described by BPA in its petition would not be a “public utility” within the meaning of Oregon law and would not be subject to this Commission’s jurisdiction.

The facilities would be used solely by BPA to provide wholesale transmission service. There would be no “holding out” of the facilities to the public, by either BPA or the Owner Lessor. The facilities would not be available for bundled retail service. The contract terms assure that the use of the facilities would not change during the term of the use.

We make no findings with regard to the nature and extent of FERC jurisdiction over the facilities.

VI. CONCLUSION

Based on the nature and use of the facilities described by BPA in its petition, and the terms and conditions of the lease of the facilities as stated by BPA, the Owner Lessor would not be a public utility and is not subject to the jurisdiction of this Commission. The following findings of fact presume that BPA will conduct its affairs in the manner described in its petition. Material deviations from these presumed facts may lead the Commission to a different conclusion.

Findings of Fact

1. BPA petitioned this Commission for a declaratory ruling to the effect that the Owner Lessor of certain “facilities” would not be a “public utility” if the facilities were used as intended.
2. The “facilities” would include transmission system replacements, upgrades and additions to be put into service over time, primarily affecting existing infrastructure ranging from 69 kV to 1000 kV.
3. BPA will use the facilities to provide interstate transmission service and will not make the facilities available for bundled retail service.
4. The Owner Lessor is a special purpose entity formed expressly for the purpose of arranging for the acquisition and financing of the facilities.
5. All of the capital stock of Owner Lessor will be owned by JH Holdings, acting on behalf of The 1960 Trust, an independent charitable support organization operated for the benefit of Harvard University.

6. 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.
7. The Owner Lessor will have no operating responsibilities or control rights with respect to the facilities.

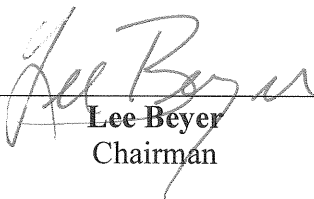
Conclusions of Law

1. Owner Lessor would not be a public utility if it were to construct, install and/or acquire certain electric transmission facilities as described in BPA's petition.
2. This Commission has no jurisdiction over Owner Lessor.

ORDER

IT IS ORDERED that, as described in Bonneville Power Administration's petition, the entity owned by JH Holdings, that intends to lease certain specified electric transmission facilities to Bonneville Power Administration, is not a public utility and is not subject to the Public Utility Commission of Oregon's jurisdiction.

Made, entered, and effective MAY 09 2007 .



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.