

123 FERC ¶ 61,017  
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.

Bicent (California) Malburg LLC

Docket No. EL08-41-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION

(Issued April 4, 2008)

1. In this order, the Commission grants the petition of Bicent (California) Malburg LLC (Bicent) seeking a declaratory order disclaiming jurisdiction under section 201(e) of the Federal Power Act (FPA) over certain entities that will participate in a sale/leaseback transaction.<sup>1</sup>

**Background**

2. Bicent has filed a petition for a declaratory order stating that it proposes to acquire the Malburg Generation Station, a 134 MW natural gas-fired combined cycle generation facility, from the City of Vernon, California and that it may need to engage in a sale/leaseback transaction in order to make this acquisition. Bicent requests that the Commission disclaim jurisdiction over certain entities that will participate in the sale/leaseback transaction. It refers to these entities as Passive Participants and states that they include all parties to the proposed sale/leaseback transaction possessing certain characteristics described further below, including one or more lessors, one or more owner participants, equity owners of the owner participants, owner trusts, lenders, and holders of the lessor notes.

3. Bicent states that the sale/leaseback transaction will take place under one of two alternative structures. These structures differ based on the specific steps that are taken to transfer ownership of the Malburg Generation Station to the lessors. Under the first structure, Bicent would on the date that it acquires the Malburg Generation Station sell its interest in that facility to one or more Delaware statutory trusts or limited liability

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<sup>1</sup> 16 U.S.C. § 824(e) (2000).

companies that will function as lessors for the benefit of as-yet-unknown investors, referred to as owner participants, that would be parties to the sale/leaseback transaction. In each case, a bank or trust company would act as the owner trustee of the statutory trust or the owner manager of the limited liability company, as applicable. On the closing date, the lessors would simultaneously lease back to Bicent the undivided interest in Malburg Generation Station for an initial lease term expected to be 30 years in exchange for fixed rental payments.

4. Under the second structure, the lessors, as assignees of Bicent would on the date of the sale/leaseback transaction purchase the Malburg Generation Station from the City of Vernon for benefit of as-yet-unknown owner participants that would be parties to the sale/leaseback transaction. In each case, a bank or trust company would act as the owner trustee of the statutory trust or the owner manager of the limited liability company, as applicable. In addition, the lessors would on the closing date lease the undivided interest in the Malburg Generation Station to Bicent for an initial lease term expected to be 30 years in exchange for fixed rental payments.

5. Bicent states that under either transaction structure, the purchase of the Malburg Generation Station by the lessors would be financed by the proceeds of an equity investment made by the owner participants to the lessors and the proceeds of a debt offering by the lessors. The lessors would secure their debt with, among other things, the rental payments under the leases and the lessors undivided interest in the Malburg Generation Station.

6. In addition, as part of the Sale/Leaseback Transaction, Bicent would assign two agreements with Vernon, a power purchase and tooling agreement (PPTA) and an interconnection transmission services agreement (ITSA), to the Lessors which, in turn, would reassign these agreements back to Bicent for the term of Bicent's lease of the Malburg Generation Station.

7. Bicent states that following the sale/leaseback transaction, it would, as lessee, control the Malburg Generation Station during the term of the lease, and it would sell the output of the Malburg Generation Station to the City of Vernon under the PPTA. The lessors and the owner participants would have no control over the operations of the Malburg Generation Station or the sales of its output.

8. Bicent represents that the Passive Participants will have the following characteristics:

- (1) Each Passive Participant will be a bank, bank holding company, financial holding company, finance company, insurance company, or other company that is not an electric utility, or a wholly-owned, direct or indirect subsidiary of an electric utility company;

- (2) Such Passive Participants will not be directly and primarily engaged in the business of selling or transmitting electric energy other than as investors in companies that engage in such activities;
- (3) None of the Passive Participants will be a public utility; and
- (4) None of such owner participants will have an interest in electric generation, transmission, and/or distribution facilities in the relevant geographic markets in which Bicent will operate, other than (i) minority interests or investments that do not comprise five percent or more of voting interests or otherwise allow them to exercise control over such facilities and (ii) investments in leveraged lease financings of electric generation, transmission, and/or distribution facilities.

### **Discussion**

9. Bicent seeks a disclaimer of jurisdiction over the Passive Participants, i.e., a determination that the Passive Participants will not be regarded as public utilities as defined in section 201 of the FPA.

10. Section 201(b)(1)<sup>2</sup> of the FPA states that:

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) states that “[t]he term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . .”

11. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.<sup>3</sup> The Commission uses a two-step analysis for determining whether a financial interest in jurisdictional facilities makes the entity a “public utility” under the FPA. Under this precedent, the Commission first determines whether the passive participant will operate the facilities.

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<sup>2</sup> 16 U.S.C. § 824(b)(1) (2000).

<sup>3</sup> See, e.g., *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 106 FERC ¶ 61,076 (2004); *U.S. Dep’t of Energy-Bonneville Power Admin.*, 118 FERC ¶ 61,240 (2007); *FirstEnergy Generation Corp.*, 119 FERC ¶ 61,171 (2007).

The Commission then determines whether the passive participant is otherwise in the business of selling or transmitting electric energy. It would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities, and subject them to the Commission's jurisdiction, where these participants hold only equitable or legal title to the facilities, and are removed from the operation of the facilities and the sale or transmission of electric energy.

12. Here, Bicent states that the lessors and the owner participants would have no control over the operations of the Malburg Generation Station or the sales of its output. In addition, as described by Bicent, none of the Passive Participants will be engaged in the business of selling or transmitting electric energy. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Passive Participants, as contemplated in the proposed sale/leaseback transaction, will be passive investors that do not exercise control or decision-making authority over the leased facilities, and are not otherwise in the business of selling or transmitting electric energy. Accordingly, we will disclaim jurisdiction over the Passive Participants, as requested by Bicent.<sup>4</sup>

The Commission orders:

Bicent's request that the Commission disclaim jurisdiction over the Passive Participants in this proceeding, based on the facts presented by Bicent in the petition, is hereby granted.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>4</sup> If the facts change so that a Passive Participant operates the Malburg Generation Station in order to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, it will become a public utility and will be required to make filings under section 205 of the FPA (16 U.S.C. § 824d (2000)). See, e.g., *Unicom Investments, Inc.*, 91 FERC ¶ 61,109, at 61,387, n.9 (2000).