



Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

February 28, 2012

Corporate Decision #2012-06
April 2012

Mr. Richard Kim
Partner
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019

Re: Operating Subsidiary Application by Sovereign Bank, National Association,
Wilmington, Delaware
OCC Control No.: 2012-NE-08-0001

Dear Mr. Kim:

The following sets forth the analysis and determinations by the Office of the Comptroller of the Currency in connection with the application filed by Sovereign Bank, National Association, Wilmington, Delaware (“Bank”), to establish two direct subsidiaries, Sovereign Finance 2012-1 LLC (“Finance LLC”) and Sovereign Lease Holdings, LLC (“Lease Holdings LLC”), which the OCC approved on February 16, 2012.

The Application

The Bank proposes to provide financing for a completed energy generation project (“Project”), located in California, through a sale-and-leaseback transaction with enXco, Inc. (“enXco”). To engage in this transaction, the Bank will establish Finance LLC as a wholly-owned subsidiary, the sole activity of which will be to hold a one percent interest in Lease Holdings LLC. The Bank will directly hold the remaining 99 percent interest in Lease Holdings LLC. Lease Holdings LLC will acquire Shiloh Wind Project LLC (“Project LLC”) from enXco. Project LLC owns the personal property assets - consisting of wind turbines and ancillary equipment - of the Project. Immediately upon acquisition of Project LLC, Lease Holdings LLC will lease these personal property assets to an affiliate of the energy company (“Lessee”).¹

¹ Before advancing funds to acquire Project LLC, the Bank will determine the creditworthiness of the transaction pursuant to the Bank’s standard loan underwriting criteria. This underwriting, as well as monitoring of the lease transaction during the term of the lease, will be performed by Bank personnel experienced in lease financing transactions.

Leasehold interests and easements in the real property upon which the turbines sit will be held by an affiliate of the Lessee and not by Project LLC. At no time during the term of the lease will Project LLC, the Bank, or any of its other subsidiaries directly or indirectly acquire, hold, or lease these real property interests.

The term of the lease is twenty years. For the term of the lease, the Lessee will operate and maintain the Project and will be responsible for paying for insurance and any licensing or registration requirements. Neither the Bank nor any of its subsidiaries will participate in the operation and maintenance of the Project, the production of energy via the Project, or the sale of the energy generated by the Project. The Lessee will pay the Bank an agreed-upon rent over the lease term that, when combined with the available federal tax credits and other tax benefits, the Bank represents will provide repayment of the purchase price of Project LLC plus the cost of financing.

At the end of the lease term, the energy company will have the option to re-purchase Project LLC. If the energy company does not re-purchase Project LLC, the Bank represents that it will direct the affiliate of the Lessee holding the real property interests to assign those interests to an unrelated third party and will move to dispose of Project LLC as off-lease property in conformance with the requirements of 12 C.F.R. Part 23.

Discussion

The Bank, through its subsidiaries, will engage in the leasing of energy generation equipment (specifically, wind turbines) and ancillary equipment through a sale-and-leaseback transaction. A national bank may engage in the leasing of personal property pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. Part 23, if the lease qualifies as a full-payout lease and a net lease. The activities proposed in the Application meet these standards.²

A “full-payout lease” is defined as a lease in which a national bank reasonably expects to realize the return of its full investment in the leased property and the estimated costs of financing the property over the term of the lease from rentals, estimated tax benefits, and the estimated residual value of the leased property. 12 C.F.R. § 23.2(e). The “net lease” requirement means

² A threshold question is whether the interests in the turbines and ancillary equipment constitute real property and thus implicate the restrictions of 12 U.S.C. § 29. While we look to the law of the state where the asset is situated as a guide for our analysis, the ultimate determination of whether an asset is “real estate” for purposes of 12 U.S.C. § 29 is one of federal law. Wind turbines have been characterized as personal property under California law. *See In re Oak Creek Energy Farms, Ltd.*, 107 B.R. 266 (Bankr.E.D.Cal.1998) (wind turbine is personal property and therefore cannot be subject to a mechanics lien). Where addressed by other states, wind turbines have been characterized as personal property. *See, e.g.*, Iowa Code §§ 423.2 and 423.3; Kan. Stat. Ann. 79-3606(kk)(1); R.R.S. Neb. § 77-2704.57; Ohio Rev. Code § 5727.01(P); Utah Code Ann. §59-12-104; W. Va. Code § 11-6A-5a; and Wyo. Stat. Ann. §§ 39-15-105 and 39-16-105. In addition, wind turbines are treated as equipment or personal property for federal income tax purposes. *Compare* 26 U.S.C. § 168(e)(3)(vi) (special depreciation for equipment, including wind turbines and towers that are classified the same as solar panels) *with* § 168(e)(2) (real property). For these reasons, we treat interests in the turbines and ancillary equipment as personal property and, therefore, not “real estate” under our federal definition of that term.

that the national bank will not, directly or indirectly, provide or be obligated to provide for, among other things, servicing and repairs on the leased property or the payment of insurance for the lessee. 12 C.F.R. § 23.2(f). These requirements, along with the limit on the unguaranteed portion of the estimated residual value, discussed below, ensure that the personal property leasing transaction is the functional equivalent of a loan.³

As described above, the Bank represents that it expects to receive a full return of its investment in Project LLC with interest from lease payments and tax benefits. In addition, the Lessee will be responsible for operating and maintaining the project and paying for insurance. Therefore, the “full-payout lease” and “net lease” requirements are satisfied.

Subpart C of Part 23 further requires that the lease must represent a noncancelable obligation of the lessee. 12 C.F.R. § 23.20(a). The Bank represents that the Lessee may cancel the lease only upon default of the Bank. As mentioned above, this subpart also requires that the residual value of the leased property be reasonable in light of the nature of the leased property and that any unguaranteed amount of the residual value not exceed 25 percent of the original cost of the property. 12 C.F.R. § 23.21(a). Because the Bank expects to realize the return of its full investment in Project LLC, plus the cost of financing, solely from lease payments and estimated tax benefits, this requirement is satisfied.

Based on a review of the information provided, including the representations and commitments made in the Bank’s application, and for the reasons discussed above, we conclude that the proposed transaction constitutes the permissible leasing of personal property pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. Part 23.

If you have any questions concerning this letter, please contact Steven V. Key, Assistant Director, Bank Activities & Structure, at (202) 874-5300.

Sincerely,

Stephen A. Lybarger

Stephen A. Lybarger
Deputy Comptroller, Licensing

³ Personal property lease financing transactions are subject to the national bank legal lending limits. 12 C.F.R. § 23.6. The proposed transaction does not exceed this standard.