

118 FERC ¶ 61,069  
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.

Buffalo Gap Wind Farm 2, LLC

Docket No. EG07-9-000

ORDER GRANTING EXEMPT WHOLESALE GENERATOR STATUS

(Issued January 31, 2007)

1. On November 7, 2006, as supplemented on December 13, 2006, Buffalo Gap Wind Farm 2, LLC (Applicant) filed a notice of self-certification as an exempt wholesale generator (EWG) pursuant to the Public Utility Holding Company Act of 2005<sup>1</sup> and section 366.7 of the Commission's regulations.<sup>2</sup> In this order, we grant Applicant EWG status and clarify the Commission's policy with regard to the co-ownership of a facility by affiliated EWGs.

**I. Background**

2. Applicant, a wholly-owned, indirect subsidiary of the AES Corporation (AES), is developing and constructing a 232.5 MW (nameplate) wind-powered electric generation facility (facility) in north central Texas. Applicant states that the facility will consist of 60 Hz wind turbine generators mounted on 80 meter towers with pad-mounted step-up transformers located adjacent to each wind turbine and a system of underground and overhead 34.5 kV collection lines. In addition, Applicant will own undivided interests in certain shared facilities and property with Buffalo Gap Wind Farm, LLC (Buffalo Gap 1)

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<sup>1</sup> Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594, 972-78 (2005) (PUHCA 2005). The Energy Policy Act of 2005, among other things, repealed the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a *et seq.* (2000) (PUHCA 1935), and enacted PUHCA 2005.

<sup>2</sup> 18 C.F.R. § 366.7 (2006).

and Buffalo Gap Wind Farm 3, LLC (Buffalo Gap 3).<sup>3</sup> Buffalo Gap 1, a wholly-owned, indirect subsidiary of AES, obtained EWG status in 2005.<sup>4</sup> According to Applicant, Buffalo Gap 3 will also be a wholly-owned, indirect subsidiary of AES and will seek EWG status.

3. Applicant states that it will sell, at wholesale, 100 percent of the energy output generated by the facility to Direct Energy, L.P. pursuant to a 10-year power purchase agreement. Applicant also plans to engage in project development activities that it states the Commission has found to be consistent with EWG status.

4. In its December 13, 2006, supplemental filing, Applicant points out that a potential interpretation of the Commission's regulations could mean that EWGs would be prohibited from co-owning facilities with affiliated EWGs. Applicant explains that the definition of an EWG contained in the Commission's regulations incorporates by reference section 32(d)(1) of PUHCA 1935, as amended,<sup>5</sup> which prohibits an EWG from owning or operating any facility along with an electric utility company that is an affiliate or associate company of that EWG. As EWGs were exempted from being electric utility companies under PUHCA 1935, they could co-own facilities with affiliated EWGs. However, Applicant states that, under PUHCA 2005, EWGs fall within the definition of an electric utility company. Thus, according to Applicant, one may interpret the Commission's regulations to prohibit EWGs from sharing ownership with other affiliated EWGs while maintaining EWG status. Applicant argues that the Commission's regulations should be interpreted to permit shared ownership of facilities by affiliated EWGs because the issue presents itself as "an anomaly that arises *only* because of the overlay of the new definition of 'electric utility company' enacted in PUHCA 2005 on the unchanged provisions of section 32(d)(1) of PUHCA 1935."<sup>6</sup>

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<sup>3</sup> Applicant plans to share the following facilities and property with Buffalo Gap 1 and/or Buffalo Gap 3: two main power transformers; other substation equipment; communication, protection, supervisory and revenue metering equipment; a 138 kV transmission tie line to connect the facility to a delivery point near the AEP Bluff Creek 138/345 kV substation; access roads; and real property interests necessary for the use of these shared items.

<sup>4</sup> See *Buffalo Gap Wind Farm, LLC*, 112 FERC ¶ 62,143 (2005).

<sup>5</sup> 15 U.S.C. § 79z-5a(d)(1) (2000).

<sup>6</sup> Supplemental filing at 4.

5. Applicant presents several reasons why EWGs should continue to be permitted to co-own facilities with affiliated EWGs. First, Applicant asserts that there is no indication that the Commission intended to prohibit such co-ownership. Applicant contends that nothing in the record of the Order No. 667 proceeding suggests that outcome, and argues that the Commission would not intentionally make such a change without discussion.

6. Second, Applicant argues that there is no statutory provision requiring the Commission to prohibit affiliated EWGs from co-owning facilities. Applicant states that PUHCA 2005 provides that the term exempt wholesale generator shall have the same meaning as provided in section 32 of PUHCA 1935, but that not every provision of section 32 of PUHCA 1935 is properly thought of as comprising the meaning "EWG." Applicant also states that the Commission was not required under PUHCA 2005 to include the prohibition in section 32(d)(1) of PUHCA 1935 in its regulations; therefore, the Commission has discretion to specify how section 32(d)(1) will be applied pursuant to its regulations under PUHCA 2005.

7. Additionally, Applicant argues that the legislative purpose of section 32(d)(1) was to prevent cross-subsidization between EWGs and affiliated traditional utilities. Applicant asserts that the Commission should continue to prohibit EWGs from co-owning facilities with affiliated traditional utilities but should not prohibit such co-ownership with affiliated EWGs. Finally, Applicant argues that numerous EWGs currently share facilities with other EWG affiliates and that a prohibition on such co-ownership could create tremendous hardship and uncertainty for existing EWGs. Applicant requests that the Commission interpret "electric utility company" as employing the PUHCA 1935 definition rather than the definition contained in PUHCA 2005.

## **II. Applicant's Representations Regarding Its EWG Status**

8. In support of its notice of self-certification Applicant states the following:
- a. Applicant represents that it will be engaged directly and exclusively in the business of owning and operating the facility and selling electric energy at wholesale. Applicant may engage in activities incidental to the sale of electric energy at wholesale that are consistent with Commission precedent.
  - b. The facility constitutes an "eligible facility" as defined in section 32(a)(2) of the PUHCA 1935 and as incorporated by reference in 18 C.F.R. § 366.1. The facility does not include transmission or distribution facilities other than interconnection facilities necessary to effect the sale of power to wholesale customers.
  - c. There will be no lease of the facility to any public utility company.

- d. Except for other EWGs, no portion of the facility will be owned or operated by an “electric utility company” that is an “associate company” or “affiliate” of the Applicant, as such terms are defined in PUHCA 2005.
- e. No rate or charge for, or in connection with, the construction of the facility, or for electric energy produced thereby, was in effect under the laws of any state on October 24, 1992. As such, no determination or certification by any state commission is necessary prior to acceptance of Applicant's self-certification as an EWG.
- f. Applicant filed a copy of its notice of self-certification with the Public Utility Commission of Texas, which is the state regulatory authority of the state in which the facility is located.

### **III. Notice of Filing**

9. Notice of the self-certification filing was published in the *Federal Register*, 71 Fed. Reg. 66,767 (2006), with comments, interventions, and protests due on or before November 28, 2006. None was filed.

### **IV. Discussion**

10. To address whether the Commission’s EWG regulations prohibit affiliated EWGs from co-owning or jointly operating facilities and whether Applicant should be granted EWG status, we must first briefly review the genesis of the current EWG regulations.

11. In Order No. 667,<sup>7</sup> the Commission amended its regulations to implement the repeal of PUHCA 1935 by replacing part 365 of its regulations with part 366. Section 366.1 of the Commission’s regulations<sup>8</sup> essentially adopts the language contained in section 32(a)(1) of PUHCA 1935,<sup>9</sup> and adds: “For purposes of establishing or

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<sup>7</sup> *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh'g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213, *order on reh'g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006).

<sup>8</sup> 18 C.F.R. § 366.1 (2006).

<sup>9</sup> 15 U.S.C. § 79z-5a(a)(1) (2000).

determining whether an entity qualifies for exempt wholesale generator status, sections 32(a)(2) through (4), and sections 32(b) through (d) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79z-5a(a)(2)-(4), 79z-5a(b)-(d)) shall apply.”<sup>10</sup>

12. Section 32(d)(1) of PUHCA 1935, referenced in the definition above, provides: “No exempt wholesale generator may own or operate a portion of any facility if any other portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company of such exempt wholesale generator.”<sup>11</sup> However, section 32(e) of PUHCA 1935 (which was not incorporated into the definition of EWG in section 366.1) provided that “[a]n exempt wholesale generator shall not be considered an electric utility company.”<sup>12</sup> Thus, under PUHCA 1935, having an affiliated EWG own or operate part of an eligible facility did not trigger the prohibition in section 32(d)(1). With the repeal of PUHCA 1935 and the adoption of part 366 of our regulations, an EWG now can be an electric utility company and the question of affiliated EWGs is squarely before the Commission.

13. The policy objective embodied in section 32(d)(1) was to prevent cross-subsidization between EWGs and affiliated traditional utilities. Co-ownership (or joint operation) by affiliated EWGs does not pose the same problem as co-ownership (or joint operation) with affiliated traditional utilities. Accordingly, we will interpret section 32(d)(1) as not precluding co-ownership (or joint operation) by affiliated EWGs.<sup>13</sup>

14. Applicant states that it will have undivided interests in certain shared facilities and properties with two affiliated EWGs. In addition, Applicant represents that, except for other EWGs, no portion of the facility will be owned or operated by an electric utility company that is an associate company or affiliate of the Applicant, as such terms are defined in PUHCA 2005. Because we interpret section 32(d)(1) of PUHCA 1935, as not barring affiliated EWGs, we find that Applicant has met the requirements for EWG status pursuant to section 366.7 of the Commission’s regulations.

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<sup>10</sup> 18 C.F.R. § 366.1 (2006).

<sup>11</sup> 15 U.S.C. § 79z-5a(d)(1) (2000).

<sup>12</sup> 15 U.S.C. § 79z-5a(e) (2000).

<sup>13</sup> In this regard, we note that section 32(a)(2) of PUHCA 1935 seems to contemplate affiliated EWGs as it defines “facility” to include “a portion of a facility subject to the limitations of subsection (d).” 15 U.S.C. § 79z-5a(a) (2000).

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The Commission orders:

Applicant's EWG status is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.