

UNITED STATES OF AMERICA 62 FERC ¶ 61,157
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Charles A. Trabandt, Jerry J. Langdon,
Martin L. Allday, and Branko Terzic.

Richmond Power Enterprise, L.P.) Docket No. EG93-7-000
Entergy Richmond Power Corporation) Docket No. EG93-8-000
Entergy Power Development Corporation) Docket No. EG93-9-000

DETERMINATIONS OF EXEMPT WHOLESALE GENERATOR STATUS
AND INTERPRETATION OF SECTION 32 OF THE
PUBLIC UTILITY HOLDING COMPANY OF 1935, AS AMENDED

(Issued February 18, 1993)

On December 23, 1992, Richmond Power Enterprise, L.P. (Richmond Power), Entergy Richmond Power Corporation (Entergy Richmond) and Entergy Power Development Corporation (Entergy Power) each separately filed an application for determination of exempt wholesale generator (EWG) status pursuant to section 32 of the Public Utility Holding Company Act of 1935, as amended (PUHCA). Pub. L. No. 102-486, 106 Stat. 2776 (1992); see 15 U.S.C. § 79 et seq. (1988).

Notices of the applications were published in the Federal Register, 1/ with protests, interventions or comments 2/ due on or before January 19, 1993. None was received.

In its application, Richmond Power states that it is engaged directly and exclusively in the business of owning and operating the Richmond Cogeneration Facility, a 250 MW electric generating facility (the Facility). According to Richmond Power, the Facility is a qualifying facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 et seq. (1988), 3/ that sells electric energy at wholesale,

1/ 58 Fed. Reg. 542, 543 (1993).

2/ See Filing Requirements and Ministerial Procedures for Persons Seeking Exempt Wholesale Generator Status, Notice of Proposed Rulemaking, Docket No. RM93-1-000, 57 Fed. Reg. 55,195 (November 24, 1992), IV FERC Stats. & Regs. ¶ 32,490, mimeo at 6.

3/ See Notice to the Commission of Qualifying Status of a Cogeneration Facility, Docket No. QF90-104-000, filed (continued...)

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within the meaning of section 201(d) of the Federal Power Act (FPA). 4/ Richmond Power explains that its current owners are Enron-Richmond Power Corp. (Enron-Richmond) and Enron Power Development Corp. Richmond Power further explains that upon consummation of the transactions described in the instant applications, Entergy Richmond and Enron-Richmond each will own a 49 percent limited partnership interest and a 1 percent general partnership interest in Richmond Power. Entergy Richmond is a wholly-owned subsidiary of Entergy Power, which in turn is a wholly-owned subsidiary of Entergy Corporation, a registered holding company under PUHCA. The applications indicate that Entergy Richmond and Entergy Power, after they acquire their interests in Richmond Power, will be indirectly 5/ and exclusively in the business of owning and operating the Facility and selling electric energy at wholesale, within the meaning of section 201(d) of the FPA. 6/

Each of the applicants represents that all of the electric energy generated by the Facility will be sold at wholesale within the United States and that no retail sales of electricity within the meaning of section 32 of PUHCA will be made from the Facility. Each applicant also states that there are no leasing arrangements involving the Facility and any public utility company.

3/ (... continued)

March 5, 1990; Notice of Self-Recertification of Qualifying Facility Status for a Cogeneration Facility, Docket No. QF90-104-001, filed July 8, 1992.

- 4/ 16 U. S. C. \pm 824(d) (1988). See PUHCA section 32(a) (3). See also the discussion *infra* regarding the sale of steam produced by the Facility.
- 5/ Entergy Richmond states in its application that it will be directly engaged in owning and operating the Facility, but it is clear from the applications that Richmond Power will continue to directly own and operate the Facility. Entergy Richmond's role, therefore, will be indirect, through its ownership of partnership interests in the entity that directly owns and operates the Facility.
- 6/ 16 U. S. C. \pm 824(d) (1988). See PUHCA section 32(a)(3). See also the discussion *infra* regarding the sale of steam produced by the Facility.

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Richmond Power states that other than the entities described in its application, 7/ its only affiliate or associate company under sections 2(a)(11) and (10) of PUHCA that is an electric utility company within the meaning of section 2(a)(3) of PUHCA is Teeside Power Limited. Both Entergy Richmond and Entergy Power identify the following affiliates or associate companies that are electric utility companies: Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., System Energy Resources, Inc. and Entergy Power, Inc.

Each applicant states that no rate or charge for, or in connection with, the construction of the Facility, or for electric energy produced by the Facility (other than any portion of a rate or charge that represents recovery of the costs of a wholesale rate or charge), was in effect under the laws of any state on October 24, 1992. Each applicant further represents that no other portion of the Facility will be owned or operated by an electric utility company that is an affiliate or associate company, as such terms are respectively defined in sections 2(a)(3), 2(a)(11) and 2(a)(10) of PUHCA, of such applicant.

Accordingly, Richmond Power, Entergy Richmond and Entergy Power each represent that the Facility is an eligible facility as defined in PUHCA section 32(a)(2). Richmond Power, Entergy Richmond and Entergy Power also each represent that it is an exempt wholesale generator as defined in PUHCA section 32(a)(1).

Prior to determining whether to grant the instant applications for EWG status, we first address several issues raised by the applications that require interpretation of the requirements of PUHCA section 32(a). First, each of the applicants points out that as part of owning and operating the Facility, a cogeneration facility that by definition produces both electric energy and steam, such applicant is engaged in selling steam to a retail customer as well as selling electric energy at wholesale. The instant applications, therefore, present the issue of whether such sale of steam precludes a determination of EWG status.

Section 32(a)(1) of PUHCA defines "exempt wholesale generator," in pertinent part, as a person "engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B) [of PUHCA], and exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale" (emphasis added). The only legislative history

7/ See supra text accompanying note 5 (describing entities).

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relevant to the question of whether that definition's exclusivity requirement prohibits an EWG from selling by-products of electric generation are certain comments by Senator Johnston, a co-sponsor of the Energy Policy Act of 1992. 8/ Senator Johnston stated that the definition of an EWG "permits an exempt wholesale generator to sell by-products of electric generation such as steam and fly ash. Such ownership and sales are incidental to an EWG's involvement in wholesale electric generation." 138 Cong. Rec. S17,644 (daily ed. October 8, 1992). In light of the legislative history, it is clear that a person otherwise meeting the requirements for EWG status may engage in the sale of by-products of electric generation such as steam and fly ash, incidental to the sale of electric energy at wholesale, without violating the exclusivity requirement.

Second, in addition to stating the facts and representations necessary to demonstrate eligibility for EWG status, Entergy Richmond and Entergy Power in their applications also assert that an EWG may own a QF and that the Facility may be simultaneously an eligible facility and a QF. With respect to the applicants' assertion that an EWG may own a QF, we agree. See PUHCA section 32(j). With respect to the assertion that a facility may simultaneously be a QF and an eligible facility, we agree that a facility that satisfies the statutory requirements of both PUHCA and PURPA may be both an eligible facility and a QF. Compare PUHCA section 32(a)(2) with 16 U.S.C. §§796(17)(C), 18(B) (1988). Moreover, there is nothing in the Energy Policy Act or its legislative history to indicate that a facility that satisfies the requirements for QF status may not also be an eligible facility if it meets the statutory definition of an eligible facility. Thus the Commission is of the view that an EWG may own an electric generating facility that qualifies as an eligible facility under PUHCA 9/ at the same time that such facility also satisfies the requirements for a QF under PURPA. 10/

8/ Pub. L. No. 102-486, 106 Stat. 2776 (1992) (Energy Policy Act). The Energy Policy Act, inter alia, amended PUHCA by adding a new section 32.

9/ While an eligible facility may be used for the production of electric energy for sale at retail, see PUHCA Sections 32(a)(2)(B) and (b), an EWG selling electric energy must sell such energy exclusively at wholesale. See PUHCA Section 32(a)(1).

10/ In the case of the Facility in this proceeding, applicants present the facts and representations necessary to determine (continued...)

Finally, the Commission determines, based upon the information contained in their respective applications, that Richmond Power, Entergy Richmond and Entergy Power are each an exempt wholesale generator as defined in section 32(a)(1) of PUHCA. As required by section 32(a)(1) of PUHCA, the Secretary is directed to notify the Securities and Exchange Commission of these determinations.

By the Commission.

(S E A L)

Lois D. Cashell,
Secretary.

10/(...continued)

that it is an eligible facility under PUHCA. An EWG proceeding is not the appropriate forum for determining whether or not the Facility is also a QF. Parties seeking confirmation of their facilities' QF status may either file notices of self-certification or apply to the Commission for QF certification. See 18 C.F.R. § 292.207 (1992). We note in that regard that Richmond Power states in its EWG application that it intends to file a notice of self-recertification of QF status -- to supplement the notices of self-certification previously filed with respect to the Facility, see supra note 3 -- to reflect the acquisition of interests in Richmond Power by Entergy Richmond and Entergy Power.

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