

143 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Prairie Breeze Wind Energy LLC

Docket No. EG13-16-000

ORDER DISMISSING NOTICE OF SELF-RECERTIFICATION OF EXEMPT
WHOLESALE GENERATOR STATUS
AS UNNECESSARY, AND PROVIDING GUIDANCE

(Issued April 18, 2013)

1. On February 27, 2013, Prairie Breeze Wind Energy LLC (Prairie Breeze) filed with the Commission a notice of self-recertification as an exempt wholesale generator (EWG). Prairie Breeze had previously achieved EWG status through filing a notice of self-certification of EWG status. Prairie Breeze states that it has filed its notice of self-recertification of EWG status to reflect a proposed increase in the size of its wind generation project, which it believes is a material change in facts from those contained in its initial self-certification of EWG status. As we explain below, because the Commission's regulations do not specify generation facility size as a fact that is relevant to whether a company satisfies the definition of an EWG, and therefore do not mandate that this fact be included in an initial self-certification,¹ the change that Prairie Breeze has reported here is not a material change in facts that may affect its EWG status. We therefore dismiss Prairie Breeze's notice of self-recertification as unnecessary and, in doing so, we provide guidance on when and when not to file such a notice.

Background

2. Prairie Breeze was certified as an EWG by a self-certification that was filed on July 9, 2009 in Docket No. EG09-72-000 (July 2009 Certification) and that became effective by operation of the Commission's regulations in September 2009.² Prairie

¹ See 18 C.F.R. § 366.7(a) (2012).

² Notice of Effectiveness of Exempt Wholesale Generator Status in Docket Nos. EG09-69-000 *et al.* (Oct. 30, 2009).

Breeze states that it is filing its current notice of self-recertification because of a proposed change in the size of the generation facilities that it plans to own, and it describes this change as “a material change in facts from those contained in [its] July 2009 Certification.”³ Prairie Breeze makes representations that are necessary to establish EWG status.

Notice of Filings

3. Notice of Prairie Breeze’s filing was published in the *Federal Register*, 78 Fed. Reg. 14,530 (2013), with interventions and protests due on or before March 20, 2013. None was filed.

Discussion

4. We dismiss Prairie Breeze’s notice of self-recertification of EWG status. The Commission’s regulations contemplate the filing of a new notice of self-certification only in situations where there is a “material change in facts that may affect the [EWG’s] . . . status as an [EWG]”⁴ EWG status is established by making representations as to certain facts.⁵ A material change in facts that may affect EWG status is thus a change in one or more of those facts. In the case of companies like Prairie Breeze that will own or operate generation facilities located in the United States, the facts that establish EWG status are as follows:

- The company is a person engaged directly, or indirectly through one or more affiliates, as defined in section 366.1 of the Commission’s regulations, 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;
- any electric generation facility that the company owns or operates (i) is used for the generation of electric energy exclusively for sale at wholesale or (ii) is used for the generation of electric energy and leased to one or more public-utility companies; and (iii) includes only those interconnecting transmission facilities that are necessary to effect a sale of electric energy at wholesale;

³ Prairie Breeze Notice of Self-Recertification, Docket No. EG13-16-000, at 1 (filed Feb. 27, 2013).

⁴ 18 C.F.R. § 366.7(c) (2012).

⁵ *Id.* §§ 366.1, 366.7(a).

- (i) no rate or charge for, or in connection with, the construction of the company's generation facility, or for electric energy produced by the facility (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge), was in effect under the laws of any state on October 24, 1992 or (ii) if such a rate or charge was in effect on that date, every state commission having jurisdiction over any such rate or charge has determined that allowing the facility to be an eligible facility (A) will benefit consumers, (B) is in the public interest, and (C) does not violate state law; and
- (i) no portion of the company's generation facility is owned or operated by an electric utility company that is an affiliate or associate company, as defined in section 366.1 of the Commission's regulations, of the entity certifying that it is an EWG or (ii) if a portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company, every state commission having jurisdiction over a rate or charge for electric energy produced by the facility has determined that allowing the facility to be an eligible facility (A) will benefit consumers, (B) is in the public interest, and (C) does not violate state law.⁶

5. The Commission's regulations specify that an EWG must file a notice of any material change in facts that may affect its EWG status within 30 days of that change. In the notice, the company must either: (i) submit either a new notice of self-certification or a petition for a Commission certification order, (ii) explain why the material change in facts does not affect its status as an EWG, or (iii) notify the Commission that it no longer seeks to maintain EWG.⁷ The Commission has also stated that companies that file notices of self-recertification should "identify in their filing the material change in fact

⁶ *Id.*; see *DTE Pontiac North LLC*, 121 FERC ¶ 61,037, at PP 6-7 (2007). The issue of eligible facility ownership by an affiliate or associate company does not apply if the affiliate or associate company is an EWG. See *Buffalo Gap Wind Farm 2, LLC*, 118 FERC ¶ 61,069 (2007).

An EWG that owns or operates a facility located in a foreign country should, in its filing with the Commission, affirm that, to the extent that it makes retail sales, no electric energy produced by the facility will be sold to consumers in the United States.

⁷ 18 C.F.R. § 366.7(c) (2012).

that they believe warrants their filing by describing a change in one or more of the facts that establish EWG status. . . .”⁸

6. As noted above, Prairie Breeze states that the “proposed change in the size of the generation facilities it plans to own is a material change in facts from those contained in Prairie Breeze’s July 2009 Certification.”⁹ However, the Commission’s filing requirement focuses on material changes in facts that “may affect an exempt wholesale generator’s . . . status as an exempt wholesale generator . . .”¹⁰ A change that may affect EWG status is a change in one of the facts that establish EWG status, i.e., those recited above. The requirement that companies filing notices of self-recertification identify in their filing the material change in fact that they believe warrants their filing is thus a requirement to identify a material change in one or more of those facts. The change in fact that Prairie Breeze has identified, a change in the capacity of its generation facility, is not a change of a fact that is necessary to establish EWG status, as explained below.

7. To qualify as an EWG, the generation facility that a company owns or operates must be an “eligible facility.” An eligible facility is a generation facility that: (i) is used for the generation of electric energy exclusively for sale at wholesale or (ii) is used for the generation of electric energy and leased to one or more public-utility companies; and that (iii) includes only those interconnecting transmission facilities that are necessary to effect a sale of electric energy at wholesale.¹¹ A demonstration of eligible facility status in an initial self-certification does not require specification of the facility’s size, and therefore a change in size does not affect eligible facility status. Rather, whether a generation facility is an eligible facility is dependent upon whether it is used in the manner specified above and whether any included interconnecting transmission facilities are necessary to effect sales of electric energy at wholesale. A material change in fact that affects one of these matters is one that would require the filing of a notice of a material change in facts.

8. We commend Prairie Breeze for its concern with regulatory compliance, and we recognize that many entities desire to have a documented basis for assuring both

⁸ *BG Dighton Power, LLC*, 132 FERC ¶ 61,029, at P 5 (2010).

⁹ Prairie Breeze Notice of Self-Recertification, Docket No. EG13-16-000 (filed Feb. 27, 2013) at 1.

¹⁰ 18 C.F.R. § 366.7(c) (2012) (emphasis supplied).

¹¹ *See* 18 C.F.R. § 366.1 (2012); *see also* 15 U.S.C. §§ 79z-5a(a)(2) – (4) and 79z-5a(b) - (d) (2000) (subsequently repealed but made applicable for purposes 18 C.F.R. § 366.1).

themselves and parties with whom they transact business that they are in compliance with the Commission's regulatory requirements. Thus while there is no requirement that EWGs provide notices of changes in facts other than material changes in facts that may affect EWG status, it has become common for EWGs to file notices of what are, in fact, non-material changes in facts. These filings have included notices of changes in facility capacity such as the one under consideration here, in some instances changes in capacity that are quite significant.¹² However, notices of such changes are optional and need not be filed.

The Commission orders:

Prairie Breeze's notice of self-recertification of EWG status is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Moeller is concurring with a separate statement to be issued at a later date.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² See, e.g., *Long Beach Power LLC*, Docket No. EG98-61-000 (filed June 4, 2007) (noting change in facility output from a maximum of between 530 and 560 megawatts to 260 magawatts).