

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Arthur Kill Power LLC

Docket No. EG05-66-000

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

(Issued July 14, 2005)

1. On May 19, 2005, Arthur Kill Power LLC (Arthur Kill) filed an application for a redetermination of exempt whole generator (EWG) status pursuant to section 32 of the Public Utility Holding Company Act of 1935, (PUHCA).¹ In this order, the Commission grants Arthur Kill's request for EWG status, based on the proposed change in facts set forth in Arthur Kill's application.

Background

2. On May 19, 2005, Arthur Kill filed its application for a redetermination of its EWG status,² in light of a proposal by the City of New York (City) to acquire a perpetual easement from Arthur Kill, across a parcel of land on which the Arthur Kill Generating Facility (Facility) is located. The City has requested this easement for the purpose of reactivating an industrial rail spur to transport municipal waste across the Arthur Kill property to a facility owned by the City.

3. In consideration for granting the easement, the City proposes to pay a one-time, lump-sum payment of about \$1.1 million, which includes \$130,000 in costs incurred by Arthur Kill as a result of the easement. Arthur Kill states that the City will attempt to acquire this easement through condemnation if Arthur Kill refuses to grant the easement.

¹ 15 U.S.C. § 79z-5a (2000).

² The Commission granted Arthur Kill's request for EWG status in an order issued on July 22, 1999. *Arthur Kill Power LLC*, 88 FERC ¶ 62,072 (1999).

Arthur Kill states that granting the easement will not affect its operations at the Facility, nor will it affect its ability to traverse the easement property for entry and exit to the Facility.

4. Arthur Kill argues that granting this easement to the City in exchange for a one-time payment does not violate the requirement that Arthur Kill be exclusively engaged in the business of owning and/or operating eligible facilities and selling power at wholesale under section 32 of PUHCA. Arthur Kill argues that it is granting the easement at the request of a governmental authority that is threatening condemnation if it refuses to comply. It asserts that the Commission has previously found that complying with a requirement of a governmental entity does not destroy or alter EWG status. Arthur Kill states that by granting the easement and receiving a one-time payment from the City, it will not be in the business of granting easements, nor is its primary purpose to engage in granting easements to the City.

5. Arthur Kill asserts that granting the easement will establish a needed link in the City's planned transportation route for municipal solid waste and will advance the public interest. Arthur Kill further argues that the payment to be received for the easement is de minimis in comparison to the annual revenues received by Arthur Kill for the sale of power. Finally, Arthur Kill claims that the facts in this situation are unique and that our determination in this case would not have a broad application.

6. Arthur Kill states and affirms that the following facts and representations are true:
- a. Arthur Kill is engaged directly, or indirectly through one or more "affiliates," as defined in PUHCA section 2(a)(11)(B), 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 exclusively at wholesale.
 - b. Arthur Kill is not currently engaged, and has no present plans to engage, in foreign sales of power at retail after the closing date.
 - c. The Facility is an "eligible facility," as defined in PUHCA section 32.
 - d. The Facility is interconnected with Consolidated Edison Company of New York, Inc.'s (Con Ed) transmission system, which is operated and controlled by the New York Independent System Operator. Arthur Kill will neither own nor operate any transmission facilities other than step-up transformers and generator lead lines necessary to interconnect the Facility.
 - e. There are no lease arrangements through which Arthur Kill will lease the Facility to a public utility company or any other party.

- f. Arthur Kill is an indirect wholly-owned subsidiary of NRG Energy, Inc. Arthur Kill is neither an "affiliate" nor an "associate company" of an "electric utility company" as those terms are defined in PUHCA section 2, 15 U.S.C. § 79b.
- g. No portion of the Facility will be owned or operated by an "electric utility company" that is an "affiliate" or "associate company" of Arthur Kill.
- h. On October 24, 1992, the Facility was owned by and included in the rate base of Con Ed, a public utility whose retail rates are regulated by the New York Public Service Commission (New York Commission). A written determination from the New York Commission making the findings required by the Commission's regulations was attached to the application for determination of EWG status, filed in Docket No. EG99-165-000 on June 9, 1999 and is incorporated by reference.
- i. Arthur Kill may engage in certain activities incidental to the sale of electric energy at wholesale as previously authorized by the Commission.

Notice of the Filing and Intervention

7. Notice of Arthur Kill's application was published in the *Federal Register*, 70 Fed. Reg. 32,318 (2005), with comments, protests, or interventions due on or before June 9, 2005. The City filed a motion to intervene.

8. The City states that it must receive the easement immediately so that the necessary construction can be completed in a timely manner. The City issued notice of a public hearing held on June 22, 2005 pursuant to the New York Eminent Domain Procedure Law and states that it will pursue condemnation of the easement property if Arthur Kill does not grant an easement on terms agreeable to the City.

Discussion

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the City's timely, unopposed motion to intervene serves to make the City a party to this proceeding.

10. Section 32(a)(1) of PUHCA defines an EWG as: "any person . . . engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B), 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." This application raises the issue of whether Arthur Kill will be "exclusively" engaged in such a business.

11. Based on the particular circumstances present, we find that Arthur Kill will be engaged "exclusively" in the business of owning and operating an eligible facility and selling electric energy at wholesale. We have held in the past that the exclusivity requirement is not violated when the activity at issue is "incidental" to the ownership and/or operation of an eligible facility. We believe that Arthur Kill's grant of a perpetual easement to the City for a one-time payment, as described in the application, would be incidental to its ownership and operation of its Facility. We have stated that whether an activity is undertaken pursuant to a government requirement is a "critical fact" to consider in determining if that activity violates the exclusivity requirement.³ Here, Arthur Kill must grant the easement as a requirement of the City, since the City has already begun a condemnation proceeding in the event that Arthur Kill does not voluntarily grant the easement to the City. Moreover, Arthur Kill's property is uniquely able to meet the City's purpose and will not be used for purposes that could be met equally well by other properties. Based on the limited nature of Arthur Kill's grant of an easement to the City, the fact that Arthur Kill's primary business activity is the ownership and operation of a facility used for wholesale sales of electric energy, and the fact that Arthur Kill must grant the easement pursuant to City's requirement, we find that Arthur Kill will not violate the exclusivity requirement.

The Commission orders:

Based on the information contained in this application, the Commission determines that Arthur Kill is an EWG 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 this determination.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

³ See, e.g., *AEP Resources Project Management Co.*, 74 FERC ¶ 61,202 at 61,674-75 and n. 7 (1996); *CMS Morocco Operating Company SCA*, 78 FERC ¶ 61,118 at 61,454 (1997). See also *Safe Harbor Water Power Corp.*, 84 FERC ¶ 61,318 (1998) (activities undertaken consistent with hydroelectric project license are incidental and do not violate the exclusivity requirement). Although a government requirement is a "critical fact" for consideration, we have *not* stated that any and all conditions imposed by a governmental entity would be found not to violate the exclusivity requirement. The determinations in our previous cases, and the determination in the present case, are based on the limited facts before us.