

107 FERC ¶ 61,101
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Redbud Energy LP

Docket No. EG04-38-000

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

(Issued May 4, 2004)

1. On March 5, 2004, Redbud Energy LP (Redbud) 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, as amended by the Energy Policy Act of 1992 (PUHCA).¹ In this order the Commission grants Redbud's request for EWG status, based on the proposed change in facts set forth in Redbud's application. This determination benefits customers by ensuring that applicants who qualify for EWG status under PUHCA will receive such status, as Congress intended.

Background

2. Redbud is applying for a redetermination of its EWG status, originally determined and granted in Docket No. EG01-46-000 and subsequently in Docket No. EG04-17-000 (Second Application).² As described in its Second Application, Redbud constructed and owns a switching station (Switchyard) in accordance with an Interconnection Agreement (IA) between Redbud and Oklahoma Gas and Electric Company (OG&E).³

¹ 15 U.S.C. § 79z-5a (2000).

² Redbud Energy LP, 94 FERC ¶ 62,043 (2001) and Redbud Energy LP, 105 FERC ¶ 62,043 (2003), respectively.

³ Interconnection Agreement Between Oklahoma Gas and Electric Company and Redbud Energy, L.P. (Oklahoma County, Oklahoma), section 9.1 (accepted for filing by unpublished letter order issued on October 26, 2001 in Docket No. ER01-2987-000).

3. Redbud states that the configuration of the Switchyard and its location on OG&E's transmission system makes the Switchyard a network transmission facility. Redbud explains that, pursuant to the IA, a portion of the existing Arcadia-Riverside 345 kV transmission line was looped through the Redbud Switchyard. Redbud also states that power flows into and out of the Switchyard from sources other than Redbud's 1,200 MW combined cycle generation facility that is interconnected with OG&E's 345 kV Arcadia Substation and OG&E's Arcadia-Riverside 345 kV transmission line (Facility). Redbud states that the Switchyard and its configuration were necessary to interconnect the Facility with OG&E's transmission system, and for OG&E to ensure it could maintain reliability as a result of the interconnection.

4. In a tariff filing also submitted on March 5, 2004, pursuant to the Federal Power Act (FPA) section 205 and subject to the granting of EWG status in the instant proceeding, Redbud proposes to recover its investment in the Switchyard.⁴ Redbud contends that such recovery of costs of its investment is incidental to its sale of electric energy at wholesale, and, therefore, does not violate the exclusivity requirement of PUHCA section 32(a)(1).

5. Redbud contends that because the Commission already determined that Redbud's ownership of the Switchyard is consistent with EWG status – and those facts have not changed – the recovery of costs associated with the construction of the Switchyard also is consistent with EWG status.

Representations by Redbud regarding its EWG status

6. Redbud states and affirms that the following facts and representations are true:
- a. Redbud will be engaged directly and exclusively in the business of owning or operating, or both owning and operating all or part of one or more Eligible Facilities, as that term is defined in PUHCA § 32(a)(2), and selling electric energy at wholesale to customers within the United States.
 - b. As described in its instant application and Second Application, Redbud owns or operates electric transmission facilities necessary to effectuate the Facility's wholesale power sales.
 - c. Except as discussed in the instant Application, there are no lease arrangements involving Redbud.

⁴ Docket No. ER04-622-000 (Mar 5, 2004).

- d. No portion of Redbud's Facility will be owned or operated by an "electric utility company" that is an "affiliate" or "associate company" within the meaning of PUHCA sections 2(a)(11) and 2(a)(10).
- e. No rate or charge for, or in connection with, the Facility, or for electric energy produced thereby, was in effect under the laws of any state on October 24, 1992.

Redbud's proposed cost recovery

7. Redbud contends that it is placing itself in a position similar to the position in which it would have been had the Switchyard been deeded-back to OG&E in exchange for transmission credits, *i.e.*, in exchange for a reimbursement of Redbud's initial investment in the network transmission facilities. Redbud states that it now seeks such reimbursement by developing a rate based on the identical costs that would have been included in transmission credits.

8. Redbud states that the cost of service on which the proposed rate is based includes the actual costs Redbud incurred in constructing the Switchyard. Redbud seeks to recover these costs—\$19,356,533—over 60 months, with interest accruing on the balance.

Notice and responsive pleadings

9. Notice of Redbud's March 5, 2004 filing was published in the Federal Register, 69 Fed. Reg. 12,312 (2004), with interventions and protests due on or before March 26, 2004. OG&E filed a motion to intervene and protest. Pursuant to rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), OG&E's timely, unopposed motion to intervene serves to make it a party to this proceeding.

10. On April 9, 2004, Redbud filed an answer to OG&E's protest. rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Redbud's answer and will, therefore, reject it.

11. On April 26, 2004, OG&E filed an answer to Redbud's answer to OG&E's protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits answers to answers unless otherwise ordered by the decisional authority. We are not persuaded to accept OG&E's answer and will, therefore, reject it.

Discussion

12. Redbud's application raises the issue of whether recovering payments for money invested in transmission facilities violates the requirement set forth in section 32 (a)(1) of PUHCA, that an EWG be "exclusively" in the business of owning and/or operating an eligible facility and selling electric energy at wholesale. Typically, a generator that advances payment for network facilities required to reliably interconnect to a transmission utility is entitled to a cash refund in the form of a transmission credit equal to amounts paid for such network upgrades.⁵ The generator initially would pay for the network facilities, and after the construction the utility would assume ownership. The generator would be refunded the full amount of its initial investment on a dollar-for-dollar basis, as credits against the generator's payments for transmission services.⁶

13. In this proceeding, Redbud seeks to retain EWG status upon reimbursement for its construction costs, which costs were paid to effect reliable interconnection to a transmission facility. Redbud alleges that such reimbursement would put Redbud in a similar position had Redbud received transmission credits for the network upgrades it paid for. Redbud states that it is currently engaged directly and exclusively in the business of owning and operating a generating facility and selling electric energy at wholesale. Redbud contends that the collection of these costs associated with the construction of the Switchyard through the rate Redbud proposes is an incidental activity, is directly related to its wholesale generation business, and is de minimis when compared to such business.

14. OG&E alleges that Redbud seeks to expand PUHCA beyond its plain meaning by asking the Commission to hold that an entity can still qualify as an EWG if a majority, if not all, of its revenues are generated from transmission service provided to third parties where such transmission service has nothing to do with sales from the eligible generating facility. OG&E states that Redbud intends to collect a rate for transmission service over its switching station facility from OG&E monthly for a five-year period, from which the revenue is hardly de minimis. Such revenues, OG&E contends, will account for most, if not all, of Redbud's annual revenue for the foreseeable future. OG&E argues that the costs Redbud incurred should be recovered through the rates Redbud charges for sales of the output of the generating unit, not by imposing these costs on OG&E's ratepayers and

⁵ See Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., Regulations Preambles ¶ 31,146, P 676, 720, 723 (2003) (Order No. 2003), order on reh'g, Order No. 2003-A, 69 Fed. Reg. 15,932 (2004), FERC Stats. & Regs., Regulations Preambles ¶ 31,160 (2004) (Order No. 2003-A).

⁶ Order No. 2003 at P 676.

other transmission customers in the Southwest Power Pool and thereby gaining a competitive advantage over other sellers who are not subsidized through rates charged to transmission customers.

15. OG&E also states that Redbud's ownership of the Switchyard facilities is incidental to its sales of power only because such ownership was required under the terms of the Interconnection Agreement. OG&E contends that for Redbud to now take the position that receiving revenues for providing jurisdictional transmission service pursuant to a tariff on file with the Commission is somehow incidental to Redbud's operation of its facility or its sales of power from that facility is absurd and internally inconsistent. Redbud's goal is to subsidize its sales and ensure that it is able to recoup at least a portion of its investment without ever making any sales of power from its facility, according to OG&E.

16. In previous cases, the Commission found that an EWG may engage in a number of incidental commercial activities when such activities are directly related to the wholesale generation business, in addition to its primary business of owning and or operating an eligible facility and selling power at wholesale generated at its eligible facility, without violating the statutory exclusivity requirement.⁷ In particular, the Commission has found that an EWG that owns a generating facility may provide transmission service to others over the associated transmission facilities when the EWG is not using all of the transmission capacity for delivery of its own power.⁸ Therefore, based on the fact that Redbud's primary business activity will be owning and/or operating an eligible facility and selling electric energy at wholesale and that we find Redbud's proposed arrangements will not violate the exclusivity requirement, accordingly we determine Redbud to be an EWG.

⁷ See, e.g., *Killingholme Generation Limited*, 90 FERC ¶ 61,194, at 61,632 & n.3 (2000).

⁸ See *PP&L Colstrip III, LLC and PP&L Montana, LLC*, 88 FERC ¶ 61,281 at 61,868-69 (1999).

Docket No. EG04-38-000

- 6 -

The Commission orders:

Based on the information contained in this application, the Commission determines that Redbud 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,
Acting Secretary.