

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Indian River Power LLC

Docket No. EG05-97-000

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

(Issued October 21, 2005)

1. On August 22, 2005, Indian River Power LLC (Indian River) 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 Indian River's request for EWG status, based on the proposed change in facts set forth in Indian River's application.

Background

2. Indian River filed its application for a redetermination of its EWG status,² in light of its March 29, 2005 agreement with Delmarva Power & Light Company (Delmarva) to grant Delmarva an easement, in exchange for a one-time payment of \$80,000.

3. Indian River states that it owns and operates an approximately 784 megawatt electric generation facility in Millsboro, Delaware (Facility) that it acquired from Delmarva in 2001. Indian River further states that Delmarva retained certain assets located on the transferred property. Accordingly, Indian River entered into an Easement and License Agreement with Delmarva, granting it an easement to allow its continued use of these assets in its normal conduct of business of transmitting and distributing electricity, including providing interconnection services to Indian River pursuant to their Interconnection Agreement.

¹ 15 U.S.C. § 79z-5a (2000).

² The Commission granted Indian River's initial request for EWG status in an order issued on September 24, 2001. *Indian River Power LLC*, 96 FERC ¶ 62,294 (2001).

4. This application involves an addendum to the Easement and License Agreement, entered into on March 29, 2005, by which Indian River has agreed to grant Delmarva an additional easement for a four acre area in exchange for \$80,000, payable either to Indian River or a charitable organization. Indian River states that Delmarva plans to construct and operate an additional 230 kilovolt (kV) substation and associated facilities, which will provide additional reliability in the region. It further states that granting the easement will not interfere with the operation of the Facility.

5. Indian River requests that the Commission determine that its grant of this additional easement, in exchange for \$80,000, does not violate the requirement that an EWG be exclusively engaged in the business of owning and/or operating eligible facilities and selling power at wholesale. It states that the Commission has permitted EWGs to engage in incidental commercial activities which provide reliability benefits, and that the additional 230 kV substation will enhance system reliability. It further asserts that Indian River will remain exclusively in the business of owning an eligible facility and selling electricity at wholesale; it will not be in the business of granting easements, nor will its primary purpose be to engage in granting easements.

6. Indian River states and affirms that the following facts and representations are true:

- a. Indian River 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. The Facility is an "eligible facility," as defined in PUHCA section 32.
- c. The Facility is interconnected with Delmarva's transmission system, which is operated and controlled by the PJM Interconnection, L.L.C. Indian River neither owns nor operates any transmission facilities other than step-up transformers and generator lead lines necessary to interconnect the Facility.
- d. There are no lease arrangements through which Indian River will lease the Facility to a public utility company or any other part, other than those described in its original EWG application. Specifically, those leases include several agricultural leases and a railroad lease (structured so that Indian River remains revenue neutral), several access licenses (including the easement noted above), a stone and gravel depot lease, and an ash utilization agreement.
- e. Indian River is an indirect wholly-owned subsidiary of NRG Energy, Inc. Indian River 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.

- f. No portion of the Facility will be owned or operated by an "electric utility company" that is an "affiliate" or "associate company" of Indian River.
- g. On October 24, 1992, the Facility was owned by and included in the rate base of Delmarva, a public utility whose retail rates are subject to regulation by the state commissions of Delaware, Maryland, and Virginia. Written determinations from these state commission making the findings required by section 365.3(b) were attached to the initial application and are incorporated by reference.
- h. Indian River may engage in certain activities incidental to the sale of electric energy at wholesale as previously authorized by the Commission.

7. Notice of Indian River's application was published in the *Federal Register*, 70 Fed. Reg. 52,902 (2005), with comments, protests, or interventions due on or before September 12, 2005. None was filed.

Discussion

8. 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 Indian River will be "exclusively" engaged in such a business as a result of granting an easement to Delmarva in exchange for a one-time payment.

9. Based on the particular circumstances present, we find that Indian River will be engaged "exclusively" in the business of owning and operating an eligible facility and selling electric energy at wholesale. We have held in previous cases 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 exclusivity requirement. In *Killingholme Generation Limited*,³ we found that an EWG did not violate the exclusivity requirement by collecting rental payments from a third party for use of a simulator operator training facility located at its facility and used to train its own personnel.⁴

³ 90 FERC ¶ 61,194 (2000).

⁴ See also *Nine Mile Point Nuclear Station, LLC*, 97 FERC ¶ 61,358 (2001) (holding that sharing specialized personnel with another generator that was not an EWG and providing back-up support personnel and equipment in the event of an emergency with the potential for reimbursement did not violate exclusivity requirement).

10. We have also found appropriate reimbursement for construction costs which were paid to effect reliable interconnection to a transmission facility,⁵ and in *Duke Energy Hot Spring, LLC*,⁶ we found that the applicant's back-up power agreement to help maintain reliability of the transmission provider's substation, was an incidental activity that did not violate the exclusivity requirement. Given that the back-up power agreement provided operational reliability that was critical to the applicant's wholesale generation business and that it provided a service under the agreement to another electric generator to enable the latter to sell its power to wholesale or retail customers, we found that exclusivity was not breached.

11. Based on the limited nature of Indian River's grant of an easement to Delmarva, the fact that construction of the substation by Delmarva will increase reliability in the region, and the fact that Indian River's primary business activity is the ownership and operation of its eligible facility, we find that Indian River will not violate the exclusivity requirement.

The Commission orders:

Based on the information contained in this application, the Commission determines that Indian River 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)

Magalie R. Salas,
Secretary.

⁵ *Redbud Energy LP*, 107 FERC ¶ 61,101 (2004).

⁶ 98 FERC ¶ 61,287 (2002).