

UNITED STATES OF AMERICA 69 FERC ¶61,037
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Selkirk Cogen Partners, L.P.) Docket No. EG94-95-000

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

(Issued October 13, 1994)

On August 25, 1994, Selkirk Cogen Partners, L.P. (Selkirk) filed an application for determination of exempt wholesale generator (EWG) status pursuant to section 32 of the Public Utility Holding Company Act of 1935 (PUHCA), as amended by the Energy Policy Act of 1992. 1/

Notice of Selkirk's application was published in the Federal Register, 59 Fed. Reg. 46,408 (1994), with interventions or comments due on or before September 19, 1994. On September 19, 1994, Niagara Mohawk Power Corporation (Niagara Mohawk) filed an intervention that raised no issues.

Selkirk states that it is the owner and operator of a 79.9 MW gas-fired cogeneration facility (Unit 1) located in the Town of Bethlehem, New York. It states that it is also the owner and operator of a 265 MW gas-fired cogeneration facility that is not yet in commercial operation (Unit 2; together with Unit 1, the Facility) to be located in the Town of Bethlehem, New York. 2/ Selkirk states that the Facility is located adjacent to the plastics manufacturing plant of General Electric Company (General Electric). Selkirk states that Unit 2 of the Facility is expected to commence commercial operation in September 1994.

Selkirk states that as an EWG, it will sell, at wholesale, capacity and electric energy produced by Unit 1 to Niagara Mohawk and capacity and electric energy produced by Unit 2 to Consolidated Edison Company of New York, Inc. (Con Edison). Selkirk further states that it may sell any excess capacity and electric energy, exclusively at wholesale, to other power purchasers. In addition, Selkirk states that the Facility is a

1/ 15 U.S.C.A. § 79z-5a (West Supp. 1994).

2/ The Facility will include interconnection facilities which will be used exclusively for the transmission of electricity generated by Selkirk to its wholesale purchasers.

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qualifying cogeneration facility and, accordingly, produces steam as an incident of its generation of wholesale electric power. The steam is and will be sold to General Electric, according to Selkirk.

Selkirk also states that when the Facility is not operating at full load because of either dispatch or availability constraints, or as a result of ambient conditions, it will sell excess gas supplies not required to operate the Facility and reassign gas transportation capacity not required for transportation services to the Facility. 3/ Selkirk further states that it may engage in gas sales and transportation assignments even if a unit is dispatched on-line, when Selkirk finds that it is more economical to purchase and operate the unit on substitute gas supplies or fuel oil in lieu of its firm arrangements.

Selkirk states that but for its wholesale electric power generation business and the dispatchable nature of its power purchase agreements with Niagara Mohawk and Con Edison, it would not have any gas supplies available for resale and transportation capacity available for reassignment. 4/ Selkirk asserts that

- 3/ Selkirk states that its lenders and Con Edison require it to have long-term, firm gas supply and transportation contracts in order to assure that the Facility will have sufficient fuel to operate as required under its power purchase agreements and to assure Niagara Mohawk and Con Edison of electric power on a reliable basis at a firm price. Selkirk further states that if the Facility does not use all of its gas supply and transportation entitlements because the Facility is not operating, Selkirk nevertheless remains obligated to pay the fixed costs associated with the reservation of its full entitlements under those agreements. Moreover, Selkirk states that when a unit is unavailable beyond certain limits, Niagara Mohawk or Con Edison is entitled to reduce certain fixed payments to Selkirk related to the electric capacity of the unit.
- 4/ Further, Selkirk states that it entered into the long-term firm gas supply and transportation agreements as a matter of prudent business practice. Selkirk asserts that it is prudent for it to seek to minimize its costs and maximize its revenues under those agreements by engaging in resale and peak shaving activities and capacity assignments when its contracted gas supplies and gas transportation are not required to generate power. Selkirk also states that unless it purchases from one of its gas suppliers gas required to offset imbalances resulting from deliveries to the Facility in excess of volumes nominated by Selkirk, it is contractually required to make gas sales to the supplier.

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such fuel-related activities are incidental to its business of owning and operating eligible facilities and selling electric energy at wholesale, and, therefore, do not violate the exclusivity requirement in section 32(a)(1) of PUHCA. Selkirk also cites Commission orders holding that an EWG may engage in commercial activities that are incidental to its wholesale electric generation business, such as selling steam or the byproducts from the fuel it burns. Selkirk also states that the legislative history indicates that an EWG is permitted to own fuel and related facilities that are necessary to its wholesale electric generation. 5/

Selkirk states that it will be engaged directly and exclusively in the business of owning or operating, or both owning and operating, the Facility and selling electric energy at wholesale. Selkirk states that it will not make any retail sales.

Selkirk states that the Facility is an eligible facility and that there will be no lease arrangements involving the Facility and public utility companies. Selkirk further states that no rate or charge for, or in connection with, the construction of the Facility or for electric energy produced thereby (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.

In addition, Selkirk states that it is not an associate company or affiliate of any electric utility companies. Selkirk states that it anticipates that upon closing of a merger between J. Makowski Company, Inc. (JMCI) and Bruins Acquisition Corp. (BAC), expected to occur by the end of August 1994, Selkirk will become an indirect affiliate of Pacific Gas & Electric Company (PG&E), an electric utility company. 6/ Selkirk also states that Energy Initiatives, Inc. (EI) has an option to purchase the limited partnership interest in Selkirk held by Makowski Selkirk Holdings, Inc., a subsidiary of JMCI. Selkirk states that EI is an indirect subsidiary of General Public Utility Corporation, a registered electric utility holding company under PUHCA. Finally, Selkirk states that no portion of the Facility is owned

5/ 138 Cong. Rec. S17,644 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

6/ Selkirk states that JMCI owns general and limited partnership interests in Selkirk through special purpose subsidiaries and that PG&E is an indirect stockholder of BAC. At the time of the merger, BAC will merge into JMCI. At that time, PG&E will become an indirect stockholder of JMCI, and, therefore, it will indirectly have ownership interests in Selkirk.

or operated by an electric utility company that is an affiliate or associate company of Selkirk.

The Commission has held that the sale of byproducts from electric generation, such as steam or fly ash, is incidental to an EWG's involvement in wholesale electric generation. 7/ Accordingly, Selkirk's sales of steam from the Facility to General Electric would not violate the exclusivity requirement of section 32(a)(1) of PUHCA.

We also find on these facts that Selkirk's resale of its excess gas supplies and assignment of its excess transportation capacity would not violate the exclusivity requirement. While the legislative history does not specifically address the facts presented here (i.e., whether the resale of contracted fuel and fuel transportation arrangements, tailored to the eligible facility's requirements, would violate the exclusivity requirement), as noted above the legislative history indicates that the sale of byproducts of electric generation would not violate the requirement. 8/ Congress apparently did not think it made any sense to require an entity to effectively waste byproducts of electric generation in order to qualify for EWG status. This same logic applies to the instant facts, regardless of whether the activities at issue can be construed to be byproducts of electric generation. 9/

There is no indication that the gas supplies and transportation arrangements which Selkirk has contracted for have been determined on any basis other than the expected fuel supply requirements of the Facility. In other words, Selkirk has not contracted for more gas and transportation than it believes is necessary to operate the Facility. On these facts, we find that the resale of fuel and reassignment of transportation capacity will be incidental to the EWG's involvement in wholesale electric

7/ See, e.g., Richmond Power Enterprises, 62 FERC ¶ 61,157 at 62,097-98 (1993); Elm Energy & Recycling (UK) Limited, 63 FERC ¶ 61,201 at 62,553 (1993).

8/ 138 Cong. Rec. S17,644 (daily ed. Oct. 8, 1992) (statement of Sen. Johnston).

9/ We note that the second definition of "byproduct" is the "result of another action, often unforeseen or unintended." The Random House Dictionary of the English Language 287 (2d ed. 1987). See also Webster's New Collegiate Dictionary 150 (1979) ("a secondary and sometimes unexpected or unintended result"). Under this definition, it would appear that Selkirk's activities could qualify as byproducts of its wholesale electric generation business.

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generation, and that Selkirk will not violate the exclusivity requirement.

Based on the information contained in its application, the Commission determines that Selkirk is 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 this determination.

By the Commission.

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Lois D. Cashell,
Secretary.

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