

174 FERC ¶ 61,098
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Brunner Island, LLC

Docket No. EG00-39-000

ORDER ON RECERTIFICATION OF STATUS AS EXEMPT WHOLESALE
GENERATOR

(Issued February 18, 2021)

1. On October 26, 2020, Brunner Island, LLC (Brunner), pursuant to the Public Utility Holding Company Act of 2005¹ and section 366.7 of the Commission's regulations,² submitted a self-recertification of its exempt wholesale generator (EWG) status. In its self-recertification filing, Brunner reports a change in facts involving its proposal to provide fly ash obtained from unaffiliated third parties to be processed at an unaffiliated facility, and to receive a share of the profits from the sale of processed fly ash, regardless of whether the fly ash is sourced from its EWG facility or from an unaffiliated third party. In this order, we find that Brunner would qualify to be an EWG only if it does not receive and retain profits from the sale of any processed third-party fly ash, as discussed below.

Background

2. Brunner explains that it is a Delaware limited liability company, all of whose membership interests are indirectly owned by Talen Energy Corporation. Brunner owns and operates an approximately 1,411 MW (summer rating) coal- and fuel oil-fired generation facility (Brunner Facility) in East Manchester Township, York County,

¹ 42 U.S.C. §§ 16451-63.

² 18 C.F.R. § 366.7 (2020).

Pennsylvania. Brunner self-certified as an EWG in 2000.³ Brunner has also been granted authority to make wholesale sales at market-based rates.⁴

3. Brunner explains that this change in facts to its EWG status is occurring because it will be assigned the rights and obligations of Brunner Island Services, LLC (BIS), a non-EWG affiliate of Brunner, that is under a fly ash tolling agreement (Fly Ash Agreement) with an unaffiliated fly ash processor (Processor). Processor owns and operates a facility (Separation Facility) at the site of the Brunner Facility that processes fly ash, a byproduct of fossil fuel-fired generation. Under the Fly Ash Agreement, BIS provides fly ash to Processor and receives a share of the proceeds from Processor's sale of the processed fly ash. The Processor is obligated to dispose of any fly ash not sold or otherwise utilized. Brunner states that, although it has not done so to date, BIS has the right to provide fly ash obtained from third parties to be processed at the Separation Facility, and BIS would still receive a share of the proceeds from the sale of processed fly ash, regardless of whether the fly ash were sourced from the Brunner Facility or a third party.⁵ Brunner asserts that it would continue to satisfy the EWG exclusivity requirement if BIS were to assign its rights and obligations under the Fly Ash Agreement to Brunner, asserting that providing fly ash sourced from third parties to the Processor and sharing in the proceeds from Processor's sale of the processed fly ash is consistent with Commission precedent regarding incidental use of facilities installed to support an EWG's electric generation activities.⁶

Notice of Filing

4. Notice of Brunner's self-recertification filing was published in the *Federal Register*⁷ with interventions and protests due on or before November 9, 2020. None was filed. On December 2, 2020, Brunner filed a supplement to its self-recertification filing to provide certain additional information regarding its proposed activities under the Fly Ash Agreement.

³ *PPL Brunner Island, LLC*, 91 FERC ¶ 61,228 (2000).

⁴ October 26 Filing at 2 (citing *Southaven Power, LLC*, 90 FERC ¶ 61,063 (2000)).

⁵ *Id.* at 7.

⁶ *Id.* at 9 (citing *NRG Northeast Generating LLC*, 88 FERC ¶ 61,190, at 61,655 (1999)).

⁷ 85 Fed. Reg. 72,647 (November 13, 2020).

5. On December 18, 2020 a Secretary's notice tolling the time for acting on Brunner's self-recertification filing was issued under section 366.7(a) of the Commission's regulations to allow time for further consideration and for the submission of additional information. A letter requesting that Brunner provide additional detail regarding whether it will retain the proceeds from the sales of unaffiliated third-party fly ash was also issued on December 18, 2020 under section 366.7 of the Commission's regulations. On December 30, 2020, Brunner responded to the letter, and clarified that if it were to deliver third-party fly ash to the Separation Facility, it "would receive and retain profits from the sale of processed third-party fly ash."⁸

Discussion

6. The Commission's regulations at section 366.1, as relevant here, define an EWG as "any person engaged directly, or indirectly, through one or more affiliates as defined in this subchapter, *and exclusively* in the business of owning or operating, or both owning or operating, all or part of one or more eligible facilities and selling electric energy at wholesale."⁹ The statutory definition of an EWG, as relevant here, thus requires that an EWG be engaged *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.¹⁰ The Commission has approved a long list of incidental activities that are deemed to be consistent with the exclusivity requirement. This consistency arises from the fact that such activities do not constitute a separate line of business but rather are simply incidental to the business of wholesale generation and sales.

7. With regard to fly ash sourced from the Brunner Facility itself, assignment of BIS's rights and obligations under the Fly Ash Agreement to Brunner does not present exclusivity issues. The Commission has previously accepted arrangements under which an EWG shares in the proceeds from the sale of processed fly ash and other combustion byproducts from its *own* generation activities as reasonably incidental to the activities of owning and/or operating eligible facilities and selling electric energy at wholesale.¹¹

⁸ December 30 Response at 2.

⁹ 18 C.F.R. § 366.7 (emphasis added).

¹⁰ 42 U.S.C. §§ 16451-63.

¹¹ See, e.g., *Richmond Power Enter., L.P.*, 62 FERC ¶ 61,157, at 62,098 (1993) ("[I]t is clear that a person otherwise meeting the requirements for EWG status may engage in the sale of byproducts of electric generation such as steam and fly ash, incidental to the sale of electric energy at wholesale, without violating the exclusivity requirement."); *Erie Blvd. Hydropower, L.P.*, 87 FERC ¶ 61,378, at 62,407 (1999) (same).

However, the Commission has not directly addressed an arrangement where, as here, an EWG would share in the proceeds from the sale of processed fly ash obtained from unaffiliated third parties.

8. The Commission has allowed arrangements in which EWGs receive and retain revenues for the use of their own facilities that are related to their production of electric energy, including, among other things, arrangements involving third-party use of transmission facilities built to interconnect their eligible generating facilities, barges acquired to deliver coal to their eligible generating facilities, water supply infrastructure, a combined cycle gas turbine training simulator, and oil storage facilities.¹² This precedent allows a generator to qualify as an EWG when it receives and retains revenues for disposing of fly ash and other waste from unaffiliated generators. Brunner argues that its proposal involves “simply receiving revenues for helping other generators dispose of their fly ash”¹³ and argues that such activity is consistent with the Commission’s acceptance of arrangements in which EWGs received revenues from third parties for the disposal of fly ash and other waste materials. But the precedent Brunner relies upon applies to the proceeds from the disposal of the EWG’s own waste, or of an affiliated EWG’s waste,¹⁴ not the proceeds from disposal of the waste of an unaffiliated third party, i.e., not from a fact pattern like that presented by Brunner. Indeed, retaining profits from the sale of processed fly ash of unaffiliated third parties – as Brunner proposes – would be inconsistent with Commission precedent, as it would constitute a separate line of business.¹⁵

¹² October 26 Filing at 8 (citing *PP&L Colstrip III, LLC*, 88 FERC ¶ 61,281, at 61,869 (1999); *PSEG Fossil, LLC*, 95 FERC ¶ 61,405, at 62,509 (2001) (*PSEG*); *Compañia Hidroeléctrica Doña Julia S. De R.L.*, 85 FERC ¶ 61,336, at 62,317-18 (1998); *KeySpan-Ravenswood, Inc.*, 88 FERC ¶ 62,073 (1999)).

¹³ October 26 Filing at 9.

¹⁴ *Id.* (citing *NRG Northeast Generating LLC*, 88 FERC at 61,655 (finding that accepting the waste produced by an affiliated EWG’s nearby operations will not violate the exclusivity requirement)).

¹⁵ *See PSEG*, 95 FERC at 62,509 (finding that “leases that do not relate to the generation and sale of electric energy and from which Applicants receive more than a nominal amount of money are independent businesses the preclude Applicants from engaging exclusively in the ownership and/or operation of eligible facilities and the sale of electric energy at wholesale.”). *See also CMS Morocco Operating Co. SCA*, 78 FERC ¶ 61,118 (1997) (granting EWG status where the applicant would handle coal going to third parties, but would not profit from that activity).

9. Brunner also argues that delivering third party fly ash to the Processing Facility and sharing in the revenues from the sale of the processed unaffiliated third-party fly ash is consistent with Commission precedent because it would avoid “economic waste” by using the excess capability of the Separation Facility which processes the fly ash. Brunner explains that the Separation Facility, which was primarily intended to process fly ash from the Brunner Facility, and was appropriately sized to perform that function, has had excess processing capability relative to the fly ash produced by the Brunner Facility, because the Brunner Facility’s generation output, and fly ash output, has fallen in recent years. Brunner contends that “[o]btaining and delivering fly ash entails costs and risks, and Brunner will have little or no incentive to deliver third-party fly ash to the Separation Facility if it cannot receive and retain a share of the proceeds from Processor’s sale of the processed third-party fly ash.”¹⁶ Brunner argues that “the result will be economic waste as what is likely to be an increasing proportion of the Separation Facility’s processing capability goes unused.”¹⁷

10. However, Brunner’s argument regarding avoidance of “economic waste” does not apply in these circumstances, because here the economic waste that would result would not be the Brunner Facility’s economic waste, but rather the wasted capacity of the unaffiliated Separation Facility and Processor.¹⁸ Commission precedent stating that EWGs may engage in certain incidental activities to avoid economic waste applies to the EWG’s own waste, not to a larger societal economic waste, such as the economic waste of an unaffiliated third party’s facility not operating at full capacity.¹⁹

11. In its December 30 Response, Brunner has clarified that, in the event of delivery of third-party fly ash to the Separation Facility, it would expect to receive and retain

¹⁶ December 2 Supplement at 2.

¹⁷ *Id.*

¹⁸ As described above, Brunner’s affiliate, BIS, has the right to provide fly ash obtained from third parties to the unaffiliated Processor to be processed at the Processor’s Separation Facility, and BIS would receive a share of the profits from the sale of the processed fly ash, specifically including from the sale of the processed fly ash originally sourced from a third party.

¹⁹ *Martins Creek, LLC*, 105 FERC ¶ 61,177, at P 10 (2003); *accord High Desert Power Project, LLC*, 105 FERC ¶ 61,213, at P 14 (2003) (finding that “economic waste” would result if an EWG could not release natural gas pipeline capacity); *Blue Spruce Energy Ctr., LLC*, 105 FERC ¶ 61,059, at P 10 (2003) (finding that an EWG could sell turbines determined to be surplus to its needs in order to avoid “economic waste”).

profits from the sale of processed third-party fly ash.²⁰ In that event, Brunner would not qualify to be an EWG. However, in its response, Brunner also clarifies that it would not intend to retain profits from the sale of processed third-party fly ash if doing so would jeopardize its EWG status; Brunner states that, if the Commission determines that it may not both retain profits from the sale of processed third-party fly ash and also remain an EWG, it will either: (1) not deliver third-party fly ash to the Separation Facility; or (2) donate to charity any revenues from sales of processed third-party fly ash in excess of Brunner Island's costs of securing and supplying third-party fly ash. Although the sale of the fly ash would violate the exclusivity requirement and thereby disqualify Brunner as an EWG, consistent with *PSEG*, we find that the sale of the processed third party fly ash would not violate the exclusivity requirement if Brunner donates to charity the profits from those sales in excess of Brunner's costs of securing and supplying third-party fly ash, which it has proposed to do.²¹ Therefore, consistent with *PSEG*, we find that Brunner may qualify as an EWG only on the condition that either it not deliver third-party fly ash to the Separation Facility or it contributes to charity all of the profits from the third-party fly ash sales in excess of Brunner's costs of securing and supplying third-party fly ash.

12. Given its commitment, Brunner is granted EWG status subject to the condition outlined above, but if it ever delivers third-party fly ash and retains the profits from the sale of processed third-party fly ash, it must submit a notice of material change under section 366.7(c) of the regulations to relinquish its EWG status.

²⁰ December 30 Response at 2.

²¹ 95 FERC at 62,509 (After finding that retention of proceeds would violate the exclusivity rule, the Commission held that "the Commission will find that Applicants are EWGs only on the condition that they contribute all of the proceeds of such activities to charity, as Applicants have indicated that they will do.").

The Commission orders:

Brunner's self-recertification of its EWG status is hereby conditionally granted, based on the commitment specified in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.