UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Duke Energy Vermillion, LLC — Docket No. EG04-24-000

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

(Issued February 17, 2004)

1. On December 19, 2003, Duke Energy Vermillion, LLC (Duke Vermillion) filed an application for redetermination of exempt wholesale generator (EWG) status pursuant to Section 32 of the Public Utilities Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (PUHCA).[1] In this order we grant Duke Vermillion's request for EWG status. Our determination serves the public interest by ensuring that applicants who qualify for EWG status under PUHCA will receive such status, as Congress intended.

2. Notice of the application was published in the Federal Register, 69 Fed. Reg. 2,133 (2004), with comments or interventions due on or before January 9, 2004. None was filed.

Background

3. Duke Vermillion is a wholly-owned subsidiary of Duke Energy Trenton, LLC (Duke Trenton), which is a wholly-owned indirect subsidiary of Duke Energy North America, LLC. Duke Vermillion owns and operates a 648 MW electric generating facility in Cayuga, Indiana (the Facility). It also owns and operates interconnecting transmission facilities connecting the facility with the transmission grid of PSI Energy, Inc. (PSI Energy), a subsidiary of Cinergy Corporation. In its application, Duke

[1] 15 U.S.C. § 79z-5a (2001).

Vermillion states that it is currently an EWG pursuant to an order issued May 1, 2000.[2] This application is occasioned by a transfer of an undivided 25 percent ownership interest in the Facility. As of the effective time of closing (transaction closing time) of the transfer, Duke Vermillion will continue to own a 75 percent undivided interest in the Facility.

4. Duke Vermillion submits a sworn statement by a representative legally authorized to bind it stating that:

a. As of the transaction closing time, Duke Vermillion will be engaged directly, or indirectly through one or more affiliates as defined in Section 2(a)(11)(B) of PUHCA, 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.

b. As of the transaction closing time, the Facility will be an eligible facility within the meaning of Section 32 of PUHCA. It will be interconnected with the electric transmission system of PSI Energy. Duke Vermillion will own interconnecting transmission facilities only as necessary to effectuate the sale of electric energy at wholesale.

c. No rates or charges for, or in connection with, the construction of the facilities, or for electric energy produced by the facilities, were in effect under the laws of any state as of October 24, 1992.

d. As of the transaction closing time, no part of the facility will be owned or operated by an electric utility company that is an affiliate or an associate company of Duke Vermillion.

5. On August 11, 2003, Duke Vermillion entered into an agreement with Wabash Valley Power Association, Inc. (Wabash)[3] to sell to Wabash a 25 percent undivided interest in the Facility and related project agreements. This agreement entitles Wabash to

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[2] Duke Energy Vermillion, LLC, 91 FERC ¶ 62,069 (2000).

[3] Wabash is a non-profit corporation owned by its member systems which are all non-profit electric cooperatives that sell energy to their customers. Wabash sells power at wholesale to its member systems for resale. Wabash is not an EWG, nor will it seek EWG status as a result of this transaction.

25 percent of the capacity, net electric energy and ancillary services available from the Facility.

6. The Facility will be jointly owned and operated by Duke Vermillion and Wabash in accordance with an Ownership and Operation Agreement (Ownership Agreement). Duke Vermillion will also be required to enter into an Administrative and Procurement Service Agreement under which it will provide Wabash certain administrative services (Fixed Fee Services)[4] and Wabash will pay a fixed fee of $50,000 per year subject to inflation. In addition, Duke Vermillion will provide certain specific Cost Allocation Services[5] which, to the extent the actual costs for providing such services are part of the Facility budget, will be included in the cost of the Facility's operation under the Ownership Agreement and for which Wabash will reimburse Duke Vermillion for Wabash's share based on its ownership percentage.

Discussion

7. Duke Vermillion's application raises the issues of whether an EWG's sale of a 25 percent undivided interest in a facility satisfies the "eligible facility" requirement and whether the services provided for a fee to a joint owner violate the requirement set forth in Section 32(a)(1) of PUHCA that an EWG be "exclusively" in the business of owning and/or operating eligible facilities and selling electric energy at wholesale.

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[4] These services include: (i) providing accounting, budgeting, cash management/treasury, and tax administration to the extent not provided by a third party; (ii) the services of the Facility project manager who is in charge of the operations of the Facility; (iii) access to Duke Vermillion's information systems used for plant operations; (iv) services provided by a scheduling coordinator relating to the scheduling, dispatch, balancing and arrangements for transmission of energy from the Facility and the scheduling, delivery, transportation, balancing or consumption of fuel for the Facility; and (v) Duke Vermillion's ability to procure parts and services for the Facility pursuant to an existing equipment and purchasing agreement that Duke Vermillion has entered into with a third party.

[5] These services include: (i) administrative services comprised of regulatory compliance and legal services; (ii) technical services comprised of engineering, environmental and similar technical services, outage planning, management services, supervision of contractors, major overhauls and repairs and capital projects; (iii) information systems acquired specifically for the Facility and related information technology services; and (iv) environmental health and safety administrative and compliance services.

8. We find here that Duke Vermillion's sale of an undivided 25 percent interest will not affect its EWG status. In FTM Energy, Inc.[6] the Commission allowed an eligible facility to be an undivided 50 percent interest in a generating unit. Section 32(a) of PUHCA states that "the term 'facility' may include a portion of a facility…."[7] The 75 percent interest owned by Duke Vermillion is therefore an eligible facility, whereas the 25 percent interest held by Wabash is not a part of the eligible facility.

9. In previous cases, we have found that an EWG may engage in a number of "incidental" commercial activities, in addition to its primary business of selling power at wholesale generated at its eligible facility, without violating the statutory "exclusivity" requirement.[8] We find here that services provided for a fee by Duke Vermillion to Wabash are incidental to Duke Vermillion's ownership and/or operation of a generating facility for wholesale sales of electric energy and thus will not violate the exclusivity requirement. We base our determination on the following considerations. First, Duke Vermillion must engage in the Fixed Fee Services and the Cost Allocation Services to generate and deliver its power. Duke Vermillion will not be in the business of providing such services or access, and provision of such services is necessary for Duke Vermillion's own operations.[9] Second, Duke Vermillion will not receive any additional revenues for Wabash's use of the Cost Allocation Services for the Facility because these activities only affect the allocation of costs between Duke Vermillion and Wabash.[10]

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[6] 74 FERC ¶ 61,312 (1996); see also PanEnergy Lake Charles Generation, Inc., 77 FERC ¶ 61,250 (1996).

[7] 15 U.S.C. § 79z-5a (2001).

[8] See, e.g., Killingholme Generation Limited, 90 FERC ¶ 61,194 (2000) (Killingholme) (authorizing an EWG to receive rental payments from a third party user of simulator operator training facilities associated with an eligible facility because, e.g., the EWG needed to train its own personnel to operate the facility and others would use the facility for only approximately five weeks per year); Hardee Power Partners, Ltd., 104 FERC ¶ 61,327 (2003) (Hardee) (authorizing the use by a third-party of road, water and switchyard facilities associated with an eligible facility); and PP&L Colstrip, LLC, 88 FERC ¶ 61,281 (1999) (PP&L Colstrip) (authorizing an EWG to operate a facility in its entirety even though it is partially owned by other entities).

[9] See Hardee, 104 FERC ¶ 61,327 (2003).

[10] See id.

10. In addition, the Commission has stated that the operation of a facility in its entirety even though it is partially owned by other entities is incidental to the primary function of owning and/or operating an EWG.[11] We held that "it would be inefficient to have more than one entity be responsible for the overall operation of [the facility]" and that, therefore, the "operation of a generating station partly owned by others is incidental to its ownership of the rest of that station." Consistent with PP&L Colstrip, we hold here that Duke Vermillion's operation of the portion of the Facility owned by Wabash is incidental to its function as an EWG. Accordingly, we find that Duke Vermillion will not violate the exclusivity requirement of Section 32(a)(1) of PUHCA.

The Commission orders:

Based on the information contained in its application, the Commission determines that Duke Vermillion will be an EWG as defined in Section 32(a)(1) of PUHCA as of the transaction closing time. 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.

[11] PP&L Colstrip, 88 FERC ¶ 61,281 (1999).