UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Jubail Energy Company Docket No. EG04-29-000

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

(Issued February 13, 2004)

1. On December 31, 2003, Jubail Energy Company (Jubail) filed an application for determination of exempt wholesale generator (EWG) status pursuant to Section 32(a)(1) of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (PUHCA).[1] In this order, we grant Jubail's request for EWG status. Our determination serves customers 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. 2,587 (2004), with comments or interventions due on or before January 21, 2004. No comments were filed in response to the notice.

**Background**

3. Jubail states that it is a limited liability company formed under the laws of Saudi Arabia. CMS Generation Co., a Michigan corporation, indirectly owns 25 percent of Jubail. CMS Generation Co. is a wholly-owned indirect subsidiary of CMS Energy Corporation (CMS Energy), also a Michigan Corporation and an exempt holding company under PUHCA. National Power Company Holding, a company organized under the laws of Bahrain owns the remaining 75 percent of Jubail.

4. Jubail is currently constructing an approximately 242 MW natural gas fired, combined cycle power generation and 510 TPH steam cogeneration facility (Facility) at the Saudi Petrochemical Company (SADAF) petrochemical complex at Jubail Industrial

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[1] 15 U.S.C. § 79z-5a (2000).

City in the Kingdom of Saudi Arabia. Jubail also will engage in development activities related to the Facility that are consistent with existing Commission precedent.

5. According to Jubail, it will be engaged directly and exclusively in the business of owning and operating the Facility, which is located outside the United States, and selling electric energy exclusively at retail to consumers outside the United States. All of Jubail's electric energy sales will be made to SADAF.[2]

6. Jubail argues that PUHCA Section 32(b) does not prohibit an EWG that otherwise qualifies from selling electric energy exclusively at retail outside the United States. In other words, Section 32(b) overrides all wholesale requirements applicable to an EWG, if the EWG is selling retail power exclusively outside the United States from facilities outside the United States.

7. Jubail asserts that in passing PUHCA Section 32(b), Congress made clear that the requirement that EWGs sell power exclusively at wholesale was meant to address domestic concerns only. Jubail argues that Congress also made clear that the distinction between wholesale and retail sales had no relevance for foreign EWGs and left the entire matter as something to be regulated by the countries in which the EWGs operate.

**Discussion**

8. Section 32(b) of PUHCA, regarding foreign retail sales, states:

> Notwithstanding paragraphs (1) and (2) of subsection (a), retail sales of electric energy produced by a facility located in a foreign country shall not prevent such facility from being an eligible facility, or prevent a person owning or operating, or both owning and operating, such facility from being an exempt wholesale generator if none of the electric energy generated by such facility is sold to consumers in the United States.

This statutory language makes clear that any retail sales by an EWG must be foreign retail sales, and that a company making foreign retail sales can receive the exemption

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[2] Jubail also will be engaged in the sale of steam generated by the Facility, which the Commission has previously determined to be an incidental activity that is consistent with EWG status. See Richmond Power Enterprises, L.P., 62 FERC ¶ 61,157 (1993) (The Commission determined that: (i) a person otherwise meeting EWG requirements may engage in incidental sales of by-products of electric generation such as steam; and (ii) an eligible facility may also be a cogeneration facility).

from PUHCA. Section 32(b) on its face does not require an EWG making foreign retail sales to also make wholesale sales. Moreover, we are aware of no legislative history supporting such a statutory limitation or explaining why Congress would have intended such a result. Finding no basis in the statutory language or legislative history for imposing such a limitation, we will grant Jubail's application.

9. This result is consistent with the limited Commission precedent addressing Section 32(b). The Commission has not previously determined whether an EWG could own and operate only facilities used exclusively for the purpose of foreign retail sales. However, the Commission has previously addressed whether to grant EWG status to applicants that own and/or operate facilities outside the United States.[3]

10. In Wartsila Diesel Development Corp., Inc.,[4] the applicant stated that it would be exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities as defined under Section 32(a)(2) of PUHCA, and selling electric energy at wholesale, with the exception of the Punta Cana Facility located in Punta Cana, Dominican Republic. At the time of its application, Wartsila also stated that it may develop facilities that will sell electric energy at retail directly and exclusively to foreign retail customers.

11. The Commission did not reach the question of whether an entity owning or operating, or both owning and operating only facilities that make solely foreign retail sales of electric energy can be an EWG, since it was clear that Wartsila would be selling electric energy at wholesale from one of its facilities, which is an eligible facility. However, the Commission determined that because the electric energy from the Punta Cana Facility will not be sold to consumers in the United States, and because the retail sales from other facilities that Wartsila may develop will not reach consumers in the United States, under PUHCA Section 32(b), Wartsila's ownership and/or operation of these facilities does not deprive it of the EWG status for which it otherwise qualifies.

12. The Commission granted Wartsila's determination of EWG status, in part, based on the assurance that electric energy from the Punta Cana Facility will not be sold to consumers in the United States, and the retail sales from other facilities that Wartsila may

[3] See Brooklyn Navy Yard Cogeneration Partners, L.P., 77 FERC ¶ 61,262 (1996); Cardinal Power of Canada, L.P., 70 FERC ¶ 61,220 (1995); Wartsila Diesel Development Corp., Inc., 68 FERC ¶ 61,281 (1994); 1069284 Ontario Inc., 68 FERC ¶ 61,069 at 61,232-233 (1994); John J. Wheeling and Service Systems Energy, 65 FERC ¶ 61,164 (1993).

[4] 68 FERC ¶ 61,281 at 62,211.

develop will not reach domestic consumers. The Commission relied on Wartsila's representation that foreign retail sales would be produced and consumed outside of the United States. Today's order builds on this holding.

13. We conclude that, under PUHCA Section 32(b), retail sales of electric energy produced in Saudi Arabia do not prevent Jubail from being an EWG since none of the energy produced at the Facility will be sold to consumers in the United States.

The Commission orders:

Based on the information contained in the application, we determine that Jubail 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.

Magalie R. Salas,
Secretary.