

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Shuweihat CMS International Power Company  
Shuweihat O&M Limited Partnership

Docket Nos. EG04-27-000  
EG04-28-000

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, Shuweihat CMS International Power Company (the Company) and Shuweihat O&M Limited Partnership (the Operator) filed applications for a determination of exempt wholesale 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).<sup>1</sup> In this order the Commission grants the Company's and the Operator's requests for EWG status. This 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 both applications was published in the Federal Register, with comments or interventions due on or before January 21, 2004.<sup>2</sup> None was received.

**Background**

3. In Docket No. EG04-27-000, the Company applied for EWG status. The Company states that it is currently constructing an approximately 1,500 megawatt natural gas fired, combined-cycle electric and steam cogeneration facility (the Facility) located at Shuweihat, Emirate of Abu Dhabi, United Arab Emirates. The Company also states that the Abu Dhabi Water and Electric Authority (ADWEA), a government entity, conditioned proposals to build, own, and operate the Facility on the development, ownership, and operation of a power plant and desalination plant as a single project that

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<sup>1</sup> 15 U.S.C. § 79z-5a (2000).

<sup>2</sup> 69 Fed. Reg. 2,586 (2004).

would sell both its potable water and energy output to the government-controlled Abu Dhabi Water and Electricity Company (ADWEC). The Company states that it has entered into a Power and Water Purchase Agreement (PWPA) with ADWEC, to sell all of its electric energy at wholesale. The Company further states that it will sell potable water processed at the desalination plant to ADWEC under the PWPA. The Company states that approximately 40 percent of its revenues will come from water sales, and approximately 60 percent will come from energy sales. On November 28, 2001, the Company entered into an Operations and Maintenance Agreement by and between the Company and the Operator (the O&M Agreement).

4. In Docket No. EG04-28-000, the Operator applied for EWG status on December 31, 2003. The Operator also identified as the relevant facility the 1,500 megawatt plant located at Shuweihat, Abu Dhabi, United Arab Emirates. The Operator states that it will provide operations and maintenance services for the Facility and the desalination plant under the O&M Agreement, which establishes an agency relationship with the Company.

5. In their respective applications, the Company and the Operator request a ruling that their respective revenues from the operation of the desalination plant are incidental to their EWG activities, and therefore will not violate the exclusivity requirement of Section 32(a)(1) of PUHCA.<sup>3</sup> They state that the ADWEA required the successful bidder to include the desalination plant in its bid. The Company and the Operator cite Commission precedent that holds that a government-mandated additional activity will be consistent with the exclusivity requirement of Section 32(a)(1), provided that the additional activity is “incidental” to the Applicant’s “primary purpose.”<sup>4</sup>

### **Representations By The Company Regarding Its EWG Status**

6. In addition to the foregoing, Shuweihat CMS International Power Company makes the following representations regarding the determination of its EWG status:

- a. As required to qualify as an EWG under Section 32(a)(1) of PUHCA, and subject to Section 32(b) of PUHCA, applicant represents that it will be engaged directly and exclusively in the business of owning and operating the Facility, and selling electric energy at wholesale. Applicant will engage in water desalination operations that, as discussed above in this application, are consistent with

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<sup>3</sup> Section 32(a)(1) provides that an EWG must be exclusively in the business of owning and operating an eligible facility and selling electric energy at wholesale.

<sup>4</sup> See *Gippsland Energy, L.L.C.*, 74 FERC ¶ 61,209 (1996); *CMS Morocco Operating Company SCA*, 78 FERC ¶ 61,118 (1997); *TXU (No. 5) Pty Ltd.*, 92 FERC ¶ 61,170 (2000); *PSI Argentina, Inc.*, 68 FERC ¶ 61,286 (1994).

Commission precedent on EWG incidental activities. Applicant also will engage in development activities related to the Facility and desalination equipment that are consistent with existing Commission precedent on allowable EWG incidental activities.

- b. The Facility constitutes an “eligible facility” as defined in Section 32(a)(2) of PUHCA, because it will be used exclusively to generate electric energy for sale at wholesale. If the applicant engages in retail sales of electric energy from the Facility, which is located in a foreign country, those sales will be exclusively to consumers outside the United States and will be consistent with Section 32(b) of PUHCA. The Facility does not include any interconnecting transmission facilities other than those necessary to effect the sale of electric energy at wholesale to ADWEC.
- c. The only electric utility company in the United States that is an “affiliate” or “associate company” (each as defined in PUHCA) of applicant is Consumers Energy Company, a wholly-owned subsidiary of CMS Energy.
- d. No portion of the Facility will be owned or operated by an “electric utility company” that is an “affiliate” or “associate company” of applicant, as such terms are defined in PUHCA.
- e. There will be no lease arrangements involving the Facility.
- f. No rate or charge for, or in connection with the construction of the Facility, or for electric energy produced thereby, was in effect under the laws of any state on October 24, 1992.

### **Representations by the Operator Regarding Its EWG Status**

7. Shuweihtat O&M Limited Partnership makes the following representations regarding its EWG status:

- a. As required to qualify as an EWG under Section 32(a)(1) of PUHCA, and subject to Section 32(b) of PUHCA, Applicant represents that it will be engaged directly and exclusively in the business of operating the Facility, and selling electric energy at wholesale. Applicant will engage in water desalination operations that, as discussed above in this application, are consistent with Commission precedent on EWG incidental activities.
- b. The Facility constitutes an “eligible facility” as defined in Section 32(a)(2) of PUHCA, because it will be used exclusively to generate electric energy for sale at wholesale. If the Company engages in retail sales of electric energy from the

Facility, which is located in a foreign country, those sales will be exclusively to consumers outside the United States and will be consistent with Section 32(b) of PUHCA. The Facility does not include any interconnecting transmission facilities other than those necessary to effect the sale of electric energy at wholesale to ADWEC.

- c. The Operator will provide operations and maintenance services for the Facility under the O&M Agreement with the Company and thereby has an agency relationship with the Company. The Company will sell electric energy at wholesale from the Facility. The Company maintains ultimate control, direction, and decision-making authority over the Facility and its operation. Therefore, the sales of the Company will be imputed to the Operator under the Commission's rules (18 C.F.R. § 356.3(a)(1)(i) and (iii)).
- d. The only electric utility company in the United States that is an "affiliate" or "associate company" (each as defined in PUHCA) of applicant is Consumers Energy Company, a wholly-owned subsidiary of CMS Energy.
- e. No portion of the Facility will be owned or operated by an "electric utility company" that is an "affiliate" or "associate company" of applicant, as such terms are defined in PUHCA.
- f. There will be no lease arrangements involving the Facility.
- g. No rate or charge for, or in connection with the construction of the Facility, or for electric energy produced thereby, was in effect under the laws of any state on October 24, 1992.

### **Discussion**

8. These two related applications raise the issue of whether a foreign government-mandated activity from which an applicant derives approximately 40 percent of its total revenues violates 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. In previous cases, the Commission found that an EWG may engage in a number of incidental commercial activities that are mandated by a foreign government as a condition of operation, 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 statutory exclusivity requirement.<sup>5</sup>

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<sup>5</sup> See orders cited supra note 4.

9. Based on the fact that the ownership and operation of the desalination plant is a condition of doing business with the ADWEA and the fact that the applicants' primary business activity will be owning and/or operating an eligible facility and selling electric energy at wholesale, we find the applicants will not violate the exclusivity requirement.

The Commission orders:

Based on the information contained in these applications, the Commission determines that the Company and the Operator are EWGs 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.