

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

FPL Energy New England Transmission, LLC

Docket No. EG03-50-000

ORDER DENYING APPLICATION FOR DETERMINATION OF EXEMPT
WHOLESALE GENERATOR STATUS

(Issued May 19, 2003)

1. On March 21, 2003, FPL New England Transmission, LLC (FPLE NET or Applicant) filed an application for 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).¹ In this order we deny the Applicant's request for EWG status based on the discussion below.

Background

2. Applicant submitted a sworn statement by a representative legally authorized to bind Applicant stating that:

a) Applicant will be engaged directly and exclusively in the business of owning and operating an undivided interest in the interconnection transmission facilities (IT facilities), which are part of an eligible facility. Applicant's direct parent, FPL Energy Seabrook, LLC (FPLE Seabrook) owns an 88.23 percent interest in Seabrook Station, a 1,161 MW generating facility located in Seabrook, New Hampshire, and is engaged directly in the business of wholesale sales of electric energy.

b) No portion of the IT facilities will be owned or operated by an "electric utility company" that is an "affiliate" or "associate company," as defined in PUHCA, of Applicant.

¹15 U.S.C. § 79z-5a (2000).

c) The IT facilities constitute "eligible facilities" as defined in Section 32(a)(2) of PUHCA because such facilities are interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale.

d) There will be no leases involving the IT facilities, including leases to any United States public utility company or to any affiliate or associate company of any United States public utility company.

e) FPLE NET is an "affiliate" or "associate company," as defined by PUHCA, of Florida Power & Light Company.

f) A rate or charge for, or in connection with, the construction of the IT facilities was in effect under state laws on October 24, 1992. However, all state consents have been obtained by FPLE NET's predecessor in interest, FPLE Seabrook, and have been submitted to the Commission. The Commission granted EWG status to FPLE Seabrook based on the state consents.² The IT facilities currently owned by FPLE Seabrook as an EWG, are outside of the state ratebase. The transfer of facilities from an EWG to FPLE NET does not require further state consents.

3. FPLE NET explains that currently its parent, FPLE Seabrook, owns an 88.23 percent interest in Seabrook Station and Seabrook Station's IT facilities.³ Applicant states that the IT facilities are necessary to reliably interconnect Seabrook Station to the interstate transmission system, and to thereby enable FPLE Seabrook to effect sales of electric energy at wholesale. In Seabrook, the Commission granted EWG status to FPLE Seabrook with the IT facilities constituting part of the eligible facility. FPLE Seabrook's 88.23 percent interest in the IT facilities will be transferred to FPLE NET and will be the "eligible facility."

4. According to Applicant, the IT facilities include all equipment in the 345 kV Seabrook substation beyond the disconnect link on the high-side of the Generator Step-Up transformer for Seabrook Station.⁴ FPLE NET also states that the IT facilities tie together

²See FPL Energy Seabrook, LLC, 101 FERC ¶ 62,042 (2002) (Seabrook).

³The remaining 11.77 percent of the IT facilities will be owned by Massachusetts Municipal Wholesale Electric Company (MMWEC), Taunton Municipal Lighting Plant (Taunton), and Hudson Light & Power Department (Hudson). The minority interest will not be part of the eligible facility.

⁴The application states that the equipment includes, but is not limited to, conductors,

three 345 kV transmission lines in NEPOOL and are under the direction and control of ISO New England, Inc. (ISO-NE), the independent transmission system operator for NEPOOL. According to Applicant, the IT facilities are classified as Pool Transmission Facilities (PTF) under the NEPOOL Open Access Transmission Tariff (OATT). Applicant states that FPLE Seabrook's transfer of the facilities to FPLE NET will allow Applicant to better facilitate record-keeping in accordance with the Uniform System of Accounts, and will improve reliability of the NEPOOL transmission system. Another benefit according to Applicant, will be cost tracking for the IT facilities separately from the generating facilities. Applicant also states that transferring the facilities into a separate entity will facilitate developing a record establishing revenue requirements with respect to PTF facilities, and will allow it to recoup costs expended performing operation and maintenance activities. Applicant states that it will also apply to NEPOOL for membership as a Transmission Provider.

5. FPLE NET states that the term "eligible facilities" includes interconnecting transmission facilities such as the IT facilities in the instant circumstance, and that the language in PUHCA Section 32(a)(2) expressly includes "interconnecting transmission facilities necessary to effect a sale of electricity at wholesale."⁵ According to Applicant, the Seabrook Station and the IT facilities currently comprise FPLE Seabrook's "eligible facility," and to transfer only the IT facilities to a wholly owned subsidiary (FPLE NET), should have no effect on the previous determination. Applicant argues that after the transfer, the IT facilities alone will continue to meet the definition of an "eligible facility" because the IT facilities are necessary to effect the sale of electric energy at wholesale from an eligible facility, and Applicant will be directly and exclusively engaged in owning part of the eligible facility.⁶

6. FPLE NET argues that the instant situation is analogous to that in Termoelectrica U.S., LLC and Termoelectrica de Mexicali, S. De R.L. de C.V., 102 FERC ¶ 61,019 (2003) (Termoelectrica), where the Commission granted EWG status to an entity owning part of an interconnection line, which was part of an eligible facility. FPLE NET claims that it should be granted EWG status based on Termoelectrica because it will own part of an eligible facility, because the circumstances make it reasonable to have different entities owning the generating facility and the interconnecting transmission facilities, and because FPLE

⁴(...continued)

buses, gas insulated bus ducts, wave traps, coupling capacitors, switches, surge arrestors, breakers, relays and related equipment located in the 345 kV Seabrook substation.

⁵15 U.S.C. § 79z-5a(a)(2) (2000).

⁶Application at 9.

Seabrook's selling of power at wholesale can be imputed to its wholly owned subsidiary FPLE NET consistent, it states, with Termoelectrica.

Notice of Filings

7. Notice of the application was published in the Federal Register,⁷ with interventions and comments due no later than April 15, 2003. Timely motions to intervene and protest were filed by United Illuminating Company (United) and Northeast Utilities Service Company (Northeast).⁸ On April 3, 2003, FPLE NET filed an answer to the protests. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁹ the timely, unopposed motions to intervene of United and Northeast serve to make them parties to this proceeding. Rule 213 of the Commission's Rules of Practice and Procedure,¹⁰ does not allow an answer to a protest. Accordingly, we will reject FPLE NET's answer.

Protests

8. United and Northeast both make several arguments concerning FPLE Seabrook's transfer of facilities to FPLE NET and its potential for cost recovery of generation facilities under NEPOOL. These matters are currently pending before the Commission in Docket No. EC03-69-000 and will not be addressed here. We will only address the arguments having to do with whether FPLE NET satisfies the criteria for EWG status.¹¹

9. Both United and Northeast argue that FPLE NET should be denied EWG status based on its application to NEPOOL for "Transmission Provider" status. Northeast states that under the NEPOOL OATT a transmission provider is an entity that does not make sales of electricity. United makes a similar argument stating that being a Transmission Provider

⁷68 FR 16013 (2003).

⁸Northeast filed its motion to intervene and protest on behalf of the NU Operating Companies, which include: The Connecticut Light and Power Company, Western Massachusetts Electric Company, Holyoke Water Power Company, Holyoke Power and Electric Company, and Public Service Company of New Hampshire.

⁹18 C.F.R. § 385.214 (2002).

¹⁰18 C.F.R. § 385.213 (2002).

¹¹See Entergy Nuclear Indian Point 3, LLC, 92 FERC ¶ 61,163 at 61,552 (2000) (protests not raising any arguments asserting that applicant failed to satisfy EWG requirements are irrelevant).

means that FPLE NET would be "in the business of providing transmission service" to third parties, and thus would not satisfy EWG requirements.

10. Northeast also argues that FPLE NET will neither own any generation facilities nor sell power at wholesale and therefore, cannot be an EWG as defined by PUHCA. Northeast asserts that neither of the cases cited by FPLE NET support its application for EWG status. In PPL Colstrip III, LLC et al., 88 FERC ¶ 61,281 (1999) (Colstrip) the Commission found that EWG status was appropriate for a transmission provider because the facilities were necessary to effect a sale at wholesale, and the transmission service offered was incidental to the wholesale sales. Northeast contends that such is not the case with FPLE NET because its primary business would be serving as a "transmission provider." According to Northeast, Termoelectrica also does not apply to FPLE NET's situation. Northeast argues that Termoelectrica was a cross-border facility benefitting the California markets. More importantly, Northeast argues, the interconnecting entity in Termoelectrica was not proposing to serve as a "transmission provider" under the California ISO.

Discussion

11. Based on the information in its application, and for the reasons discussed below, we find that FPLE NET is not an EWG as defined in Section 32(a)(1) of PUHCA, and therefore we deny its application.

12. While we stated in Termoelectrica, that Section 32 of PUHCA clearly defines "eligible facility" as including "interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale,"¹² we find that the situation in Termoelectrica can be distinguished from the instant facts. The interconnecting transmission facility in Termoelectrica was simply a radial line connecting the generator to the California power grid. Here, the determination is not as easily made. The facilities in question are not merely a transmission line connecting the generator to the grid, but include all of the interconnection facilities within the Seabrook substation that tie together "three major 345 kV transmission lines in NEPOOL, including one of the major North-South wholesale transmission interfaces in New England."¹³ Due to this distinction, we find it is more of a stretch of the statute to determine that an entity that neither owns nor operates a generating facility and that owns IT facilities described as being an integral part of the wholesale

¹²15 U.S.C. § 79z-5a(a)(2) (2000).

¹³FPLE NET application at 4.

transmission system in the area,¹⁴ regardless of the existence of the relevant generating facility, is an EWG.

13. While interconnection facilities alone can constitute "eligible facilities," we are not persuaded in these circumstances that FPLE NET's facilities are interconnecting transmission facilities necessary to effect a sale at wholesale. While these facilities were previously found, along with Seabrook station, to be part of an eligible facility, FPLE NET's proposal to own the transmission facilities as a business separate from the ownership of the Seabrook station, causes us to find differently this time. We can also distinguish the instant facts from the situation in Colstrip, which Applicant relies on. Providing transmission service to third parties in Colstrip was determined to be incidental to the applicant's primary business of operating as an EWG. This was in part because the applicant, PP&L Montana, was providing limited transmission service under a pre-existing contract, and the transmission line in question was built to effectuate wholesale sales of electricity from the Colstrip generation facility.¹⁵ Such is not the situation here with FPLE NET.

14. In EP Edegal, Inc., 68 FERC ¶ 61,265 (1994) (Edegal), transmission service from third parties to the Peruvian national grid was deemed "incidental in nature"¹⁶ to Edegal's activities as an EWG because Peruvian law required privatized systems to offer transmission service under certain circumstances. Edegal can also be distinguished from the present situation. The applicant in Edegal indirectly owned an interest in certain generating facilities. And, to further distinguish between our present facts and those in other precedent, the facilities here, according to Applicant, will be included in transmission revenue requirements that are used to determine NEPOOL RNS transmission rates.¹⁷ Moreover, the Seabrook substation, according to Applicant, will be under the control and operation of the ISO-NE, and there is no information in the application indicating how much of FPLE NET's activity will be providing transmission service to FPLE Seabrook, and how much it is likely to be providing to third parties. Based on the description of the IT facilities in the application, FPLE NET has not demonstrated that any transmission service provided would be "incidental" to Applicant's owning or operating an eligible facility.

¹⁴Id at 5.

¹⁵Colstrip at 61,869.

¹⁶See also, Zond Systems, Inc., 81 FERC ¶ 61,001 (1997) (Applicant providing transmission from generating facilities for wholesale sales as well as backup power to entities purchasing wholesale power deemed "incidental to" sales at wholesale).

¹⁷FPLE NET application at 5.

15. Accordingly, we deny FPLE NET's arguments that its situation falls within the bounds of our prior determinations in Colstrip and Termoelectrica,¹⁸ and therefore deny its application for EWG status because the IT facilities do not meet the requirement that applicants be "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."¹⁹

The Commission orders:

Accordingly, based on the information contained in this application, the Commission denies FPLE NET's application for EWG status as defined in Section 32(a)(1) of PUHCA.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁸Because we find that FPLE NET does not meet the exclusivity requirement of Section 32, we do not need to reach the additional issues of whether additional state consents are required and whether FPLE Seabrook's wholesale sales may be imputed to FPLE NET.

¹⁹15 U.S.C. § 79z-5a(a)(1) (2000).