

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Texas Genco, LP

Docket No. EG03-96-000

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

(Issued October 23, 2003)

1. On August 25, 2003, Texas Genco, LP (Texas Genco) 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 grant Texas Genco's request for EWG status. Our determination will benefit 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, 68 Fed. Reg. 52,760 (2003), with comments or interventions due on or before September 17, 2003. No comments were filed in response to the notice.

Background

3. Texas Genco states that it is a limited partnership organized and existing under the laws of the State of Texas, and that it is owned by two limited liability companies, Texas Genco GP, LLC, which owns a one percent partnership interest in Texas Genco, and Texas Genco LP, LLC, which owns the remaining 99 percent partnership interest in Texas Genco. Each of Texas Genco GP, LLC and Texas Genco LP, LLC is a wholly-owned subsidiary of Texas Genco Holdings, Inc. CenterPoint Energy, Inc. (CNP), a registered holding company, indirectly owns 81 percent of the shares of Texas Genco

Holdings, Inc., while members of the public own the remaining 19 percent of the shares

¹15 U.S.C. § 79z-5a (2000).

of Texas Genco Holdings, Inc., with no individual owning 5 percent or more of the shares of Texas Genco Holdings, Inc.²

4. Texas Genco states that another wholly-owned, indirect subsidiary of CNP is CenterPoint Energy Houston Electric, LLC (CEHE), which owns and operates the electric transmission and distribution system located in and around Houston, Texas.

5. The eligible facilities that Texas Genco owns and operates (the Facilities) comprise twelve generating plants located in Texas. The application states that the Facilities have an aggregate maximum generating capacity of approximately 14,000 megawatts. Texas Genco asserts that it uses the Facilities exclusively to generate electric energy and sell that electric energy at wholesale. The Facilities are stated to be interconnected with the transmission system owned by CEHE; however, Texas Genco confirms in its application that it sells no electric energy to CEHE. The application further describes other assets owned by Texas Genco that are said to be necessarily incidental to the operation of the Facilities, including interconnection facilities necessary to deliver energy produced by the Facilities to the transmission grid, support facilities, real property and a pipeline used to transport fuel to several of Applicant's facilities. Texas Genco states that these are its only assets, and that the Facilities are eligible facilities as they are used to generate electricity exclusively for sale at wholesale.

PUHCA Section 32(c) - Ruling by State Commissions

6. As the application notes, where facilities that are the subject of an EWG application have been included in any rate base over which a State commission had jurisdiction on October 24, 1992, Section 32(c) of PUHCA requires all relevant State commissions to make a finding that allowing those facilities to be eligible facilities will benefit customers, will be in the public interest, and will not violate State law.³

7. The application states that CEHE's predecessor, Houston Lighting & Power

²Under an approved Business Separation Plan, required by Texas's electric industry restructuring legislation, Reliant Resources, Incorporated, formerly an affiliate of CNP, has an option to purchase CNP's shares in Texas Genco Holdings, Inc. (being 81 percent) in January 2004. If Reliant Resources, Incorporated does not purchase CNP's shares in Texas Genco Holdings, Inc., CNP will look for another purchaser. See, Public Utility Commission of Texas, Reliant Energy, Incorporated, Business Separation Plan Filing Package, Docket No. 21956 (April 10, 2001); and Application of Reliant Energy, Incorporated, Business Separation Plan Update, Docket No. 24839 (December 20, 2001).

³ 15 U.S.C. § 79z-5a(c) (2000).

Company (HL&P), charged rates which included an amount associated with construction of, and electric energy produced by, the Facilities. These rates were approved under the laws of Texas, and were in effect on October 24, 1992. However, upon implementation of CNP's Business Separation Plan, which occurred on August 31, 2002, the Facilities were removed from HL&P's rate base and transferred to Texas Genco. On July 25, 2003, the Texas Public Utility Commission (PUCT) issued an order finding that allowing the Facilities to be eligible facilities owned by an EWG will benefit consumers, is in the public interest, and does not violate State law, in accordance with the requirements of Section 32(c) of PUHCA.⁴

8. The application notes that CEHE's parent company, CNP, is a registered holding company. However, its only other public utility company affiliates are gas utility companies, whose retail rates and charges are subject to the jurisdiction of the State commissions of Arkansas, Louisiana, Minnesota, Mississippi, Oklahoma and Texas. The Applicant states that it did not seek a determination with respect to the Facilities from the State commissions with jurisdiction over the retail rates of those gas utilities as, in its view, no charge in connection with the Facilities has ever been included in the rates of any of the gas utility company affiliates and no such determination should therefore be required under Section 32(c) of PUHCA. Applicant contends that this is even clearer in the present circumstances, in which the Facilities have been removed from the rate base of the only utility affiliate whose charges in connection with the Facilities were included in rates. Therefore, according to the Applicant, the "applicable" rates are those subject to the PUCT's jurisdiction and therefore, it is appropriate that the PUCT is the only State commission from which a determination is required, and this has been obtained by the Applicant and submitted with its application.

Discussion

9. Section 32(c) of PUHCA states:

"If a rate or charge for, or in connection with, the construction of a facility, or for electric energy produced by a facility (other than any portion of a rate or charge which represents recovery of the cost of a wholesale rate or charge) was in effect under the laws of any State as of [October 24, 1992], in order for the facility to be considered an eligible facility, every State commission having jurisdiction over any such rate or charge must make a specific determination that allowing such

⁴ Public Utility Commission of Texas, Application of Texas Genco, L.P. for Certain Findings under 15 USC § 79z-5a, Docket No. 27597, at 3, ¶ 17 (July 25, 2003).

facility to be an eligible facility (1) will benefit customers, (2) is in the public interest, and (3) does not violate State law;...”

10. The Commission agrees with the Applicant that the instant application includes an issue that is similar to an issue determined by the Commission in the case of FTM Energy, Inc.⁵ In FTM, the applicant was to acquire a share in a steam-electric generating unit from Duquesne Light Company (Duquesne). The steam-electric generating unit had been part of Duquesne’s rate base and subject to the jurisdiction of the Pennsylvania Commission and would be removed from that rate base upon the transfer to FTM being effected. Only that part of the unit that was to be owned by FTM was defined as the eligible facility relied upon in the application for EWG status. The other part of the multi-unit power station was owned by State-regulated public utility affiliates of the applicant. Those affiliates had rate bases that were subject to the jurisdiction of State commissions other than Pennsylvania. The Commission decided that Section 32(c) of PUHCA did not require FTM to obtain rulings from State commissions who had jurisdiction over rates charged by the affiliates, because the portion of the power station owned by those affiliates was not part of the eligible facility.⁶ Therefore, only a ruling from the Pennsylvania Commission was required, as this was the only State commission that had jurisdiction over the applicable rates, which were those charged by Duquesne, the entity that would transfer ownership of its share in the eligible facility to FTM.

11. The Applicant in the present filing argues that a similar finding can be made here, as the rates of the gas utility affiliates of Texas Genco have never had any effect on, or relevance to, the rates charged by Texas Genco in connection with the eligible facility. The Commission construes Section 32(c) as not applying to the rates of the gas utility affiliates in these circumstances. There is therefore no requirement under PUHCA for the applicant to have obtained a ruling from any State commission that had jurisdiction over the rates of these gas utility affiliates.

12. The Applicant in the present filing has obtained a ruling from PUCT that satisfies the requirements of Section 32(c) of PUHCA.

Conclusion

13. Based on the information contained in the application, as confirmed by the Applicant, and given that the Applicant has sought and obtained a determination from the

⁵ FTM Energy, Inc. 74 FERC ¶ 61,312 (1996) (FTM).

⁶ *Id.* at 61,989.

PUCT that the Facilities may be approved for EWG status in accordance with Section 32(c) of PUHCA, we determine that Texas Genco 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.

(S E A L)

Linda Mitry,
Acting Secretary.