

121 FERC 61,037
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

DTE Pontiac North LLC

Docket No. EL07-31-000

ORDER GRANTING REQUEST FOR DECLARATORY RULING
REGARDING EXEMPT WHOLESALE GENERATOR STATUS

(Issued October 18, 2007)

1. On January 4, 2007, as supplemented on January 16 and June 19, 2007,¹ DTE Pontiac North LLC (DTE Pontiac) filed a request for a declaratory ruling that, based on the facts and circumstances described in its request, it would be an exempt wholesale generator (EWG) pursuant to the Public Utility Holding Company Act of 2005² and section 366.7 of the Commission's regulations.³
2. For the reasons set forth below, we will grant DTE Pontiac's petition for a declaratory ruling.

Background

3. DTE Pontiac states that it will be in the business of owning and operating a 27 MW (gross) coal-fired cogeneration facility (Facility) located in Pontiac, Michigan and selling electric energy exclusively at wholesale. In addition, DTE Pontiac states that

¹ On February 5, 2007 DTE Pontiac requested that this proceeding be held in abeyance because it was evaluating whether to lease the substation where its generation facility interconnects with the transmission grid. DTE Pontiac stated that if the lease were consummated, it would need to amend certain statements in its filing. On June 19, 2007 DTE Pontiac notified the Commission that it will own, rather than lease, the substation and requested the Commission to proceed with a ruling on its request.

² Pub. L. No. 109-58, §§ 1261 *et seq.*, 119 Stat. 594, 972-78 (2005) (PUHCA 2005).

³ 18 C.F.R. § 366.7 (2007).

pursuant to a contract it also will be engaged in incidental activities consisting of providing steam to its host, General Motors Corporation (GM), and owning and operating auxiliary gas-fired boilers to be used exclusively as a substitute source of steam for GM during periods in which the Facility is not providing sufficient steam for GM's needs. DTE Pontiac intends to use the auxiliary gas-fired boilers exclusively as a substitute source of steam when the primary circulating fluidized-bed boiler (primary boiler), which powers the cogeneration facility, experiences a forced or unforced outage and fails to provide sufficient steam for GM's needs. Under normal circumstances, the primary boiler is capable of producing adequate steam to exceed GM's requirements. Thus if the primary boiler is operating at its capacity, there would be no need to use the auxiliary gas-fired boilers to supplement steam production. Simultaneous operation of the auxiliary gas-fired boilers and the primary boiler would occur only in transitional states where the primary boiler is being brought up and the auxiliary gas-fired boilers brought down (for example, after an outage) or *vice versa*. According to DTE Pontiac, any simultaneous operation would not exceed a matter of hours.⁴

4. DTE Pontiac requests confirmation that (i) its ownership and operation of the auxiliary gas-fired boilers for the purpose of selling steam, (ii) its sales of steam from the Facility, and (iii) its sales of steam from the auxiliary gas-fired boilers when the Facility is unable to meet the host's steam requirements are incidental to DTE Pontiac's business of owning and operating an eligible facility and selling power at wholesale.

Notice of Filing

5. Notice of DTE Pontiac's filing was published in the *Federal Register*, 72 Fed. Reg. 2505 (2007), with interventions or protests due on or before February 5, 2007. None were filed.

Discussion

6. To confirm its EWG status, an entity must demonstrate that it conforms to the definition of an EWG set forth in the Commission's regulations. These regulations define an EWG as:

any person engaged directly, or indirectly through one or more affiliates . . . , and exclusively in the business of owning or

⁴ DTE Pontiac states that it may engage in the sale of ancillary services as a by-product that is incidental to the wholesale electric energy sales from the Facility. DTE Pontiac maintains that such sales by an EWG are consistent with Commission precedent and in this connection cites to *Sithe Framingham, LLC*, 83 FERC ¶ 61,106 (1998).

operating, or both owning and operating, all or part of one or more eligible facilities and selling electric energy at wholesale.⁵

7. The Commission's regulations also state that sections 32(a)(2) through (4), and sections 32(b) through (d) of the Public Utility Holding Company Act of 1935 (15 U.S.C. §§ 79z-5a(a)(2)-(4), 79z-5a(b)-(d) (2000)) shall apply for purposes of establishing or determining whether an entity qualifies for EWG status. As a result, an entity seeking to establish that it is an EWG must first represent that it is engaged directly, or indirectly through one or more affiliates as defined in section 366.1 of the Commission's regulations, 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. In addition, it must represent:

- a. that any electric generation facility it owns or operates is an "eligible facility" because (i) it is used for the generation of electric energy exclusively for sale at wholesale or (ii) it is used for the generation of electric energy and leased to one or more public-utility companies;⁶ and (iii) it includes only those

⁵ 18 C.F.R. § 366.1 (2007). The Commission has noted that its PUHCA 2005 regulations do not state that entities meeting the definition of an EWG or a foreign utility company (FUCO) must obtain formal EWG or FUCO "status," and that it included in its regulations the self-certification process (as well as the option of filing a petition for a declaratory order) for purposes of confirming the availability of the exemptions accorded under PUHCA 2005 to companies that are holding companies solely with respect to one or more EWGs, foreign utility companies, or qualifying facilities. *See Ecofin Holdings Limited*, 120 FERC ¶ 61,189, at P 61-62 (2007).

⁶ Entities that lease a facility in this way are deemed to be engaged in sales of electric energy at wholesale for purposes of acquiring EWG status. While the Commission's prior EWG regulations required applicants to describe "any lease arrangements involving the facilities. . . ," 18 C.F.R. § 365.3(a)(2)(ii) (2005), a comprehensive description of lease arrangements is not required under the Commission's current regulations. Other than leases of facilities to public utility companies, applicants are not required to provide a comprehensive description of lease arrangements involving their facilities. For example, the fact that a company leases the site on which its facility is located rather than owning the site outright has no bearing on whether it can qualify as an EWG. However, lease transactions that are part of a scheme of activity that goes beyond the core functions of an EWG, i.e., owning and/or operating an eligible facility and selling electric energy at wholesale, must be explained and justified as an appropriate incidental activity that is consistent with EWG status.

- interconnecting transmission facilities that are necessary to effect a sale of electric energy at wholesale;
- b. in cases where the facility in question is located in a foreign country, (i) whether or not retail sales of electric energy produced by the facility will occur and (ii) that no electric energy produced by the facility will be sold to consumers in the United States in cases where retail sales from a foreign facility will occur;
 - c. that (i) no rate or charge for, or in connection with, the construction of the facility, or for electric energy produced by the 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 on October 24, 1992 or (ii) if such a rate or charge was in effect on that date, that every state commission having jurisdiction over any such rate or charge has determined that allowing the facility to be an eligible facility (A) will benefit consumers, (B) is in the public interest, and (C) does not violate state law;⁷ and
 - d. that (i) no portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company, as defined in section 366.1 of the Commission's regulations, of the entity certifying that it is an EWG⁸ or (ii) if an affiliate or

On the distinction between incidental and non-incidental leasing activities, *see, e.g., PSEG Fossil, LLC*, 95 FERC ¶ 61,405 (2001); *Killingholme Generation Ltd.*, 90 FERC ¶ 61,194 (2000).

⁷ In situations where no such state commission determinations are necessary, the Commission's regulations require the person certifying itself as an EWG to state that fact explicitly. 18 C.F.R. § 366.7 (2007).

⁸ The Commission's prior EWG regulations required applicants to list any electric utility company that is an affiliate or associate company of the applicant. 18 C.F.R. § 365.3(a)(2)(iii) (2005). This is not required under the Commission's current regulations, and in some cases where the representation continues to be made, the result has been confusion and a need for clarification. This is because, although EWGs were not electric utility companies under the Public Utility Holding Company Act of 1935, they are electric utility companies under PUHCA 2005. *Buffalo Gap Wind Farm 2, LLC*, 118 FERC ¶ 61,069, at P 12 (2007) (*Buffalo Gap*). As a result, it is incorrect to say that an EWG has no affiliates or associate companies that are electric utility companies if it has an EWG as an affiliate or associate company, this being a relatively common occurrence.

associate company that is an electric utility company does own or operate a portion of the facility, that every State commission having jurisdiction over a rate or charge for electric energy produced by the facility has determined that allowing the facility to be an eligible facility (A) will benefit consumers, (B) is in the public interest, and (C) does not violate State law.⁹

8. DTE Pontiac has made basic representations that satisfy these requirements for certification as an EWG, and the sole issue raised by its request thus is whether its steam sales and its ownership and operation of the auxiliary gas-fired boilers, as described in its request, will be incidental to its business of owning and operating an eligible facility and selling electric energy at wholesale. We conclude that they will be incidental.

9. The Commission has ruled that the sale of by-products of electric generation, including steam, incidental to the sale of electric energy at wholesale does not violate the exclusivity requirement applicable to EWGs.¹⁰ For example, the Commission has granted EWG status to an applicant that, in addition to producing steam in conjunction with electric generation, also produced steam to meet the steam requirements of its host when electricity was not being generated (e.g., during periods when the electric energy purchaser dispatched the electric generation at zero).¹¹ The Commission has found the sale of steam from auxiliary boilers in such circumstances to be consistent with EWG status.¹² In another case, the Commission found that a party engaged exclusively in the business of operating all or part of one or more eligible facilities and selling electric energy at wholesale could qualify as an EWG if it also operated and maintained standby

⁹ The Commission determined in *Buffalo Gap* that PUHCA 2005 does not preclude co-ownership or joint operation of a facility by affiliate or associate company EWGs. State commission determinations therefore are not required in connection with such co-ownership or joint operation.

¹⁰ *Richmond Power Enterprises, L.P.*, 62 FERC ¶ 61,157 at 62,098 (1993) (determining that a person otherwise meeting EWG requirements may engage in incidental sales of by-products of electric generation, including steam); *LG&E Westmoreland Hopewell*, 70 FERC ¶ 61,257 (1995) (finding that the sale of steam as a by-product of the cogeneration process does not violate the EWG exclusivity requirement).

¹¹ *LG&E Westmoreland Hopewell*, 70 FERC ¶ 61,257 at 61,795.

¹² *LG&E Westmoreland Altavista*, 70 FERC ¶ 61,258 (1995).

thermal facilities owned by a thermal host to meet the host's thermal needs when electricity is not being generated.¹³

10. Treating DTE Pontiac's proposed steam and sales and its ownership and operation of the auxiliary gas-fired boilers as incidental is consistent with this Commission precedent. Therefore, we find that DTE Pontiac's (i) ownership and operation of the auxiliary gas-fired boilers for the purpose of selling steam, (ii) its sales of steam from the Facility, and (iii) its sales of steam from the auxiliary gas-fired boilers when the Facility is unable to meet the host's steam requirements are incidental to DTE Pontiac's business of owning and operating an eligible facility and selling electric energy at wholesale, and therefore are consistent with EWG status.

The Commission orders:

DTE Pontiac's petition for declaratory ruling is hereby granted, as discussed in the body of this order, provided that DTE Pontiac's activities are limited to and consistent with the activities described in its request and in this order. To the extent that facts or representations which form the basis of this order change, this order cannot be relied upon. While DTE Pontiac might continue to be an EWG under the changed circumstances, confirmation of EWG status would require a filing under section 366.7(c) of the Commission's regulations at that point.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ *Wellco Services, Inc.*, 102 FERC ¶ 61,197 (2003).