

132 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

BG Dighton Power, LLC Docket No. EG06-73-000

MASSPOWER Docket No. EG98-79-000

Lake Road Generating Company, L.P. Docket No. EG99-220-000

ORDER DISMISSING NOTICES OF SELF-RECERTIFICATIONS OF EXEMPT
WHOLESALE GENERATOR STATUS AND PROVIDING GUIDANCE

(Issued July 15, 2010)

1. On June 10, 2010, BG Dighton Power, LLC (BG Dighton), MASSPOWER, and Lake Road Generating Company, L.P. (Lake Road) (collectively the Filing Companies) each filed with the Commission a notice of self-recertification as an exempt wholesale generator (EWG). Each of these companies had previously achieved EWG status, either through a notice of self-certification of EWG status or through a Commission order determining the company to be an EWG. Each of the Filing Companies states that it filed its notice of self-recertification as the result of a change in its upstream ownership. In this order, we dismiss these notices of self-recertification and provide guidance on when a notice of self-recertification of EWG status is appropriate under our regulations.

Background

2. BG Dighton was certified as an EWG by a self-certification that was filed on August 15, 2006, and that became effective by operation of the Commission's regulations in October 2006.¹ MASSPOWER and Lake Road were each determined to be an EWG by Commission order.² Each of the Filing Companies states that as a result of a transfer of upstream ownership interests, they are now indirectly owned by six different

¹ Notice of Effectiveness of Exempt Wholesale Generator Status in Docket Nos. EG06-68-000 *et al.* (issued Nov. 1, 2006).

² MASSPOWER, Docket No. EG98-79-000 (letter order issued June 30, 1998); Lake Road Generating Co., L.P., 89 FERC ¶ 62,027 (1999).

investment funds, Energy Capital Partners II-A, LP, Energy Capital Partners II, LP, Energy Capital Partners II-B, LP, Energy Capital Partners II-D, LP, Energy Capital Partners II-C (Direct IP), LP, and Energy Capital Partners II (EquiPower Co-Invest), LP. The Filing Companies all make representations that are necessary to establish EWG status, but their submissions contain no other information beyond a description of their new upstream ownership structure, a statement that they have made their filings as a result of a change in that structure, and a further statement that this change does not affect their EWG status.

Notice of Filings

3. Notice of the of the Filing Companies' filings was published in the *Federal Register*, 75 Fed. Reg. 37,787 (2010), with interventions and protests due on or before July 12, 2010. None was filed.

Discussion

4. We dismiss the Filing Companies' notices of self-recertification of EWG status. The Commission's regulations contemplate the filing of a new notice of self-certification only in situations where there is a "material change in facts that may affect the [EWG's] . . . status as an [EWG] . . ." ³ EWG status is established by making representations as to certain facts. ⁴ A material change in facts that may affect EWG status is thus a change in one or more of those facts. In the case of companies like the Filing Companies, the facts that establish EWG status are as follows:

- The company is a person 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;
- any electric generation facility that the company owns or operates (i) is used for the generation of electric energy exclusively for sale at wholesale or (ii) is used for the generation of electric energy and leased to one or more public-utility companies; and (iii) includes only those interconnecting transmission facilities that are necessary to effect a sale of electric energy at wholesale;

³ 18 C.F.R. § 366.7(c) (2010).

⁴ *Id.* §§ 366.1, 366.7(a).

- (i) no rate or charge for, or in connection with, the construction of the company's generation 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, 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; and
- (i) no portion of the company's generation 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 EWG or (ii) if a portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company, 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.⁵

5. The facts that establish EWG status set forth above do not include the upstream ownership of the company that is seeking EWG status, and for that reason EWG status is not dependent on the identity of upstream owners. This means that a change in upstream ownership would not, in and of itself, be a material change in facts that could affect EWG status and therefore also would not, in and of itself, necessitate a recertification of EWG status.⁶ In fact, two of the Filing Companies have in the past acknowledged the non-material nature of upstream ownership changes by filing in their respective Commission

⁵ *Id.*; see *DTE Pontiac North LLC*, 121 FERC 61,037, at P 6-7 (2007). An EWG that owns or operates a facility located in a foreign country should also affirm that, to the extent that it makes retail sales, no electric energy produced by the facility will be sold to consumers in the United States.

⁶ A change in upstream ownership of an EWG should be distinguished from a change involving a transfer of a direct ownership interest in an EWG's eligible facility to an electric utility company that is an affiliate or associate company of the EWG. Such a transfer would be a material change in fact that calls for a filing under 18 C.F.R. § 366.7(c) (2010) unless the affiliate or associate company is also an EWG. See *Buffalo Gap Wind Farm 2, LLC*, 118 FERC ¶ 61,069 (2007).

EWG docket letters informing the Commission of changes in their upstream ownership that they described as “non-material” changes.⁷ We therefore conclude that the Filing Companies did not need to file notices of self-recertification of EWG status, and we will dismiss those filings.

6. Companies that file a notice of self-recertification of EWG status with the Commission, or that seek a new determination of EWG status by Commission order, should state specifically in their notice or application that they are making their filing under section 366.7(c)(1) of the Commissions’ regulations. They should also identify in their filing the material change in fact that they believe warrants their filing by describing a change in one or more of the facts that establish EWG status set forth above. They should also explain why they remain entitled to EWG status despite the change.⁸

The Commission orders:

The Filing Companies notices of self-recertification of EWG status are hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner LaFleur voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

⁷ See Letters of Lake Road filed in Docket No. EG99-220-000 on November 23, 2004, and April 10, 2007; Letter of MASSPOWER filed in Docket No. EG98-79-000 on May 30, 2007.

⁸ We note that a material change in facts does not mean that recertification is necessary. The EWG may also simply describe the change and explain why the change does not affect its EWG status or notify the Commission that it no longer seeks to maintain EWG status. 18 C.F.R. § 366.7(c)(2)-(3) (2010).