

106 FERC ¶ 61,104  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Duquesne Power, L.P.

Docket No. EG04-21-000

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

(Issued February 6, 2004)

1. On December 8, 2003, Duquesne Power, L.P. (Applicant or Duquense) 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).<sup>1</sup> In this order, we will grant Duquesne'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.

**I. Background**

2. Duquesne is acquiring an approximately 436 megawatt four-unit coal-fired generating station located in Shamokin Dam, Pennsylvania (Facility). This Facility consists of four coal-fired generating units totaling 389 MW, plus two black-start diesel generating sets and two oil-fired combustion turbine generators totaling approximately 47 MW, and interconnecting transmission facilities necessary to effect sales of electric energy at wholesale.

3. Duquesne will engage in the sale of ancillary services and power marketing activities and states that these are incidental activities which the commission has

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

previously found consistent with EWG status.<sup>2</sup> Duquense also states that it will engage in the purchase and sale of congestion revenue rights as an incidental activity that it asserts will be integral to its Facility and power marketing operations. Duquesne will also lease to PP&L, Inc. (PP&L) building space in the Sunbury switchyard control house to conduct operations that Duquesne states are necessary to ensure proper functioning of the transmission facilities so that Duquense can make wholesale electric sales.

4. Notice of the application was published in the Federal Register, 68 Fed. Reg. 70,500 (2003), with interventions or comments due on or before December 29, 2003. None was filed.

## II. EWG Application

5. Duquesne has submitted a sworn statement by a representative legally authorized to bind it stating that:

- a. Duquesne will be engaged directly and exclusively in the business of owning and operating all or part of one or more eligible facilities and selling the electric energy exclusively at wholesale.
- b. The Facility constitutes an eligible facility as defined in Section 32(a)(2) of PUHCA because it will be used for the generation of electric energy exclusively at wholesale.
- c. No portion of the Facility will be owned or operated by an electric utility company that is an affiliate or associate company of the Applicant.
- d. Other than the lease arrangement described above, there are no lease arrangements involving Duquesne.
- e. A rate or charge for, or in connection with, the construction of the Facility, or for electric energy produced by the Facility was in effect under the laws of the Commonwealth of Pennsylvania on October 24, 1992. Applicant further states

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<sup>2</sup> Duquesne cites the following precedents: Erie Boulevard Hydropower, L.P., 87 FERC ¶ 61,378 (1999); Duke Energy Oakland LLC, 83 FERC ¶ 61,304 (1998); Entergy Power Marketing Corp., 73 FERC ¶ 61,063 (1995); Sithe Framingham LLC, 83 FERC ¶ 61,106 (1998); Entergy Power Marketing Corp., 73 FERC ¶ 61,063 (1995); Southern Energy Marketing Inc., 71 FERC ¶ 61,376 (1995); CNG Power Services Corp., 69 FERC ¶ 61,002 (1994).

that the Pennsylvania Public Utility Commission (PaPUC) has determined that allowing the Facility to be an eligible facility will benefit consumers, is in the public interest and does not violate State law.

### **III. Discussion**

#### **A. Congestion Revenue Rights**

6. Duquesne asserts that the purchase and sale of congestion revenue rights are incidental activities that do not violate the requirement set forth in Section 32(a)(1) of PUHCA that an EWG be “exclusively” in the business of owning and/or operating an eligible facility and selling energy at wholesale. Duquesne states that buying and selling congestion revenue rights will be integral to its Facility and power marketing operations.

7. In the context of natural gas supplies and transportation capacity, the Commission has held that if the purchase was originally intended for use at the facility and not purchased for resale, then the resale of unused gas supplies and transportation capacity not required for the operation of the facility is an incidental activity and does not violate the statutory exclusivity requirement.<sup>3</sup> The sale of unused congestion revenue rights originally purchased for use at the Facility is similar to the resale of unused energy or transportation capacity originally purchased for an EWG’s use. On the condition that Duquesne buys and sells only the congestion revenue rights that it needs for its facility, we find the purchase and sale of congestion revenue rights will be incidental to the EWG’s involvement in wholesale electricity generation, and therefore, will not violate the exclusivity requirement.

#### **B. Leasing Activities**

9. Another issue raised in the application is the lease of building space to PP&L. Duquesne asserts that the lease of the switchyard control house space is directly related to ensuring the proper functioning of the transmission facility that it utilizes. We believe that, under the circumstances here, leasing the space to PP&L will not violate the

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<sup>3</sup> Selkirk Cogen Partners, L.P., 69 FERC ¶ 61,037 (1994). See also PSEG Fossil, LLC, *et al.*, 95 FERC ¶ 61,405 (2001) (lease of idle barge capacity permissible); Compania Hidroelectrica Dona Julia S. De R. L., 85 FERC ¶ 61,336 (1998) (sale of excess hydro supplies and capacity permissible).

exclusivity requirement.<sup>4</sup> This determination is based on the fact that the transmission facility is essential to effect Duquesne's wholesale sales, and the lease is directly related to ensuring the proper functioning of this facility. We find that Duquesne will not be in the business of leasing building space, and that the lease will constitute an incidental activity.

The Commission orders:

Based on the information contained in this application, the Commission determines that Duquesne 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.

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<sup>4</sup> The Commission has permitted the leasing of shared access roads, water and switchyard facilities to an affiliated EWG where, among other things, the application needed the shared facilities to deliver its power and the applicant's control over the shared facility was necessary for the safety of its own operations. Hardee Power Partners, Limited, 104 FERC ¶ 61,327 (2003). See also Nine Mile Point Nuclear Station, LLC, 97 FERC ¶ 61,358 (2001) (permitting the provision of back-up support personnel and equipment to other facilities in the event of an emergency).