

UNITED STATES OF AMERICA 66 FERC ¶61,264
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Southern Electric Wholesale Generators, Inc.) Docket No. EG94-14-000
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DETERMINATION OF EXEMPT WHOLESALE GENERATOR STATUS
AND INTERPRETATION OF SECTION 32 OF THE
PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

(Issued March 1, 1994)

On January 7, 1994, Southern Electric Wholesale Generators, Inc. (Southern) filed an application for determination of exempt wholesale generator (EWG) status under section 32 of the Public Utility Holding Company Act of 1935, as amended by the Energy Policy Act of 1992 (PUHCA). 1/

Notice of the application was published in the Federal Register, 2/ with interventions or comments due on or before February 11, 1994. None were filed.

In its application, Southern states that in SEI Hawaiian Cogenerators, Inc., et al., 63 FERC ¶ 61,261 (1993), the Commission determined that Southern is an EWG. Southern states that the Commission based that determination upon the information contained in an application filed by Southern on April 8, 1993. Southern further states that it wishes to engage in activities in addition to those described in its April 8, 1993 application. The additional activities relate to the development of and the acquisition of ownership interests in as-yet-undefined eligible facilities and/or EWGs. Southern states that the additional activities would include: due diligence, project design review or development, preparation of bid proposals, application for required permits and/or regulatory approvals, negotiation of agreements to sell electric energy at wholesale, negotiation of contractual commitments with lenders and equity investors, and other such activities as may be required to achieve financial closing on an eligible facility or an EWG. Southern states that before actually acquiring an ownership interest in an additional eligible facility and/or EWG, Southern will file a new application for EWG status with the Commission

1/ 15 U. S. C. A. § 79z-5a (West Supp. 1993).

2/ 59 Fed. Reg. 5413 (1994).

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providing adequate information to show that such acquisition will not adversely affect its compliance with the requirements of section 32 of PUHCA for EWG status.

Southern states that the purpose of this application is to obtain a determination from the Commission that engaging in such project development activities will not cause Southern to lose its status as an EWG. Southern states that it does not consider its anticipated engagement in the enumerated project development activities to be a "material change in facts" occurring after the Commission's determination of Southern's EWG status. It is filing this application because the Commission explained that if there is any question concerning whether a change is material, the EWG can file another request for EWG status based on the facts that will exist if the change occurs. 3/ Southern further states that a change does not appear to be material, under the Commission's regulations, unless it affects eligibility for EWG status under section 32 of PUHCA. Finally, Southern asserts that Southern's project development activities will not affect Southern's EWG status until and unless such activities result in the acquisition of another eligible facility or EWG. Alternately, Southern asks that if the Commission determines that the project development activities constitute a "material change," it also determine that these activities do not adversely affect Southern's status as an EWG because the activities are consistent with section 32 of PUHCA.

We find that the development activities enumerated by Southern do not affect Southern's status as an EWG, as long as they are performed on behalf of Southern itself and not on behalf of others. We agree with Southern that such activities, when performed in contemplation of acquiring for itself additional eligible facilities, 4/ are consistent with the statutory requirement that an EWG be engaged 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. However, if Southern performed the enumerated development activities for someone other than itself, it could not meet the exclusivity criterion specified in section 32(a)(1).

- 3/ Filing Requirements and Ministerial Procedures for Person Seeking Exempt Wholesale Generator Status, Order No. 550-A, 111 FERC Stats. & Regs. ¶ 30,969 at 30,838-39 (1993).
- 4/ The statute requires that EWGs be engaged directly, or indirectly through section 2(a)(11)(B) affiliates, and exclusively in the business of owning and operating eligible facilities and selling electric energy at wholesale. Southern's development activities must, therefore, concern eligible facilities.

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Based upon the information contained in its application, the Commission determines that the Southern 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)

Linwood A. Watson, Jr.,
Acting Secretary.

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