

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PECO Energy Power Company	Docket Nos. EG04-41-000
Susquehanna Electric Company	EG04-42-000
Susquehanna Power Company	EG04-43-000

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

(Issued May 21, 2004)

1. On March 22, 2004, PECO Energy Power Company (PEPCo), Susquehanna Electric Company (SECo), and Susquehanna Power Company (SPCo) (collectively, Applicants) each 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 Applicants' request for EWG status. Our determination benefits customers by ensuring that applicants who qualify for EWG status under PUHCA will receive such status, as Congress intended.
2. Notice of Applicants' filings was published in the Federal Register,² with comments or interventions due on or before April 12, 2004. None was filed.

Background

3. PEPCo and SECo are each wholly-owned subsidiaries of Exelon Generation Company, LLC (Exelon Generation). SPCo is a wholly-owned subsidiary of PEPCo, and by virtue of this ownership, PEPCo is a public utility holding company under PUHCA. Together, PEPCo and SPCo own and hold a license pursuant to Part I of the Federal Power Act (FPA)³ for the Conowingo Hydroelectric Project (Project), located on the Susquehanna River in Lancaster and York Counties, Pennsylvania and Harford and Cecil

¹ 15 U.S.C. § 79z-5a (2000).

² 69 Fed. Reg. 16,913 (2004).

³ 16 U.S.C. §§ 791a-823c (2000).

Counties, Maryland. PEPCo owns the portions of the project located in Pennsylvania, which include the lands underlying the Conowingo Reservoir and the shoreline of the reservoir in Pennsylvania, and the segment of primary transmission lines necessary to effect a sale of electric energy at wholesale from the Project that is located in Pennsylvania (PEPCo Facilities). SPCo, in turn, owns the portions of the project located in Maryland, including the lands underlying the Conowingo Reservoir and the shoreline of the reservoir in Maryland, the Project's dam and powerhouse, the step-up transformers, the switching facilities on top of the powerhouse, and the other segment of primary transmission lines located in Maryland (SPCo Facilities). Pursuant to two separate lease agreements, SECo operates the dam and powerhouse, maintains the reservoir and shoreline, and sells the Project's electrical output at wholesale to Exelon Generation.

4. As noted above, certain transmission facilities are connected to the Project. PEPCo owns the segment of the Project's primary lines which are located in Pennsylvania, and SPCo owns the switching equipment, 220-kV transformers, the segment of the Project's primary lines located in Maryland, and a 33-kV substation. SECo operates the step-up transformers and switching equipment, which lead to the Project's primary transmission lines. The primary transmission lines are leased to and operated by PECO Energy Company (PECO Energy), a public utility and indirect subsidiary of Exelon. The lease payments for the lines are fixed, and do not vary with the volume of energy transmitted. Along with the step-up transformers, these lines are used to effect sales of electric energy at wholesale from the Project. When the Project is generating power, the primary transmission lines are used to transmit its output from the dam to an interconnection with PECO Energy at East Nottingham Township, and to deliver power to Conectiv at two taps on the Maryland segment of lines. When the Project is not generating power, the primary transmission lines are utilized to deliver station power from the interstate grid to the Project's powerhouse, and to serve load from the 33-kV substation.⁴ Applicants state in their applications that no source of generation other than the Project directly connects to these lines, that all service provided by PECO Energy over the lines is pursuant to a rate schedule on file with the Commission, and that all revenues from providing transmission service to any third parties over the line are retained by PECO Energy and do not inure to the benefit of Applicants.

5. Through the three separate applications in the instant docket, Applicants seek EWG status. The applications describe the "eligible facility" to include only a portion of the Project. Specifically, the "eligible facility" identified includes the dam and powerhouse, the step-up transformers and switching equipment on top of the powerhouse, the lands underlying the Conowingo Reservoir and the dam, and the

⁴ Three transmission lines extending from the substation serve Conectiv, PECO Energy, and the Peach Bottom Atomic Power Station, which is jointly owned by subsidiaries of Exelon Corporation and Public Service Enterprise Group (PSEG).

contiguous shoreline. The primary transmission lines owned by PEPCo and SPCo and leased to PECO Energy as described above, are excluded from the “eligible facility” defined by the Applicants as the basis for their individual applications for EWG status.

Representations by the Applicants Regarding Their EWG Status

6. Pursuant to section 365.3 of the Commission’s EWG regulations⁵, the Applicants each submitted a sworn statement by a representative legally authorized to bind it stating that:
- a. Applicants will be engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B) of PUHCA,⁶ 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.
 - b. The Project facilities included by the Applicants in the “eligible facility” satisfies the definition of “eligible facility” in PUHCA because they are used for the generation of electric energy for sale exclusively at wholesale, and SECo’s lease and operating agreements for the Project allowing it to operate the Project and sell its output at wholesale satisfy the “selling electricity at wholesale” requirement of section 32(a)(2) of PUHCA.⁷
 - c. Applicants may provide certain ancillary services and interconnected operations services at wholesale, consistent with Commission precedent.
 - d. Applicants are each an associate company or affiliate, as defined in PUHCA,⁸ of the following electric utility companies:⁹ Exelon Generation, PECO Energy, Commonwealth Edison Company, and Commonwealth Edison Company of Indiana, Inc. Additionally, until their EWG status is determined, the Applicants are each electric utility company affiliates of one another.
 - e. No rate or charge for or in connection with the construction of the Applicants’ facilities or any other portion of the Project, or for the electric energy produced by Applicants’ facilities or any other portion of the Project

⁵ 18 C.F.R. § 365.3 (2003).

⁶ 15 U.S.C. § 79b(a)(11)(B) (2000).

⁷ 15 U.S.C. § 79z-5a(a)(2) (2000).

⁸ 15 U.S.C. § 79b(a)(10)-(11) (2000).

⁹ 15 U.S.C. § 79b(a)(3) (2000).

(with the exception of any portion of a rate or charge representing recovery of the cost of a wholesale rate or charge), was in effect under the laws of any State on October 24, 1992.

- f. Once Applicants are granted EWG status, no portion of the “eligible facility” will be owned or operated by an associated or affiliated electric utility company of the Applicants. Applicants note that while PECO Energy (an affiliated electric utility company of the Applicants) leases and operates the primary transmission lines connected to the Project, those lines are not included within the “eligible facility” for which Applicants seek EWG status.

Discussion

7. These three related applications raise the issue of whether the Project for which Applicants seek EWG status is a prohibited “hybrid” facility under section 32(d) of PUHCA,¹⁰ because the primary transmission lines extending from the Project are owned by PEPCo and SPCo, but leased and operated by PECO Energy, an electric utility company affiliated with Applicants.

8. We find that Applicants have not proposed a “hybrid” facility, and thus their applications for EWG status do not violate section 32(d). While the primary transmission lines which are necessary to sell energy from the Project at wholesale are leased to and operated by an electric utility affiliated with the Applicants, those lines are not within the “eligible facility” forming the basis for the instant applications. Both section 32(a)(2) of PUHCA and prior Commission precedent allow the “eligible facility” forming the basis for EWG status to be a portion of a larger facility.¹¹

¹⁰ 15 U.S.C. § 79z-5a(d) provides that “[n]o exempt wholesale generator may own or operate a portion of any facility if any other portion of the facility is owned or operated by an electric utility company that is an affiliate or associate company of such exempt wholesale generator.”

¹¹ See 15 U.S.C. § 79z-5a(a)(2) (“[F]or purposes of this paragraph, the term ‘facility’ may include a portion of a facility”); see also, e.g., Energy Alternatives, Inc., 89 FERC ¶ 61,146 (1999) (EWG status granted where eligible facility consisted of only generators, step up transformers and circuit breakers, and did not include either the distribution stations that the facilities were located in or the sublease for the sites on which they were located, both of which were owned or leased by an electric utility affiliate of the applicant).

9. Additionally, the applications raise issues regarding the “exclusivity” requirement of section 32(a)(1),¹² because PEPCo and SPCo receive lease payments from PECO Energy for the lease of the primary transmission lines, and because Applicants receive some compensation from leases of lots along the shore of the reservoir and contracts for municipal water withdrawals from the reservoir. Applicants note in their applications that they engage in the leasing of shoreline lands and water withdrawal activities to fulfill the obligations imposed on them by the Commission license granted for the Project.¹³

10. We find that the receipt of lease payments for the primary transmission lines, the leasing of lands along the shore of the reservoir, and the contracts for municipal water withdrawals do not violate the “exclusivity” requirement. As Applicants note in their applications, the Commission has determined in several previous orders that EWGs may generally engage in activities that are “incidental” to the sale of electric energy at wholesale without violating the “exclusivity” requirement.¹⁴ Here, we find that the lease of the primary transmission lines by PEPCo and SPCo is incidental to the operation of the Project, and thus does not violate the “exclusivity” requirement. The Commission has previously found that the provision of limited transmission service over lines constructed primarily to allow for the sale at wholesale of electric energy produced by the EWG does not violate the “exclusivity” requirement.¹⁵ We also note that in Safe Harbor Water Power Corporation,¹⁶ the Commission held that activities undertaken by an EWG which are consistent with the requirements of its hydroelectric project license are incidental to their ownership and operation of the project and do not violate the “exclusivity” requirement. Consistent with that precedent, we find that PEPCo and SPCo’s leasing of lots on the shoreline of the Conowingo Reservoir, and the contracts for municipal water withdrawals which they are a party to, do not violate the “exclusivity” requirement of section 32(a)(1).

¹² 15 U.S.C. § 79z-5a(a)(1) provides that an EWG must 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.”

¹³ Section 10(a)(1) of the Federal Power Act (FPA), 16 U.S.C. § 803(a)(1) (2000), provides that each license for the operation of a hydroelectric facility is issued on the condition that the project be adapted to provide “beneficial public uses, including . . . water supply . . . and recreational . . . purposes.”

¹⁴ See, e.g., Hardee Power Partners, Ltd., 104 FERC ¶ 61,327 at 62,235, P 10 (2003); Killingholme Generation Limited, 90 FERC ¶ 61,194 at 61,632 (2000).

¹⁵ See PP&L Colstrip III, LLC, 88 FERC ¶ 61,281 at 61,869 (1999).

¹⁶ 84 FERC ¶ 61,318 (1998).

The Commission orders:

Based on the information contained in the applications, the Commission determines that PEPCo, SPCo and SECo will be EWGs 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)

Magalie R. Salas,
Secretary.