

UNITED STATES OF
AMERICA 88 FERC ¶ 61,190
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt H. bert, Jr.

NRG Northeast Generating LLC Docket No. EG99-
161-000
Dunkirk Power LLC Docket No. EG99-162-000
Huntley Power LLC Docket No. EG99-163-000

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

(Issued August 24, 1999)

On June 8, 1999, as amended on June 9 and 25, 1999, NRG Northeast Generating LLC (NRG), Dunkirk Power LLC (Dunkirk), and Huntley Power LLC (Huntley) (collectively, Applicants) filed applications 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/

Notices of the applications and amendments thereto were published in the Federal Register, 64 Fed. Reg. 32,849, 32,852, and 37,960 (1999), with interventions or comments due on or before July 28, 1999. None was filed.

In their applications, Applicants submit sworn statements by a representative legally authorized to bind them stating that:

1. NRG, Huntley, and Dunkirk will be engaged directly, or indirectly through one or more affiliates as defined in section 2(a)(11)(B) of PUHCA, and exclusively in the business of owning and operating eligible facilities (Facilities) and selling electric energy at wholesale.

2. NRG's Facilities include 37 units at five locations in New York and Massachusetts totaling over 3000 MW, and associated interconnection facilities. Dunkirk's Facility consists of two coal-fired 100 MW units, two coal-fired 200 MW units, and associated interconnection facilities, located in Dunkirk, New York. Huntley's Facility consists of four 90 MW coal-fired

1/ 15 U.S.C. § 79z-5a (1994).

Docket No. EG99-161, et al.

- 2 -

units, two 200 MW coal-fired units, and associated interconnection facilities, located near Buffalo, New York.

3. Each of the Applicants' Facilities is an "eligible facility" as defined in section 32(a)(2) of PUHCA because it will be used for the generation of electric energy exclusively for sales at wholesale.

4. No portion of the Facilities will be owned or operated by any electric utilities that are affiliate or associate companies of the Applicants.

5. There are no lease arrangements involving the Facilities and any public utility company, except that Huntley will lease from Niagara Mohawk the land on which its Facility is located.

6. All of the Facilities were in the rate base of Consolidated Edison Company of New York, Niagara Mohawk Power Corporation (Niagara Mohawk), or Montaup Electric Company on October 24, 1992. Each of the relevant state commissions (and in the case of Rhode Island, the Utility Restructuring Act of 1996) made the requisite findings under section 32(c) of PUHCA that allowing each Facility to become an eligible facility would benefit consumers, would be in the public interest, and would not violate state law.

The applications state that Huntley and Dunkirk will own and operate, in addition to generation and interconnection facilities, landfills for the disposal of coal combustion by-products. In the June 25 amendment, Applicants clarify that these landfills will be used exclusively for the disposal of coal combustion by-products produced by Huntley and Dunkirk, except that in the future they may be used for disposing of coal combustion by-products from another EWG yet to be acquired by NRG (the Oswego station). 2/

Applicants' proposal raises the issue of whether owning and operating such a landfill violates the requirement set forth at section 32(a)(1) of PUHCA that an EWG be "exclusively" in the business of owning and/or operating eligible facilities and selling electric energy at wholesale.

Based on the particular circumstances present here, we find that Applicants will satisfy the "exclusivity" requirement. We

- 2/ Applicants request that, if the Commission concludes the use of the landfills for disposal of waste from the Oswego station is not permissible, their applications be granted subject to the condition that the landfills not be used for that waste.

♀

Docket No. EG99-161, et al.

- 3 -

have held in the past that the exclusivity requirement is not violated when an activity is "incidental" to the ownership and/or operation of an eligible facility. 3/ We believe that, under the circumstances here, operating a facility for the disposal of an EWG's own waste resulting from generating electric energy is incidental to the ownership and/or operation of a generating facility for wholesale sales of electric energy and will not violate the exclusivity requirement. Based on the fact that the need for a landfill arises from the production of electric energy and the fact that Applicants are in the business of owning and operating Facilities used for sales of electric energy, not in the landfill business, we find that Applicants will not violate the exclusivity requirement.

We also find that accepting waste produced by an affiliated EWG's nearby operations will not violate the exclusivity requirement. Dunkirk and Huntley will be sharing a resource with another member of their corporate family located in relative proximity to Buffalo, New York. Given these circumstances, the Applicants' landfills will not be a line of business independent from their EWG operations. The proposed use of the landfills by the Oswego station will not violate the requirement that Applicants be engaged exclusively in the business of owning and/or operating eligible facilities.

Based on the information contained in these applications, the Commission determines that NRG, Dunkirk, and Huntley are 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)

Linwood A. Waton, Jr.,
Acting Secretary.

3/ See CMS Morocco Operating Company SCA, 78 FERC ¶ 61,118 at 61,454 (1997), and the cases relied upon therein.