DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Docket No. RM79-54; Order No. 70-B]

Small Power Production and Cogeneration Facilities—Qualifying Status; Order Granting in Part and Denying in Part Rehearing of Order No. 70 and Amending Regulations

August 4, 1980.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order Granting in Part and Denying in Part Rehearing of Order No. 70 and Amending Regulations.

SUMMARY: The Federal Energy Regulatory Commission (Commission) hereby adopts an order granting in part and denying in part rehearing of Order No. 70 and amending regulations. The Order amends two sections of the Commission's rules involving small power production. The order includes a new definition of "electric utility holding company," and amends §§ 292.206 and 292.207 by deleting the word "public" and inserting in lieu thereof the word "electric."

EFFECTIVE DATE: August 4, 1980.

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On April 14, 1980, Elizabethtown Gas Company (Elizabethtown) and Southern California Gas Company (SCGC) applied for rehearing and clarification of Order No. 70, issued by the Federal Energy Regulatory Commission (Commission) on March 13, 1980.[1] Order No. 70 prescribes rules pursuant to section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA) under which small power production and cogeneration facilities can obtain "qualifying" status, and thus become eligible for the rates and exemptions set forth in the Commission's rules implementing section 210 of PURPA.[2]

Elizabethtown and SCGC contend that § 292.206(b) of the Commission's rules erroneously exclude from qualifying status facilities owned by gas public utility holding companies, despite the fact that they are not engaged in the generation or sale of electricity. Elizabethtown stated that PURPA does not prohibit a gas distribution utility from owning a qualifying facility.

Sections 17(C)(ii) and 18(B)(ii) of the Federal Power Act as amended by PURPA require the Commission to limit qualifying status to facilities "owned by persons not primarily engaged in the generation or sale of electric power." Section 292.206(b) of the Commission's rules prohibits public utility holding companies from owning more than 50 percent of the equity interest of a qualifying facility.

On May 15, 1980 the Commission issued an "Order Granting in Part and Denying in Part Rehearing of Order Nos. 69 and 70, and Amending Regulations."[3] The Commission stated in that order that it did not intend to prohibit companies without any electric utility interests from owning qualifying facilities, but believed it appropriate to consult with the Securities and Exchange Commission (SEC) before changing Order No. 70 in this respect.

The Commission's Office of the General Counsel has consulted with the SEC's Division of Corporate Regulation. That Division stated that permitting gas holding companies to own qualifying facilities would be consistent with the SEC's regulation of holding companies.[4] Accordingly, the Commission will amend its rules to permit gas utility holding companies to own qualifying facilities. This change is accomplished by substituting the words "electric utility holding company" for the words "public utility holding company" in §§ 292.206(b) and 292.207(b)(2)(v) of the Commission's rules, and adding a definition of "electric utility holding company" to § 292.202. An electric utility holding company is defined as any holding company which owns one or more electric utilities, as those terms are defined in the Public Utility Holding Company Act of 1935.

The Commission recognizes that certain companies which are not "primarily engaged in the generation or sale of electric power" may nevertheless be classified as "electric utilities" or "electric utility holding companies." The result of such classification is to prevent cogeneration or small power production facilities of which such companies own more than 50 percent of the equity from being qualifying facilities. Included in this category are companies which derive most of their income from non-utility operations, but which, as a result of selling some electric energy, are classified as "electric utilities" under section 3(22) of the Federal Power Act; and public utility holding companies which are exempt by rule or order issued by the Securities and Exchange Commission pursuant to sections 3(a)(3), 3(a)(4), and 3(a)(5) of the Public Utility Holding Company Act of 1935.

The Commission intends to exercise its authority to amend its rules so as to permit, in appropriate circumstances, ownership of qualifying facilities by some or all of these types of companies. Until it completes its analysis of the issues involved in making those changes, the Commission believes it

[1] 45 FR 17959 (March 20, 1980).

[2] Order No. 69, 45 FR 12214 (February 25, 1980).

[3] 45 FR 33958 (May 21, 1980).

[4] Letter of June 6, 1980, from Aaron Levy, Director, Division of Corporate Regulation, SEC, in response to letter of May 14, 1980, from Robert Nordhaus, General Counsel, FERC.

appropriate to amend its rules so as to permit ownership of a qualifying facility by public utility holding companies, such as Elizabethtown and SCGC, which have no electric utility company subsidiaries.

On June 13, the American Paper Institute, Inc. (API) filed a Petition for Rehearing or Modification of the Commission's May 15, 1980, Rehearing order. The petition noted that the Order on Rehearing amended Order No. 70 by amending § 292.204. That section required that the primary energy source of a qualifying small power production facility be biomass, waste, renewable resources, or any combination thereof, and that more than 50 percent of the total energy input must be from these energy sources. Section 292.204(b)(2) limits the use of oil, natural gas and coal to 25 percent of the total energy input of a qualifying facility during any calendar year period.

In the rehearing order, the Commission stated that it was aware of virtually no eligible fuels which are neither oil, natural gas, nor coal, and yet are not biomass, waste or renewable resources. As a result, the Commission changed the requirement that 50 percent of a facility's energy input be from biomass, waste, or renewable resources to 75 percent.

In its petition, API states that use of the 50 percent figure was intended to permit the use of "synfuel, low Btu gas or similar types of emerging energy resources."

The Commission has reviewed the statutory and policy bases involved in this issue, and has determined that it is appropriate to retain the 75 percent requirement adopted in the rehearing order of May 15, 1980.

"Primary energy source" is defined in section 201 of PURPA as fuel or fuels used for the generation of electric energy. The term does not include fuel used for startup, testing, flame stabilization, and control uses, or fuel used during forced outages or emergencies.

The statutory intent is to divide fuel use by small power production facilities into two categories—(1) fuel used as an acceptable primary energy source, and (2) all other fuel. The Statement of Managers indicates a recognition that the second category involves the use of "oil or natural gas *or other nonrenewable fuel*, in combination with eligible primary energy sources." (emphasis supplied) It reflects an intent to include all nonrenewable fuels in the same category as oil and natural gas.[1]

The Commission notes that neither synthetic fuel nor low Btu gas is a renewable fuel. Low Btu gas is not a waste product; it is produced from the incomplete combustion of coal for use as boiler fuel. These fuels are properly included within the 25 percent oil, natural gas and nonrenewable fuels limit set forth in § 292.204(b)(2). Accordingly, the Commission does not accept the contentions of API, and denies the petition.

The Commission notes that on May 19, 1980, Elizabethtown filed a Petition for Review of Order No. 70 and of the Commission's Order on Rehearing of Orders Nos. 69 and 70 in the United States Court of Appeals for the District of Columbia Circuit. On June 30, 1980, the Commission filed with the court the Certificate of Record in Lieu of Record. Under section 313(b) of the Federal Power Act that Court has exclusive jurisdiction to modify those orders. Accordingly, this order is issued subject to the Court's permission.

The Commission orders that: (A) The applications for rehearing and clarification of Order No. 70 filed by Elizabethtown Gas Company and Southern California Gas Company are granted with respect to § 292.206 of the Commission's rules.

(B) Sections 292.202, 292.206(b) and 292.207(b) are amended as set forth below effective August 4, 1980.

(C) The Petition for Rehearing or Modification filed by the American Paper Institute, Inc., on June 13, 1980, is denied.

(Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601 *et. seq.;* Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et. seq.;* Federal Power Act, as amended, 16 U.S.C. 792 *et seq.;* Department of Energy Organization Act, 42 U.S.C. 7101 *et. seq.;* E. O. 12009, 3 CFR 142 (1978))

In consideration of the foregoing, the Commission amends Part 292 of Chapter I, Title 18, Code of Federal Regulations, as set forth below, effective August 4, 1980.

By the Commission.

Kenneth F. Plumb,

Secretary.

1. Section 292.202 is amended by adding a new paragraph (n) to read as follows:

§ 292.202 Definitions.

* * * * *

(n) "Electric utility holding company" means a holding company as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utility companies, as defined in section 2(a)(3) of that Act, 15 U.S.C. 79b(a)(3).

§§ 292.206 and 292.207 [Amended]

2. Section 292.206 is amended in paragraph (b), and § 292.207 is amended in paragraph (b)(2)(v), by deleting the word "public" and inserting in lieu thereof the word "electric."

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[1] Conference Report on H.R. 4018, Public Utility Regulatory Policies Act of 1978, H. Rep. No. 1750, 88, 95th Cong., 2nd Sess. (1978).