

3. On May 2, 2003, the Commission initiated an investigation into Enron and its ownership of three additional QFs, following Enron's merger with Portland General Corporation (Portland General) in 1997. The May 2 Order consolidated the proceedings with the ongoing investigation initiated by the February 24 Order. In the May 2 Order, the Commission also directed Enron to file a list with the Commission of all QFs over which Enron, an Enron affiliate, or an Enron employee had any ownership interest or control following Enron's merger with Portland General.⁴

4. In compliance with the May 2 Order, Enron provided a list of thirteen additional QFs in which it held an ownership interest following Enron's merger with Portland General. Included in that list was Ponderosa's cogeneration facility.

Statutory and Regulatory Background

5. PURPA was designed to lessen the country's dependence on foreign oil. Congress believed that increased use of non-utility energy resources would reduce the demand for traditional fossil fuels.⁵ In passing PURPA, Congress identified two major obstacles that had served in the past to stifle non-utility powerplant development: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional utilities; and (2) the substantial burdens of pervasive federal and state regulation. Congress in PURPA sought to remove these obstacles.

6. As directed by Congress in Section 210(a) of PURPA,⁶ the Commission prescribed regulations designed to encourage the development of cogeneration and small power production. As directed by Congress, the Commission's regulations required electric utilities to purchase electricity from and sell electricity to QFs. The Commission further required that electric utilities purchase electric energy from QFs and that they do so at "avoided cost" rates.⁷ The Commission also removed certain state and federal regulation that QFs would otherwise be subject to, by granting QFs exemptions from most such regulation.⁸

⁴ *Investigation of Certain Enron-Affiliated QFs*, 103 FERC ¶ 61,122 (2003) (May 2 Order).

⁵ See *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (citing legislative history of PURPA).

⁶ 16 U.S.C. § 824a-3(a) (2000).

⁷ 18 C.F.R. §§ 292.303-292.304 (2004).

⁸ 18 C.F.R. §§ 292.601-292.602 (2004).

7. In Subpart B of the Commission's PURPA regulations, the Commission set forth criteria and procedures for QF status.⁹ One of the criteria for QF status relates to ownership of the QF,¹⁰ provide that a QF must be:

owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

The Commission's regulation implementing this statutory requirement states that:

(a) General Rule. A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) Ownership test. For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.^[11]

8. The Commission has also provided for exemptions from the ownership criteria for QF status. Under 18 C.F.R. § 292.206(c) (2004), a company is not considered an "electric utility" for ownership purposes if it has been declared not to be an "electric utility" by rule or order of the Securities and Exchange Commission (SEC) pursuant to section 2(a)(3)(A) of PUHCA.¹²

⁹ 18 C.F.R. §§ 292.201-292.211 (2004).

¹⁰ Sections 3(17)(C)(ii) and (18)(B)(ii) of the Federal Power Act (FPA), 16 U.S.C. §§ 796(17)(C)(ii) and (18)(B)(ii) (2000).

¹¹ 18 C.F.R. §§ 292.206 (a) and (b) (2002).

¹² 15 U.S.C. § 79b(a)(3)(A) (2000).

9. Section 3(c) of PUHCA¹³ states:

[t]he filing of an application *in good faith* [for a PUHCA exemption] . . . shall exempt the applicant from any obligation, duty or liability imposed [by PUHCA] upon the applicant as a holding company until the [SEC] has acted upon such application [emphasis added],

The Commission has cited section 3(c) of PUHCA indicating that an entity which has filed an application for a PUHCA exemption with the SEC is not considered an "electric utility" pending an SEC decision.¹⁴

Factual Background

10. Ponderosa's facility is located in Cleburne, Texas. It was originally certified as a QF on January 13, 1995,¹⁵ and commenced operation in January 1997. Pursuant to a long term power sales contract, it sells its entire energy output to Brazos Electric Cooperative, Inc. (Brazos).

11. The history of Ponderosa's ownership is set forth fully in the Initial Decision.¹⁶ As relevant here, an affiliate of Enron had certain interests in the facility until September 30, 2002.

12. However, on April 12, 2000, Enron had applied to the SEC for exemption from PUHCA. And only on December 29, 2003, did the SEC issue an order denying Enron's application for exemption from PUHCA.¹⁷

Initial Decision

13. The judge found that he could decide this case on summary disposition because there was no material issue of fact in dispute. The judge stated that the relevant issue in the proceeding is whether Enron's interest in the facility, following Enron's merger with

¹³ 15 U.S.C. § 79c(c) (2000).

¹⁴ *See Doswell Limited Partnership and Diamond Energy, Inc.*, 56 FERC ¶61,170 at 61,590 (1991) (*Doswell*).

¹⁵ *Tenaska IV Texas Partners, Ltd.*, 70 FERC ¶ 62,026 (1995).

¹⁶ 108 FERC ¶ 63,001 at P12-19.

¹⁷ *In the Matter of the Application of Enron Corporation*, Public Utility Holding Company Act of 1933 Rel. No. 27782 (December 29, 2003). The SEC did not, however, make a finding that Enron's application had not been in "good faith."

Portland General, caused the facility not to meet the ownership criteria under PURPA. Ponderosa, Enron, Enron North America (ENA) and Commission Trial Staff (Trial Staff) (collectively, joint movants) moved for summary disposition. They claimed that they demonstrated that Enron's interest in the facility began in June 2000 and ended prior to December 29, 2003, the date the SEC denied Enron's PUHCA exemption application. Having demonstrated when Enron's interests began and ended, the joint movants argued that summary disposition was appropriate because the Commission had already determined in *Green Power Partners I, LLC*, 106 FERC ¶ 61,030 (2004), that, from April 12, 2000 through December 29, 2003, Enron was entitled to be considered exempt from the electric utility ownership limitations of PURPA due to the pendency of its application with the SEC.

14. Brazos argued that there were genuine issues of material fact which precluded summary disposition. Brazos contended that Enron's interests in the facility were not what they appeared to be, and may not have terminated. Brazos further contended that it should have been allowed to conduct more discovery in the proceeding. Finally, Brazos challenged whether Enron's application to the SEC for exemption from PUHCA was made in "good faith."

15. The judge found that Brazos had raised only allegations, not issues of material fact. The judge also determined that the issue of the "good faith" of Enron's application for exemption from PUHCA was one for the SEC to decide. The judge continued that the appropriate forum for Brazos to have challenged the "good faith" of Enron's application for exemption was the SEC and that Brazos arguments concerning "good faith" before this Commission constitute a collateral attack on the SEC's action.

Exceptions to the Initial Decision

16. On exceptions to the Initial Decision, Brazos argues that: (1) there were genuine issues of material fact; (2) the Commission should have determined whether Enron's application to the SEC was made in "good faith" and (3) Brazos had insufficient opportunity to conduct discovery.

17. Briefs opposing exceptions were filed by Trial Staff, by Ponderosa, and jointly by Enron and ENA. Brazos filed a reply to the briefs opposing exceptions. Joint movants filed a motion to strike Brazos' reply.

Discussion

18. Rule 711 of the Commission's Rules of Practice and Procedure¹⁸ provides for briefs on exceptions and briefs opposing exceptions. Rule 711(a)(3) provides that "[n]o additional briefs are permitted, unless specifically ordered by the Commission." The Commission did not specifically order additional briefs. We accordingly reject all pleadings filed after the Initial Decision other than the briefs on and opposing exceptions.

19. The Commission finds, having reviewed the Initial Decision, the record, and the parties' briefs, that all of the issues raised by the parties were properly resolved by the Initial Decision. In the Initial Decision the judge found that, if Enron had a PUHCA exemption, Ponderosa satisfied the ownership requirements for QF status. And Enron had a PUHCA exemption until December 29, 2003, when the SEC denied its application for exemption, because, until then, there was a "good faith" application pending before the SEC. As the judge correctly found, the SEC is the proper agency to determine whether applications filed with it were made in "good faith." In the absence of a finding by the SEC that Enron's application was not made in "good faith," we cannot conclude otherwise. We therefore will deny the exceptions and summarily affirm and adopt the Initial Decision as our own decision.

The Commission orders:

The Initial Decision in these proceedings is hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas
Secretary

¹⁸ 18 C.F.R. § 385.711 (2004).