

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory  
Commission**

**18 CFR Part 292**

**[Docket No. RM79-54; Order No. 70-D]**

**Order Amending Regulations**

Issued: January 28, 1981.

**AGENCY:** Federal Energy Regulatory  
Commission.

**ACTION:** Order Amending Regulations.

**SUMMARY:** The Federal Energy  
Regulatory Commission (Commission)  
hereby adopts an order amending  
regulations. The Order amends § 292.206  
of the Commission's rules which  
establishes the ownership criteria for  
qualifying facilities. The Order enables  
certain "electric utilities" which are not  
"primarily engaged in the generation or  
sale of electric energy" to own up to 100  
percent of a qualifying facility.

**EFFECTIVE DATE:** January 28, 1981.

**FOR FURTHER INFORMATION CONTACT:**

Glenn Berger, Office of the General  
Counsel, Federal Energy Regulatory  
Commission, 825 North Capitol  
Street, NE., Washington, D.C. 20426  
(202) 357-8033

or

Michael Kessler, Office of the General  
Counsel, Federal Energy Regulatory  
Commission, 825 North Capitol  
Street, NE., Washington, D.C. 20426  
(202) 357-8033

The Federal Energy Regulatory  
Commission (Commission) has the  
authority to certify small power  
production and cogeneration facilities as  
qualifying facilities, pursuant to  
§ 292.207 of the Commission's rules.  
Qualifying status exempts qualifying  
facilities from regulation under certain  
provisions of the Federal Power Act  
(FPA),<sup>1</sup> from regulation under the Public

<sup>1</sup> 18 C.F.R. § 292.601.

Utility Holding Company Act of 1935 (PUHCA)<sup>3</sup> and from certain state law and regulation<sup>4</sup> and allows such facilities to obtain the "avoided cost" rate for power purchased by an electric utility.

Recent applications to the Commission by persons seeking qualifying status have raised the issue of whether the 50 percent ownership restriction for electric utilities other than those generating power solely from cogeneration or small power production, established in § 292.206(b) of the Commission's rules, is consistent with the general rules of ownership established in section 201 of the Public Utility Regulatory Policies Act (PURPA) and § 292.206(a) of the Commission's rules.

Section 3(22) of the FPA, as amended by section 201 of PURPA, broadly defines an "electric utility" as "any person or State which sells electric energy". Section 3(17)(C)(ii) of the FPA, as amended by section 201 of PURPA, requires that a qualifying facility 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)" (emphasis added). This requirement is implemented in § 292.206(a) of the Commission's rules. Section 292.206(b) of the Commission's rules, provides, *inter alia*, that a facility of which an electric utility or utilities, or an electric utility holding company or companies, or any combination thereof, owns more than 50 percent of the equity interest cannot obtain qualifying status.

Thus, a cogeneration or small power production facility of which an electric utility or utilities, or an electric utility holding company or companies, or any combination thereof, owns more than 50 percent of the equity interest, can be a qualifying facility only if all of the power generated and sold by the parent utility or holding company is generated from cogeneration or small power production facilities.

Section 292.206(b) of the Commission's rules also provides that:

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.

In determining whether a facility is owned by an electric utility or an

electric utility holding company, the Commission looks "upstream" to the parent company of a subsidiary which owns a cogeneration or small power production facility

The Commission has recognized that the ownership restrictions for qualifying facilities in the original rule were overly strict in certain respects. In particular, in Order Nos. 70-B<sup>4</sup> and 70-C,<sup>5</sup> the Commission recognized 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 Commission is aware of two cases in which a company would presently be defined as an "electric utility" under the FPA but should not be considered to be "primarily engaged in the generation or sale of electric power" for purposes of ownership of a qualifying facility.

The Commission will permit otherwise eligible cogeneration and small power production facilities owned by these types of companies to be qualifying facilities. However, the FPA requires that the Commission regulate any wholesale sales of power in interstate commerce where the power is generated from sources other than cogeneration or small power production facilities.<sup>6</sup> Only if a company can show that all of its wholesale power sales are from cogeneration or small power production facilities will such sales be exempt from regulation under the FPA.

#### CASE 1A—Exempt Electric Utility Holding Company

The first type of case involves a parent and subsidiary company

<sup>4</sup>45 FR 52779 (Aug. 6, 1980).

<sup>5</sup>45 FR 66787 (Oct. 8, 1980).

In that order, the Commission amended its regulations to exclude from the definition of "electric utility holding company" any such company which is exempt by rule or order of the SEC pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935.

The Commission reasoned that: a determination by the SEC that an electric utility holding company is exempt as such under either section 3(a)(3) or 3(a)(5) of PUHCA satisfies the requirement that a qualifying facility may not be owned by a person primarily engaged in the generation or sale of electric power.

<sup>6</sup>The State authorities may still regulate any retail sales made by a company, regardless of the company's ability to own qualifying facilities, and regardless of whether the sales are made from qualifying facilities.

ownership situation. In this case, the company which owns a small power production facility or cogeneration facility is also a subsidiary of an exempt electric utility holding company.

In Order No. 70-C<sup>7</sup> the Commission determined that electric utility holding companies that are exempt as such pursuant to either section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act (PUHCA) will not be subject to the 50 percent ownership restriction.<sup>8</sup> Thus, a cogeneration or small power production facility which is directly owned by an exempt electric utility holding company can be a qualifying facility.

The Commission believes that it would be inconsistent not to allow a subsidiary electric utility to do directly what its exempt-parent company can do indirectly. Thus, a subsidiary of a PUHCA section 3(a)(3) or 3(a)(5) exempt electric utility holding company will be allowed to own 100 percent of a qualifying facility whether or not the subsidiary is "primarily engaged in the generation or sale of electric power."

#### CASE 1B—Registered Electric Utility Holding Company

Under the rule stated above, if the parent company is an exempt electric utility holding company, any subsidiary of such a company may own 100 percent of a facility without disqualification. In the case of a parent company which is a registered electric utility holding company, § 292.206(b) of the Commission's rules prohibits a facility, of which the parent owns more than 50 percent, from obtaining qualifying status. For the purpose of determining the ownership of a facility, § 292.206(b) of the Commission's rules requires that the Commission look upstream to a parent electric utility or electric utility holding company. Thus, a facility, of which a subsidiary of a registered electric utility holding company owns more than 50 percent, cannot obtain qualifying status.

#### CASE 2—Exempt Electric Utility

The second case is, similarly, a two-level ownership situation. In this case, however, the subsidiary is an "electric

<sup>7</sup>45 FR 66787 (Oct. 8, 1980).

<sup>8</sup>Under § 292.202(n) of the Commission's rules, such companies are not considered to be "electric utility holding companies."

<sup>3</sup>*Id.* § 292.602(b).

<sup>4</sup>*Id.* § 292.602(c).

utility" pursuant to section 3(22) of the FPA but has been declared by the SEC *not* to be an "electric utility" pursuant to section 2(a)(3)(A) of PUHCA.

Section 2(a)(3) of PUHCA defines an electric utility company as "any company which owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale." \* This section of PUHCA also provides that the SEC:

shall by order declare a company operating any such facilities not to be an electric utility company if the Commission finds that (A) such company is primarily engaged in one or more businesses other than the business of an electric utility company, and by reason of the small amount of electric energy sold by such company it is not necessary in the public interest or for the protection of investors or consumers that such company be considered an electric utility company.<sup>10</sup>

The SEC may order such exclusion either by rule (where the company falls below certain *de minimus* standards) or on a case-by-case basis.

In this case, the Commission believes that a facility owned 100 percent by such a subsidiary should be allowed to obtain qualifying status. The statutory standard for exclusion of the subsidiary company from the definition of "electric utility" under PUHCA is identical to the ownership requirements expressed in sections 17(C)(ii) and 18(B)(ii) of the FPA. Both statutes require that the company *not* be primarily engaged in the generation or sale of electric power.

Thus, exclusion under section 2(a)(3)(A) of PUHCA means that a subsidiary company within a holding company system is not an "electric utility" for purposes of the ownership restriction established in § 292.206(b) of the Commission's rules. Therefore, a facility owned 100 percent by such a subsidiary company may obtain qualifying status.

The Commission notes that on May 19, 1980, Elizabethtown Gas Company filed a Petition for Review of Order No. 70 and of the Commission's Order on Rehearing of Order 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, the Court has exclusive jurisdiction to modify those orders. Accordingly, this order is issued subject to the courts permission.

The Commission notes that several applications for certification as a qualifying small power production

facility or cogeneration facility are pending before the Commission. As a result of the amendments to the rules in this Order, the pending applications may obtain qualifying status. The Commission believes it is in the public interest to issue the certification of qualifying status as soon as possible so the applicants may begin to produce power which will help the nation reduce its dependence on imported oil. For this reason, the Commission finds good cause to waive the 30 day requirement set forth in 5 U.S.C. § 553(d) and to make this rule effective on January 28, 1981.

#### The Commission Orders

Section 292.206 is amended as set forth below effective January 28, 1981, for the reasons set forth below.

(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 January 28, 1981.

By the Commission.

Kenneth F. Plumb,  
Secretary.

Section 292.206 is amended by adding a new paragraph (c) to read as follows:

#### § 292.206 Ownership criteria.

\* \* \* \* \*

(c) *Exceptions.* For purposes of this section a company shall not be considered to be an "electric utility" company if it:

(1) Is a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3), 79c(a)(5); or

(2) Is declared not to be an electric utility company by rule or order of the Securities and Exchange Commission pursuant to section 2(a)(3)(A) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3)(A).

[FR Doc. 81-4337 Filed 2-5-81; 8:45 am]

BILLING CODE 6450-85-M

\* 15 U.S.C. § 79b(3).

<sup>10</sup> *Id.*