

103 FERC ¶ 61,122
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Investigation of Certain Enron-Affiliated QFs Docket Nos. EL03-117-000

Cogen Technologies Linden Venture, L.P.	QF90-65-008
Camden Cogen L.P.	QF90-87-008
Cogen Technologies NJ Venture	QF86-972-006

Investigation of Certain Enron-Affiliated QFs Docket Nos. EL03-47-000

Saguaro Power Company	QF90-203-004
Las Vegas Cogeneration Limited Partnership	QF89-251-008

ORDER INITIATING INVESTIGATION, ESTABLISHING HEARING
PROCEDURES, AND CONSOLIDATING DOCKETS

(Issued May 2, 2003)

1. In this order we initiate an investigation into Enron Corporation (Enron) and its ownership of three cogeneration facilities.¹ Each of the facilities was or is affiliated with Enron. Each submitted an application for certification as a Qualifying Facility (QF) under the Public Utility Regulatory Policies Act of 1978 (PURPA) and has since then self-recertified as a QF. Each later self-recertified as a QF. It has come to the attention of the Commission that Enron appears to have improperly retained QF benefits for these facilities, following Enron's merger with Portland General Corporation (Portland General). The Commission has previously set for hearing the QF status of other Enron

¹The three facilities are: Cogen Technologies Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture.

generating facilities.² Moreover, the Commission also has been reviewing its QF files to determine whether other facilities, claiming QF status, do not meet the criteria for QF status. In this order, we are setting for hearing the issue of whether these three cogeneration facilities, in fact, satisfied the statutory and regulatory requirements for QF status, and are consolidating this proceeding with the ongoing proceeding in Docket No. EL03-47-000, et al.

2. In addition, as part of this investigation, we are setting for hearing whether any other Enron-affiliated QFs have violated the ownership criteria for QF status following Enron's merger with Portland General. In this regard, we will require Enron to file with the Commission and to provide Commission Trial Staff and the parties in these consolidated proceedings a list of all QFs in which it, or any affiliate, has held any ownership interest following its merger with Portland General.

3. This order benefits customers by assuring that generating facilities disclose all relevant information in seeking the benefits of QF status before the Commission.

Background

Statutory and Regulatory Background

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

5. As directed by Congress in Section 210(a) of PURPA, 16 U.S.C. § 824a-3(a) (2000), 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

²Investigation of Certain Enron-Affiliated QFs, 102 FERC ¶ 61,199 (2002); Investigation of Certain Enron-Affiliated QFs, 101 FERC ¶ 61,076 (2002); Southern California Edison Company v. Enron Generating Facilities, et al., 101 FERC ¶ 61,313 (2002) (SoCal Edison).

QFs. The Commission further required that electric utilities purchase electric energy from QFs and that they do so at "avoided cost" rates. 18 C.F.R. §§ 292.303-292.304 (2002). The Commission also removed certain state and federal regulation that QFs would otherwise be subject to, by granting QFs exemptions from most such regulation. 18 C.F.R. §§ 292.601-292.602 (2002).

6. In Subpart B of the Commission's PURPA regulations, the Commission set forth criteria and procedures for becoming a QF. 18 C.F.R. §§ 292.201-292.211 (2002).

7. One of the criteria for being a QF relates to ownership of the QF. 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), 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.

18 C.F.R. §§ 292.206 (a) and (b) (2002).³

³The Commission has also provided for exemptions from the ownership criteria for QF status. Under 18 C.F.R. § 292.206(c) (1) and (2) (2002), a company is not

(continued...)

8. The Commission has summarized how it applies Sections (a) and (b) of its ownership requirements for QF status thus:

The Commission's regulation thus equates "ownership interest" with "equity interest," but does not define the term "equity interest." This definitional issue has been most problematic in cases involving partnerships as opposed to corporations. This is because the stated percentage of partnership interests in partnership agreements does not always correspond with specific provisions in the partnership agreements concerning control of and/or division of benefits from the partnership

³(...continued)

considered an "electric utility" for ownership purposes if it is a subsidiary of an electric utility holding company exempt from PUHCA by a rule or order issued by the Securities and Exchange Commission (SEC) under Sections 3(a)(3) or (5) of PUHCA, 15 U.S.C. §§ 79c(a)(3) or (5), or has been declared not to be an "electric utility" by rule or order of the SEC pursuant to Section 2(a)(3)(A) of PUHCA, 15 U.S.C. § 79b(a)(3)(A).

The Commission, citing Section 3(c) of PUHCA, 15 U.S.C. § 79c(c), which 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]

has applied its exemption on ownership criteria so 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. See *Doswell Limited Partnership and Diamond Energy, Inc.*, 56 FERC ¶ 61,170 at 61,590 (1991) (Doswell).

On April 12, 2000 Enron filed an application with the SEC requesting an order finding that Enron is exempt from all provisions of PUHCA excepting one. On February 6, 2003, an SEC administrative law judge issued an Initial Decision denying Enron's application for an exemption pursuant to Sections 3(a)(1), 3(a)(3) and Section 3(a)(5). The SEC administrative law judge did not rule on whether the filing had been made in good faith, however. See Initial Decision Release No. 222, Administrative Proceeding File No. 3-10909, review pending.

assets. The Commission has therefore looked to the entitlement to profits, losses, and surplus after return of initial capital contribution, as well as the share of control of the venture, to help it in determining whether the division of equity interests in a partnership complies with the statutory and regulatory ownership requirements for QF status.^[4]

9. The Commission's regulations provide that a facility that meets the criteria for QF status is a QF. See 18 C.F.R. § 292.207(a)(1)(I) (2002).

10. The owner of a facility seeking QF status may either "self-certify" (under Section 292.207(a)(1)(ii) of the Commission's regulations) or seek Commission certification (under Section 292.207(b) of the Commission's regulations). In either case a facility must meet both the ownership criteria for QF status, and technical criteria for QF status. 18 C.F.R. §§ 292.203(a), (b) (2002). The ownership criteria for QF status, which are the criteria relevant here, are found in Sections 3(17) and 3(18) of the Federal Power Act and Section 292.206 of the Commission's regulations, and are quoted above.

11. When a notice of self-certification is filed by an owner of a facility with the Commission, the notice is not published in the Federal Register, see 18 C.F.R. § 292.207(a)(1)(iv) (2002), and the Commission takes no formal action; that is, the Commission does not issue an order granting or denying QF status. A notice of self-certification is simply a notice by the owner of the facility that it believes that it satisfies the requirements for QF status. If a purchasing utility or someone else wishes to challenge a self-certified facility's QF status, it may do so in the context of a petition for declaratory order.

12. Self-certification was the encouraged means of obtaining QF status when the Commission's QF regulations were initially promulgated. Commission certification was, and still is, labeled the "optional procedure." See 18 C.F.R. § 292.207(b) (2002). The Commission encouraged self-certification in the belief that QFs and purchasing utilities needed to talk to arrange interconnection to accomplish sales and could resolve all issues at that time.

13. It has come to the Commission's attention that some facilities may have, at times, used the self-certification procedures to avoid a thorough examination of whether a

⁴Indeck North American Power Fund, L.P., 85 FERC ¶ 61,239 at 62,001-02 (1998)(footnote omitted), order noting withdrawal of reh'g and denying motion to vacate, 86 FERC ¶ 61,123 (1999).

facility satisfies the criteria for QF status.⁵ (Commission Staff has therefore been reviewing its QF files. Among other things, Staff is looking to determine whether notices of self-certification describe a facility that meets QF criteria.)

Certification and Recertification of the Enron-affiliated Facilities

14. In prior orders initiating investigations into Enron-affiliated facilities, we have set for hearing allegations that: (1) Enron used various partnerships to conceal Enron's control of, and/or more than a 50% ownership interest in, certain facilities claiming QF status in a period following its merger with Portland General;⁶ and (2) Enron retained control of, and/or more than a 50% ownership interest in, certain QFs, while improperly claiming it complied with the ownership criteria for QF status based on its having made filings with the SEC for exemptions from Sections 3(a)(3) and 3(a)(5) of PUHCA.⁷

15. On February 4, 1999, notices of self-recertification were filed by Cogen Technologies Linden, L.P. (in Docket No. QF90-65-003), Camden Cogen, L.P. (in Docket No. QF90-87-004) and in Cogen Technologies NJ Venture (Docket No. QF86-972-003). Each of the facilities filed additional notices of self-recertification again on January 14, 2000 and April 11, 2001. The February 4, 1999 notices as well as the January 14, 2000 notices describe ownership structures under which Enron affiliates appear to have more than 50% ownership interests in and/or control of the facilities claiming QF status. The notices of self-recertification also do not explicitly explain the basis on which the claims that the facilities meet the ownership criteria for QF status are based.

Discussion

16. As described above, it appears that Enron affiliates may own and/or control or may have owned and/or may have controlled Cogen Technologies Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture. If true, notwithstanding the representations made in their notices for self-recertification as QFs, Cogen Technologies

⁵See supra note 1.

⁶Investigation of Certain Enron-Affiliated QFs, 101 FERC ¶ 61,076 (2002).

⁷SoCal Edison, 101 FERC ¶ 61,313 (2002) (the reliance on the PUHCA exemption filings as a basis for satisfying the ownership criteria for QF status was alleged to be improper because the PUHCA exemption filings were not made "in good faith").

Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture may not have been QFs. We, therefore, will institute a proceeding, pursuant to 18 C.F.R. § 292.207(d)(1) (2002), to determine whether Cogen Technologies Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture fail to meet and/or failed to meet the QF ownership criteria as a result of their associations with Enron, its affiliates, and their employees.

17. With this order, the Commission is setting for hearing, for the fourth time, whether Enron-affiliated QFs have claimed QF status for facilities that do not satisfy the ownership criteria for QF status because of the ownership interests of Enron affiliates in those facilities. As a result, we believe that it is necessary to review all ownership interests by Enron or Enron affiliates in any facility claiming QF status to assure that those facilities satisfy the Commission's ownership criteria for QF status. We will therefore order Enron to file in these proceedings and to serve on Commission Trial Staff and all parties in these proceedings, a list of all QFs in which Enron or any Enron affiliate, or their employees, holds any ownership interest and/or control over, or has held any ownership interest and/or control over at any time from the date of Enron's merger with Portland General. The list should identify the percentage of ownership of each owner and its upstream affiliates, and this information should also be reflected in corporate organizational charts. We will also set for hearing the issue of whether any facility on that list, which, following submission of that list, is claimed by Commission Trial Staff or any party to these proceedings to have failed to meet the ownership criteria for QF status, has failed to meet at any time the ownership criteria for QF status.

18. The Commission in the past has revoked some of the benefits of QF status in cases involving a failure to comply fully with the requirements for QF status. In those cases, where the failure to comply was not willful, the Commission revoked the QF's exemption from Section 205 of the FPA and determined that the QF was not entitled to charge QF avoided cost rates during the period it had failed to comply with the requirements for QF status, redetermined the applicable rates, and ordered refunds for the period of non-compliance with the requirements for QF status. See LG&E-Westmoreland Southampton, 76 FERC ¶ 61,116 (1996), order granting clarification and denying reh'g, 83 FERC ¶ 61,132 (1998); New Charleston Power I, L.P., 76 FERC ¶ 61,282 (1996), order denying reh'g and ordering settlement judge proceedings, 83 FERC ¶ 61,281, order denying reh'g in part and granting reh'g in part, 84 FERC ¶ 61,286 (1998). Those orders left open the possibility of a greater revocation of QF benefits (e.g., revocation of a QF's exemption from other sections of the Federal Power Act, see 18 C.F.R. § 292.601 (2002), and revocation of a QF's exemption from PUHCA and certain state law and regulation, see 18 C.F.R. § 292.602 (2002)), as well as a permanent revocation of QF benefits in more serious cases.

19. At this time, we are setting for hearing whether Cogen Technologies Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture (and any other facility claimed by Trial Staff or a party to have failed to satisfy the ownership criteria for QF status) have actually satisfied the Commission's ownership requirements for QF status. If following review of the Initial Decision resulting from the hearing ordered herein, we find that Cogen Technologies Linden Venture, L.P., Camden Cogen L.P., and Cogen Technologies NJ Venture (or any other facility claimed by Trial Staff or a party to have failed to satisfy the ownership criteria for QF status) have failed to conform with the Commission's ownership criteria for QF status, we will then establish the appropriate remedies.

20. We find that common questions of law and fact may be presented in Docket Nos. EL03-47-000, QF90-203-004, and QF89-251-008 and in Docket Nos. EL03-117-000, QF90-65-008, QF90-87-008 and QF86-972-006. As a result, we shall consolidate those dockets for purposes of hearing and decision.

The Commission orders:

(A) Pursuant to 18 C.F.R. § 292.207(d)(1) (2002), a public hearing, to be conducted pursuant to Subpart E of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.501 et seq. (2002), shall be held in Docket Nos. EL03-117-000, QF90-65-008, QF90-87-008 and QF86-972-006 concerning the matters discussed in the body of this order.

(B) The Secretary shall promptly publish a notice of the Commission's initiation of the proceeding in Docket Nos. EL03-117-000, QF90-65-008, QF90-87-008 and QF86-972-006 in the Federal Register; the notice shall include a time within which to seek intervention in this proceeding.

(C) The proceeding instituted in Docket Nos. EL03-117-000, QF90-65-008, QF90-87-008 and QF86-972-006 is hereby consolidated for purposes of hearing and decision with the ongoing proceeding in Docket Nos. EL03-47-000, QF90-203-004, and QF89-251-008.

(D) The presiding administrative law judge designated in Docket Nos. EL03-47-000, QF90-203-004, and QF89-251-008 shall determine the procedures best suited to accommodate consolidation of these proceedings.

Docket No. EL03-117-000, et al.

- 9 -

(E) Enron is hereby ordered to file in these proceedings a list of all facilities claiming QF status, or which ever claimed QF status, in which Enron or any Enron affiliate holds any ownership interest, or has held any ownership interest at any time from the date of Enron's merger with Portland General. The list should identify the percentage of ownership of each owner and its upstream affiliates, and this information should also be reflected in corporate organizational charts. Enron shall serve copies of this list on Commission Trial Staff as well as all parties in these consolidated proceedings.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.