115 FERC ¶61,225
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 131 and 292

(Docket No. RM05-36-001; Order No. 671-A)

Revised Regulations Governing Small Power Production and Cogeneration Facilities

(Issued May 22, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Order; Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) reaffirms its determinations and grants clarification in part of Order No. 671, which amended the Commission's regulations governing small power production and cogeneration facilities.

EFFECTIVE DATE: The final rule and order on rehearing will become effective **[insert date 30 days after publication in the FEDERAL REGISTER].**

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Revised Regulations Governing Small Power Production and Cogeneration Facilities	Docket No. RM05-36-001

ORDER NO. 671-A

ORDER ON REHEARING

(Issued May 22, 2006)

1. On February 2, 2006, the Federal Energy Regulatory Commission (Commission) issued Order No. 671,[1] in which the Commission revised its regulations governing qualifying small power production and cogeneration facilities. Specifically, the Commission, among other things, eliminated certain exemptions from rate regulation that were previously available to qualifying facilities (QFs). Several parties have requested rehearing or clarification. For the reasons discussed below, we deny the requests for rehearing and grant clarification in part.

[1] Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006).

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Introduction

2. Order No. 671 was issued in response to the Energy Policy Act of 2005 (EPAct 2005),[2] which modified in relevant part section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Specifically, Order No. 671 sought to: (1) ensure that new qualifying cogeneration facilities are using their thermal output in a productive and beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or institutional purposes; and that there is continuing progress in the development of efficient electric energy generating technology; (2) amend Form 556[3] to reflect the criteria for new qualifying cogeneration facilities; (3) eliminate ownership limitations for qualifying cogeneration and small power production facilities; and (4) amend the exemptions available to QFs from the requirements of the Federal Power Act (FPA)[4] and the Public Utility Holding Company Act of 1935 (PUHCA 1935).[5]

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[2] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[3] 18 C.F.R. 131.80.

[4] 16 U.S.C. 824 et seq.

[5] 15 U.S.C. 79; See Pub. L. No. 109-58, 1261-77, 119 Stat. 594, 972-78 (2005).

ARIPPA,[6] the National Rural Electric Cooperative Association (NRECA) and the Non-Utility QF Group have requested rehearing.

Exemption of QFs from FPA Section 205/206 Authority

Background

3. In Order No. 671, the Commission stated that in light of significant changes that have occurred in the industry since the first QF facilities were introduced and in light of changing electric markets and resulting market power issues that have arisen in recent years, it was no longer necessary or appropriate to completely exempt QFs from sections 205 and 206 of the FPA.[7] However, the Commission clarified that QFs would continue to have an exemption from sections 205 and 206 of the FPA when a sale is made pursuant to a state regulatory authority's implementation of PURPA. In addition, to avoid creating the hardship that removal of exemptions might cause for smaller QFs, the Commission provided that facilities 20 MW or smaller would remain exempt from sections 205 and 206 of the FPA.

Requests for Rehearing

4. ARIPPA argues against the imposition of rate regulation on QFs that are not owned by electric utilities. It argues that the rule change is a "bait-and-switch," in that it

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[6] ARIPPA, formerly known as the Anthracite Region Independent Power Producers Association, states that it is a not-for-profit association comprising fourteen independent power producers in Pennsylvania that generate approximately 1,346 MW of electrical power buring coal mining refuse.

[7] 16 U.S.C. 824d, 824e.

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would impose rate regulation on QF owners who had been induced to invest in and develop QFs by the exemption from the state and federal rate regulation.

5. ARIPPA points to the Commission's statement that "a complete exemption is not necessary to encourage the development" of cogeneration.[8] It emphasizes the word "development," noting that this might be a reasonable basis for a rule that newly-built QFs would not enjoy exemptions from rate regulation, but argues that the statement does not address the issue of the Commission's treatment of those who invested in such facilities in the past in reliance on the exemption from rate regulation. It argues that the Commission's statement that QF's had no reasonable expectation that the rules would not be amended is wrong. It argues that that was the inducement for developers to invest.

6. ARIPPA argues that the Commission cites to no record for its assertion that non-QF sales by QFs could potentially have a significant market effect. It argues that the Commission did not cite to a single indication that one or more non-utility QFs under common ownership and control have achieved or could achieve market power. It argues that Commission's assertion is mere speculation.

7. ARIPPA argues that the exception for QFs selling pursuant to a state avoided-cost regime is inconsistent with other parts of the existing rule. It argues that it is vague and that the uncertainty it will create will stymie future development, despite Congress' continuing charge to the Commission to continue to encourage development. It contends that it is unclear how much variance from a state avoided-cost regime is tolerable and

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[8] Id. at 6 (citing Order No. 671 at P 96).

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how much crosses the line and would cause the QF to lose its exemption from federal rate regulation. It questions whether investors will be willing to initiate development knowing that the process may be affected by such uncertainties. It also questions whether it is in the public interest for the Commission to set up what is sees as barriers and disincentives to settlement of disputes arising during contract negotiations between utilities and QFs.

8. NRECA, on the other side, argues that all power sales by QFs owned by Commission-regulated public utilities should be subject to sections 205 and 206 even if the sales were made pursuant to a state's implementation of PURPA.[9] It states that Order No. 671 continues to exempt from sections 205 and 206 any sales made pursuant to a state PURPA implementation plan, even if the QF is owned by a public utility.[10] It argues that there is no policy reason why such wholesale sales of power from QFs owned by public utilities should be exempt from Commission review under sections 205 and 206, while all other wholesale sales by such public utilities (i.e., from resources other than QFs) are subject to such review.

9. NRECA argues that all sales by QFs owned by public utilities should be subject to the Commission's rate authority, whether such sales are pursuant to an avoided cost rate or not. NRECA also states that the filing of avoided cost contracts with the Commission

[9] NRECA Request for Rehearing at 5.

[10] Id. (citing Order No. 671 at P 99).

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will enhance oversight and transparency, while not requiring filing creates a risk of market power abuse.

10. NRECA further argues that all QFs that make non-PURPA sales should be subject to sections 205 and 206, no matter how small. It states that it is sensitive to the needs of smaller QFs, but that a QF as small as 5 MW could have a substantial impact upon a small distribution cooperative. NRECA states that small QFs that believe they are too small to handle public utility regulation may continue to make sales pursuant to a state PURPA implementation plan, and continue to be exempt from section 205 and 206 (unless they are owned by a public utility). NRECA adds that, on the other hand, if small QFs want the flexibility available to utilities with market-based rates and feel that they are large enough and sophisticated enough to sell at market-based rates, they should be subject to sections 205 and 206, like any other public utility that sells power at market-based rates.

11. NRECA argues that, under Order No. 671, if a large public utility owned a 20 MW QF, it could make power sales from that QF without any Commission review. It further argues that, if the facility were not a QF, the public utility would not be able to make such a sale without the Commission's express approval. It argues that this underscores the potential for market power abuse and affiliate transaction abuse that could occur if Order No. 671 is not changed.

12. The Non-Utility QF Group argues that the Commission should increase the threshold for exemption from sections 205 and 206 of the FPA from 20 MW to 30 MW.

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First, it argues that the change would simplify Commission regulation by maintaining a consistent 30 MW threshold for all FPA exemptions as they apply to qualifying small power production facilities. Second, it argues that, in PURPA, Congress determined that 30 MW was a critical threshold for small power production facilities, and notes that Congress did not disturb that threshold in EPAct 2005. Thus, it argues, the Commission already has a ready statutory reference for a 30 MW threshold, while the 20 MW threshold is more arbitrary. Third, it argues that the total installed generation capacity for all qualifying cogeneration plants under 30 MW, combined with the total installed generation capacity of all qualifying small power production facilities under 30 MW, totals a mere 7,095.5 MW.[11] It argues that this represents less than 0.7 percent of the total installed generation capacity in the U.S. in 2004. It argues that, accordingly, exemptions for QFs less than 30 MW would not detract from the purposes of sections 205 and 206 of the FPA, and would serve both administrative efficiency and Congressional mandates to avoid utility-type regulation of entities having de minimis market presence.

Commission Determination

13. We disagree that any original “bargain” has been reneged on, or that the Commission has engaged in what ARIPPA refers to as a "bait and switch." The Commission granted very broad exemptions from the FPA (and state laws) in order to remove the disincentive of utility-type regulation from QFs. Exemptions from FPA

[11] Non-Utility QF Group Request for Rehearing at 4-5 (citing U.S. Department of Energy Annual Electric Generator Report (2004)).

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sections 205 and 206 rate regulation were necessary to encourage the development of QFs. However, at that time the Commission had no way to predict how markets would develop in the decades to follow. When the Commission first granted the exemptions from sections 205 and 206 of the FPA in 1980, there was no market for electric energy produced by non-traditional generators and thus such generators were rare. However, prompted originally by PURPA, markets for electric energy produced by non-traditional generators have developed. Now that these markets are in existence and provide a forum for sales of electric energy produced by non-traditional generators, the same level of encouragement for QFs is no longer necessary; access to these markets provides encouragement. Accordingly, it is no longer necessary to completely exempt QFs from sections 205 and 206 of the FPA in order to encourage development of QFs.

14. Moreover, given these changes to energy markets, there will be times when Commission oversight of QF sales is appropriate and necessary under section 205 and 206 of the FPA. The passage and implementation of EPAct 2005 has provided us an opportunity to now provide for such oversight.

15. We remain unpersuaded that eliminating exemptions will upset the legitimate expectations of QF owners, lenders and investors. As we stated in Order No. 671, the exemptions previously granted were always subject to revision and QFs had no justifiable expectations that, no matter the changes in circumstances, changes in the regulatory regime would not occur. In addition, the Commission has already taken significant steps to ease any adverse impact. Specifically, the Commission recognized that expectations

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reflected in current contracts should be protected, and did so by grandfathering the exemption from sections 205 and 206 of the FPA for existing contracts.[12] However, on a prospective basis, the need for oversight of QF sales is a compelling reason to subject new contracts to rate regulation under section 205 and 206 of the FPA.

16. ARIPPA's argument that Order No. 671's changes to the exemptions from sections 205 and 206 of the FPA will discourage future development of non-traditional generation is misplaced. The large number of non-QF independent generators that have developed in recent years, addressed in the many orders granting them market-based rate authority under section 205 of the FPA, indicate that the exemptions from sections 205 and 206 are not necessary to promote non-traditional generation.

17. We find unpersuasive the arguments made by NRECA that even sales made by utility-owned QFs that are subject to a state's PURPA implementation plan should nevertheless be subject to section 205 and 206 regulation. Our goal in part was and is to close the gap that had developed in the regulatory regime that allowed some QF sales to avoid any rate regulation.[13] We believe that having QF sales regulated at the state level is sufficient, and will allow us to close the regulatory gap while not dramatically or inappropriately increasing the regulatory burden on QFs.

18. Likewise, we find unpersuasive the arguments of the Non-Utility QF Group and NRECA to change the threshold for section 205/206 exemptions. The Non-Utility QF

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[12] Order No. 671 at P 97.

[13] Id. at P 95-96.

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Group argues that the threshold should be increased to 30 MW; NRECA argues that all non-PURPA sales should be regulated no matter how small the QF. In Order No. 671, we attempted to strike a balance by ensuring that QF sales are regulated by either the states or the Commission while at the same time easing the burden on the smallest facilities.[14] In the NOPR, the Commission originally suggested that the exemptions should remain in effect for QFs under 5 MW. Most commenters supported the exemption for QFs under 5 MW, while some suggested a higher figure.[15] In response to those comments, the Commission raised the threshold to 20 MW.[16] The 20 MW threshold strikes a reasonable balance by protecting the smallest facilities while ensuring that sales by larger QFs are subject to Commission oversight.[17] The arguments presented by the Non-Utility QF Group are simply not compelling enough to persuade us to raise the threshold further. In addition, we reject arguments by NRECA to make all non-PURPA sales subject to rate regulation, no matter how small the QF. We believe that an exemption from regulation is still appropriate to ease the regulatory burden for the smallest QFs.

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[14] Id. at P 98.

[15] Id. at P 87.

[16] Id. at P 98.

[17] The 20 MW threshold adopted in Order No. 671 is also consistent with the 20 MW size limit for small generating facilities found in Order No. 2006. Standardization of Small Generator Interconnection Agreements and Procedures, Order No. 2006, 70 FR 34100 (June 13, 2005), FERC Stats. & Regs. ¶ 31,180 at P 75 (2005), order on reh'g, Order No. 2006-A, 70 FR 71760 (Nov. 30, 2005), FERC Stats. & Regs. ¶ 31,196 (2005).

Self-Certification

Background

19. In Opinion No. 671, the Commission retained the option to self-certify for new cogeneration facilities. The Commission also stated that self-certifications and self-recertifications of new cogeneration facilities would now be noticed in the Federal Register, in order to enhance the visibility of self-certifications for interested parties. The Commission further stated that a facility should not be able to claim QF status without having made any filing with the Commission. Accordingly, the Commission amended its regulations to expressly require that a facility claiming QF status must file either a notice of self-certification or an application for Commission certification.[18]

Requests for Rehearing

20. NRECA argues that the Commission should not permit new cogeneration facilities to self-certify. It states that the "fundamental use" and "presumptively useful" standards are subjective and that there are no guidelines established yet on how the standard will be applied. It contends that, although the Commission has stated that these factors will require a case-by-case review, self-certification will be meaningless if the Commission accepts a new cogeneration facility's unsupported representation in a self-certification that it satisfies subjective standards. It argues that, consequently, new cogeneration

[18] Id. at P 78-83.

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facilities should at the present time be required to submit an application and obtain a Commission determination as to its QF status.[19]

21. NRECA further argues that the Commission's proposal in Order No. 671 to notice self-certifications and self-recertifications in the Federal Register is insufficient to ensure that new cogeneration facilities satisfy the new standards for QF status, given the inherently subjective and case-by-case nature of the application of such new standards. It contends that, because QFs frequently file self-certifications before they have approached an electric utility for interconnection or power sales, electric utilities would be compelled to monitor every self-certification filing in order to determine whether the QF is planning to locate in the electric utility's service territory. It further argues that, until the new standards are better developed, it will be unclear on what basis an electric utility could challenge a QF's qualifying status. It contends that only electric utilities with significant litigation resources will be in position to protect themselves from inappropriate self-certifications, and that small cooperatives will be at a disadvantage.

Commission Determination

22. We deny rehearing. We find the processes and safeguards included in Order No. 671 to be sufficient. As we noted in Order No. 671, the Commission has the authority to review a self-certification.[20] With this authority, the Commission is able to review the self-certifications of new cogeneration facilities to ensure their compliance with the new

[19] NRECA Request for Rehearing at 8.

[20] Order No. 671 at P 78.

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standards. NRECA argues that, for the first self-certifications, there will be no prior cases that provide guidelines on how to satisfy the standards. We think EPAct 2005's statutory language and the newly-adopted regulations provide a sufficient starting point, and we also expect such case law to develop quickly so that QFs and electric utilities will have further guidance on what is necessary to meet the new standards.

23. In addition, we disagree with NRECA's argument that publication of notice in the Federal Register will not help to ensure that prospective QFs comply with the new standards. Publication of such notices will enhance the visibility of self-certifications and self-recertifications for interested parties. We expect that such visibility will allow attempted self-certifications and self-recertifications of new cogeneration facilities that fail to meet the new standards set forth in Order No. 671 to be spotted quickly, and so help to ensure that such facilities satisfy the new standards in Order No. 671.

PUHCA Clarification

Background

24. In Order No. 671, the Commission stated that it interprets PURPA to permit it to exempt QFs from the Public Utility Holding Company Act of 2005 (PUHCA 2005)[21] in 18 CFR 292.602. The Commission stated that, accordingly, revised 18 CFR 292.602 would now provide that a QF shall not be considered an "electric utility company" as defined by PUHCA 2005. We also stated in Order No. 671 that, consistent with recent

[21] Pub. L. No. 109-58, 1261-77, 119 Stat. 594, 972-78 (2005).

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actions on FPA section 203,[22] QFs would be considered "electric utility companies" for purposes of section 203(a)(2) of the FPA.[23]

Requests for Rehearing

25. The Non-Utility QF Group argues that there is a tension between Order No. 671 and Order No. 669[24] in how the two orders relate to transactions involving entities that only own QFs and exempt wholesale generators (EWGs) for purposes of section 203(a)(2) of the FPA. It states that, in Order No. 669, the Commission explained that, regardless of their status under PUHCA 2005, QFs (and EWGs) will be regarded as "electric utility companies" for purposes of section 203(a)(2), which addresses the acquisition of securities by "holding companies" as defined in PUHCA 2005.[25] It notes that the Commission also stated that, while most QFs themselves remain exempt from section 203, holding companies will require Commission approval pursuant to section 203 in order to acquire an interest in a QF or an EWG.[26] Finally, it notes that the Commission in Order No. 669 stated that this would hold true even if the holding

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[22] 16 U.S.C. 824b.

[23] Order No. 671 at P 102.

[24] Transactions Subject to FPA Section 203, Order No. 669, 70 FR 58636 (Oct. 7, 2005), FERC Stats. & Regs. ¶ 31,200 (2005), order on reh'g, Order No. 669-A, 71 FR 28,422 (May 16, 2006), FERC Stats. & Regs. ¶ 31,214 (2006).

[25] See Non-Utility QF Group Request for Rehearing at 5.

[26] Id. (citing Order No. 669 at P 59-60 and 70).

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company were a holding company solely by reason of its ownership interest in QFs, EWGs and foreign utility companies (FUCOs).

26. The Non-Utility QF Group states that, while it understands why the Commission would want some review of acquisitions of large QFs by holding companies having real generation or transmission market power, it disagrees with the Commission's suggestion in Order No. 669 that holding companies otherwise exempted by Congress from PUHCA 2005, i.e., owners only of QFs, EWGs and FUCOs, should be subject to section 203 requirements. It argues that this assertion represents a potential dramatic increase in regulatory oversight over independent companies that own precisely the types of smaller, non-traditional generating plants that Congress has long sought to encourage. It argues that it is "silly" to require every 500 KW landfill gas or hydroelectric plant to be subject to section 203 just because it is being acquired by the owner of another small QF.

27. The Non-Utility QF Group argues that a better balance is provided by Order No. 671. It argues that, by exempting QFs from PUHCA 2005's definition of "electric utility company," a QF would not be an "electric utility company" under PUHCA 2005, and therefore its upstream 10 percent owners would not be "holding companies" under PUHCA 2005 – and therefore would not be "holding companies" for purposes of section 203(a)(2) of the FPA.[27]

[27] Id. at 6 (citing Order No. 671 at P 92-94).

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Commission Determination

28. The Non-Utility QF Group is correct that there was an inconsistency in the treatment of QFs with regards to their status under PUHCA 2005. However, the Commission has corrected this inconsistency in its order on rehearing of Order No. 667,[28] the final rule which amended the Commission's regulations to implement the repeal of PUHCA 1935 and the enactment of PUHCA 2005. In that order on rehearing, the Commission clarified that QFs will not be excluded from the definition of "electric utility company" but added that the Commission intends nevertheless to exempt QFs from PUHCA 2005 and most FPA requirements pursuant to the Commission's PURPA authority to grant such exemptions.[29] Accordingly, we will on rehearing here revise 18 CFR 292.602 to remove the statement that a QF is not an "electric utility company" within the meaning of PUHCA 2005, and to provide an exemption from PUHCA 2005. As to FPA section 203, the definition of "electric utility company" in that context was addressed in Order No. 669-A.[30]

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[28] Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005, Order No. 667, 70 FR 75,592 (Dec. 20, 2005), FERC Stats. & Regs. ¶ 31,197 (2005), order on reh'g, Order No. 667-A, 71 FR 28,446 (May 16, 2006), FERC Stats. & Regs. ¶ 31,213 (2006).

[29] See Order No. 667 at P 14 n.31.

[30] Order No. 669-A at P 41-54.

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The Commission orders:

Rehearing is hereby denied and clarification is hereby granted in part, as discussed in the body of this order.

List of Subjects

18 CFR Part 292

Electric Power Plants

Electric utilities

Natural gas

Reporting and record Keeping requirements

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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In consideration of the foregoing, under the authority of EPAct 2005, the Commission is amending Part 292 in Chapter I of Title 18 of the Code of Federal Regulations, as set forth below:

1. In § 292.602, paragraph (b) is revised to read as follows.

§ 292.602 Exemption of qualifying facilities from the Public Utility Holding Company Act of 2005 and certain State law and regulation.

* * * * *

(b) Exemption from the Public Utility Holding Company Act of 2005. A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall be exempt from the Public Utility Holding Company Act of 2005, 42 U.S.C. 16,451-63.

* * * * *