

18 CFR Part 292

[Docket No. RM79-54]

Order Granting Rehearing of Order No. 70-B and Amending Regulations

Issued: September 26, 1980.

AGENCY: Federal Energy Regulatory Commission.**ACTION:** Order granting rehearing of Order No. 70-B and amending regulations.

SUMMARY: The Federal Energy Regulatory Commission hereby adopts an Order Granting Rehearing of Order No. 70-B. The Order amends § 292.202(n) of the Commission's rules involving small power production and cogeneration facilities. The amendment allows electric utility holding companies which have obtained an exemption from the Securities and Exchange Commission, pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act, to own 100 percent of the equity of a qualifying facility.

EFFECTIVE DATE: September 26, 1980.

FOR FURTHER INFORMATION CONTACT: Adam Wenner, Office of General Counsel, 202-357-8033 or Glenn Berger, Office of General Counsel, 202-357-8364, or Michael Kessler, Office of General Counsel, 202-357-5227.

On August 28, 1980, STEAG Aktiengesellschaft (STEAG) applied for rehearing of Order No. 70-B, issued by the Federal Energy Regulatory Commission (Commission) on August 4, 1980.¹ On September 3, 1980, the American Paper Institute, Inc. (API) also applied for rehearing of Order No. 70-B. In Order No. 70-B, the Commission amended its rules to permit gas utility holding companies to own qualifying facilities. That change was 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 by adding a definition of "electric utility holding company" to § 292.202.²

In Order No. 70-B the Commission also recognized that, as a result of the above changes, certain companies which are not "primarily engaged in the generation or sale of the electric power" may nevertheless be classified as "electric utilities" or "electric utility holding companies." Such companies

could not own more than 50 percent of the equity of a qualifying cogeneration or small power production facility.³ The Commission specifically recognized that:

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 [SEC] pursuant to sections 3(a)(3), 3(a)(4), and 3(a)(5) of the Public Utility Holding Company Act of 1935.⁴

Both STEAG and API contend that the definition of "electric utility holding company" added by Order No. 70-B is too restrictive and will exclude certain potential cogenerators and small power producers from obtaining qualifying status, contrary to the intent of Congress as expressed in section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Both companies point out that the general rule contained in § 292.206(a) of the Commission's rules which paraphrases sections 3(17)(C)(ii) and 3(18)(B)(ii) of the Federal Power Act (FPA), is that a qualifying 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)." They contend that companies which have obtained exemption from regulation as electric utility holding companies by the SEC on the grounds that they are not primarily engaged in the generation or sale of electric power should be similarly exempted from the definition of "electric utility holding company" found in § 292.202(n) of the Commission's rules.

Section 3(a)(3) of PUHCA

API suggests that the Commission allow facilities owned by persons exempt from the requirements of the Public Utility Holding Company Act (PUHCA) by reason of an exemption granted under section 3(a)(3) of that Act to obtain qualifying status. Section 3(a)(3) of PUHCA permits the SEC to grant an exemption to a holding company which is "only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public utility company."⁵ Since the standards under section 3(a)(3) of

PUHCA and sections 3(17)(C) and 3(18)(B) of the Federal Power Act are virtually identical, API asserts that exemption under the former clearly satisfies the standard set forth in the latter.

Section 3(a)(3) of PUHCA allows the SEC to exempt any holding company from the provisions of that Act if:

... such holding company is only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public utility company and (A) not deriving, directly or indirectly, any material part of its income from any one or more subsidiary companies, the principal business of which is that of a public-utility company, or (B) deriving a material part of its income from one or more such subsidiary companies, if substantially all the outstanding securities of such companies are owned, directly or indirectly, by such holding company.⁶

The SEC grants holding companies an exemption under section 3(a)(3) on a case-by-case basis. Although the SEC has the authority to do so, it has not adopted a generic rule regarding this exemption. The statute, however, sets out two basic standards for granting such an exemption. These are: (a) whether the company is only incidentally a holding company, and (b) whether the company is primarily engaged in a business other than that of a public utility.⁷

Under the "incidental ownership" standard, the SEC determines whether the utility operations of the subsidiary company are functionally related to the parent company seeking exemption. An example of this type of ownership is the case where a parent company purchases power for industrial purposes from a utility subsidiary, with only surplus power being sold to others.

Under the "primarily engaged" standard, the SEC examines both the absolute amount of utility assets owned by the parent company, and also compares utility with non-utility gross revenues and assets. Although there is no fixed standard, if, for example, more than 50 percent of a company's revenues were derived from utility revenues, it is unlikely that it would qualify for an exemption. An electric utility holding company must satisfy both of these standards in order to qualify for exemption.

The present definition of an "electric utility holding company" is so broad that many industries which are classified as exempt holding companies may be discouraged from investment in cogeneration or small power production

¹ 45 FR 52779 (August 6, 1980).² *Id.*³ See § 292.206 of the Commission's rules regarding ownership criteria of cogeneration or small power production facilities.⁴ Order No. 70-B, 45 FR at 52779 (August 8, 1980).⁵ 15 U.S.C. § 79c(a)(3).⁶ 15 U.S.C. § 79c(a)(3).⁷ *Id.*

facilities. The exempt status of such a holding company is not affected by the fact that a facility owned by a subsidiary of the holding company is a qualifying facility. However, if a facility owned by the subsidiary company is not a qualifying facility, the subsidiary company could be subjected to regulation as a "public utility" under Part II of the Federal Power Act, and to State regulation of rates and financial organization. In this case the rates the subsidiary would receive for wholesale sales could be determined not on the basis of avoided costs, but rather under traditional "cost-of-service" utility regulation. This would likely result in less investment in cogeneration and small power production by exempt holding companies.

The Commission believes that a finding by the SEC that a holding company is exempt under section 3(a)(3) satisfies the standard in the Federal Power Act that an owner of a qualifying facility is "not primarily engaged in the generation or sale of electric power." The Commission believes that "incidental" holding companies are, by definition, primarily non-utility companies which, for purposes of this program, should not be treated differently from industries which are not classified as holding companies under the PUHCA.

In the preamble to Order No. 69, the Commission stated that "these rules are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities." * The Commission believes that review by the State regulatory authority of the prudence of a purchase is especially appropriate when a qualifying facility owned by a subsidiary of an exempt public utility holding company provides power directly or indirectly to an electric utility which is part of the same holding company system.

Moreover, the State regulatory authorities may establish rate for purchases from existing qualifying facilities at less than avoided cost on a finding that the rate "is sufficient to encourage cogeneration or small power production." * Under this provision, a rate for purchases from existing facilities which obtain qualifying status could be maintained at existing levels, if the State makes the requisite finding.

Section 3(a)(5) of PUHCA

STEAG contends that the limitation on ownership of qualifying facilities established in the Commission's rules is inapplicable to holding companies which are exempt from SEC regulation under section 3(a)(5) of PUHCA. Section 3(a)(5) of PUHCA allows the SEC to exempt a holding company from regulation if it "is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company." ¹⁰ Included in the category of companies that may obtain an exemption under section 3(a)(5) of PUHCA are domestic, as well as foreign holding companies which derive no material part of their income from subsidiary companies, the principal business of which, within the United States, is that of an electric utility.

Based on the legislative history of the ownership criteria established in PURPA section 201, STEAG suggests that Congress was seeking "to preserve the authority of regulatory agencies within the United States over persons with monopoly franchises primarily engaged in the generation or sale of electric power subject to their jurisdiction." ¹¹ The ownership restrictions on qualifying facilities for both electric utilities and their parent holding companies are based on a concern that such companies would divert scarce capital resources or convert existing jurisdictional facilities into unregulated qualifying facilities. ¹²

This policy, STEAG contends, has no applicability to foreign holding companies "since they would not be diverting funds or facilities from regulated to unregulated electric utility activities within the United States." ¹³ STEAG contends that exclusion of electric utility holding companies which have obtained a PUHCA section 3(a)(5) exemption is contrary to the Congressional intent.

STEAG points out that "unless the intention to have a statute apply to actions occurring beyond the limits of the United States is clearly expressed or indicated by its language, purpose, subject matter or history, the presumption is that the statute is

intended to have no extraterritorial effect, but to apply only to activities occurring within the territorial jurisdiction of the United States or involving United States citizens." ¹⁴ This principle applies "to a statute using general words, such as 'any' or 'all' in describing the persons or acts to which the statute applies." ¹⁵ STEAG also contends that the use of the general words "any" and "a" in the PURPA definitions of "electric utility" and qualifying cogeneration and small power production facilities should not be construed to include the generation or sale of electric power which occurs outside the territorial jurisdiction of the United States.

The Commission believes that domestic and foreign holding companies which are exempt under section 3(a)(5) of PUHCA are not "primarily engaged in the generation or sale of electric power" in the United States for the purpose of obtaining qualifying status. So long as these Companies meet the requirements of section 3(a)(5) of PUHCA they should be permitted to own qualifying cogeneration and small power production facilities.

The Commission believes 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. Thus, the Commission believes it is appropriate to allow ownership of qualifying facilities by electric utility holding companies which have obtained an exemption as such pursuant to sections 3(a)(3) or 3(a)(5) of PUHCA.

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, that court has exclusive jurisdiction to modify those orders. Accordingly, this order is issued subject to the court's permission.

The Commission orders:

(A) The applications for rehearing of Order No. 70-B filed by STEAG Aktiengesellschaft on August 4, 1980, and the American Paper Institute, Inc., on September 3, 1980, are granted with

¹⁰ 15 U.S.C. § 79c(a)(5).

¹¹ Application for Rehearing at 8.

¹² See Hearings on H.R. 6831, *et al.* Before the Subcomm. on Energy & Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 1st Sess. 1745-47 (1977) (answer of the Federal Power Commission).

¹³ Application for Rehearing at 4.

¹⁴ 73 Am. Jur. 2d Statutes § 359.

¹⁵ *Id.*

* 45 FR 12233 (February 25, 1980).

* Order No. 69, Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, § 292.304(b)(3).

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respect to § 292.206 of the Commission's rules.

(B) Section 292.202(n) is amended as set forth below effective September 28, 1980.

(Public Utility Regulatory Policies Act of 1978, 18 U.S.C. § 2601 *et seq.*; Federal Power Act, as amended, 18 U.S.C. § 292 *et seq.*; Department of Energy Organization Act, 42 U.S.C. 3 C.F.R. 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 September 28, 1980.

By the Commission.

Lois D. Cashell,
Acting Secretary.

1. Section 292.202(n) is amended 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 utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C. § 79b(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79c(a)(3) or § 79c(a)(5).

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