

18 CFR Part 292

[Docket No. RM81-2; Order No. 135]

Eligibility, Rates, and Exemptions for Qualifying and Utility-Owned Geothermal Small Power Production Facilities

Issued: March 23, 1981.

AGENCY: Federal Energy Regulatory Commission.**ACTION:** Final rule.

SUMMARY: The Federal Energy Regulatory Commission hereby adopts a final rulemaking regarding eligibility, rates, and exemptions for qualifying and utility-owned geothermal small power production facilities. The Order implements the Energy Security Act amendments to the Federal Power Act and the Public Utility Regulatory Policies Act of 1978 concerning geothermal small power production facilities by amending Part 292 of the Commission's rules. Except with respect to the Public Utility Holding Company Act, this rulemaking implements the Energy Security Act amendments, only as they relate to geothermal small power production facilities of which a utility own less than 50 percent.

EFFECTIVE DATE: May 1, 1981.

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SUPPLEMENTARY INFORMATION:

In the matter of small power production and cogeneration facilities—eligibility, rates, and exemptions for qualifying and utility-owned geothermal small power production facilities.

On November 6, 1980, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR)¹ which proposed rules to implement section 643 of the Energy Security Act of 1980 (ESA).² The ESA amended the Federal Power Act (FPA) and the Public Utility Regulatory Policies Act of 1978 (PURPA) by adding provisions relating to geothermal small power production. Except with respect to the Public Utility Holding Company Act (PUHCA) (15 U.S.C. 79), this rulemaking implements the ESA amendments only as they relate to geothermal small power production facilities of which a utility owns less than 50 percent. The ESA amendments

relating to utility-owned geothermal small power production facilities will be the subject of a subsequent rulemaking.

I. Background

Section 201 of PURPA authorizes the Commission to prescribe rules under which small power production facilities and cogeneration facilities can obtain "qualifying" status and thus become eligible for the rates and exemptions set forth in the Commission's rules implementing sections 201 and 210 of PURPA.³ Section 643(a) of the ESA is intended to clarify the authority of the Commission to classify geothermal resources as a "primary energy source" for the purpose of eligibility as a qualifying small power production facility under section 3(17)(A) of the FPA, as amended by section 201 of PURPA.⁴

Section 643(b) of ESA contains three amendments to section 210 of PURPA. Subsection 643(b)(1) amends section 210(a) of PURPA. Section 210(a) requires the Commission to prescribe rules necessary to encourage cogeneration and small power production. The ESA amendment to this section requires the Commission to prescribe rules to encourage "geothermal small power production facilities of not more than 80 megawatts capacity."

Section 643(b)(2) of ESA amends section 210(e)(1) of PURPA to authorize the Commission to exempt "geothermal small power production facilities of not more than 80 megawatts capacity" from the FPA, the PUHCA, and State laws and regulations respecting the rates or the financial or organizational regulation of electric utilities, if the Commission determines such exemption is necessary to encourage cogeneration and small power production. Under this amendment, the Commission's exemptive authority is no longer limited to "qualifying" geothermal small power production facilities. Therefore, the Commission may exempt utility-owned

¹ 45 FR 74934 (1980).² Pub. L. No. 96-294, 94 Stat. 611 (1980).³ Order No. 69, 45 FR 12214 (Feb. 25, 1980). Order No. 70, 45 FR 17959 (Mar. 20, 1980).⁴ It is the Commission's position that, even before the ESA amendments, geothermal facilities were eligible for qualification as small power production facilities. This view is based on the legislative history of PURPA. 125 Cong. Rec. S. 17806 (daily ed. October 9, 1978) (remarks of Senators Durkin and Jackson). The conference report of the ESA indicates that the legislation does not intend "to cast the FERC's present regulations under section 3(17) into doubt by reason of this amendment." S. Rep. No. 96-824, 96th Cong., 2nd Sess. 312 (1980).

geothermal small power production facilities (UGSPPF) from these laws and regulations.

Prior to amendment, section 210(e)(2) of PURPA limited the Commission's authority to exempt qualifying small power production facilities to those with a capacity of 30 megawatts or less.³ Section 643(b)(3) of ESA increases the limit to "80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source * * *". Thus, the Commission may exempt any qualifying small power production facility using geothermal energy as the primary energy source from the laws and regulations specified in section 210(e)(1) of PURPA.

The NOPR also discussed exempting UGSPPFs from the laws and regulations specified in section 210(e)(1) of PURPA, as well as extending the "avoided cost" rate to such facilities pursuant to section 210(a). Public comments addressing this proposal generally supported the exemption of UGSPPFs from the PUHCA. Comments were divided, however, regarding exemption of UGSPPFs from the remaining laws and regulations. In order to have more time to consider the latter comments, the Commission has decided to implement the ESA amendments to the FPA and PURPA concerning geothermal small power production in two rulemakings.

This rule implements the ESA amendments to the FPA and PURPA concerning qualifying geothermal small power production facilities. It also exempts UGSPPFs from the PUHCA. In a subsequent rulemaking the Commission will consider further the implications of exempting UGSPPFs from the FPA, and certain State laws. The Commission does not yet reach the issue of extending the "avoided cost" rate principals to such facilities.

The Commission received thirteen comments in response to the NOPR in this docket and has considered all the comments in the formulation of the final rule.

II. Section-by-Section Analysis

§ 292.204 Primary energy source.

Section 3(17)(A) of the Federal Power Act, as amended by section 201 of PURPA, defines a "small power production facility" as a facility which produces energy solely by the use, as a primary energy source, of biomass,

³ Small power production facilities between 30 and 80 megawatts which use biomass as a primary energy source are exempt from the Public Utility Holding Company Act, and from State laws respecting the (wholesale) rates or financial or organizational regulation. See § 292.602 of the Commission's rules.

waste, renewable resources, or any combination thereof, and which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts. The amendment contained in section 643(a)(1) of ESA states that geothermal resources are an eligible primary energy source for small power production facilities.

Section 292.204 of the Commission's rules sets forth criteria for qualifying small power production facilities. To reflect the changes required by section 643(a)(1) of ESA, the Commission is amending this section of its rules to make it clear that small power production facilities using geothermal resources as a primary energy source can be qualifying facilities. This change appears in § 292.204(b)(1)(i), where "geothermal resources" is added to the list setting forth the eligible primary energy sources of a qualifying small power production facility.

§ 292.202 Definitions.

The Commission is amending § 292.202 of its rules by adding a new paragraph (o) which defines "utility geothermal small power production facility" (UGSPPF) as a small power production facility which uses geothermal energy as the primary energy source, and of which more than 50 percent is owned either (1) by an electric utility, electric utility holding company or any combination thereof, or (2) by any company 50 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by an electric utility, electric utility holding company, or any combination thereof.

The proposed rule defined a "utility geothermal small power production facility as a * * * facility * * * of which an electric utility * * * owns more than 50 percent of the outstanding voting securities." Several commenters noted that it is not the facility which issues securities. The commenters correctly pointed out that a UGSPPF is an asset of a corporation, and it is the corporation which issues securities. The Commission agrees with the commenters and has redefined a UGSPPF to reflect the ownership arrangements between a utility and a geothermal small power production facility.

§ 292.601 Exemption of qualifying facilities from the Federal Power Act.

This section implements section 210(e)(2) of PURPA as amended by section 643(b)(3) of ESA. The ESA permits the Commission to exempt

qualifying small power production facilities of up to 80 megawatts capacity using geothermal resources from regulation under the FPA, the PUHCA, and from State laws and regulations respecting rates or the financial or organizational regulation of electric utilities.

Section 292.601 of the Commission's rules is amended by increasing the size limitation for exemptions from the FPA from 30 to 80 megawatts for qualifying small power production facilities using geothermal energy as a primary energy source.

* Under the proposed rule a UGSPPF was added to the definition of "qualifying facility" and thus was eligible for exemption from the FPA, the PUHCA, and from State laws and regulations respecting rates or the financial or organizational regulation of electric utilities. The proposed rule also discussed extending the "avoided cost" rate benefits of section 210(a) to a UGSPPF.

The comments filed by the State regulatory authorities and non-utility owners regarding this provision opposed extending the rate and exemption benefits to UGSPPFs. Some of these commenters argued that the Commission lacks the statutory authority to extend the PURPA section 210 benefits to utility-owned geothermal facilities. Utility companies and affiliated associations, on the other hand, generally favored the proposed rule.

The Commission believes it has the statutory authority under ESA to grant a UGSPPF all the exemptions under section 210(e) that a qualifying facility may obtain. Due to the overwhelming response of the State regulatory authorities, however, the Commission is withholding the exemptions from the FPA and State law at this time so it may further consider the implications of granting such exemptions. The Commission does not yet reach the issue of rate benefits pursuant to section 210(a).

Avoided Cost

Commenters noted that in some areas of the country the full "avoided cost" rate benefits are not needed to encourage geothermal small power production. The commenters suggest that, if the appropriate State regulatory authority determines that a rate less than avoided cost is sufficient to encourage rapid commercial development of geothermal small power production, the State regulatory authority should have the ability to set a lower rate for purchase.

The Commission has considered this suggestion during its original rulemaking proceeding on cogeneration and small power production.⁶ Some comments received during the original rulemaking recommended that, as a matter of policy, a State regulatory authority or non-regulated utility be given the discretion to establish the relationship between avoided cost and rate for purchases.

The Commission in § 292.304 of its rules decided to set the rate for purchases at full avoided cost. The Commission continues to believe that such a rate for purchase is necessary to encourage cogeneration and small power production as required by section 210 of PURPA. A State regulatory authority is not precluded, however, from petitioning the Commission for a waiver of § 292.304 pursuant to § 292.403 of the Commission's rules.

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

This section is amended in paragraph (b) by adding a "utility geothermal small power production facility" to the types of facilities which shall not be considered to be an electric utility company as defined in section 2(a)(3) of the PUCHC, 15 U.S.C. 79(b)(a)(3). Furthermore, the Commission is extending the exemption from the PUHCA for qualifying small power production facilities using geothermal energy from 30 to 80 megawatts.

The applicability of § 292.602 includes those facilities described in § 292.601(a) of the Commission's rules. Therefore, the exemption of qualifying small power production facilities of 80 megawatts or less using geothermal energy as a primary energy source is accomplished by the change to § 292.601(a) described above.

The Commission notes that the Securities and Exchange Commission (SEC) has issued a final rule, entitled "Rules Exempting Certain Acquisition by Electric Utility Companies and Exempting Such Companies as 'Holding Companies'."⁷ The SEC adopted Rule 14, which exempts from the requirements of sections 9(a)(2) and 10 of PUHCA the acquisition by one or more electric utility companies of the securities of a power supply company. The SEC also adopted Rule 15 which provides an exemption from regulation as a "holding company" under section 3(a)(2) of the PUHCA for an electric utility company that makes any such acquisitions.

The grant of exemption in Rule 14 by the SEC would, however, require: (1) authorization to acquire voting securities by "the regulatory authorities having jurisdiction over the rates and service" of the parent utility; (2) the subsidiary generating company to supply all of the electricity it generates to its parent company or companies (with certain noted exceptions); and (3) that the issuance of securities by the generating company be "expressly authorized by a regulatory authority having jurisdiction over its rates and service."⁸

As indicated, the exemption under section 210(e) of PURPA eliminates the basis for the SEC's jurisdiction over acquisition and ownership of "qualifying" facilities or a UGSPPF. By excluding a UGSPPF from the definition of "electric utility company" under section 2(a)(3) of PUHCA, the Commission's rules eliminate the SEC's jurisdiction under section 9(a)(2) of PUHCA, thus rendering moot the exemption available under the SEC's Rules 14 and 15, as it pertains to geothermal facilities of 80 megawatts capacity or less.⁹

Environmental Conclusions

The Commission issued in June 1980, a draft environmental impact statement (DEIS) on rulemakings implementing sections 201 and 210 of PURPA. In the DEIS, the Commission determined that PURPA-induced development of geothermal small power production facilities would not create significant environment effects. In compliance with the National Environmental Policy Act of 1969 (NEPA), the Commission examined the environmental effects associated with these rules and has issued a Final Supplemental Environmental Impact Statement (EIS).¹⁰

The EIS accompanying this Order describes the environmental effects associated with the PURPA-induced development of small power production facilities using geothermal energy as a primary energy source. PURPA-induced

⁶ *Id.* The exemptions are intended to facilitate joint ownership of conventional base-load generation plants, but also have application to non-conventional base-load generation plants.

⁷ This approach is similar to the exemption from PUHCA contained in section 9 of the Pacific Northwest Electric Power Planning and Conservation Act (S. 885), which would exempt a "generating company" from the definition of an electric utility company in PUHCA. The SEC has indicated its support, in principle, for that exemption.

¹⁰ Western Regional, Final Supplemental Environmental Impact Statement, Small Power Production and Cogeneration Facilities—Eligibility, Rates and Exemptions for Qualifying and Utility-Owned Geothermal Small Power Production Facilities, Docket No. RM61-2, February 1981.

development is anticipated in the near term for California, Nevada, and Idaho and may occur in other states in the West.

The revised rules under PURPA are expected to stimulate the development of up to 1,200 megawatts of electrical capacity from geothermal facilities by 1995. This is 1,100 megawatts more than predicted in the DEIS which the Commission prepared for the original rulemakings implementing sections 201 and 210 of PURPA.

The EIS found that geothermal resource development represents a relatively clean energy source and that increased geothermal development will reduce the adverse environmental impacts associated with nuclear and fossil fuel cycles.

III. Effective Date

These rules are effective May 1, 1981. (Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611 (1980) 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.*, 12009, 42 FR 46287)

In consideration of the foregoing, the Commission amends Chapter I of Title 18, Code of Federal Regulations, as set forth below.

By the Commission.
Kenneth F. Plumb,
Secretary.

1. Section 292.204 is amended by revising paragraph (b)(1)(i) to read as follows:

§ 292.204 Criteria for qualifying small power production facilities.

(b) *Fuel Use.* (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

2. Section 292.202 is amended by adding a new paragraph (o), to read as follows:

§ 292.202 Definitions.

(o) "Utility geothermal small power production facility" means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility, electric utility holding company or any combination thereof; or

⁴ 45 FR 12214, 12221 (Feb. 25, 1980).

⁷ 46 FR 5867 (1981).

(2) By any company 50 percent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

3. Section 292.601 is revised to read as follows:

§ 292.601 Exemption to qualifying facilities from the Federal Power Act.

(a) *Applicability.* This section applies to qualifying facilities, other than those described in paragraph (b).

(b) *Exclusion.* This section does not apply to a qualifying small power production facility with a power production capacity which exceeds 30 megawatts, if such facility uses any primary energy source other than geothermal resources.

(c) *General rule.* Any qualifying facility described in paragraph (a) shall be exempt from all sections of the Federal Power Act, except:

- (1) Section 1-18, and 21-30;
- (2) Sections 202(c), 210, 211, and 212;
- (3) Sections 305(c); and
- (4) Any necessary enforcement provision of Part III with regard to the sections listed in paragraphs (c)(1), (2) and (3) of this section.

4. Section 292.602 is amended by revising paragraph (b) to read as follows:

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

• * * * *
(b) *Exemption from the Public Utility Holding Company Act of 1935.* A qualifying facility described in paragraph (a) or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 2(a)(3) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(3).
• * * * *