

Docket No. EL03-47-000, et al.
- 1 -

102 FERC * 61, 199
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 Nos. EL03-47-000		Docket
Saguaro Power Company	004	QF90-203-
Las Vegas Cogeneration Limited Partnership	008	QF89-251-

ORDER INITIATING INVESTIGATION AND ESTABLISHING HEARING
PROCEDURES

(Issued February 24, 2003)

1. In this order we initiate an investigation into Enron Corporation (Enron) and its ownership of two 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. It has come to the attention of the Commission that Enron appears to have improperly retained QF benefits for its facilities. The Commission has previously set for hearing the QF status of other Enron generating facilities.[2] 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 two cogeneration facilities, in fact, satisfied the statutory and regulatory requirements for QF status. 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

2. 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.

3. 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 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).

4. 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).

5. 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), (b) (2002).

6. The Commission has summarized 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 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.[[3]]

7. 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).
8. 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.
9. 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.
10. 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.
11. 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 facility satisfies the criteria for QF status.[4] (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

Saguaro Power Company

12. Saguaro Power Company is a partnership which owns a 105 MW (net capacity) topping-cycle cogeneration facility located in Henderson, Nevada. The facility was initially certified as a QF in 1990 in Docket No. QF90-203-000 and recertified in 1996 in Docket No. QF90-203-001.[5] Saguaro sells electrical power to Nevada Power Company. On April 12, 2000, in Docket No. QF90-203-003, Saguaro filed a notice of self-recertification to reflect a change in upstream ownership.[6] Saguaro described the change as "the upstream owner of a non-utility partner in Applicant recently sold its interest in the non-utility partner to a new

upstream owner."

13. The notice of self-certification described Saguario as a limited partnership owned by Eastern Sierra Energy Company (Eastern Sierra), Magna Energy Systems, Inc. (Magna) and Black Mountain Power Company (Black Mountain). The notice of self-recertification was filed to show that Pioneer Chlor Alkali Company, Inc. (Pioneer Chlor), the upstream owner of Black Mountain sold its interest in Black Mountain to Boulder Power, L.L.C. (Boulder). The notice stated that Boulder is 100 percent owned by individuals, some of whom are also owners of Magna. The notice also stated that Boulder borrowed from Enron North America Corp. (ENA) and Joint Energy Development Investments II Limited Partnership (JEDI II) a portion of the funds it used to buy its ownership interest.[7] See Attachment A to this order.

14. The Commission is in possession of a memorandum to files, on Enron letterhead, dated September 28, 2001, which states, "ENA has entered into a Purchase and Sale Agreement to sell all of its interest in Black Mountain Power Company (Pioneer Chlor) to [Saguario] for a purchase price of \$20.8MM These proceeds include the payment of interest and an amount necessary for ENA to buy out the original equity holders' position with a return on equity of 15%. The remaining proceeds of \$19.1 MM are for the purchase of the debt. As a result, the gross carry value of the debt will be adjusted to reflect the purchase price."

Las Vegas Cogeneration Limited Partnership

15. Las Vegas Cogeneration Limited Partnership (LVCLP) owns a 56 MW (net capacity) cogeneration facility located in Clark County, Nevada. On May 15, 1989, LVCLP filed a notice of self-certification in Docket No. QF89-251-000. Subsequently, LVCLP was certified as a QF in Docket No. QF89-251-001. Las Vegas Cogeneration Limited Partnership, 57 FERC * 62,035 (1991). LVCLP self-recertified in Docket No. QF89-251-002, and was later granted recertification as a QF in Docket No. QF89-251-003. Las Vegas Cogeneration Limited Partnership, 60 FERC * 62,094 (1992). LVCLP sought waiver of the Commission's operating and efficiency standards applicable to qualifying cogeneration facilities in Docket No. QF89-251-004; LVCLP later withdrew its request for waiver. In Docket Nos. QF89-251-005, -006 & -007 LVCLP filed notices of self-recertification.

16. Docket No. QF89-251-005, filed on September 30, 1999, describes a change in upstream ownership. Among the upstream owners listed in the notice of self-recertification is RADR EMP, L.L.C. (RADR) (which is described as owning a 50 percent membership interest). Another upstream owner listed is JEDI II (which is described as owning a 25 percent membership interest) is indirectly owned by Enron North America Corp. The notice further states that while RADR's members are all private individuals, JEDI is indirectly 50 percent owned by ENA (which the notice concedes is an electric utility). Another upstream owner is TLS Investors, L.L.C. (TLS) (which is described as being the managing member of LVCLP and owning a 25 percent membership interest). The notice further states that TLS is indirectly 100 percent owned by ENA.[8]

17. Attached to this order is a ownership chart of LVCLP as described in the September 30, 1999 notice of self-recertification.[9]

Docket No. EL03-17-000

18. In Docket No. EL03-17-000, the Commission set for hearing the issue of whether three facilities, in fact, satisfied the statutory and regulatory requirements for OF status; all three facilities were Enron-affiliated facilities that had as owners entities that were named similarly to certain of the entities identified above - RADR ZWS MM, LLC and RADR ZWS, LLC (RADR partnerships).[10]

19. In that docket,[11] the Commission pointed out that, in a criminal complaint against Andrew Fastow,[12] it is alleged that Andrew Fastow and Michael Kopper created the RADR partnerships to disguise Enron's interest in certain wind farms "so that the wind farms could continue to receive beneficial regulatory treatment while they secretly remained under Enron's control." Also, according to the complaint, the partners in the RADR partnerships understood that proceeds from the partnerships were to be paid to Fastow, Kopper and their designees.

20. The Commission also pointed out[13] that in a civil action filed against Andrew Fastow by the Securities and Exchange Commission (SEC),[14] it is alleged that the RADR partnerships were what is described as a "Friends of Enron" deal which was alleged to be a scheme to enrich Andrew Fastow and others while enabling Enron to maintain secret control over, and achieve off-balance-sheet treatment, of assets that it had in fact owned. The RADR partnerships were alleged to be created so that the generating units would continue to receive beneficial regulatory treatment as QFs, while Enron secretly retained control over them.

Discussion

21. As described above, it appears that Enron affiliates may control and/or may have controlled Saguario and LVCLP (facts, we note, that were not disclosed in the filings made with the Commission). If true, notwithstanding the representations made by Saguario and LVCLP in their notices for self-recertification as QFs, Saguario and LVCLP 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 Saguario and LVCLP 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.

22. 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 the Public Utility Holding Company Act 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.

23. At this time, we are setting for hearing whether Saguaro and LVCLP 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 Saguaro and LVCLP have failed to conform with the QF ownership requirements, we will then establish the appropriate remedies.

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. EL03-47-000, QF90-203-004 and QF89-251-008 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. EL03-47-000, QF90-203-004, and QF89-251-008 in the Federal Register; the notice shall include a time within which to seek intervention in this proceeding.

(C) A presiding judge to be designated by the Chief Judge shall convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days of the date the Chief Judge designates the presiding judge, at a hearing room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss), as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Salas,
Secretary.

Magalie R.

Docket No. EL03-47-000, et al.

- 1 -

Attachment A

Saguaro Power Company

Note: Boulder Power borrowed funds to make its capital contribution from: Enron North America Corp. (ENA) and Joint Energy Development Investment II Limited Partnership (JEDI II)
Docket No. EL03-47-000, et al.

- 1 -

Attachment B

Las Vegas Cogeneration Limited Partnership
Ownership Chart as of August 31, 1999

Footnotes

[1] The two facilities are: Saguaro Power Company and Las Vegas Cogeneration Limited Partnership.

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

[3] Indeck 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).

[4] See supra note 1.

[5] Saguaro Power Company, 53 FERC * 62,209 (1990); Saguaro Power Company, 75 FERC * 62,025 (1996).

[6] Saguaro had previously self-recertified on March 3, 1998 in Docket No. QF90-203-002.

[7] Since Eastern Sierra, which owned 50 percent of Saguaro, is indirectly wholly-owned by Southern California Edison Company (SoCal Edison) (an electric utility), to the extent that Enron's dealings with Boulder may be considered electric utility ownership, then there would have been more than 50 percent electric utility ownership of the QF.

[8] Since the self-certification filing in Docket No. QF89-251-005 acknowledged that Enron affiliates indirectly owned 37.5 percent of LVCLP (through JEDI II and TLS), to the extent that Enron's dealings with RADR (which has a 50 percent membership interest in LVCLP) may be considered electric utility ownership, then there would have been more than 50 percent electric utility ownership of the QF.

[9] On August 31, 2001, LVCLP filed a notice of self-recertification showing another ownership change.

[10] Investigation of Certain Enron-Affiliated QFs, 101 FERC * 61,076 (2002)

[11] 101 FERC * 61,076 at P11.

[12] United States of America v. Andrew Fastow, Case No. H-02-889-M, United States District Court of the Southern District of Texas, Houston Division.

[13] 101 FERC * 61,076 at P12.

2721631.txt

[14]United States Securities and Exchange Commission v. Andrew Fastow, Civil Action No. H-02-3666, United States District Court of the Southern District of Texas, Houston Division.