

153 FERC ¶ 61,192
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Chevron U.S.A. Inc.

Docket No. EL15-62-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 19, 2015)

1. On April 29, 2015, Chevron U.S.A. Inc. (Chevron) filed a petition for declaratory order.¹ Chevron requests that the Commission find that, under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)² and section 292.601(c) of the Commission's regulations,³ each of Chevron's affiliates that are qualifying facilities (QF) with market-based rate (MBR) authorization from the Commission is exempt from section 203(a)(1) of the Federal Power Act (FPA).⁴ As discussed below, the Commission finds that a QF that qualifies for the exemption contained in 292.601(c) of the Commission's regulations from the FPA section 203(a)(1) filing requirements is indeed exempt from such filing requirements, even if the QF has a MBR tariff and/or generator interconnection facilities.

I. Background

2. Chevron states that it is engaged in 18 different business lines in the United States, which focus on the production and marketing of oil and natural gas, and that electric power generation is a small part of Chevron's energy business. Chevron states that it indirectly owns three cogeneration QFs that have also received MBR authorization from the Commission: Kern River Cogeneration Company, an approximately 300 megawatt (MW) cogeneration facility; Mid-Set Cogeneration Company, an approximately 38 MW

¹ 18 C.F.R. § 385.207(a)(2) (2015).

² 16 U.S.C. § 824a-3 (2012).

³ 18 C.F.R. § 292.601(c).

⁴ 16 U.S.C. § 824b (2012). Chevron states that it is seeking clarification regarding an exemption from section 203(a)(1) of the FPA, and not section 203(a)(2).

cogeneration facility; and Sycamore Cogeneration Company, an approximately 300 MW cogeneration facility.⁵ Chevron states that its affiliate, Chevron Global Energy, Inc., indirectly owns an additional three cogeneration QFs with MBR authority: Coalinga Cogeneration Company, an approximately 38 MW cogeneration facility; Sargent Canyon Cogeneration Company, an approximately 38 MW cogeneration facility; and Salinas River Cogeneration Company, an approximately 38 MW cogeneration facility.⁶

3. Chevron states that the Commission's PURPA regulations provide for the Commission to encourage cogeneration QFs by exempting them from certain regulations under the FPA.⁷ Chevron states that cogeneration QFs have been exempt from the FPA section 203 filing requirements since 1980.⁸ Chevron further contends that, in Order No. 671,⁹ the Commission rejected proposals to eliminate the exemption of QFs from the FPA section 203 filing requirements.¹⁰ Chevron argues the Commission further affirmed this position in a subsequent order that stated that Order No. 671 did not modify the exemption of QFs from the FPA section 203 filing requirements.¹¹

4. Chevron argues that, despite this language, several recent FPA section 203 applications have questioned the continued availability of the exemption for QFs with MBR tariffs. Chevron explains that several QFs with MBR tariffs have recently filed FPA section 203(a)(1) applications, noting their belief that they are exempt, however,

⁵ Chevron Petition at 3.

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.* (citing *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,895, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part on other grounds sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir 1982), *rev'd in part on other grounds sub nom. Am. Paper Inst. V. Am Elec. Power Serv. Corp.*, 461 U.S. 402 (1983)).

⁹ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 114 FERC § 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 21,219 (2006).

¹⁰ *Id.* P 102.

¹¹ Chevron Petition at 6 (citing *Midway Sunset Cogeneration Co.*, 115 FERC ¶ 61,184, at P 25 n.24 (2006)).

acceding to section 203 jurisdiction regarding the disposition of their facilities.¹² In other instances, applicants have explicitly excluded affiliated QFs with MBR tariffs.¹³ Chevron states that, regardless of the approaches taken by the applicants, the Commission has not provided any further clarification on the applicability of section 203 exemption to QFs with MBR tariffs.

5. Chevron argues that the Commission's PURPA regulations provide that QFs with MBR tariffs are exempt from section 203. Chevron states that the Commission's regulations provide that "[a]ny qualifying facility described in [18.C.F.R. § 292.601(a)]... shall be exempt from all sections of the Federal Power Act," with certain enumerated exemptions, which do not include FPA section 203.¹⁴ Chevron argues that, absent a rulemaking, the Commission therefore cannot require QFs, including those with MBR tariffs, to comply with the FPA section 203 filing requirements.

6. Chevron also argues that, given the Commission's existing market oversight and its regulation of QFs with MBR tariffs under FPA sections 205 and 206,¹⁵ there is no compelling policy objective served by requiring affected QFs to comply with FPA section 203's prior authorization requirements. Chevron adds that, subsequent to Order No. 671, many QFs are now required to file MBR tariffs. Further, those QFs with MBR tariffs must file notices of change of status when facilities are sold or new facilities are acquired.¹⁶ Finally, QFs with MBR tariffs are often part of a larger portfolio of projects containing non-QFs with MBR. Thus, the Commission has the opportunity to examine QFs particularly to the extent they are part of a larger sale of facilities that includes non-QFs. Chevron argues that this provides the Commission with sufficient oversight such that it is appropriate to explicitly affirm the FPA section 203 exemption for QFs.

¹² Chevron Petition at 6-7 (citing *Midland Cogeneration Venture Ltd. P'ship*, 127 FERC ¶ 62, 045 (2009); *Mirant Corp.*, 132 FERC ¶ 61,096 (2010); *Midland Cogeneration Venture Ltd. P'ship*, 141 FERC ¶ 62,143 (2012)).

¹³ *Id.* at 7 (citing *NRG Energy Holdings*, 146 FERC ¶ 61,196 (2014)).

¹⁴ Chevron Petition at 8 (citing 18 C.F.R. § 292.601(c) (2015)).

¹⁵ 16 U.S.C. §§ 824d, 824e (2012).

¹⁶ Chevron Petition at 9.

II. Notice of Filing

7. Notice of Chevron's filing was published in the *Federal Register*, 80 Fed. Reg. 26,024 (2015), with interventions and protests due on or before May 29, 2015. NRG Companies¹⁷ filed a motion to intervene.

III. Discussion

8. As discussed below, the Commission finds that QFs that fall within the scope of the FPA section 203 exemption are, indeed, exempt from FPA section 203(a)(1)'s filing requirements.¹⁸ Section 292.601(c) of the Commission's PURPA regulations provides that "[a]ny qualifying facility described in paragraph (a) of this section [as relevant here, including cogeneration QFs like Chevron's] shall be exempt from all sections of the Federal Power Act, except..."¹⁹ certain listed sections that do *not* include section 203.²⁰ As such, under the plain language of the Commission's regulations, QFs are exempt from the FPA section 203(a)(1) filing requirements.

9. In the instant case, Chevron requests that the Commission find that those Chevron QF facilities that also have MBR tariffs (and potentially generator interconnection facilities) still qualify for the FPA section 203(a)(1) exemption. However, the larger issue presented is whether any QF which has a MBR tariff and/or other jurisdictional assets including related agreements, generator interconnection facilities, and associated books and records qualifies under section 292.601(c) for the FPA section 203(a)(1) exemption.

10. As Chevron notes, the Commission – in response to the FPA section 203 applications filed recently – has not explicitly decided the reach of the FPA section 203 exemption. Thus, QFs with otherwise jurisdictional assets including MBR tariffs and related agreements, generator interconnection facilities, and associated books and records

¹⁷ NRG Companies include: NRG Power Marketing LLC and GenOn Energy Management, LLC.

¹⁸ Chevron seeks clarification regarding the exemption from FPA section 203(a)(1) (addressing, among other things, the sale, lease or other disposition of all or part of a public utility's jurisdictional facilities), and *not* section 203(a)(2) (addressing, among other things, mergers or consolidations of jurisdictional facilities in a holding company context).

¹⁹ 18 C.F.R. § 292.601(c) (2015).

²⁰ 18 C.F.R. §§ 292.601(c)(1)-(5) (2015).

have filed requests for authorization for disposition of assets pursuant to FPA section 203.²¹ In such cases, the applicants stated that prior Commission approval was not required because the transactions involved QFs exempt from FPA section 203.²² However, the applicants also stated that they filed the applications “out of an abundance of caution.”²³ In such instances, pursuant to delegated authority, the orders approved the transactions without explicitly making any determination of jurisdiction.²⁴

11. The language of section 292.601(c) of the Commission’s regulations, quoted above, is straight-forward, and on its face exempts the vast majority of QFs from FPA section 203(a)(1).²⁵ Moreover, in Order No. 671, the Commission rejected proposals to eliminate the QF exemption from the FPA section 203 filing requirements. Specifically, the Commission was confronted with arguments that the consumer protection concerns that led Congress, in section 1289 of the Energy Policy Act of 2005,²⁶ to expand the Commission’s FPA section 203 authority over generation acquisitions were relevant to

²¹ *Midland Cogeneration Venture Ltd P’ship*, 127 FERC ¶ 62,045 (2009); *Midland Cogeneration Venture Ltd P’ship and Sparta Acquisition Corp.*, 141 FERC ¶ 62,153 (2012).

²² *Id.* (citing *Ocean State Power*, 47 FERC ¶ 61,321 (1989) (*Ocean State*)).

²³ *Id.*

²⁴ *See supra* note 2.

²⁵ The Commission does not have statutory authority to exempt all QFs from all provisions of the FPA. PURPA section 210(e)(1), 16 U.S.C. § 824a-3(e)(1) (2012), authorizes the Commission to exempt QFs from, among other things, the provisions of the FPA. PURPA section 210(e)(2), 16 U.S.C. § 824a-3(e)(2) (2012), however, limits the Commission’s authority to exempt small power production facilities with a capacity greater than 30 MW, unless the small power production facility is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the FPA, 16 U.S.C. § 796(17)(E) (2012), or a geothermal facility. The Commission’s regulations therefore do not exempt small power production facilities with a capacity greater than 30 MW, unless those facilities are eligible solar, wind, waste or geothermal facilities as defined in 3(17)(E) of the FPA, or geothermal facilities, from the FPA.

All qualifying cogeneration facilities, in contrast, may be exempted from the FPA; Chevron’s QFs are cogeneration facilities.

²⁶ Pub. L. No. 109-58, § 1289, 119 Stat. 594, 982-83 (2005).

QF transfers as well.²⁷ The Commission responded, however, that it was “not persuaded such a change to our existing practice” was needed.²⁸

12. Nevertheless, the Commission also finds that, if a public utility would otherwise be jurisdictional because of ownership or operation of facilities other than those considered part of a QF (as defined and described in section 292.101(b)(1) of the Commission’s regulations),²⁹ that public utility would be subject to section 203 of the FPA, and the exemption contained in section 292.601 from section 203 of the FPA would not exempt that public utility from reporting its QF assets along with its other facilities in the event of a transaction within the scope of section 203 of the FPA.

13. Furthermore, we note that, after the transfer of QF facilities, the new owner or operator of the QF is required to file with the Commission an updated Form 556 to reflect the change in ownership.³⁰ This requirement applies to the transfer of all QFs including those QFs that qualify for the FPA section 203 exemption.

14. Additionally, QFs which dispose of their MBR authority are reminded to cancel their MBR authority following disposition of their facilities. QFs with MBR authority must also timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting MBR authority.³¹ Finally, we remind parties that an entity with MBR authorization must file an Electric Quarterly Report with the Commission.

²⁷ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 91.

²⁸ *Id.* P 102.

²⁹ 18 C.F.R. § 292.101(b)(1) (2015). Section 292.101(b)(1) defines a QF as a facility that meets the requirements of the Commission’s regulations in Part 292, Subpart B of its regulations, and also states that a QF may include transmission lines and other equipment used for interconnection purposes, if such lines and equipment are used to supply power output to directly or indirectly interconnected utilities, and to end users including thermal hosts, or if such lines and equipment are used to transmit supplementary, standby, maintenance and backup power to the QF, including to its thermal host, or if such lines and equipment are used to transmit power from other QFs or to transmit standby, maintenance, supplementary and backup power to other QFs.

³⁰ *Cf.* 18 CFR § 131.80 (2015).

³¹ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh’g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42 (2015).

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The Commission orders:

Chevron's QFs that qualify for the exemption contained in 18 C.F.R. § 292.601(c) (2015) from the FPA section 203(a)(1) filing requirements, as discussed herein, are exempt from such filing requirements, even if the QF has a MBR tariff and/or generator interconnection facilities.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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