Supporting Statement for
FERC-912 (556), "Cogeneration and Small Power Production"
New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*
As proposed in Docket No. RM06-10-000
(Final Rule Issued October 20, 2006)

The Federal Energy Regulatory Commission (Commission) (FERC) requests Office of Management and Budget (OMB) review and approval of the above final rule concerning the following: **FERC-556 "Cogeneration and Small Power Production"**
***Because FERC-556 was also the subject of another rulemaking (RM05-36-000) that was submitted to OMB prior to the submission of the Notice of Proposed Rulemaking (NOPR) in this docket, for the purposes of the NOPR, the Commission used a temporary identifier of FERC-912. FERC-556 has been approved in the RM05-36-000 docket and so the Commission will use the FERC-912(556) identifier in this Final Rule. Following the issuance of the final rule in this docket and the completion of OMB review, the Commission will transfer the hours associated with this rule to FERC-556. FERC-556** (1902-0075) an existing information collection requirement is approved by OMB through July 31, 2009. **FERC-912 was originally assigned the OMB Control Number 1902-0219 at the NOPR stage but prior to issuance of this final rule, this control number was eliminated from OMB's inventory.**

We estimate that the annual reporting-burden related to the subject final rule will have a minimal impact on the reporting burden. The hours indicated in this submission are only to satisfy the notice requirements of the Act. The information to be submitted to the Commission is specifically spelled out in the statute. The Final Rule implements the Congressional mandate of EPACT 2005 by establishing the criteria for termination of an electric utility's obligation to purchase energy and capacity from qualifying cogeneration facilities and qualifying small power production facilities (QFs) if FERC finds that certain conditions are met. The regulations proposed by the Commission do not change the filing requirements contained in the statute other than clarify the notice provisions of the statute.

Background

On August 8, 2005, the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) was signed in to law. Section 1253(a) of EPAct 2005 amends section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) by adding subsection (m). Section 210(m) of PURPA provides for the termination of an electric utility's obligation to purchase energy and capacity as noted above. Specifically section 210(m):

- provides a procedure for an electric utility to file an application for relief from the mandatory purchase obligation on a service territory-wide basis;
- provides a procedure for an affected entity or person to apply to the Commission for an order reinstating the electric utility's obligation to purchase energy;

• provides for termination of an electric utility's obligation to sell QFs energy and capacity if FERC finds that certain conditions are met;
• protects existing rights and remedies under any contract or obligation in effect or pending approval involving the purchase of energy or capacity or sale of energy or capacity to a QF; and
• allows FERC to issue and enforce regulations to ensure that an electric utility recovers all prudently incurred costs associated with the purchase of energy from a QF. The Commission is amending its regulations, specifically 18 CFR §292.303 to implement the requirements in section 210(m).

When Congress enacted section 210 of PURPA, it required FERC to prescribe rules as the FERC determined necessary to encourage cogeneration and small power production, including rules requiring electric utilities to offer to purchase electric power from and sell electric power to QFs. Additionally, section 210 of PURPA authorized the Commission to exempt QFs from certain federal and state laws and regulations.

Under section 201 of PURPA, cogeneration facilities and small power production facilities which meet certain standards and which are not owned by persons primarily engaged in the generation or sale of electric power[1] can become QFs, and thus become eligible for the rates and exemptions pursuant to section 210 of PURPA and found in FERC's regulations.[2]

A cogeneration facility is defined in the Federal Power Act (FPA)[3] as a facility which produces electric energy and steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes.[4] Thus, cogeneration facilities simultaneously produce two forms of useful energy, namely electric power and heat. Cogeneration facilities can use significantly less fuel to produce electricity and steam (or other forms of energy) than would be needed to produce the two separately.

Small power production facilities as defined in the FPA use biomass, waste, or renewable resources, including wind, solar energy and water, to produce electric power and have a power production capacity which, together with any other facilities located at the same site, are not greater than 80 megawatts.[5] Reliance on these sources of energy can reduce the need to consume fossil fuels to generate electric power.

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1 The ownership requirement was codified in sections 3(17) (A) and 3(18) (A) of the FPA. Section 1253(b) of EPAct 2005 removed the ownership requirement from sections 3(17) (A) and 3(18) (A) of the FPA, and the Commission has removed the ownership requirement from its regulations in Docket No. RM05-36-000. Revised Regulations Governing Small Power Production and Cogeneration Facilities, Final Rule, 71 FR 60456 (Oct.18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).
2 18 CFR Part 292 (2005).
3 16 U.S.C. 824 et seq. (2000).
4 16 U.S.C. 796(18) (2000).
5 16 U.S.C. 796(17) (A) (i)-(ii) (2000).

Prior to the enactment of PURPA, a cogenerator or small power producer seeking to establish an interconnected operation with a utility faced three major obstacles. First, utilities were not generally willing to purchase this electric output or were not willing to pay an appropriate rate for that output. Second, utilities generally charged discriminatorily high rates for back-up service to cogenerators and small power producers. Third, a cogenerator or small power producer which provided electricity to a utility's grid ran the risk of being considered a public utility and thus being subjected to extensive state and federal regulation.

Section 210 of PURPA was designed to remove these obstacles. Each electric utility is required under section 210 to offer to purchase available electric energy from cogeneration and small power production facilities which obtain qualifying status. The rates for such purchases from QFs must be just and reasonable to the ratepayers of the utility, in the public interest, and must not discriminate against cogenerators or small power producers. Rates also must not exceed the incremental cost to the electric utility of alternative electric energy (also known as the electric utilities "avoided costs"). Section 210 also requires electric utilities to provide electric service to QFs at rates which are just and reasonable, in the public interest, and which do not discriminate against cogenerators and small power producers.

Since Congress enacted PURPA, electric utilities have complained that their obligation to purchase from and sell to QFs, as implemented by the Commission in 18 CFR 292.303(a)-(b), was not economically beneficial and that they were purchasing energy they did not need and selling energy they did not want to sell. In 1995, the Commission clarified that in determining the avoided cost rate; the electric utility must take into account all alternative sources including third-party suppliers and does not have to buy power it does not need.[6] In the past decade, with the development of exempt wholesale generators (EWGs) introduced by the Energy Policy Act of 1992,[7] and increasing competition in wholesale electric markets as well as some retail electric markets, Congress has debated whether to repeal PURPA altogether, or to revise it. The result is new section 210(m), which is the subject of this rulemaking, and new section 210(n), which was addressed in the Final Rule, Docket No. RM05-36-000. New section 210(m) requires the Commission to lift the mandatory purchase obligation if it finds, in effect, that there is a sufficiently competitive market for the QF to sell its power. While the provision permits electric utilities to file applications for relief from the mandatory purchase obligation, and requires the Commission to act on such applications within 90 days, the Commission has determined that it can more appropriately address this issue through rulemaking.

6 Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC ¶ 61,215 at 61,677-78, reconsideration denied, 71 FERC ¶ 61,269 at 62,078 (1995) (finding that the determination of avoided cost must take into account "all sources").

7 Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, (1993) (EPAct 1992). EPAct 1992 added a new section 32 to the Public Utility Holding Company Act of 1935 (PUHCA) to permit a category of sellers called EWGs to be exempt from PUHCA.

NOPR (Docket No. RM06-10-000)

On January 19, 2006, the Commission issued in Docket No. RM06-10-000, a Notice of Proposed Rulemaking (NOPR) that revises its regulations in 18 CFR Part 292 (Regulations under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 with regard to Small Power Production and Cogeneration) to implement section 210(m) of PURPA..

The new PURPA section 210(m) (1) amends the obligation to purchase and states that:

Section 210(m) (1) *(section 1253(a) EPAct 2005)*

TERMINATION OF MANDATORY PURCHASE AND SALE REQUIREMENTS
"(1) OBLIGATION TO PURCHASE—After the date of enactment of this subsection, no electric utility shall be required to enter into a new contract or obligation to purchase electric energy from a qualifying cogeneration facility or a qualifying small power production facility under this section if the Commission finds that the qualifying small power production facility has nondiscriminatory access to—

(A)(i) independently administered auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)(i) transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

(ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions with the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

* * *

(3) COMMISSION REVIEW—Any electric utility may file an application with the Commission for relief from the mandatory purchase obligation pursuant to this subsection on a service territory-wide basis. **Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in subparagraph (A), (B), or (C) of paragraph (1) of this subsection have been met. After notice, including sufficient notice to potentially affected qualifying**

> **cogeneration facilities and qualifying small power production facilities**, *(emphasis added)* and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in paragraph (A)(B)(C) of paragraph (1) have been met.
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> (4) REINSTATEMENT OF OBLIGATION TO PURCHASE—At any time after the Commission makes a finding under paragraph (3) relieving an electric utility of its obligation to purchase electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. **Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in subparagraphs (A), (B), or (C) are no longer met. After notice, including sufficient notice to potentially affected utilities, and an opportunity for comment,** (*emphasis added)* the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to purchase electric energy under this section if the Commission finds that the conditions set forth in subparagraphs (A), (B) or (C) of paragraph (1) which relieved the obligation to purchase, are no longer met.
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> * * *

Section 210(m)(1) thus relieves an electric utility of its obligation to enter into a new contract or obligation to purchase QF power upon a Commission finding that certain market conditions exist.

Section 292.303(a) of the Commission's regulations, 18 CFR 292.303(a), states that:

> Obligation to purchase from qualifying facilities. Each electric utility shall purchase, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:
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> (1) Directly to the electric utility; or
>
> (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

In the NOPR, the Commission (1) discussed its interpretation of the criteria for electric utility relief from the purchase obligation; (2) made a preliminary finding that QFs interconnected with utilities that are members of Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO-NE), and New York Independent System Operator (NYISO) have nondiscriminatory access to those markets and that those markets satisfy the section 210(m)(1)(A) criteria for removing the obligation of those electric utilities to enter into new contracts or obligations with QFs; and (3) provided guidance on the definition of "nondiscriminatory access," and "new

contract or obligation."

Subject Final Rule (Docket No. RM06-10-000)

On October 20, 2006, the Commission issued a Final Rule to implement the provisions of the new PURPA section 210(m) and terminating the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs if the electric utility is a member of Midwest Independent Transmission System Operator, Inc. (Midwest ISO), PJM Interconnection, L.L.C. (PJM), ISO New England, Inc. (ISO-NE), or New York Independent System Operator (NYISO). After considering industry comments on the NOPR, the Commission amended its regulations to implement the requirements in section 210(m). The regulations adopted in the Final Rule reflect Congress's intent to differentiate between three types of market structures, each of which presents differing factors relevant to the Commission's determination of whether QFs have access to a sufficiently competitive market to support elimination of the purchase requirement. The Final Rule also recognizes the special circumstances faced by small QFs and, accordingly, applies a different test for this class of QFs. In addition to a presumption in favor of small QFs, the rule also recognizes that some QFs, irrespective of size, may not have the ability to sell in certain markets because of operational characteristics or other constraints. The Final Rule amends the Commission's regulations in Part 292[8] (pertaining to electric utilities' requirement to purchase electric energy from or sell electric energy to a QF) to implement section 1253 of the EPAct 2005. As relevant here, section 1253 added a new section 210(m) to PURPA, which:

A. Provides for the termination of the requirement that an electric utility enter into new contracts or obligations to purchase electric energy from a QF, after appropriate findings by the Commission;

B. Preserves existing contracts and obligations to purchase electric energy or capacity from or to sell electric energy or capacity to a QF;

C. Provides for the reinstatement of the requirement to purchase electric energy from a QF, upon a showing that the conditions for terminating the requirement are no longer met; and

D. Provides for the termination of the requirement that an electric utility enter into new contracts to sell electric energy to QFs, after appropriate findings by the Commission.

8 18 CFR part 292, subpart C, Arrangements Between Electric Utilities and Qualifying Cogeneration and Small Power Production Facilities Under section 210 of the Public Utility Regulatory Policies Act of 1978.

The Commission is amending its Part 292 regulations to address the above section 210(m)
provisions and also to provide a process for applying for the reinstatement of the requirement to sell electric energy to QFs upon a showing that the conditions for the removal of that requirement are no longer met. In the final rule the Commission has established a rebuttable presumption that small QFs, with a net capacity no greater than 20 MW, do not have nondiscriminatory access to wholesale markets described in section 210(m)(1)(A), (B), or (C). Unless an electric utility seeking the right to terminate its requirement to purchase small QF power specifically rebuts this small QF presumption, and that electric utility's request is granted by the Commission, a small QF would continue to be eligible to require the electric utility to purchase its electric energy. With this 20 MW rebuttable presumption the Commission reduces the burden, i.e., the cost of participating in termination proceedings, of small QFs to participate in the section 210(m)(3) proceedings.

Specifically the changes to Part 292 include:

- New § 292.309 of the Commission's regulations describes the findings that the Commission must make to justify relieving an electric utility's obligation to enter into new QF purchase contracts. If the Commission finds that the QF has nondiscriminatory access to one of three wholesale markets described in the statute, the requirement that the electric utility enter into new contracts or obligations is terminated. These three wholesale markets, are set forth in the statute in section 210(m)(1).

- New § 292.310 of the Commission's regulations sets forth the filing requirements for an application by an electric utility seeking to terminate its requirement to enter into new purchase contracts with QFs. Among other things, the regulations require the electric utility to list the names and addresses of all potentially affected QFs, existing or under development. After notice and comment, the Commission will issue an order making a final determination within 90 days of the application, as required by section 210(m)(3).

- The Final Rule also sets forth a process by which a QF may seek the reinstatement of the requirement to purchase electric energy, by showing that the conditions necessary for the removal of the requirement to purchase are no longer met. After notice, including notice to the affected utilities, and comment, the Commission will issue an order within 90 days of the application. This process is set forth in the new § 292.311 of the Commission's regulations.

- The Final Rule provides for applications to remove the requirement to enter into new contracts to sell electric energy to QFs. The statute provides that if the Commission finds that competing retail electric suppliers are willing and able to sell and deliver electric

energy to a QF, and the electric utility is not required by state law to sell electric energy in its service territory, the requirement to sell should be terminated. The new § 292.312 of the Commission's regulations describes this process.

► Finally, the Final Rule provides for applications to reinstate the requirement of an electric utility to sell electric energy to QFs, by showing that the conditions necessary for the removal of the requirement to sell are no longer met. After notice and comment, the Commission will issue an order within 90 days if the required showing is made. Applications for reinstatement are addressed in the new § 292.313 of the Commission's regulations.

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

The Commission is obligated by statute to regulate key economic aspects of the electric, natural gas and oil industries. The law requires the Commission's economic regulatory activity because the transmission of electricity, natural gas, and oil has often been a natural monopoly. In enacting Part II of the Federal Power Act (FPA) in 1935, one of the primary Congressional goals was to protect electric ratepayers from abuses of market power. To accomplish this goal, Congress directed the FERC to oversee sales for resale and transmission service provided by public utilities in interstate commerce. Today, one of FERC's overarching goals is to promote competition in wholesale power markets, having determined that effective competition, as opposed to traditional forms of price regulation, can best protect the interests of ratepayers. Market power, however, can be exercised to the detriment of effective competition and exercise of market power in bulk power markets.

FERC-556 is required to implement the statutory provisions governed by Section 3 of the Federal Power Act (FPA) (16 U.S.C. 792-828c) and Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §2601). These statutes authorize FERC or Commission to encourage cogeneration and small power production and to prescribe such rules as necessary in order to carry out these statutory directives. As noted above, the Commission has codified FERC-556 in 18 CFR 131.80 and related regulations in 18 CFR Part 292.

A primary objective of PURPA, as indicated in Section 2 of the Act is the conservation of energy through efficient use of energy resources and facilities by electric utilities. One means of achieving this goal is to encourage production of electric power by cogeneration facilities which make use of reject heat associated with commercial or industrial processes, and by small power production facilities which use other wastes and renewable resources. PURPA, through

establishment of various regulatory benefits, encourages the development of small power production facilities and cogeneration facilities which meet certain technical and corporate criteria. Facilities that meet these criteria are called Qualifying Facilities or QFs.

The Commission's regulations in 18 CFR Part 292, specify the certification procedures which must be followed by owners or operators of small power production and cogeneration facilities; specify the criteria which must be met; specify the information which must be submitted to FERC in order to obtain qualifying status; specify the PURPA benefits which are available to QFs to encourage small power production and cogeneration; and specify the requirements pertaining to PURPA implementation plans regarding the transaction obligations that electric utilities have with respect to QFs.

Among the PURPA benefits identified in Part 292, are the requirements for electric utilities: to make available to the public avoided cost information and system capacity needs; to provide certain interconnection and transmission services priced on a nondiscriminatory basis; and to operate in "parallel" with other interconnected QFs so that they may be electrically synchronized with electric utility grids.

Other PURPA benefits identified in Part 292 included exemption from certain corporate, accounting, reporting and rate regulation requirements under the Public Utility Holding Company Act of 1935 (*since repealed by EPAct 2005)*, certain state laws and in certain instances, regulation under the Federal Power Act.

The Final Rule as noted above, implements the Congressional mandate of EPAct 2005 to terminate an electric utility's obligation to purchase energy and capacity from qualifying cogeneration and qualifying small power production facilities if certain conditions are met. The Act also protects existing rights and remedies under any contract or obligation in effect or pending approval involving the purchase of energy or capacity or sale of energy or capacity to a QF. FERC is satisfying the statutory mandate and satisfying its continuing obligation to review its policies encouraging cogeneration and small power production, energy conservation, efficient use of facilities and resources by electric utilities and equitable rates for energy customers.

2. HOW, BY WHOM AND FOR WHAT PURPOSE IS THE INFORMATION TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

Since 1935, the Commission has regulated certain electric utility activities under the Federal Power Act (FPA). Under FPA sections 205 and 206, FERC oversees the rates, terms and conditions of sales for resale of electric energy and transmission service in interstate

commerce by public utilities. The Commission must ensure that those rates, terms and conditions are just and reasonable, and not unduly discriminatory or preferential.

The information collected from FERC-556 and under 18 CFR Parts 131 and 292 is used by the Commission determine whether an application for certification (FERC certification or self-certification) meets the criteria for a qualifying small power production facility or a qualifying cogeneration facility under its regulations and eligible to receive the benefits available to it under PURPA..

In order to obtain QF status and obtain PURPA benefits, an owner or operator of a small power production or cogeneration facility must follow the process indicated in FERC-556 and select, at its option, either the procedure set forth in section 292.207(a), which requires the submission to FERC, of a self-certification or a notice of pre-authorized recertification, or the application for FERC certification through the process set forth in section 292.207(b). The information requirements for both processes are largely the same, i.e., the submission of a completed FERC-556 which provides the information necessary to demonstrate compliance with FERC's regulations. If FERC did not collect the FERC-556 information, it would not be possible to determine whether a facility satisfies all of the QF requirements.

Since revocation of the qualifying status of a small power production or cogeneration facility may occur if the facility fails to comply with any of the Part 292 criteria, private financial lenders to small power production and cogeneration power facilities often require small power producers and cogenerators to follow the more involved section 292.207(b) procedures (certification by FERC as opposed to self-certification) in order to reduce the risk of revocation.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND THE TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

There is an ongoing effort to determine the potential and the value of improved information technology to reduce the burden. Specifically, in order to increase the efficiency with which it carries out its program responsibilities, the Commission has been implementing measures to use information technology to reduce the amount of paperwork required in its proceedings. In Order No. 619, FERC established an electronic filing initiative to meet the goals of the Government Paperwork Elimination Act, which directed agencies to provide for optimal use and acceptance of electronic documents and signatures and electronic recordkeeping, where practical, by October 2003. Among the qualified documents that can now be filed electronically are comments on a filing. "Comments on a Filing" is a document filed in response to a FERC public notice or order in a specific FERC docketed proceeding. It includes

comments on applications, comments filed with environmental documents, protests or statements of positions.

In Order No. 617, July 27, 2000, FERC amended its records' retention regulations to reduce the burden of maintaining records for regulated companies. The Commission did not establish specific media type in order to give the regulated entities the flexibility in the selection of media in order to adapt quickly to changes in technology without the necessity of obtaining FERC approval on the use of media not provided for in the regulations.

With regard to FERC-556, applicants frequently submit portions of their documentation on diskette, e.g., present value analyses of the stream of benefits flowing to the various owners of joint venture facilities involving electric utilities. FERC has attempted to facilitate the granting of QF status by providing materials to potential small power producers and cogenerators to assist in their preparation of notices of self-certification and preparation of applications for certification. The information package is free, brought to the attention of potential applicants through routine inquiry, provided upon request either in hard copy or electronic media, and is available from the Commission's web site. FERC-556 can be downloaded from the Commission's web site at the following address: http://www.ferc.gov/docs-filing/hard-fil-elec.asp#556. Further applicants can file electronically, Notice of Self-Certification as a qualifying facility if they meet the requirements of 18 CFR 292.203 and a subsequent notice of self-recertification as a qualifying facility if they meet the requirements in 18 CFR 292.207.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATON AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2.

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. There are no similar sources of information available that can be used or modified for these reporting requirements. FERC-556 is not likely to be duplicated in other government forms due to the uniqueness of the QF program. No similar information is available to FERC for these purposes. This Final Rule was drafted to meet the requirements as specified in section 210(m) as created by section 1253(a) of EPAct 2005.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

The intent of PURPA section 210 is one of small power producer and cogeneration

regulations in a less burdensome manner vis-à-vis the regulation of conventional electric utilities. Part 292 of the Commission's regulations already incorporates various features designed to reduce regulatory burdens on small entities. The Commission as noted above is responding to a Congressional mandate in EPAct 2005 to terminate the obligation of electric utilities to purchase energy and capacity from qualifying small power production facilities and qualifying cogeneration facilities.

> Sections 292.101 and 292.201 define the specialized terms used throughout Part 292 to assist would-be QF applicants.
> Sections 292.101 and 292.201 define the specialized terms used throughout Part 292 to assist would-be QF applicants.
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> Sections 292.209, 292.210 and 292.211 provide exemptions to certain small power production hydroelectric facilities from some Section 292.208 environmental requirements. Sections 292.204(a) (3) and 292.205(c) provide for waiver of certain documentation requirements.
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> Section 292.207(d)(2) provides that, prior to undertaking any substantial alteration or modification of a facility, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification to the facility will not result in the revocation of QF status.

The Commission views the Final Rule as an interpretative rule. Under Small Business Administration guidance, interpretative rules "generally interpret the intent expressed by Congress, where an agency does not insert its own judgments or interpretations in implementing a rule and simply regurgitates statutory language."[9] In the Final rule the Commission is proposing that this docket is mostly an interpretative rule and as stated this position in the final rule, and therefore, does not require a regulatory flexibility analysis. However there is one exception and this will have an impact on small entities. The Commission has established a rebuttable presumption that small QFs, with a net capacity no greater than 20 MW, do not have nondiscriminatory access to wholesale markets described in section 210(m)(1)(A), (B), or (C). Unless an electric utility seeking the right to terminate its requirement to purchase small QF power specifically rebuts this small QF presumption, and that electric utility's request is granted by the Commission, a small QF would continue to be eligible to require the electric utility to purchase its electric energy. With this 20 MW rebuttable presumption the Commission reduces the burden, i.e., the cost of participating in termination proceedings, of small QFs to participate in the section 210(m)(3) proceedings. In fact, the Commission is being generous in allowing

9 "How to Comply with the Regulatory Flexibility Act: A Guide for Government Agencies", Small Business Administration, Office of Advocacy, P.5, May 2003.

small QFs up to 20 MWs to have a rebuttable presumption given that the Small Business Administration considers "small" to mean 4 MW or less.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

Applicants submit an initial FERC-556 and additional notices for any changes in qualifying status criteria. In view of the one-time requirement, the PURPA objective of conservation through encouragement of small power production and cogeneration would be undercut if FERC-556 information were to be collected less frequently (i.e., not collected at all). If the information were not to be collected as noted above, the Commission would be unable to certify a facility as a QF, and the cogenerator or small power producer would be unable to determine in advance whether self-certification or request for Commission certification is warranted.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

The Commission requires an original and fourteen copies of the application to be filed. This exceeds the OMB guidelines in 5 CFR 1320.5(d) (2) (iii) because of the number of divisions within the Commission that must analyze the application in order to carry out the regulatory process. The original is docketed, imaged through *e*-Library and filed as a permanent record for the Commission. The remaining copies are distributed to the necessary offices of the Commission with one being placed immediately in the Commission's Public Reference Room for public use. Since the time frame for responses to the request is very limited, the multiple hard copies are necessary for the various offices to review, analyze and prepare the final order at the same time. The electronic filing initiative at FERC, may in the near future, allow for relief of the number of copies, but at this time, the program turn around time for docketing, imaging and retrieval does not permit sufficient time to review the filings and to prepare the necessary documents for the processing of these applications.

8. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

The Commission's procedures require that the rulemaking notice be published in the Federal Register, thereby allowing all public utilities, state commissions, federal agencies, and other interested parties an opportunity to submit comments, or suggestions concerning the proposal. The rulemaking procedures also allow for public conferences to be held as required. Comments were due 30 days from publication in the Federal Register.

The Commission received extensive comments to its NOPR.[10] At one extreme are commenters who argued that the Commission may not address the mandatory purchase requirement issues by rulemaking and that competitive capacity and energy markets do not yet exist to support a generic finding that QFs in the four regional transmission organization/ independent system operator (RTO/ISO) regions should lose the right to require electric utilities to purchase their electric output. At the other extreme are those who argued that the Commission, with limited exceptions, should eliminate the mandatory purchase requirement altogether.

The Commission does not believe that either extreme reflects the letter or the spirit of section 210(m). The QFs who advocated that the Commission may not or should not act at all by rulemaking failed to recognize that the Commission has broad latitude to act by either rulemaking or adjudication. Nowhere does section 210(m) preclude the Commission from acting by rulemaking. Moreover, where, as here, recurring and common issues of fact arise, acting by rulemaking is not only permissible, but provides more effective notice to and opportunity for participation by all affected parties. To some extent, generic findings about markets are inevitable, either by rulemaking or in the first utility specific filing concerning a specific market. Making generic findings by rulemaking provides affected entities, including QFs, a better opportunity to participate in the generic proceeding as well as the individual proceedings that will follow. Finally, the substantive arguments of these entities that underlie their procedural objections fail to recognize that Congress, in enacting section 210(m), explicitly recognized three different market structures and required the Commission to respect the differences in those markets when making determinations as to whether to rescind the purchase obligation. In essence, they are rearguing the very debates that Congress settled in adopting section 210(m).

The Commission also does not agree with the position of utilities that advocate that it should terminate the purchase obligation in summary fashion in the Final Rule. Although the Commission's action in the Final Rule respects the choice of Congress in establishing different tests for different market structures, the Commission does not, in the Final Rule, terminate the purchase obligation of any utility. In this respect, the Commission modifies its approach in the NOPR. In contrast to the NOPR, the Commission establishes in the Final Rule only rebuttable presumptions that the purchase obligation should be eliminated with respect to certain QFs, not final determinations.

10 Attached as Appendix A of the final rule is a list of all commenters and the abbreviations that are used throughout the order to refer to the commenters.

In sum, the Final Rule appropriately reflects Congressional intent in enacting section 210(m). It does not, as some commenters suggest, ignore the fact that Congress did not repeal PURPA section 210(a)'s directive that the Commission prescribe, and from time to time revise, such rules as it determines necessary to encourage cogeneration and small power production. Rather, it recognizes the fundamental change which Congress made to the statutory construct when it determined that "no electric utility shall be required . . . to purchase electric energy from" a QF if certain findings are made with respect to various markets. The Commission's action properly implements Congressional intent in the new section 210(m) that the three different market structures present different considerations in determining whether to relieve utilities of the purchase obligation. The Commission's action also properly recognizes that smaller QFs can face more significant challenges than larger QFs in accessing competitive wholesale markets. The Commission's action continues to support QF development by ensuring that, where the requirements of section 210(m) are met, QF development will, as determined by Congress, be stimulated by market forces, and that where those requirements have not been met, QF development will continue to be stimulated as it is today through the mandatory purchase obligation. Finally, nothing in the Final Rule affects any electric utility's resource adequacy obligations, compliance with the Electric Reliability Organization's reliability standards, prudent utility practice to build or purchase reliable power at the most economical price, or resource portfolio obligations under state law including obligations to purchase renewable energy.

Of the approximately 2,000 pages of comments the Commission has received to its NOPR, a large portion of the comments focused on the standards applicable to utilities within the "Day 2" RTO/ISOs and the procedures for utilities within "Day 2" markets to claim relief from the purchase requirement. Based on careful consideration of the comments submitted in response to the NOPR, the Commission adopts a Final Rule that makes certain modifications and clarifications to the approach in the NOPR.

Compliance Filing

NOPR

The Commission proposed that to claim relief from the purchase obligation, electric utilities that are members of Midwest ISO, PJM, ISO-NE, and NYISO will need to make compliance filings pursuant to section 210(m)(3).

Comments

AEP and PJM Transmission Owners argued that the Commission should remove the obligation to require a compliance filing for utilities located in one of the exempted RTO/ISOs.

PJM Transmission Owners argued that it is not apparent that Congress intended the Commission only to grant relief from such mandatory purchase requirements upon receipt of an application. AEP and PJM Transmission Owners contend there is nothing prohibiting the Commission from granting blanket relief for all electric utilities in a particular RTO/ISO that meets the requirements of section 210(m). PJM Transmission Owners requested, if compliance filings are ultimately required, to be allowed to make one filing on behalf of all the electric utilities in PJM.

EEI stated that, instead of compliance filings by utilities located within the four "Day 2" markets, the Commission may wish to require utilities to apply for relief from the mandatory purchase requirement, in accordance with section 210(m)(3) of PURPA. EEI stated that utilities applying for relief would be entitled to rely on generic Commission findings (as the Commission has proposed in the NOPR) that the four "Day 2" markets meet the tests established in section 210(m)(1)(A) and that a Commission-approved OATT is evidence of nondiscriminatory access to these markets under section 210(m)(1).

Commission Determination

In light of the comments filed, the Commission concludes that utilities in "Day 2" RTO/ISO markets should file applications pursuant to section 210(m)(3), instead of the "compliance filings" proposed in the NOPR. The Commission believes that this will be more consistent with the statute than the compliance filings proposed in the NOPR. In the section 210(m)(3) application, a utility within a "Day 2" RTO/ISO will be required to: (a) show that it is a member of a "Day 2" RTO; (b) provide information to enable QFs larger than 20 MW to seek to rebut the presumption that they have nondiscriminatory access to the market; such information will be a description of transmission constraints not otherwise publicly available, and if publicly available, provide a specific link to such information; and (c) provide a list of affected interconnected QFs. With respect to the section 210(m)(A) "Day 2" RTO/ISO markets, these applications, in conjunction with the generic findings and rebuttable presumptions adopted in the Final Rule, will allow the Commission to timely and fairly process applications within the 90-day time period intended by Congress.

Section 210(m)(3) – Commission Review

Sufficient Notice

NOPR

Section 210(m)(3) states, in relevant part, that "after notice, including sufficient notice to potentially affected [QFs], and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in

subparagraph (A), (B), or (C) of paragraph (1) have been met"[11] Prior to the issuance of the NOPR, the Commission dealt with two section 210(m)(3) applications.[12] In Alliant, the Commission explained its interpretation and application of "notice, including sufficient notice to potentially affected [QFs]." The Commission clarified that an applicant would be required to identify all potentially affected QFs in any section 210(m)(3) application. The Commission also listed five categories of facilities that would constitute "all potentially affected QFs." In the NOPR, the Commission proposed to incorporate this interpretation of "sufficient notice" and "all potentially affected QFs" in new § 292.310(b) and (c) of the Commission's regulation.

Comments

PSNM is concerned with requiring notice by applicants seeking relief from the purchase obligation to developers of facilities that have pending state avoided cost proceedings and any other QFs that the applicant reasonably believes to be affected by its petition. Specifically, it stated that the applicant seeking relief may not necessarily be aware of the all the entities falling within these classifications. PSNM recommends that the Commission revise the proposed § 292.310(c)(4) to state: "developers of facilities that have pending state avoided cost proceedings involving the applicant."

SCE is concerned with proposed § 292.310(b), (c)(2) and (c)(5). It stated that these categories may capture too broad a category of entities and thus lead to needless debates over the scope of notice provided. It states that in any case uncertified QFs and certified QFs not in the service territory of the applicant, as well as all other interested parties will receive sufficient notice through the Federal Register notice process. SCE argued that the relevant statute requires sufficient notice, not actual notice.

Commission Determination

The Commission will adopt the NOPR's proposal to incorporate its interpretation of "sufficient notice" and "all potentially affected QFs" as described in Alliant with one modification. PSNM pointed out that an applicant may not be aware of state avoided cost proceedings that do not involve the applicant and recommends adding "involving the applicant" to proposed § 292.310(c)(4). The Commission agrees that an applicant would not necessarily know about QF developers that have initiated state avoided cost proceedings that do not involve the applicant. Nor did the Commission intend for applicants in this situation to identify such QF

11 16 U.S.C. 824a-3(m)(3) (emphasis added).

12 See Alliant Energy Corporate Services, Inc., 113 FERC ¶ 61,024 (2005) (Alliant); Montana-Dakota Utilities Co., 113 FERC ¶ 61,045 (2005) (Montana-Dakota).

developers. The Commission finds PSNM's proposed revision adds clarity to § 292.310(c)(4) and it is consistent with the Commission's interpretation of "all potentially affected QFs." Accordingly, the Commission will modify § 292.310(c)(4) to state: "(4) The developers of facilities that have pending state avoided cost proceedings involving the applicant; and".

The Commission disagrees with SCE's notion that "all potentially affected QFs" will receive sufficient notice through the Federal Register notice process. While the statutory language does not explicitly state that the "notice, including sufficient notice" shall be actual notice, the Commission nonetheless believes its statutory requirement is best met by providing all potentially affected QFs, many of which are small entities that do not regularly read the Federal Register, with actual notice.

Filing Fee

NOPR

Section 210(m)(3) states, in relevant part, that any electric utility may file an application for relief from the mandatory purchase requirement. In the NOPR, the Commission proposed that utilities seeking relief from the mandatory purchase requirement would need to file an application pursuant to section 210(m)(3).

Comments

SCE sought confirmation that an application filed pursuant to section 210(m)(3) is not subject to Rule 207.[13] SCE argued that the statute indicates that the filing is an "application" and thus should be subject to Rule 204,[14] which does not require the payment of a fee.

Commission Determination

SCE was the only commenter to seek clarification on whether or not a filing fee is associated with a section 210(m)(3) application. The Commission finds that no filing fee shall apply to section 210(m)(3) applications.

Three Standards for Relief

NOPR

13 18 CFR 385.207.

14 18 CFR 385.204.

Section 210(m)(1) defines under what conditions the Commission must relieve an electric utility of the obligation to enter into a new contract or obligation to purchase electric energy from a QF. Essentially, section 210(m)(1) establishes three different standards for relief from the purchase requirement depending on whether: (1) electric utilities are members of "Day 2" RTO/ISOs; (2) electric utilities are members of "Day 1" RTO/ISOs; and (3) electric utilities are in neither "Day 2" nor "Day 1" RTO/ISOs. The NOPR interpreted the language of section 210(m)(1) as to what conditions must exist for the three types of markets and sought comments.

The NOPR explained that the first standard for relief is established in section 210(m)(1)(A) of section 210(m)(1), which applies to "Day 2" markets with wholesale bilateral long-term contracts for the sale of capacity and electric energy available to participants. The Commission indicated that, under section 210(m)(1)(A)(ii), there was no requirement, given the statutory language, to consider "evidence of transactions within the relevant market" when determining whether QFs have nondiscriminatory access to "wholesale markets for long-term sales of capacity and electric energy." The Commission suggested that Congress presumed QFs, which have "nondiscriminatory access to" ISO and RTO regions with auction-based day ahead and real time markets, have nondiscriminatory access to long-term sales of electric energy and capacity wholesale markets outside the interconnected utility. The Commission proposed to find that Midwest ISO, PJM, ISO-NE, and NYISO meet the requirements of section 210(m)(1)(A).

The second standard for relief is established in section 210(m)(1)(B), which the Commission found to be intended to apply in "Day 1" RTO/ISOs, i.e., those that do not have both auction-based day ahead and real time markets. Section 210(m)(1)(B) provides for termination of the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a QF so long as there is (i) a Commission-approved regional transmission entity providing nondiscriminatory transmission and interconnection services; and (ii) "competitive wholesale markets that provide a meaningful opportunity" to sell capacity and energy on both a short- and long-term basis and energy on a real-time basis (emphasis added) to buyers other than the utility to which the QF is interconnected. In the NOPR, the Commission stated that "meaningful opportunity" is to be determined by the Commission after considering, among other factors, "evidence of transactions within the relevant market." The Commission indicated that taken together, the terms "competitive," "meaningful opportunity" and "evidence of transactions" suggest that Congress intended that termination of the purchase requirement in a "Day 1" market only if it could be established that QFs had opportunities to make long-term and short-term sales of capacity and long-term, short-term and real-time sales of energy into competitive wholesale markets.

The third standard for relief is established in section 210(m)(1)(C) of section 210(m)(1). Under this standard, the purchase requirement is removed in wholesale markets for the sale of capacity and electric energy that are, "at a minimum," of comparable competitive quality as markets described in subparagraphs (A) and (B). The Commission explained that although this

provision is not clear on its face, its reference to subparagraphs (A) and (B) requires the Commission to be mindful, in interpreting the provision, of the two types of requirements that are embodied in those sections, i.e., (1) nondiscriminatory access to transmission and interconnection services, and (2) competitive short-term and long-term markets that provide a meaningful opportunity to sell to buyers other than the utility to which the QF is interconnected.

Comments

ELCON, AWEA, Caithness and Public Interest Organizations (PIOs),[15] for example, stated that Congress did not repeal the mandatory purchase requirement and that the Commission has a continuing obligation to promote QF development. This, they contend, can only be accomplished by assuring that markets meet criteria that guarantee that QFs will enter into contracts with electric utilities of similar quality to those that they received prior to the enactment of section 210(m) of PURPA before the mandatory purchase obligation can be terminated. ELCON appeared to suggest that there is only one standard for relief from the purchase requirement: "assurance of a competitive market."[16] In essence, ELCON argued that sections 210(m)(1)(A), (B) and (C) establish a single standard for terminating the mandatory purchase obligation. ELCON stated that section 210(m) authorizes the Commission to grant relief from the purchase requirement "if and only if a viable market exists."[17] ELCON expressed its concern that because discrimination continues and the markets are flawed, competition and on-site generation will be discouraged. AWEA and Caithness stated that the Commission should grant relief from the purchase requirement only in markets which are "sufficiently competitive."[18] EPSA argued that the mandatory purchase requirement can be terminated only where the Commission finds that the "economic and technical equivalent to mandatory purchase is available through a competitive market."[19] PIOs argued that electric utilities have to demonstrate that QFs do, in fact, have physical and economic access to all of the required markets on a nondiscriminatory basis. The American Chemistry Council contended that the mandatory purchase requirement can be terminated only in those situations where wholesale markets have evolved to ensure the long-term commercial viability of QFs which

15 The PIOs filing these comments were the Center for Energy Efficiency & Renewable Technologies, Delaware Division of the Public Advocate, Environmental Law & Policy Center, Interwest Energy Alliance, Izaak Walton League of America, Natural Resources Defense Council, Northwest Energy Coalition, Office of the Ohio Consumers' Counsel, Pace Energy Project, Project for Sustainable FERC Energy Policy, West Wind Wires, and Western Resource Advocates.

16 ELCON Comments at 8.

17 Id.

18 AWEA Comments at 2.

19 EPSA Comments at 9.

enables QFs to attract investment capital and facilitates QF development; the American Chemistry Council urged the Commission to interpret section 210(m)(1) in such a manner.

NPRA reminded the Commission that the main purpose of cogeneration is not to serve the needs of an electric power grid or "market," but, rather, it is to serve the interconnecting industrial thermal and electrical load. Consequently, NPRA argued that the operation of these facilities may require different market features than are required by utility electric generation or merchant generation. NPRA argued that Congress intended to terminate the "must take" requirement only when it can be demonstrated that an electric market supports not only the role of merchant power, but the retention and encouragement of cogeneration. In other words, while a market may prove an efficient and viable alternative for a merchant plant, it does not necessarily ensure that it is an efficient and viable alternative for sales of power by a cogeneration facility.

Commission Determination

The Commission disagrees with commenters' interpretation of the statutory standard for relief from the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from a QF. There is nothing in section 210(m) to suggest that Congress intended to ensure a QF's commercial viability. Nor does the statute require the Commission to find that the "economic and technical equivalent to mandatory purchase is available through a competitive market" before it terminates the requirement that an electric utility enter into a new contract or obligation to purchase electric energy from QFs. Although the Commission certainly agrees with the QF commenters that Congress did not repeal the mandatory purchase requirement in its entirety, Congress clearly left the Commission with no choice but to eliminate the mandatory purchase requirement for utilities operating in certain markets upon certain findings being made. The fact is that the language of section 210(m)(1) provides that an electric utility shall be relieved of the requirement to purchase from a QF if the Commission makes certain findings, which findings do <u>not</u> include a determination that the "economic and technical equivalent to mandatory purchase is available through a competitive market." This is not what section 210(m) says, nor would it make any sense to infer such an interpretation. Competitive markets do not, by definition, impose "mandatory" purchase obligations on buyers. Buyers choose among differing sellers based on their relative cost, reliability, etc. The QFs making this argument therefore ignore the relevant statutory language and, in doing so, reargue the debate before Congress when it enacted section 210(m).

The most reasonable interpretation of section 210(m)(1) is that Congress, in setting forth discrete tests for three different types of markets, was requiring the Commission to differentiate among these markets, and the differing circumstances they present, in determining whether a utility must be relieved of the mandatory purchase obligation. Although the statute is

ambiguous in certain respects, it clearly reflects Congressional intent that the Commission differentiate among these three markets in making its determination regarding whether to terminate the purchase obligation. This approach not only reflects a natural reading of the words of the statute, it also is reasonable given the nature of the determination being made. There is little debate in this proceeding that Day 2 organized markets, as a general matter, provide greater opportunities for QFs (and other independent generators) to compete than unorganized markets because of the existence of day-ahead and real-time energy markets that allow all competing generators to submit bids to participate in the market on a nondiscriminatory basis. Although other markets – including "Day 1" markets and non-organized markets – also provide opportunities for independent generators to compete, it is not surprising that Congress would find that, as a general matter, they have less formalized structures for doing so and, hence, utilities seeking relief from the purchase obligation in those markets would bear a heavier evidentiary burden to obtain relief. The Commission cannot, as some commenters in effect ask us to do, simply collapse the three discrete tests into one test that requires an electric utility to demonstrate that a QF will remain economically viable if the purchase requirement is eliminated. This would make the three different statutory standards meaningless.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents in the requirements contained in the final rule.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission generally does not consider the data filed to be confidential. However the applicant may request privileged treatment for supporting documents the release of which might be harmful to the competitive posture of the applicant in accordance with Section 18 CFR 388.112 of the Commission's regulations.

11. PROVIDE ADDITIONAL JUSTIFICAITON FOR ANY QUESTIONS OF A SENSITIVE NATURE

There are no questions of a sensitive nature associated with the reporting requirements proposed in the subject Final Rule.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

Based on FERC's experience with the burden of information collection in connection

with FERC Form 556, the Commission has found that 90% of the applications for certification are submitted using the self-certification process as opposed to completing the FERC Form 556 (having FERC review and prepare the certification process).
The following estimates are based on the efforts to meet the notice requirements as specified in section 210(m) (1). These hours will be added to the 10,368 hours associated with the self certification process of FERC Form 556 after the final rule is used.

FERC-912 (FERC Form 556)	No. of Respondents	No. of Responses	Burden Hours per/Respondent	Total Burden Hours
Proposed §292.310[20]	230*	1	2	460
Proposed §292.312[21]	230*	1	2	460
Proposed §292.313[22]	630	1	3	1,890

20 **§ 292.310 Procedures for utilities requesting termination of obligation to purchase from qualifying facilities**

a) An electric utility may file an application with the Commission for relief from the mandatory purchase requirement under §292.303(a) pursuant to this section on a service territory-wide basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in §292.309(a)(1), (2) or (3) have been met. After notice, including sufficient notice to potentially affected qualifying cogeneration facilities and qualifying small power production facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in §292.309(a)(1), (2) or (3) have been met.

21 **§ 292.312 Termination of obligation to sell to qualifying facilities.**

(a) Any electric utility may file an application with the Commission for relief from the mandatory obligation to sell under this section on a service territory-wide basis or a single qualifying facility basis. Such application shall set forth the factual basis upon which relief is requested and describe why the conditions set forth in paragraphs (b)(1) and (b)(2) of this section have been met. After notice, including sufficient notice to potentially affected qualifying facilities, and an opportunity for comment, the Commission shall make a final determination within 90 days of such application regarding whether the conditions set forth in paragraphs (b)(1) and (b)(2) of this section have been met.

22 **292.313 Reinstatement of obligation to sell.**

At any time after the Commission makes a finding under §292.312 relieving an electric utility of its obligation to sell electric energy, a qualifying cogeneration facility, a qualifying small power production facility, a State agency, or any other affected person may apply to the Commission for an order reinstating the electric utility's obligation to purchase electric energy under this section. Such application shall set forth the factual basis upon which the application is based and describe why the conditions set forth in Paragraph (b)(1) and (b)(2) of this section are no longer met. After notice, including sufficient notice to potentially affected utilities, and opportunity for comment, the Commission shall issue an order within 90 days of such application reinstating the electric utility's obligation to sell electric energy under this section if the Commission finds that the conditions set forth in paragraphs (b)(1) and (b)(2) of this section are no longer met.

Totals	860	1	3.2674#	2,810

- *The respondent universe of 230 is the same universe of respondents who must file the necessary information for both of these requirements, namely public utilities. The remaining requirement applies to qualifying facilities.

- # 3.2674 hours per response = 2,810 hours ÷ 860 respondents

In response to the NOPR, the Commission received no comments concerning its estimates for burden and corresponding costs and will use those estimates here in the final rule. Where commenters believe that a disproportionate amount of burden had been placed on certain entities in order to meet statutory criteria, the Commission has addressed this issue elsewhere in the rule and will not repeat its responses here. The actions taken in the Final Rule should ameliorate their concerns of a significant shift in the burden.

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Current costs:

The estimated annual cost to respondents for the requirements in the Final Rule is $421,500, reporting burden of 2,810 hour x $150 an hour (includes attorney fees, engineering consultation and administrative support). The costs associated with the Final Rule will be added to the costs associated with the self-certification process of FERC Form 556 after the issuance of the final rule.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

(a) Information Analysis (2.3 FTE)[23] $269,934
(b) Forms Clearance review $ 6,239

Year of Operation $276,173

The estimate of the cost to the Federal Government is based on salaries for professional and clerical support, as well as direct and indirect overhead costs. Direct costs include all costs directly attributable to providing this information, such as administrative costs and the cost for

23 ?/ The estimated annual cost per staff/employee ($117,363) is based on the number of employees in the Office of Energy Markets and Reliability and the FY 2006 appropriation for that office as reported in the Commission's FY 2006 Budget. The $117,363 is the actual (as opposed to the estimated) cost and consists of salary and benefits.

information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission. These costs apply to activities which benefit the whole organization rather than anyone particular function or activity. The estimated annualized cost to the Federal Government will be reduced when electronic filing is fully implemented.

An "FTE" is a "Full Time Equivalent" employee that works the equivalent of 2,080 hours per year. Salary represents the allocated cost per electric program employee at the Commission based on its appropriated budget for fiscal year 2006. The $117,363 "salary" represents the staff responsible for processing Section 210 filings.

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

While the Commission is implementing the provisions of EPAct and specifically amended provisions of section 1253 (See reasons for change in Background section above), the changes do not substantially change the filing requirements for self certification.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

Copies of the filings are made available to the public within two days of submission to FERC via the Commission's web site. There are no other publications or tabulations of the information.

17. DISPLAY OF EXPIRATION DATE

The notices required by section 210(m) will be published on the Commission's web site and in the Federal Register. Because FERC-556 is available from the Commission's website as a standard format that can be downloaded and printed the expiration date for OMB approval is printed on the first screen.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There is an exception to the Paperwork Reduction Act statement. The Commission will not be using statistical survey methodology for these information collections.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not Applicable. Statistical methods are not employed for these data collections.