

Supporting Statement
FERC-914, Cogeneration and Small Power Production - Tariff Filings
Request for a Three-Year Extension of a Currently Approved Collection

The Federal Energy Regulatory Commission (Commission or FERC) requests that the Office of Management and Budget (OMB) review and extend its approval of FERC-914 “Cogeneration and Small Power Production - Tariff Filings” (OMB No. 1902-0231).¹ Current OMB approval expires on July 31, 2009.

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

Section 205(c) of the Federal Power Act (FPA) (Attachment A) requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) (Attachment A) of the FPA requires that every public utility must provide notice to the Commission and the public of any changes to its jurisdictional rates and tariffs, file such changes with the Commission, and make them available for public inspection, in such manner as directed by the Commission. In addition, FPA section 206 (Attachment B) requires the Commission, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable, unduly discriminatory or preferential. FPA section 207 (Attachment C) requires the Commission upon complaint by a state commission and a finding of insufficient interstate service, to order the rendering of adequate interstate service by public utilities, the rates for which would be filed in accordance with FPA sections 205 and 206.

In Orders Nos. 671 and 671-A², (Attachment D) the Commission revised its regulations that govern qualifying small power production and cogeneration

¹ Normally, these requirements and burden would be included in FERC-516, “Electric Rate Schedule Filings” (OMB Control No. 1902-0096). However, FERC-516 is currently the subject of OMB review, so the Commission will continue to track these requirements (and the related burden hours) separately under FERC-914 [formerly labeled “FERC-914(516)”]. FERC-914 covers the tariff filing requirements under 18 CFR Part 35 for those qualifying facilities that do not meet the exemption requirements in 18 CFR Part 292.

In the future, the Commission will incorporate the FERC-914 reporting requirements and related burden into the FERC-516.

facilities. Among other things, the Commission eliminated certain exemptions from rate regulation that were previously available to qualifying facilities (QFs). New qualifying facilities may need to make tariff filings if they do not meet the new exemption requirements.

FERC implemented the Congressional mandate of the Energy Policy Act of 2005 (EPAAct 2005) to establish criteria for new qualifying cogeneration facilities by: (1) amending the exemptions available to qualifying facilities from the FPA and from PUHCA [resulting in the burden imposed by FERC-914, the subject of this statement]; (2) ensuring that these facilities are using their thermal output in a productive and beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or industrial purposes; and there is continuing progress in the development of efficient electric energy generating technology; (3) amending the FERC Form 556³ to reflect the criteria for new qualifying cogeneration facilities; and (4) eliminating ownership limitations for qualifying cogeneration and small power production facilities. The Commission satisfied the statutory mandate and 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

The information filed under FERC-914 enables the Commission to exercise its wholesale electric rate and electric power transmission oversight and enforcement responsibilities in accordance with the Federal Power Act, the Department of Energy Organization Act and EPAAct 2005. It also enables Commission staff and other parties to examine and evaluate the cost element of rates, as well as other financial information and to determine whether and how much of these elements should be included in the utility's rates.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE

² Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); and Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order 671-A, 71 FR 30585 (May 30, 2006), in Docket No. RM05-36.

³ The FERC-556 is cleared separately as OMB Control No. 1902-0075 and is not a subject of this notice.

BURDEN AND THE TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

On September 19, 2008, in Order No. 714⁴, the Commission revised its regulations to require that all tariffs, tariff revisions and rate change applications for public utilities, natural gas pipelines, oil pipelines and power administrations be filed electronically according to a set of standards developed in conjunction with the North American Energy Standards Board. This rule is part of the Commission's efforts to comply with the Paperwork Reduction Act, the Government Paperwork Elimination Act, and the E-Government Act of 2002 by developing the capability to file electronically with the Commission via the Internet. Electronic filing reduces physical storage space needs and document processing time, provides for easier tracking of document filing activity; potentially reduces mailing and courier fees; allows concurrent access to the tariff filing by multiple parties as well as the ability to download and print tariff filings; and provides automatic e-mail notification to an applicant of receipt of the filing and whether or not it has been accepted. Beginning April 1, 2010, all tariffs, tariff revisions and rate change applications must be filed electronically. More information is available on the Commission's web page: <http://www.ferc.gov/docs-filing/etariff.asp>.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION 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 information requirements are periodically reviewed in conjunction with the OMB renewal process. Staff reviews the Commission's regulations and information requirements and searches for other sources of this information from outside parties. Staff could find no similar sources of information that could be used to replace any of the information collected under FERC-914. This information is not likely to be collected by other federal agencies as the Commission is the only federal entity responsible for the regulation of the nation's interstate wholesale power sale tariffs.

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

⁴ Electronic Tariff Filings, Order No. 714, 73 FR 57,515–57,538, (October 3, 2008).

As FERC-914 information is collected from both small and large entities, the Commission has put forth significant effort in its design of an eFiling system that will present the least amount of burden. The North American Energy Standards Board assisted greatly in the process of developing the protocols, standards, and data formats needed to provide tariff and related data to enable the Commission to develop a database to track electronic tariff and rate schedules filings. Committees were established including representatives from the wholesale natural gas industry, wholesale electric industry, oil pipelines, intrastate natural gas pipelines, and third party software developers to work with Commission staff to develop applicable standards. Between February 1, 2007 and January 23, 2008, these committees held a total of 16 meetings in various cities over 24 days.

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

Once an initial tariff filing is made and accepted by the Commission, additional filings are required only when a change in the tariff is made. This is not a recurring information collection where filings are made on a cyclical basis. If the information were not collected, the Commission would be unable to oversee and regulate these tariffs as mandated by the FPA.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

Presently and up until April 1, 2010, an entity is required to submit FERC-914 in hardcopy. Fourteen copies of the filing are required which exceeds the OMB guidelines in 5 CFR 1320.5(d) (2) (iii). Multiple copies are necessary to distribute to staff in many Commission divisions for simultaneous review and analysis in order to meet regulated review deadlines.

After April 1, 2010, when the Commission's eTariff filing requirements become effective, paper filings will not be accepted.

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

In accordance with 5 CFR § 1320.8(d), the Commission issued a notice to renew the FERC-914 OMB approval and published it in the *Federal Register* on March 30, 2009 (Attachment E).⁵ The Commission did not receive any comments in response to this notice.

⁵ The notice appeared in the *Federal Register* Vol. 74, No. 59 issued on Monday, March 30, 2009.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no respondent payments or gifts required in this proposed information collection.

10. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

The Commission generally does not consider the information filed in FERC-914 to be confidential. However, the filer may request privileged treatment, in accordance with 18 CFR §388.112, for a filing thought to contain information harmful to the competitive posture of the applicant if released to the general public.

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

There are no questions of a sensitive nature associated with the reporting requirements in this information collection.

12. ESTIMATED BURDEN OF COLLECTION OF INFORMATION

FERC Data Collection - FERC-914	Number of Respondents Annually (1)	Number of Responses Per Respondent (2)	Average Burden Hours Per Response (3)	Total Annual Burden Hours (1)x(2)x(3)
FPA Section 205 filings	100	1	183	18,300
Electric quarterly reports (initial)	100	1	230	23,000
Electric quarterly reports (later)	100	3	6	1,800
Change of status	100	1	3	300
Total				43,400

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Total Respondent	Number of Hours per	Cost per Staff	Total Annualized
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Burden Hours		Staff Year		Employee ⁶		Cost
43,400	÷	2,080	x	\$128,297	=	\$2,676,966.10

The estimated total annual cost to respondents is \$2,676,966.10 [43,400 hours divided by 2,080 hours⁷ per year, times \$128,297⁸ equals \$2,676,966.10]. The estimated burden covers the qualifying facilities required to file electric quarterly reports, change of status filings, and tariff filings to comply with section 205 of the Federal Power Act (FPA).

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

(a) Information Analysis (1.6 full-time employees)	\$	205,275.20
(b) Forms Clearance review	\$	1,480.00
Total for One Year of Operation		\$ 206,755.20

This estimated 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 information technology. Indirect or overhead costs are costs incurred by an organization in support of its mission.

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

There is no change in burden from the last date of submittal.

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

⁶ The “Cost per Staff Employee” is based on the estimated annual allocated cost per Commission employee for fiscal year 2009. The estimated \$128,297 “cost” includes salaries, benefits and overhead.

⁷ Number of hours an employee works each year.

⁸ Average annual salary per employee.

It is not appropriate to display the expiration date for OMB approval of the information collected on FERC-914 because the information is not collected on a standard, preprinted form that would avail itself to this display. Rather, public utilities and licensees prepare and submit filings that reflect the unique or specific circumstances related to rates and services involved in the filing. In addition, the information contains a mixture of narrative descriptions and empirical support that varies depending on the nature of the services to be provided.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

The Commission does not use statistical survey methodology for this information collection.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

Not Applicable. Statistical methods are not employed for this information collection.

ATTACHMENT A**FPA Sec. 205. Rates and Charges; Schedules; Suspension of New Rates****[5248]**

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

ATTACHMENT B**FPA Sec. 206. Fixing Rates and Charges; Determination of Cost of Production or Transportation****(a)**
[5250]

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded

within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c)
[5251]

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e)
(1) In this subsection:

(A)
[5252]

The term 'short-term sale' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term 'applicable Commission rule' means a Commission rule

applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to —

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)

(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

ATTACHMENT C**FPA Sec. 207. Furnishing of Adequate Service****[5253]**

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes. nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

ATTACHMENT D**Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, February 15, 2006, Docket No. RM05-36-000, 18 CFR 131, 18 CFR 292, 71 FR 7852**

[30,077]

71 FR 7852 (February 15, 2006)

18 C.F.R. Parts 131 and 292

[Docket No. RM05-36-000; Order No. 671]

Revised Regulations Governing Small Power Production and Cogeneration Facilities

(Issued February 2, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: Pursuant to Section 1253 of the Energy Policy Act of 2005 (EPAAct 2005) and Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), the Federal Energy Regulatory Commission (Commission) revises 18 C.F.R. Parts 131 and 292 to implement amended regulations governing qualifying cogeneration and small power production facilities.

EFFECTIVE DATE: The rule will become effective March 17, 2006.

FOR FURTHER INFORMATION CONTACT: Paul Singh (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 502-8576.

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SUPPLEMENTARY INFORMATION:**I. Introduction**

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAAct 2005)¹ was signed into law. Pursuant to Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), as modified by Section 1253 of EPAAct 2005,² the Federal Energy Regulatory Commission (Commission) hereby issues a rule that: (1) ensures that new qualifying cogeneration facilities are using their thermal output in a productive and beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or institutional purposes; and that there is continuing progress in the development of efficient electric energy generating technology; (2) amends Form 556³ to reflect the criteria for new qualifying cogeneration facilities; (3) eliminates ownership limitations for qualifying cogeneration and small power production facilities; and (4) amends the exemptions available to qualifying facilities (QFs) from the requirements of the Federal Power Act (FPA)⁴ and the Public Utility Holding Company Act of 1935 (PUHCA).⁵

2. As discussed below, on October 11, 2005, the Commission issued a notice of proposed rulemaking (NOPR)⁶ in which it proposed certain modifications and revisions to its regulations governing small power production and cogeneration facilities. Numerous comments were filed by a variety of entities.

3. In this Final Rule, the Commission adopts some of the proposals in the NOPR as well as many of the commenters' recommendations. Specifically, the Final Rule:

(A) Adopts the NOPR's proposal to require applicants to demonstrate that the thermal output of a new cogeneration facility is used in a productive and beneficial manner;

(B) Adopts a case-by-case approach for determining the "fundamental" use of a facility's electrical, thermal, chemical and mechanical output;

[30,078]

(C) Retains the existing operating and efficiency standard for new oil and gas cogeneration facilities;

(D) Retains the option for new cogeneration facilities to self-certify as QFs;

(E) Eliminates certain exemptions from regulation that were previously granted to QFs;

(F) Eliminates the ownership limitations for all QFs;

(G) Retains the ownership disclosure requirement in the Commission's Form 556; and

(H) Clarifies that there is a rebuttable presumption that an existing QF does not become a “new cogeneration facility” when it files an application for recertification reflecting either a change in ownership or a change in operation.

4. This Final Rule will be effective on March 17, 2006.

II. Notice of Proposed Rulemaking

5. On October 18, 2005, the NOPR was published in the *Federal Register*.⁷ As discussed in more detail below, the Commission proposed to revise its regulations governing small power production and cogeneration pursuant to Section 1253 of EPA Act and Section 210 of PURPA.

III. Discussion

A. “Productive and Beneficial”

1. Background

6. Section 210(n) of PURPA requires the Commission to issue a rule revising the criteria for new cogeneration facilities to ensure that those facilities meet the requirements of Section 210(n)(1)(A) of PURPA, including that the thermal output of a new qualifying cogeneration facility be used in a “productive and beneficial manner.” We explained in the NOPR that the Commission has traditionally relied on a presumptively useful standard that was irrebuttable in determining whether a cogeneration's facility's thermal output is useful. To implement PURPA's new “productive and beneficial” requirement for a new qualifying cogeneration facility's thermal output, the Commission proposed to consider the presumption of usefulness to be rebuttable rather than irrebuttable. The Commission also proposed to consider the uses to which the product produced by the thermal output is put, including such factors as whether the product is needed and whether there is a market, in determining whether a new qualifying cogeneration facility's thermal output is “productive and beneficial.”

2. Comments

7. Most commenters support the Commission's proposal to eliminate the “presumption of usefulness” standard in determining whether the thermal energy output of a new cogeneration facility is used in a “productive and beneficial” manner. The California Electricity Oversight Board (CEOB) notes that the irrebuttable presumption has resulted in default granting of qualifying status to applicants even where there was no real need for the thermal output. Delta Power Company, *et al.*, support the elimination of the irrebuttable presumption of usefulness. They suggest, moreover, that the Commission apply a rebuttable presumption that both a thermal use is “genuine and legitimate” and “productive and beneficial” if a facility demonstrates that its thermal output would be supplied to the host from other means; a challenger would have the opportunity to prove

otherwise. Primary Energy Ventures LLC (Primary Energy) and U.S. Combined Heat and Power Association (USCHPA) support a case-by-case review of the “productive and beneficial” standard. Both commenters believe a QF applicant should support the application with adequate reference to the business and economic circumstances of the individual facility. North Carolina Eastern Municipal Power Agency (NCEMPA) advocates that the Commission continue to apply the “presumptively useful” standard to small QFs because the alleged abuses have occurred in the context of large “PURPA machines.”

8. Several Commenters argued that the irrebuttable presumption of usefulness should remain in effect in some situations. American Forest & Paper Association (American Forest & Paper) recommends the Commission not abandon an irrebuttable presumption of usefulness for many industrial applications, such as

[30,079]

papermaking. American Forest & Paper argues that a rebuttable presumption of usefulness could open up applicants who are engaged in traditional manufacturing processes to the threat of litigation over the usefulness of their enterprise by cogeneration opponents. American Forest & Paper believes that the presumptively useful standard served a legitimate purpose in encouraging the development of qualifying facilities by creating certainty, limiting wasteful litigation and expediting the review process. A properly revised standard, which provided assurance to developers and the utility industry that certain, well-recognized industrial applications would not be mired in litigation and controversy, could continue to play an important role in encouraging the development of cogeneration. Certain well-recognized industrial processes, such as papermaking, chemical production, petroleum refining and others, should continue to enjoy a very strong, if not irrebuttable, presumption of usefulness.

9. Cinergy Solutions, Inc. (Cinergy) argues that the presumption of usefulness for common industrial or commercial applications of thermal energy should be rebuttable only when a new thermal host is being developed in conjunction with the development of the cogeneration facility and the presumption should remain irrebuttable when an economically self-sustaining thermal host already exists at the site. Cinergy states that the presumption of usefulness, whether rebuttable or irrebuttable, should depend on the circumstances of the thermal host. Cinergy advocates that the presumption of usefulness should be irrebuttable where a thermal host is in existence prior to the development of a cogeneration facility. Finally, Cinergy notes that a change to a rebuttable presumption creates unnecessary uncertainty and could substantially reduce usage and the effectiveness of the self-certification process.

10. Cogeneration Coalition of Washington and the Nevada Independent Energy Coalition (collectively, QF Parties) support identifying current uses of thermal output that are “productive and beneficial” as that would provide certainty to the cogeneration owner and developer. QF Parties propose specific uses to be identified in the regulation that could include, but not be limited to, paper making, the drying of products such as

wallboard, steam used in enhanced oil recovery, and refining and chemical production.

11. Several commenters contend that the thermal use standard needs to be clear and unambiguous which would provide QFs regulatory certainty. The Public Service Electric and Gas Company jointly with the Texas-New Mexico Power Company (PSNM and TNMP) believe the Commission should not rely on “rebuttable” or “irrebuttable” presumptions, but should set out unambiguous standards that QF applicants are required to satisfy as a part of their application so that resort to a presumption is unnecessary. Clear, objective qualification standards are necessary in order for QF applicants, their investors, utilities, and the Commission itself to be able to intelligently evaluate whether the statutory “productive and beneficial” requirement has been met.

12. Cogentrix Energy, Inc. and Goldman Sachs Group, Inc. (collectively, Independent Sellers), state that the Commission has not proposed any ascertainable standards to assist cogenerators in determining whether they will meet the new requirements that will be set forth in 18 C.F.R. §292.205(d). They point out that the Commission's existing standard is an ascertainable one in that if the use of the thermal output constitutes a common industrial or commercial application then it is presumptively useful and no further analysis is required. The presumptively useful standard provides regulatory certainty that is critical to entities that invest in cogeneration facilities. Cogentrix argues that a rebuttable presumption of usefulness creates uncertainty that would harm investment in cogeneration.

13. Indeck Energy Services, Inc. (Indeck) supports a rebuttable presumption of usefulness, but cautions that the proposed new regulations would make it difficult, if not infeasible, to obtain financing or build new cogeneration facilities. Indeck claims a case-by-case approach injects uncertainty at both the construction phase and when the QF attempts to make facility changes. Indeck advocates for a bright line test or at least clear standards that remove all ambiguity concerning what constitutes acceptable uses of thermal output.

14. Some commenters believe that the Commission's rebuttable presumption of usefulness proposal is not enough. Edison Electric Institute (EEI) states that making the previous presumption that any common use of thermal energy is useful rebuttable rather than irrebuttable does not satisfy the new “productive and beneficial” test. EEI argues that the Commission should instead require QF applicants to provide evidence, including economic studies, financial projections, contracts, and other data to indicate that the thermal use of a facility will be used in a “productive and beneficial” manner. Many commenters endorsed EEI's comments.

15. In reply comments, EEI opposes those comments that suggest the Commission should retain its “presumptively useful” policy without change as the means of demonstrating that the thermal energy output will be used in a “productive and beneficial” manner. EEI argues that just because the thermal output is used in a “common” or “useful” way does not ensure that the thermal energy use is “productive and beneficial,” which EEI equates with “economic.” EEI reiterates its belief that the only way for the Commission to ensure

that the “productive and beneficial” requirement is met is for the Commission to promulgate in its regulations a list of the financial data and studies that will be required to satisfy the determination mandated by the statute.

16. Several commenters disagree with EEI's proposal. Delta Power, *et al.*, contend that EEI's proposal to require economic analyses distorts the purpose of Section 210 of PURPA by requiring economic analyses. Process Gas Consumers Group Electricity Committee argues that EEI's proposal would discourage cogeneration by increasing the costs and risks of the regulatory process.

3. Commission Determination

17. To implement Section 210(n)(1)(A)(i) of PURPA, which requires “that the thermal output of the cogeneration facility is used in a productive and beneficial manner,” the Commission will incorporate the statutory standard into its regulations. The Final Rule accordingly will require an applicant to demonstrate that a new cogeneration facility's thermal output is used in a productive and beneficial manner. As we said in the NOPR, the Commission prior to the enactment of EPAAct 2005, in deciding whether to grant certification, traditionally relied on a “presumptively useful” standard that was essentially irrebuttable in determining whether a QF's thermal output is “useful.” The Commission's finds that “productive and beneficial” is nearly synonymous with “useful,” but was intended to require the Commission to take a closer look at the use of the thermal output of a new cogeneration facility; the Commission's examination of the use of thermal output of a new cogeneration facility is intended to weed out those uses that are “shams.” Thus, the Commission, as a starting point in its analysis of the use of a new cogeneration facility's thermal output, will look to see if the new cogeneration's thermal output is “presumptively useful.” As we stated in the NOPR, however, the Commission will no longer consider this presumption to be “irrebuttable.” The Commission will examine the use of a cogeneration facility's thermal output to assure that the use is not a “sham,” and that the thermal output is used in a “productive and beneficial manner.” In determining whether the thermal output is used in a “productive and beneficial manner,” the Commission will consider factors such as whether the product produced by the thermal energy is needed and whether there is a market for the product. Consistent with the arguments of Cinergy, we find that where a thermal host existed prior to the development of a cogeneration facility whose thermal output will supplant the thermal source currently in use by that thermal host, it is appropriate to presume that the thermal output of such facility is productive and beneficial and to apply a very high hurdle to overcome the presumption. We foresee only rare circumstances in which the output of a facility would not be productive and useful if it is replacing a previously used thermal source.

18. Form 556 is being amended to include a new Section in which a new cogeneration QF applicant must show “the thermal energy output of the cogeneration facility is used in a productive and beneficial manner.”⁸ The initial

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burden of demonstrating compliance with this new standard is on the new cogeneration QF applicant.

19. We decline to institute a bright line test or specific standards concerning what constitutes acceptable uses of thermal output. The type of information that a new cogeneration QF applicant must provide will vary depending on the thermal output of the cogeneration facility and on the circumstances of the thermal host. The level of support needed may vary depending on the product produced by the thermal energy, the intended use of that product in the market and the level of need for the particular product. As we stated in the NOPR, in some geographic areas, thermal energy used to produce distilled water can be used in a productive and beneficial manner, but in other geographic areas it may not. Therefore, any application for QF status for new cogeneration facilities must provide enough detailed information, as prescribed in the updated Form 556,⁹ for the Commission to determine compliance with the new “productive and beneficial” standard.

20. EEI's proposal to require economic or financial studies to show compliance with the “productive and beneficial” standard is misplaced. Our interpretation of the meaning of “productive and beneficial” in the context of cogeneration is that there is a real, genuine need for the thermal output of the facility. Relying solely on an economic analysis of the type suggested by EEI, however, may be too narrow and may deny certification to cogeneration facilities which produce thermal output that “is used in a productive and beneficial manner.” Adopting a case-by-case approach that permits an applicant the opportunity to demonstrate, whether through narrative description or economic analysis, that its QF will have a “productive and beneficial” thermal output will provide a sufficient means to detect situations where the thermal output's application is not productive and beneficial. An applicant may receive a determination that its thermal output is being used in a productive and beneficial manner if it can show through a narrative description of the facility's operations that the use of the facility's thermal output is for a common industrial or commercial application, and that the proposed use is genuine, and not merely to allow the applicant to achieve QF status, *i.e.*, a “sham”; a detailed economic analysis will not be necessary in most cases. However, the Commission reserves the right to require additional support when appropriate.

21. Many commenters request the Commission to identify current uses of thermal energy that would satisfy the new “productive and beneficial” standard. We decline to do so because a thermal use may be “productive and beneficial” in some circumstances and not “productive and beneficial” in others (*e.g.*, the production of distilled water).

22. Several commenters call for the Commission to institute a clear and unambiguous standard which they claim would provide needed regulatory certainty. While the Commission recognizes the value of regulatory certainty, we believe that the case-by-case process proposed in the NOPR and adopted here will provide a better means to determine what satisfies the “productive and beneficial” standard of Section 210(n) of PURPA.

23. We note that the Commission does not intend to change current standards related to

the thermal output for existing cogeneration facilities; as discussed later in the Final Rule, the standards for new cogeneration facilities adopted herein will apply to new cogeneration facilities and not existing cogeneration facilities.

24. In the NOPR, we stated that we would consider the previously irrebuttable presumption of usefulness to be a rebuttable presumption. Some of the comments suggest a misunderstanding of the meaning of the term “rebuttable presumption.” Many in the QF industry fear, in particular, that new cogeneration facilities, once they have been certified as QFs, will be subject to post-certification challenges to their QF status alleging that the thermal output of a facility has become no longer “productive and beneficial.”

25. We address here two circumstances: certification of new cogeneration facilities; and post-certification challenges after the new cogeneration facilities have been certified. We clarify that, in proceedings for Commission certification of new cogeneration facilities, if certain uses of thermal output were previously considered “presumptively useful” under the prior regulations and case precedent, they will be considered “productive and beneficial” uses, but those who oppose certification will have the opportunity to demonstrate that the thermal output is not, in fact, being used in a productive and beneficial manner. However, once the Commission has granted a new cogeneration facility certification based on the new standard adopted herein, the issue of that particular QF's use of its thermal output is determined, even if the economics of a particular use may change over time. Unless there are changes in the way the QF operates, such that it does not operate as described in the application for certification, and thus no longer meets the statutory criteria, a QF may continue to rely on the Commission's certification of its facility even if the economics of the particular use have changed over time. Thus, after a QF has been certified by the Commission, absent a change in the operations of the facility, a purchaser of the electrical output of a new cogeneration facility may not return to the Commission to allege that the thermal output of a facility is not “productive and beneficial.”

26. Finally, in applying our new regulation implementing Section 210(n)(1)(A)(i) of PURPA, §292.203(d)(1) of our regulations, we will apply a rebuttable presumption that new cogeneration facilities that are 5 MW or smaller satisfy the requirement that the thermal energy output of the new cogeneration facility is used in a productive and beneficial manner. We will apply this presumption because it is our experience that such small cogeneration facilities are not generally designed with a “sham” use of thermal output whose only purpose is to achieve QF status. Rather, such smaller cogeneration facilities are designed to meet the thermal needs of the facility's steam host and any electrical output available for sale is a byproduct of the thermal process.

B. “Fundamentally” Requirement

1. Background

27. Section 210(n)(1)(A)(ii) of PURPA requires the Commission to revise §292.205 of its regulations to ensure the electrical, thermal, and chemical output of a new cogeneration

facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility. The NOPR proposed to incorporate the language of Section 210(n)(1)(A)(ii) of PURPA as §292.205(d)(ii) of the Commission's regulations, and to apply this language on a case-by-case basis to determine whether a new cogeneration facility can be considered a qualifying cogeneration facility. In addition, the Commission proposed adding the term “mechanical” output to the statutory criteria, because this has traditionally been a part of the Commission's analysis of cogeneration output, and is consistent with the statutory language.

28. As described in the NOPR, applications for certification under new Section 210(n) of PURPA, and under new §292.205(d)(ii) of our regulations, would be required to provide a detailed explanation of how the cogeneration facility meets the requirements of those sections. The NOPR requested comments on whether we should adopt this general case-by-case approach for determining the “fundamental” use of a facility's output, or whether we should adopt a specific standard, *e.g.*, requiring some specified percentage of the total energy output to be used for industrial, commercial, or institutional purposes, rather than for sale to electric utilities.

2. Comments

29. Many commenters favor a case-by-case evaluation of compliance to the new “fundamentally” requirement, and argue: (1) that the different operating characteristics of QFs and cogenerators render the use of a specific standard unworkable; (2) that the Congressional language in the new Section 210(n)(1)(A)(ii) of PURPA to “[take] into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric

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energy from a qualifying facility to its host facility” clearly contemplates a case-by-case evaluation; (3) that any “bright-line” test will, by its nature, be prone to becoming outdated; (4) that the Commission does not currently have sufficient experience with the new “fundamentally” requirement to develop specific standards (although it may in the future); and (5) that the standards proposed by the utilities generally seem to be designed to discourage cogeneration. Some of these commenters also argue that the Final Rule should provide additional detail on how the case-specific determination will be made, or that the Final Rule should include specific “safe harbors” that will decrease the risk and uncertainty associated with planning and constructing a cogeneration facility.

30. Many other commenters favor a specific, numerical standard, arguing: (1) that a case-by-case evaluation will necessarily lead to large amounts of uncertainty and litigation, both for new cogeneration applicants and for utilities; (2) that Congress required the Commission to act through rulemaking to adopt new qualification standards in order to

provide transparent criteria by which both new cogeneration QF applicants and utilities can know in advance the requirements of the statute and be assured that these requirements are being consistently interpreted and applied; and (3) that Congress specifically required revision to 18 C.F.R. §292.205, which contains very specific mathematical formulae and numerical standards, implying their desire for some sort of objective standard.

31. Many of the same commenters who advocate a specific, numerical standard for the total energy output also argue that the operating standard should be significantly increased from the current five percent to ensure that any proposed new cogenerator is fully integrated with its host and that the output of the facility complies with the new “fundamentally” requirement. In particular, EEI and other utilities advocate increasing the operating standard to 20 percent, and Southern California Edison Company (SoCal Edison) advocates an increase to 60 percent. Some of these commenters cite claims made in public by cogeneration advocates as evidence that such significant increases in operating standards are achievable and appropriate. Others argue that an increase in the operating standard is not necessary to implement the “fundamentally” requirements. Some argue that the cogeneration advocates' public claims are not a sound basis for establishing a standard, and that, in any case, the utilities are misapplying these public claims. They point out that, since the Commission considers only half the thermal energy output in its calculations, that such comparisons between operating standards are not appropriate. Others argue that Congress could have required such an increase of the operating standard in the text of EPAAct 2005, but specifically chose not to do so.

32. EEI and others point out that some commenters advocate taking essentially no action whatsoever in response to new Section 210(n)(1)(A)(ii) of PURPA, and argue that this cannot be the intent of Congress. Instead, they argue, the structure of the language in the statute suggests that the entire output of a cogeneration facility is to be aggregated, and that by calculating the percentage of the facility's output used for industrial, commercial or institutional purposes, the Commission can determine whether the new “fundamentally for” test has been met. In particular, EEI recommends a two-part test: First, a minimum threshold of 67 percent of the cogenerator's total energy output, over the course of 12 months; and second, if the facility will generate electricity on a continuous basis, the cogenerator should also demonstrate that the facility has not been “oversized.” Others argue that it has not been shown how a 67 percent “total energy output operating standard” follows from the “fundamental” use requirement, and that such a restrictive standard may eliminate certain applications that could otherwise meet the fundamental use criteria through other means. EEI responds by stating that the Commission could establish a case-by-case waiver process for unique technologies and industrial processes, where the applicant would have the opportunity to demonstrate that such a waiver is warranted. EEI also states that the notion of safe harbors is compatible with its recommendations, so long as such safe harbors are not absolute.

33. Other types of numeric tests are also advocated by various commenters. FICA recommends that any cogeneration facility, regardless of fuel use, owned or

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operated by and appurtenant to an industrial mining or manufacturing operation, where at least 25 percent of the electric energy or 25 percent of the thermal energy is consumed in such industrial operation, is in compliance with the “fundamentally” requirement. Cinergy proposes that, if the Commission decides to establish a numerical standard as urged by EEI and others, the standard be set at 25 percent.

34. Entergy argues that, in addition to demonstrating compliance with its proposed 67 percent standard, the Commission should require that cogeneration applicants, at a minimum, submit the following technical data as part of the certification process: (1) average annual hourly useful electrical output in Btu/hr; (2) average annual hourly useful thermal output in Btu/hr; (3) average annual hourly useful mechanical output in Btu/hr; and (4) utilization of thermal, electrical and mechanical output along with the steam, electrical and mechanical usage diagrams for the facility. This data, Entergy argues, should be accompanied by an affidavit of a senior officer, attesting to the accuracy of the data.

35. As discussed in more detail below, some commenters urge the Commission to consider that it may often be legitimate for a cogeneration plant to have considerably more electric generation capacity than is needed for consumption by the thermal host, and the existence of such excess generation capacity does not indicate that such output is “intended” fundamentally for sale to an electric utility. Some commenters argue that EPCRA 2005 and PURPA clearly recognize that QF facilities will often produce a steady stream of electricity for sale to third parties, as evidenced by the must-take and competitive market opportunities that Congress has required be available to QF's.

36. Entergy suggests that, as an alternative to the traditional certification of QF facilities on an “all or nothing” basis, the Commission should consider certifying as a QF only the portion of a new cogeneration facility that the applicant is able to demonstrate will meet the revised criteria for new qualifying facilities. Entergy suggests that only this portion of a QF's total capacity should be eligible for the benefits provided by PURPA, including the put rights traditionally afforded to QFs. Under Entergy's proposal, a generator selling any excess capacity above that capacity which meets the proposed “fundamentally” criteria for new qualifying facilities would have to be sold in the market like any other generator. Entergy believes this would encourage the sizing of QFs appropriately to the needs of the host, in the manner that PURPA intended.

37. Several commenters indicate that they agree with the Commission's statement in the NOPR that Congress intended in EPCRA 2005 to discourage so-called PURPA machines, but go on to argue that PURPA machines came to exist as a direct result of specific avoided cost policies by certain states, and by the inability of independent power producers to interconnect to the grid without obtaining QF status. This Commission and state regulatory authorities have enacted policies such that conditions are now different, they argue, and thus significant changes to the Commission's regulations are not necessary. Others agree with the Commission's statement in the NOPR, but argue that the

Commission must be precise in crafting its regulatory language so that QFs which bear absolutely no resemblance to PURPA machines are not inadvertently captured by the new rules.

38. Cinergy argues that no quantitative requirements for the total energy output that must be supplied to a thermal host should be established for cogeneration facilities where power from a facility will be sold at avoided costs rates that reflect market forces.

39. Delta Power, *et al.*, argue that the application of the new requirements should focus on whether a facility is built to supply a thermal product that would be generated or procured from another fuel-consuming source in the absence of cogeneration, and that facilities that meet this standard should be presumed to have satisfied the new requirements unless a challenger demonstrates otherwise.

40. USCHPA argues that no detailed analysis or explanation of the proposed outputs of the facility should be required unless utility sales on an ongoing basis are proposed. It argues that where the electricity output from a facility is less than the electricity required at the site of the facility, and there may be few or no occasions

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when power is exported onto the grid from that site, certification as a QF should be virtually automatic.

41. USCHPA also points out that facilities are increasingly being built to serve multi-family housing complexes, apartment buildings, public housing projects and other residential applications. They argue that, in the same manner as the Commission has appropriately added “mechanical” energy to the listed types of useful energy output Congress listed in EAct, the Commission should add “residential” to the valid purposes for which a QF can intend its energy outputs other than sales of electricity to a utility.

42. Several commenters request clarification that thermal hosts are not necessarily required to use each of the enumerated electrical, thermal, chemical and mechanical outputs. Several other commenters request clarification that cogeneration facilities that utilize waste heat as their primary fuel (*i.e.*, bottoming cycle cogeneration facilities) are presumed to be in compliance with the new “fundamentally” requirements. The Independent Sellers request clarification that the technical requirements for new cogeneration facilities will apply only to those facilities that sell their electrical output at avoided cost pursuant to the mandatory purchase requirement.

43. Some utility commenters argue that Congress intended in EAct 2005 to implement requirements that fundamentally change the nature of what kind of cogeneration plants can qualify for QF status, and that make such qualification much more difficult. Several other commenters point out that Congress has not eliminated the requirement for the Commission to issue rules which encourage the use of cogeneration, and argue that implementing the “fundamentally” requirement in a way that significantly increases the

difficulty of obtaining QF status for a cogeneration plant frustrates the encouragement of cogeneration, and so cannot have been the intent of Congress.

44. Several commenters argue that the comments of the utilities on the procedures for demonstrating compliance with the “fundamentally” rule demonstrate the need for procedures to protect QFs' confidential and commercially sensitive information, and that Entergy's proposal in particular is a thinly-veiled attempt to gain access to QFs' most commercially sensitive information, and goes far beyond what is needed to prevent sham transactions or curb PURPA abuses. These commenters argue that QFs cannot be required to hand over sensitive cost data to a utility and then be expected to engage in bilateral power purchase negotiations on a level playing field, and that the new §292.205 should thus specify that the new cogeneration facilities will be able to obtain confidential treatment for commercially sensitive information submitted in support of their applications for certification and notices of self-certification. SoCal Edison states that it understands the QFs' desire to protect their business information and is willing to agree to an appropriate protective order or other procedure for protecting confidential QF information. However, SoCal Edison and others argue that potential challengers to a QF application need access to all information relevant to the application in order to evaluate whether the potential QF meets the criteria for QF status and to challenge the QF application, if appropriate.

45. The Council of Industrial Boiler Owners (CIBO) objects to the Commission's use of the word “limited” in the NOPR to describe its discretion to “[take] into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility.”¹⁰ They argue that Congress did not specifically limit the Commission's discretion beyond its statutory terms and such a self-limitation should not be used by the Commission to avoid undertaking the searching inquiry necessary to meet Congress's goal of encouraging energy efficiency. Other commenters also argue that the Commission should be sure to take into account all of the criteria specified in Section 210(n)(1)(A)(ii).

46. NCEMPA and APPA argue that small QF's (*e.g.*, those of five or fewer megawatts (MW)) should be categorically exempt from regulations aimed at implementing the “fundamental” use requirement.

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They argue that there is little valid or widespread concern that small QFs are constructed primarily for any purpose other than for commercial, industrial, or institutional use, and that the output of small QFs is not likely to cause price distortion in the energy markets.

3. Commission Determination

47. As an initial matter, we address certain requests for clarification. First, we agree that many residential uses of thermal output have long been considered legitimate for the purposes of cogeneration certification, and that “residential purposes” is subsumed within

“institutional purposes.” We therefore find that residential purposes should be maintained as acceptable for the purpose of satisfying the requirements of Section 210(n)(1)(a)(ii), and we will revise the regulatory text in §292.205(d)(ii) to specifically reference residential purposes. We also clarify that new cogeneration facilities will not need to have each of the enumerated individual outputs (electrical, thermal, chemical and mechanical) used for industrial, commercial, residential or institutional purposes, so long as the cumulative safe harbor standard, as discussed below, is met, or other sufficient support for certification is provided.

48. We also agree with commenters who point out that the Commission's obligation to encourage cogeneration has not been eliminated. This obligation was established in Section 210(a) of PURPA, which has not been repealed by EPAct 2005. As such, in implementing EPAct 2005, the Commission's goal is to interpret the requirements of new Section 210(n)(1)(A)(ii) in light of the requirement to encourage cogeneration as reflected in the existing Section 210(a).

49. Turning to the central issues regarding the “fundamentally” requirement, we find no statutory basis for the suggestions by some commenters that the Commission focus solely on the goal of eliminating so-called PURPA machines instead of implementing the specific requirements of Section 210(n)(1)(A)(ii) for all new cogeneration facilities. The discussion of PURPA machines in the NOPR ¹¹ was intended to provide context, and not to establish a policy objective that could replace the implementation of the specific requirements of Section 210(n)(1)(A)(ii). We find that Section 210(n)(1)(A)(ii) requires new cogeneration facilities seeking certification to make a showing that their energy output is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility. In short, we will implement the requirements of Section 210(n)(1)(A)(ii) as written.

50. Despite comments to the contrary, we continue to believe that a case-by-case approach to the implementation of Section 210(n)(1)(A)(ii) best provides the flexibility required to appropriately address various facilities and circumstances. However, we agree that the adoption of a safe harbor will provide greater certainty to the industry, make the evaluation of applications by the Commission more manageable, and make the certification process more objective. Thus, we will establish a safe harbor, within which a facility will be presumed to comply with the requirements of Section 210(n)(1)(A)(ii). Because, as discussed below, we will design the safe harbor to reflect the requirements of Section 210(n)(1)(A)(ii), the presumption that facilities falling within the safe harbor comply with Section 210(n)(1)(A)(ii) will be irrebuttable; the safe harbor will define those facilities which will automatically be deemed to comply with the requirements of Section 210(n)(1)(A)(ii). However, as also discussed below, the Commission, in determining whether a new cogeneration facility's energy output is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, must also take “into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility;” a finding that one of those factors exists may warrant a finding that facilities that do not fall

within the safe harbor nevertheless comply with Section 210(n)(1)(A)(ii).

51. We agree with commenters who argue that the structure of the language in Section 210(n)(1)(A)(ii) suggests that

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compliance of new cogeneration facilities with that Section will generally depend on the percentage of the total, aggregated energy output that is used for industrial, commercial, residential or institutional purposes, and not sold to an electric utility. We, therefore, believe that a safe harbor should be similarly structured to capture the intent of the overall requirement. After careful consideration of various recommendations of commenters, we believe a standard of at least 50 percent is a reasonable interpretation of Section 210(n)(1)(A)(ii) in light of the Commission's continuing obligation under Section 210(a) to encourage cogeneration. Thus, new cogeneration facilities seeking QF status, where the electrical output of the facility is intended to be sold pursuant to Section 210,¹² will be required to include a demonstration that at least 50 percent of the aggregated annual energy output of the facility is to be used for industrial, commercial, residential or institutional purposes, and not sold to an electric utility, in order to qualify under the safe harbor provisions. New cogeneration facilities complying with the safe harbor provision will be required to comply with the safe harbor provision both for the 12-month period beginning with the date the facility first produces electric energy, and for any calendar year subsequent to the year in which the facility first produces electric energy. New cogeneration facilities that do not fall within the safe harbor provision should demonstrate in their applications the percentage of aggregated annual energy output that is used for industrial, commercial, residential or institutional purposes, along with discussion of and support for why the Commission should conclude that Section 210(n)(1)(A)(ii) is nevertheless met “taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility.” Unless a new cogeneration facility qualifies under the safe harbor provision, the information submitted by the applicant concerning the percentage of total energy that is to be used for industrial, commercial, residential or institutional purposes will establish the standard that that facility must comply with, both for the 12-month period beginning with the date the facility first produces electric energy, and for any calendar year subsequent to the year in which the facility first produces electric energy.

52. Entergy has argued that, as part of the process of demonstrating compliance with the “fundamentally” standard, the Commission should require that new cogeneration facilities, at a minimum, submit: (1) average annual hourly useful electrical output in Btu/hr; (2) average annual hourly useful thermal output in Btu/hr; (3) average annual hourly useful mechanical output in Btu/hr; and (4) utilization of thermal, electrical and mechanical output along with the steam, electrical and mechanical usage diagrams for the facility. This data, Entergy argues, should be accompanied by an affidavit of a senior officer, attesting to the accuracy of the data. We note that the first four items are already required by Items 10 and 13 of Form 556.¹³ With respect to the request to require

applicants to submit an affidavit, we note that Form 556 already requires the applicant to submit with the filing the signature of an authorized individual evidencing accuracy and authenticity of information.¹⁴ This system seems to be working, and in the absence of any demonstration that it has not worked or is not working, we find that Entergy's proposal is unnecessary.

53. Many parties commented on the legitimacy of a new cogeneration facility having “excess capacity” beyond that needed to provide for the electricity needs of the host facility. These parties present various situations and circumstances, which, they argue, justify ongoing sales of electricity from a new cogeneration facility to a utility, without violation of the requirements of Section 210(n)(1)(A)(ii). In particular, commenters point out: (1) that some thermal hosts may require redundant generation capacity and/or redundant thermal capacity to ensure the reliability of their process; (2) that long lead times and high costs associated with siting approvals and equipment orders often make it significantly more economic

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to construct a large increment of capacity at one time, rather than several smaller increments as needed over time; (3) that it is generally more cost-effective for an applicant to keep a cogeneration unit operating during periods of host shutdown or curtailment; (4) that the thermal energy requirements of some thermal hosts are so large relative to their electricity requirements that optimizing electricity production from that facility generates a continuous surplus of power that can only be exported; (5) that a new cogeneration facility may require its higher capital cost to be offset in the long term with an income stream based on electric sales to the grid; (6) that it may be advantageous or necessary to all concerned for a manufacturing company to export some of its power to a utility for a short time during periods of peak demand, generally during the summer cooling season and occasionally during the winter heating season; (7) that power plants are extremely capital intensive and the maximum economies of scale are found at the largest end of an original equipment manufacturer's product line, which also typically have the best combined cycle heat rates and lowest emission rates; and (8) that cogenerators must size their plants to be able to provide for the largest expected steam demand of the customer, but also must size the steam turbine to be able to take the excess steam created when the steam host reduces its steam needs. Some commenters also point out that certain states require that a cogeneration facility provide all of its output to the local utility, and that the local utility provide electricity to the industrial host, and that such requirements should not disqualify a new cogeneration facility from eligibility for QF status.

54. The above-listed circumstances represent circumstances where the Commission may possibly want to exercise its discretion and find that a new cogeneration facility complies with Section 210(n)(1)(A)(ii), even when such facility does not fall within the safe harbor. There may, of course, be other circumstances that would also justify such treatment. In each particular case, the determination of whether a new cogeneration facility meets Section 210(n)(1)(A)(ii) will depend upon the extent to which the applicant

has sufficiently demonstrated that the facts and circumstances warrant certification under the new standard.

55. In response to the comments of CIBO, who objected to the Commission's use of the word "limited" in the NOPR to describe its discretion under Section 210(n)(1)(A)(ii), we clarify that we did not intend to imply an aversion to the exercise of our discretion, where warranted, to certify certain facilities that do not comply with the safe harbor standard. Rather, we intended to indicate that such exercise of discretion will depend on the applicants making a sufficient showing to justify certification, and that the Commission will limit its exercise of discretion to consideration of the criteria enumerated by Congress in Section 210(n)(1)(A)(ii). We also take this opportunity to clarify that we interpret our discretion to take into account technological and efficiency requirements as relating closely to our obligation under Section 210(a) to encourage cogeneration and to the new provisions under Section 210(n)(1)(A)(iii) requiring the Commission to ensure continuing progress in the development of efficient electric energy generating technology. Also, applicants that do not fall within the Section 210(n)(1)(A)(ii) safe harbor may request the Commission to exercise its discretion to grant their application, "taking into account technological, efficiency, economic and variable thermal energy requirements." The Commission will be more inclined to make an affirmative Section 210(n)(1)(A)(ii) finding for facilities employing modern, efficient technologies, both in order to encourage cogeneration under Section 210(a) and to specifically encourage continuing progress in the development of efficient electric energy generating technology under Section 210(n)(1)(A)(iii).

56. Several commenters have requested that the Commission limit the applicability of the "fundamentally" requirement to topping-cycle cogeneration facilities. While Section 210(n)(1)(A)(ii), as a matter of law, applies to both new topping-cycle and new bottoming-cycle cogeneration facilities, we believe that many, if not most, bottoming-cycle cogeneration facilities will readily satisfy the requirements of Section 210(n)(1)(A)(ii). The very nature of bottoming-cycle facilities is that they utilize waste heat from a thermal process to produce

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electric energy, as opposed to the consumption of a scarce fuel source. If the fuel utilized in a bottoming-cycle facility is merely enough to run the thermal process and has not been augmented for the purposes of power production, the facility clearly should satisfy the requirements of Section 210(n)(1)(A)(ii) that the electrical, thermal, chemical and mechanical output of the facility is used fundamentally for industrial, commercial, residential or institutional purposes; in any event, such facilities may satisfy the requirements of Section 210(n)(1)(A)(ii) by virtue of our discretion to make an affirmative finding after taking into account technological, efficiency, economic, and variable thermal requirements.

57. However, some bottoming-cycle facilities supplement the heat provided to the initial thermal process, with the intention of producing additional power from the resulting

additional steam energy. We find that, as additional supplemental firing is added to bottoming cycles, the basis for giving them deference under Section 210(n)(1)(A)(ii) is weakened. Therefore, in order for bottoming-cycle facilities to comply with Section 210(n)(1)(A)(ii), applicants should demonstrate that the heat input is sized only for the thermal process, or explain to what extent supplemental firing is utilized. If there is supplemental firing, applicants should either comply with the safe harbor provision of the regulations, or explain the situation and justify why the Commission should exercise its discretion to make an affirmative Section 210(n)(1)(A)(ii) finding.

58. We disagree with commenters who advocate a change to the Commission's existing operating standard. The language of Section 210(n)(1)(A)(ii) does not in our view direct a change to the operating standard, and we do not believe that an increase in the operating standard is necessary at this time.

59. In response to Entergy's suggestion that the Commission consider certifying as a QF only that portion of a new cogeneration facility that the applicant is able to demonstrate will meet the revised criteria under Section 210(n)(1)(A)(ii), the statute does not require this approach and it would be unduly cumbersome to administer.

60. Finally, in applying our new regulation implementing Section 210(n)(1)(A)(ii) of PURPA, §292.203(d)(2) of our regulations, we will apply a rebuttable presumption that new cogeneration facilities that are 5 MW or smaller satisfy the requirement that the electrical, thermal, chemical, and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes. We will apply this presumption because it is our experience that such small cogeneration facilities are generally designed to meet their thermal host's needs.

61. Lastly, we note that some commenters have stated that there is a need for special procedures to protect QFs' confidential and commercially sensitive information. However, under §388.112 of the Commission's regulations,¹⁵ any person submitting a document to the Commission may request privileged treatment for some or all of its document. While the party requesting privileged treatment must support that claim, none of the material for which confidential treatment is requested will be disclosed unless pursuant to a confidentiality agreement, a protective order, or a finding that material does not warrant confidential treatment. Given these procedures that the Commission already has in place, we see no need to promulgate new procedures specifically for QF applications.

C. Continuing Progress in the Development of Efficient Electrical Energy Generating Technology and the Efficiency Standard for Coal-Fired Generation

1. Background

62. Section 210(a)(1)(A)(iii) of PURPA requires that all new cogeneration facilities seeking QF status demonstrate “continuing progress in the development of efficient electric energy generating technology.” The NOPR proposed that the Commission's

regulations repeat the statutory language. In addition, the NOPR proposed to: (1) retain the existing operating standard for all cogeneration facilities; (2) retain the existing efficiency standards for oil cogeneration

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facilities for which any of the energy input is natural gas or oil; but (3) apply an efficiency standard to new coal-burning cogeneration facilities.

2. Comments

63. EEI states that the Commission must update the efficiency standards in its regulations for new cogeneration facilities, and agrees with the addition of an efficiency standard for coal-fired generation. EEI argues that the efficiency standard should apply to all cogeneration fuel inputs. EEI recommends that the Commission revise the definitions in §292.202(m) to use higher heating values instead of lower heating values. EEI also recommends that the Commission revise the definition in §292.202(m) to take into account the total energy input of all fuels, including coal and waste fuels, not just oil and natural gas. EEI argues that facilities that utilize a renewable energy resource or waste fuel should be qualified as a small power producer and not as cogenerators. EEI states that the efficiency standards for cogeneration QFs, which have existed for 25 years, should be increased for new facilities to reflect modern, more efficient technology.

64. As an interim measure, EEI believes the 60 percent efficiency standard for new cogeneration facilities primarily fueled by natural gas is appropriate. Several comments offered support for EEI's comments, while others argued that a 60 percent efficiency standard is not achievable or that 60 percent is an arbitrary value that has no rational basis other than to reduce the number of QFs that are entitled to sell their power under PURPA. Commenters state that fixed, objective standards as advocated by EEI are too simplistic to be applied to the full range of facilities that could be designed and developed.

65. Although Indeck does not object to increased efficiency standards for new cogeneration QF plants, they must be reasonable, and based on clear and definite standards. NARUC states that the Commission should take care to encourage the use of better technology and not prevent the use of any improved technologies by setting the standards unreasonably high. Any standard the Commission adopts must recognize that the requirement of greater efficiency is a technological, not an environmental standard. USCHPA states that requiring QFs to implement a "best available technology" standard would result in fearsome costs and constraints. Primary Energy states the rule should embrace the philosophy that deployment of existing technology in innovative and creative ways defines continuing progress in achieving greater overall resource efficiency. The Cogeneration Association California states that requiring each applicant to demonstrate that it would contribute to this "continuing progress" standard might discourage the continued use of well-established technologies proven to produce efficiencies, but which may no longer be considered "progressive."

66. The EPA believes there is little, if any, need to alter existing PURPA criteria or processes. The EPA also believes that because combined heat and power (CHP) systems are inherently more efficient than the alternative (separate heat and power generation), they always improve total efficiency, reduce fossil fuel consumption, and therefore advance the objectives of EPAct 2005.

67. Other commenters concur with the Commission that an efficiency standard be applied to new coal-burning cogeneration facilities in a manner similar to that applied to natural gas and oil-burning cogeneration facilities. In light of the advances in generating technology, they argue that there is no policy basis to exempt new coal-burning cogeneration facilities from efficiency standards. Indeed, requiring compliance with efficiency standards will help speed the adoption of the latest and most efficient coal-burning technology. Yet other commenters argue that there is no reason to impose an efficiency standard on coal-burning QFs. Given the abundance of coal, market forces should regulate the efficiency of coal-fired QFs. Commenters state the imposition of a minimum efficiency standard on new coal-fired cogeneration facilities is inconsistent with the intent of PURPA, as amended. Commenters state that the Commission lacks record support for such a decision on an efficiency standard for coal-fired units, which is technical and would require significant analysis and each case must be evaluated individually.

3. Commission Determination

68. Section 210(n)(1)(A)(iii) of PURPA requires the Commission to issue rules to ensure “continuing progress in the development of efficient electric energy generating technology.” As an initial matter, upon review of the comments on this issue, the Commission now believes that the regulations it is issuing implementing Sections 210(n)(1)(A)(i) and 210(n)(1)(A)(ii) of PURPA are sufficient by themselves to ensure “continuing progress in the development of efficient energy generating technology” through, for example, the application of efficiency standards and appropriate exemptions from certain regulatory requirements discussed herein. Accordingly, the Commission will not require that applicants for certification of new cogeneration facilities, provide a description of how a particular technology used by a particular applicant contributes to the continuing progress in the development of efficient energy generating technology. We will delete the requirement contained in the NOPR that applicants do so.

69. While some commenters support increasing the existing efficiency standards, and some commenters support the Commission's applying an efficiency standard to coal-fired cogeneration facilities for the first time, the Commission will retain the existing operating and efficiency standards for new oil and gas cogeneration facilities, and, will not impose new efficiency standards for new coal-burning cogeneration facilities at this time.¹⁶

70. We find persuasive the EPA comments that there is little, if any, need to alter existing PURPA criteria or processes. The EPA states that CHP (combined heat and power) remains one of the most significant opportunities to improve the efficiency and reduce the environmental impact of United States energy production and it is critical that this

rulemaking advance, not constrain, these opportunities. The EPA further states that since CHP systems are inherently more efficient than the alternative (separate heat and power generation) they always improve total efficiency, reduce fossil fuel consumption, and therefore advance the objectives of EPAAct 2005. We find the comments of Solar Turbines compelling as well. Solar Turbines, a manufacturer of generation equipment, states that, while its products have standard efficiencies greater than 60 percent, their PURPA efficiency is less than 50 percent. They are still much more efficient than conventional separate electric and thermal generation (49 percent conventional/34 percent PURPA efficiency), however. Solar Turbines states that the existing PURPA standard of 42.5 percent LHV/38.6 percent HHV is sufficient to ensure efficient CHP systems and still accommodate the wide range of technologies and applications. Therefore, the Commission will retain the existing operating and efficiency standards for new cogeneration facilities.¹⁷

71. Developers of cogeneration facilities, moreover, have an economic incentive

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to employ the efficient, modern technology giving due consideration to the costs of that technology. We see no reason at this time to impose higher efficiency standards on cogeneration facilities. As the EPA and others point out, CHP processes are inherently more efficient than producing electric energy and heat separately.

72. In sum, the increased efficiency that will result from our implementation of Sections 210(n)(1)(A)(i) and 210(n)(1)(A)(ii) of PURPA satisfy the statutory requirement that the Commission ensure continuing progress in the development of efficient electric energy generating technology.

D. Self Certification

1. Background

73. In the NOPR, the Commission invited comments on whether the Commission's self-certification procedures¹⁸ should be available to new cogeneration facilities in light of the criteria proposed for certification of new cogeneration facilities as QFs.

2. Comments

74. Several commenters argue that self-certification can remain an option as long as clear standards are established, but that it is difficult to understand exactly how self-certification would work without such standards.

75. Some commenters argue that self-certification should remain an option for certain new cogeneration facilities. American Forest & Paper asserts that self-certification should remain available to new cogeneration facilities where there is: (1) a traditional manufacturing use; (2) the facility fits into safe harbor provisions; and (3) employs a

proven or innovative cogeneration technology. NCEMPA believes the self-certification procedures should remain available for small QFs (*e.g.*, 5 MWs or smaller) because the substantial burden associated with complying with new certification procedures may greatly discourage development of small QFs. The York County Solid Waste and Refuse Authority (York County) asserts self-certification should remain available to new cogeneration facilities except for those facilities owned largely or wholly by traditional utilities.

76. A few commenters contend that new cogeneration facilities should not be allowed to self-certify. Calpine Corporation (Calpine) believes that the case-by-case approach proposed by the Commission seems inconsistent with a self-certification option. NARUC speculates that self-certification will inevitably lead to the qualification of questionable facilities which undermines Congress's intent to foster responsible QF development.

77. Several commenters maintain that self-certification should remain an option despite the subjective nature of the new standards. The PGC Electricity Committee, Indeck, and Ridgewood state that the self-certification procedures are efficient, self-implementing, less time-consuming, and relatively inexpensive. Delta Power, *et al.*, assert that QFs have always been responsible for ensuring that they meet the requirements for QF status, regardless of how they achieve certification. They further state that owners of new cogeneration facilities should have the option to either self-certify or to apply for Commission certification, depending on their comfort level with the characteristics of their facilities.

3. Commission Determination

78. The Commission will retain the option to self-certify for new cogeneration facilities. NARUC and others fear that questionable cogeneration facilities will attain QF status through the self-certification process due to the subjective nature of the new standards unless the Commission establishes clear and objective standards. As Indeck and Ridgeway correctly note in their comments, however, the Commission has the authority to review and question a self-certification.

79. Nevertheless, we note that the Commission's currently effective regulations do not make explicit the Commission's authority to revoke the QF status of self-certified QFs absent the filing of a petition for declaratory order that the self-certified QF does not meet the applicable requirements for QF status.¹⁹ Given

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that EPAAct 2005 calls for greater Commission scrutiny of QF status, we will modify §292.207(d)(1)(iii) of the Commission's regulations to provide that the Commission may on its own motion revoke the QF status of self-certified and self-recertified QFs.

80. In light of the new standards directed by Congress for new cogeneration facilities, we find it appropriate to now publish in the *Federal Register* notices of self-certifications

and self-recertifications of new cogeneration facilities; currently, the Commission does not notice any self-certifications or self-recertifications in the *Federal Register*.²⁰ Publication of notices of self-certification and self-recertification of new cogeneration facilities will enhance the visibility of self-certifications for interested parties other than the host electric utility. Thus, we will require self-certifications and self-recertifications of new cogeneration facilities to include a form of notice of the self certification or self-recertification suitable for publication in the *Federal Register*. Accordingly, we will amend §292.205(d) of the Commission's regulations to provide for publication of notice of self-certifications and self-recertifications of new cogeneration facilities.

81. Pursuant to §292.207(a) of the Commission's regulations, “[a] small power production facility or cogeneration facility that meets the applicable criteria established in §292.203 is a qualifying facility.” There is no express requirement in §292.203 that a facility make a filing to satisfy the requirements for QF status. While the current Commission's regulations do state that an owner or operator of a self-certifying facility “must” file a “notice of self-certification which contains a completed Form 556,”²¹ the Commission has interpreted this requirement as being for record keeping purposes, and not necessary for QF status.

82. The Commission, particularly in light of the criteria for new cogeneration facilities, does not believe that a facility should be able to claim QF status without having made any filing with this Commission. Accordingly, the Commission is amending Section 292.203 to expressly require that a facility claiming QF status must file either a notice of self-certification or an application for Commission certification. Any existing QF that has never filed either a notice of self-certification or an application for Commission certification, must do so within sixty (60) days of the date this order is published in the *Federal Register*, to continue claiming QF status.

83. The original reasons that the Commission instituted the self-certification process are still valid. Among the reasons for the Commission's adoption of the self-certification process were that the complexity, delays, and uncertainties created by a case-by-case qualification procedure would act as an economic disincentive to owners of smaller facilities. The Commission also envisioned that the initiation of purchase and sale arrangements would require the flow of substantial information between the proposed QF and the purchasing utility so that the filing of substantial information with the Commission would be unnecessary. While many new cogeneration facilities may want the assurance that Commission certification, as opposed to self-certification, provides, we believe that the self-certification option should still be available to new cogeneration facilities. Moreover, the new requirement that a facility claiming certification file at least a notice of self-certification, the publication of notice of self-certifications and self-recertifications for new cogeneration facilities, and the modification of the Commission's regulations to make explicit that the Commission, on its own motion, can revoke the QF status of a self-certified QF, remove the danger that a questionable new cogeneration facility, in particular, will obtain and retain QF status.

E. Exemptions

1. Background

84. In the NOPR, the Commission noted that, in implementing Section 210(e)(1) of PURPA, which provides that the Commission shall prescribe rules under which QFs are exempt in whole or in part, from the FPA, from PUHCA, from state laws respecting rates or respecting the financial or organization regulation of electric utilities, or from any combination of the foregoing, the Commission granted very broad exemptions

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from the FPA, PUHCA and state laws in order to remove the disincentive of utility-type regulation from QFs. The Commission stated that in the context of this rulemaking proceeding it found it appropriate to reexamine the broad exemptions from the FPA granted to QFs, partly because those broad exemptions may no longer be needed, and partly because the Commission through experience realized that the broad exemptions it granted QFs removed a large number of generation sales from *any* regulatory oversight. The Commission therefore proposed to eliminate the exemptions from Sections 205 and 206 of the FPA that the Commission previously granted, except for the exemptions from Sections 205 and 206 that are for sales that are governed by state regulatory authorities. In addition, the Commission proposed that QFs would not be exempt from new Sections 220, 221 and 222 of the FPA that were added to the FPA by sections 1281 (Electric Market Transparency), 1282 (False Statements) and 1283 (Market Manipulation) of EPAAct 2005.²²

2. Comments

85. As a general matter, the QFs were opposed to lifting of the total exemption from Sections 205 and 206 of the FPA in the current regulations. First, those opposed argue that in deciding to build the generating facility, the owners relied on the existence of the exemption. For example, the Electric Power Supply Association argues that FPA rate regulation of existing contracts will upset long-standing expectations and create unnecessary disruptive uncertainty regarding the financial integrity of numerous QFs. ARIPPA argues that the Commission's proposal amounts to a "bait-and-switch" on investors who were encouraged to build and operate renewable small power production facilities and cogeneration facilities. Occidental Chemical Corporation (Occidental) adds that the Commission's proposal creates incentives for utilities to challenge all existing QF contracts, which will result in litigation. They also argue that subjecting all non-PURPA sales to regulation under the FPA is unnecessary and would discourage the development of cogeneration.

86. Several QFs suggest that, in addition to exemptions being given to sales pursuant to a state PURPA program, QFs selling into an organized market under applicable market rules and tariff requirements should remain exempt from the FPA.

87. Most QFs supported the Commission's proposal to continue to exempt QFs smaller

than five MW from the provisions of the FPA. Others suggested that the Commission raise the size of the QFs that would retain all exemptions to 20 or 30 MW. For example, PGC Electricity, ENEL North America and the Illinois Landfill Gas Coalition propose exemptions for projects having capacities of 20 MW or less. Cinergy and the American Wind Energy Association argue that facilities under 30 MW do not have a significant market effect and should remain exempt.

88. A number of QFs suggest that, rather than removing the exemptions for all non-PURPA sales, the Commission remove the exemptions only for those QFs with majority utility ownership. Other QFs, such as USCHPA and York County, suggest that QFs that are independent of traditional utilities be permitted to retain all of the existing exemptions from the FPA. Other commenters note that removing exemptions is not required by EPAAct 2005. Commenters note that a blanket elimination of exemptions will remove the incentive to cogenerate for non-utility owned QFs.

89. Other commenters request that QFs remain exempt from definition of “electric utility company” under PUHCA 2005. For example, the American Chemistry Council states that this would provide an important incentive for the development of QFs by entities that otherwise are primarily engaged in business other than the generation and sale of electricity.

90. Utilities, on the other hand, generally support limiting the exemptions from the FPA. AEP, for example, argues that no QF should be exempt from the FPA, noting that QFs have the ability to participate in the economic dispatch process within an RTO. The California Electricity Oversight Board comments that the

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Commission should not exempt any QF electrical sales from its regulatory oversight unless it finds that either: (1) the energy sales from the QF are governed by a state regulatory authority; or (2) the QF is less than 5 MW and owned by individuals or small businesses that are unconnected to any electric utility, electric utility holding company, power marketer, transmission provider, transmission owner, or others in the electricity business. Entergy argues that QFs should be required to obtain market-based rate authority for all non-PURPA sales. NRECA comments that the Commission should no longer exempt QFs from the non-rate provisions of the FPA and should require QFs owned by public utilities to make rate filings under Section 205 of the FPA for avoided cost sales and all QFs should make rate filings under Section 205 of the FPA for non-PURPA sales. The Transmission Access Policy Study Group supports the elimination of Sections 205 and 206 exemptions, except for sales governed by state regulatory authorities. Some of the utilities suggested that the Commission's current proposal which states that a QF that sells electric energy “pursuant to a state regulatory authority avoided-cost ratemaking regime would remain exempt from Section 205” (unless it also makes sales of electric energy that are not pursuant to a state regulatory authority avoided-cost ratemaking regime) is not sufficiently clear. One commenter suggests the exemption be applied to “sales ... made pursuant to a state regulatory authority's

implementation of PURPA.” This, the commenter states, would more accurately limit the exemptions to “PURPA sales.” Others point out that bilateral contracts between a QF and a utility often satisfy the requirements of being pursuant to a state regulatory authority’s implementation of PURPA.

91. Commenters also propose that the Commission should add Section 203 to the list of sections with which QFs must comply. The Transmission Access Policy Study Group argues that the Commission should eliminate entirely the Section 203 exemption. It states that the consumer protection concerns that led Congress to expand the Commission’s Section 203 authority over generation acquisitions are relevant to QF transfers as well.

3. Commission Determination

92. We will eliminate certain exemptions that were previously granted to QFs as proposed in the NOPR. However, we will clarify that QFs will retain the exemption from Sections 205 and 206 of the FPA when a sale is made pursuant to a state regulatory authority’s implementation of PURPA. The Final Rule will also essentially retain the pre-existing exemption from PUHCA so that a QF will not be considered “an electric utility company” under the new Public Utility Holding Company Act of 2005.²³

93. Section 210(e)(1) of PURPA states that the Commission “shall ... prescribe rules under which [certain qualifying facilities] are exempted, in whole or in part, from the Federal Power Act, from the Public Utility Holding Company Act, from State laws and regulations respecting the rates, or respecting the financial or organization regulation, of electric utilities, or from any combination of the foregoing, if the Commission determines such exemption is necessary to encourage cogeneration and small power production.” Section 210(e)(2) of PURPA provides that the Commission is not authorized to exempt small power production facilities of 30 to 80 MW capacity from these laws, except for geothermal power production facilities. Such facilities between 30 and 80 MW may be exempted from PUHCA and from state laws and regulations, but may not be exempted from the FPA. Thus Section 210(e) requires the Commission’s regulations to grant regulatory exemptions for certain QFs, in whole, or *in part*, and *if* necessary to encourage cogeneration and small power production.

94. In Order No. 69, the Commission first implemented Section 210(e) of PURPA. The Commission stated that a broad exemption was then appropriate to remove the disincentive of utility-type regulation from QFs, including Sections 203, 205, 206, 208, 301 and 304 of the FPA. In §292.601 of its regulations, the Commission exempted QFs (other than non-geothermal small power production facilities between 30 and 80 MW) from

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Sections 203, 205, 206, 208, 301 and 304 of the FPA.

95. When the Commission first granted the exemptions from Sections 205 and 206 of the

FPA in Order No. 69, there was no market for electric energy produced by non-utility generators. Indeed this was a primary reason that PURPA was enacted. The Commission wrote its regulations, including the provisions for exemptions from Sections 205 and 206, with the expectation that all sales of electric energy from QFs would take place as a result of the Section 210 of PURPA purchase obligation, and that they would take place pursuant to state regulatory authority implementation of the Commission's avoided-cost rules under PURPA. Thus, there was no expectation that QFs would make sales that, by virtue of the Commission's granting a broad exemption from Sections 205 and 206 of the FPA, would be subject to neither this Commission's nor a state regulatory authority's oversight. However, largely as a result of PURPA, markets for electric energy produced by non-traditional power producers developed. And QFs participated in those markets and began to make sales that were not subject to either Commission or state regulatory authority oversight.

96. Therefore, in light of the significant changes that have occurred in the industry since the first QF facilities were introduced and in light of the changing electric markets and resulting market power issues that have arisen in recent years, we no longer believe that it continues to be necessary or appropriate to completely exempt QFs from Sections 205 and 206 of the FPA. We conclude that such a complete exemption is not necessary to encourage the development of cogeneration and small power production facilities and, moreover, the broad nature of the exemptions currently set forth in §292.601 removes a large number of electric energy sales from *any* regulatory oversight. Further we note that many QFs are large and their non-PURPA sales could potentially have a significant market effect.

97. We are not convinced by the comments that eliminating exemptions will cause undue uncertainty or upset the legitimate expectations of QF owners and lenders. The exemptions from regulation previously granted were always subject to revision and QFs had no justifiable expectation that, no matter the change in circumstances, changes in the regulatory regime would not occur. Further, our *partial* removal of the exemption from Sections 205 and 206 of the FPA does not affect a facility's QF status under PURPA or the obligation of an electric utility to purchase power from the QF. However, we take note of the comments requesting that existing contracts not be subject to this change in our regulations and we will provide that sales that occur pursuant to existing contracts will continue to be exempt from Sections 205 and 206 of the FPA.

98. As we also stated in the NOPR, we are aware that partial removal of exemptions might create a hardship for smaller QFs, particularly those owned by individuals or small businesses. The Commission stated that we would consider that at least some of the exemptions previously granted in §292.601 should remain in effect for smaller QFs, such as those under five MW. Numerous commenters suggested that the Commission should consider larger facilities, such as 20 MW or 30 MW facilities, to be small facilities for purposes of retaining the exemptions from Section 205 and 206 of the FPA. We agree, and modify our proposal so that the Final Rule provides that facilities 20 MW or smaller shall remain exempt from Sections 205 and 206 of the FPA. However, when an existing contract for sales from a facility expires, sales from the facility, whether pursuant to a

renewal of the existing contract or pursuant to a new contract, will be subject to Sections 205 and 206, unless otherwise exempt.²⁴

99. In the NOPR we also stated that a QF which sells electric energy pursuant to a state regulatory authority avoided-cost ratemaking regime would remain exempt from Sections 205 and 206 of the FPA. In response to comments, we clarify the regulatory language to make clear that a QF will retain exemption from Sections

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205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA (as opposed to the proposed regulations "pursuant to a state regulatory authority avoided cost regime"). We believe that this is appropriate because "avoided cost regime" is not defined and could be interpreted to include state programs that are not grounded in PURPA. Moreover, many sales made pursuant to bilateral contracts between QFs and electric utilities (including contracts at market-based rates) are made pursuant to a state regulatory authority's implementation of PURPA. The change in language, providing exemptions for QF sales made pursuant to a state regulatory authority's implementation of PURPA, will ensure that such sales from QFs, even where they happen to be pursuant to a bilateral contract and at market-based rates, will continue to be exempt from Sections 205 and 206 of the FPA.

100. EEI states that the elimination of the ownership requirements should not permit a qualifying facility to sell electric energy other than electric energy produced by itself or another qualifying facility and still retain QF status. EEI comments that paragraph 25 of the NOPR should be deleted and the Commission should maintain the "net output rule." According to EEI, the net output rule requires a utility to purchase only a QF's net output production, *i.e.*, the QF's total capacity minus the power the QF requires to operate its generating facility (often called station use or auxiliary load). EEI argues that if a QF's sales to a utility are not limited to its net output, then the QF in essence would be getting credit for more capacity than it is displacing on the utility's system. EEI states that QFs, whether or not they are majority-owned by utilities, should not be able to take advantage of PURPA to buy power from a utility at one price and sell it back to the utility at a higher price. EEI's comments are supported by NYSEG, Rochester, Progress Energy, SoCal Edison, PSNM, TNP, PG&E and Entergy Services, Inc.

101. We disagree with EEI that the elimination of the ownership requirement should be interpreted to preclude a QF from selling electric energy other than electric energy produced by itself or another QF without losing QF status. The loss of QF status in the past by a facility that sold non-QF power, such as power in excess of the net capacity of a facility, rested on the statutory and regulatory ownership requirements for QF status. Removal of the ownership prohibition removes the bar to a QF selling non-QF electric energy while retaining QF status. However, as we explained in the NOPR, any non-QF electric energy sold by a QF must be sold pursuant to the FPA. Before making sales of non-QF power, the QF must obtain authority pursuant to Section 205 of the FPA to make such sales, if a QF has not already obtained such Section 205 authority. To the extent that

EEI and others are concerned that a QF will attempt to substitute lower-cost non-QF electric energy for the electric energy that utilities are purchasing pursuant to the purchase obligation of Section 210 of PURPA, the Commission does not believe that such purchases are required by PURPA. What electric utilities are required to purchase is the “electric energy from such facilities”²⁵ which the Commission interprets to mean electric energy produced by the QF and not non-QF electric energy which the QF has purchased or has produced itself through a process that does not satisfy the technical requirements for QF status. Thus, for example, if a cogeneration QF decides to produce electric energy through non-sequential supplemental firing or a small power production QF decides to produce electric energy by burning a non-small power fuel, the electric energy would not be subject to the PURPA purchase obligation and the sales of such electric energy should not be exempt from Sections 205 and 206 of the FPA. Similarly, purchase and re-sale of non-QF power produced by others would not be exempt from Sections 205 and 206 of the FPA. Whether such purchases are otherwise required by an agreement between a utility and a QF is a separate matter of contract law, however.

102. In addition, we reject proposals to eliminate the QF exemption from the FPA Section 203(a)(i) filing requirements. We are not persuaded such a change to our existing practice is called for. With respect to the NOPR proposal

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to eliminate the QF exemption from PUHCA, we have rethought this proposal in light of the Public Utility Holding Company Act of 2005. We interpret PURPA to permit us to exempt QFs from the Public Utility Holding Company Act of 2005 in §292.602 of our regulations. Section 292.602 will thus provide that a QF shall not be considered an “electric utility company” as defined by the Public Utility Holding Company Act of 2005. However, consistent with our recent actions on FPA Section 203, QFs will be considered an “electric utility company” for purposes of 203(a)(2) of the FPA.

103. Lastly, we see no reason to exempt QFs from the newly added FPA Sections 220, 221 and 222, added by EAct 2005 Sections 1281 (Electric Market Transparency), 1282 (False Statements) and 1283 (Market Manipulation).

F. General Requirements for Qualification and Ownership Criteria

1. Background

104. Section 1253(b) of EAct 2005 amended Sections 3(17)(C) and 3(18)(B) of the FPA by eliminating the ownership limitations for QFs previously contained in those sections. Section 292.206 of the Commission's regulations was designed to implement the prior statutory requirement that a qualifying cogeneration or small power production facility 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). In the NOPR, the Commission proposed to implement Section 1253(b) of EAct 2005 by eliminating §292.206 from its regulations, and thus

eliminating the ownership limitations for all QFs —both existing and new.

105. Section 292.203 lists the general requirements for qualification status. Section 292.203(a)(3) requires that a small power production facility must “[m]eet[] the ownership criteria specified in §292.206.” Section 292.203(b)(2) requires that a cogeneration facility must “[m]eet[] the ownership criteria specified in §292.206.” In light of the elimination of the ownership limitations for all QFs and the Commission's proposal to delete §292.206, in the NOPR the Commission also proposed to delete from §292.203 these references to the ownership limitation from the requirements for qualifying small power production facilities and qualifying cogeneration facilities. Therefore, the Commission proposed to delete §§292.206, 292.203(a)(3) and 292.203(b)(2) from its regulations.

2. Comments

106. No commenter has opposed the ownership limitation from QFs and deletion of Section 292.206 and revision of definitions of cogeneration and small power production facility in Section 292.203 of the Commission's regulations.

3. Commission Determination

107. There is no opposition to the Commission's proposal in the NOPR. We will, therefore, implement Section 1253(b) of EPAct 2005 by eliminating §292.206 from our regulations, and thus eliminate the ownership limitations for all QFs —both existing and new. We will simultaneously delete §§292.203(a)(3) and 292.203(b)(2) from our regulations describing the general requirements for qualifying status.

G. Form 556

1. Background

108. In the NOPR, the Commission proposed changes in Form 556 for new qualifying cogeneration facilities. Form 556 is used by Applicants seeking qualifying facility status, whether by Commission application or by self-certification. The Commission's removal of §292.206 prompted the amendment of Form 556 to reflect the new criteria for QF status. Specifically, the Commission proposed to eliminate references in Form 556 to the requirement that a QF may not be owned more than 50 percent by certain entities and also proposed to eliminate the requirements designed to help the Commission enforce that 50 percent ownership limitation. Nevertheless, the Commission also proposed to retain a requirement that a QF provide in Form 556 ownership information, including the percentage of ownership held by any electric utility or electric utility holding company, or by any person owned by either. While ownership limitations were no longer part of the criteria for QF status, the Commission nevertheless believed that an applicant for QF status should inform the Commission of the identity of its owners, and their percentage interests. The Commission believed that this information would help the Commission determine in the

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future, as it gained experience subsequent to the enactment of EAct 2005, whether the exemptions from the FPA and state laws should continue to be available to all QFs, especially those affiliated with traditional utilities, transmission providers and other power producers. It would also allow the Commission to better monitor for undue discrimination or preference both in the provision of transmission service and sales for resale in interstate commerce.

2. Comments

109. Several commenters supported the Commission's proposal to retain the facility ownership disclosure requirement in the Commission's Form No. 556. These commenters believe that such information will allow the Commission to better monitor potential discrimination in the provision of service to customers and would assist the Commission in reviewing the extent to which various QFs should continue to be exempt from state laws and various provisions of the FPA. However, Independent Sellers disagreed with the NOPR but maintained that the ownership disclosure should be limited to those owners that hold 10 percent or more of the equity interests in the QF.

3. Commission Determination

110. Upon consideration of comments, we conclude that we should still include an ownership disclosure requirement in the Commission's Form No. 556, as proposed in the NOPR. Contrary to Independent Sellers request to limit the ownership enquiry to 10%, the Commission would like to know *all* utility owners. This information will assist us in monitoring potential discrimination in the provision of service to customers and will assist the Commission in reviewing the extent to which various QFs should continue to be exempt from various provisions of the FPA and state laws.

H. Other Issues with Respect to Section 210(n)**1. Background**

111. A number of commenters have asked the Commission to define what a “new cogeneration facility” is for purposes of EAct 2005. Specifically, they want the Commission to clarify that an existing QF does not become subject to the requirements of newly added Section 210(n) of PURPA when it files for recertification.

2. Comments

112. ELCON and many other commenters maintain that change in ownership or other modifications should not convert an “existing facility” to “new facility” on recertification. They request that the regulations clarify that the new standards apply only to “new facilities,” those being built and *first* certified after the EAct 2005 effective

date. They argue that the requirements of Section 210(n) of PURPA should not apply to facilities that are requesting recertification.

113. SoCal Edison opposes ELCON's suggestion arguing that the Commission's revised regulation for 'new' qualifying cogeneration facility should apply to a cogeneration facility that seeks recertification as a QF. It argues that an existing qualifying cogeneration facility substantially modified or altered in a way not covered by 18 C.F.R. §292.207 (a)(2)(i) and completing an extensive re-powering of the facility or converting from one technology to another should be subjected to the revised regulation for "new" qualifying cogeneration facilities.

114. Cinergy Solutions and EPSA seek clarification from the Commission that a QF facility designated as an old facility under the Commission's rules should not subsequently become a new facility because of non-compliance for a certain period or withdrawal of an application. EPSA requests that the Commission confirm that, notwithstanding future changes in the allocation of QF benefits, as a result of elimination of QF ownership criteria or otherwise, such future changes will have no retroactive effect on the QF status for periods prior to the effective date of the new rules.

3. Commission Determination

115. Initially, we note that the regulatory text adopted in §292.207(d) defines what cogeneration facilities will be considered new cogeneration facilities. In addition, we clarify that there is a rebuttable presumption that an existing QF does not become a "new cogeneration facility" for purposes of the requirements of newly added Section 210(n) of PURPA merely because it files for recertification. However, we caution that changes to an

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existing cogeneration facility could be so great (such as an increase in capacity from 50 MW to 350 MW) that what an applicant is claiming to be an existing facility should, in fact, be considered a "new" cogeneration facility at the same site.

IV. Information Collection Statement

116. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.²⁶ Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

117. The Commission is amending its regulations to implement Section 1253(a) of the EAct 2005; specifically, its regulations governing qualifying small power production

and cogeneration facilities. The Commission's regulations, in 18 C.F.R. Parts 131 and 292, specify the certification procedures that must be followed by small power production and cogeneration facilities seeking QF status; specify the criteria that must be met; specify the information which must be submitted to the Commission in order to obtain QF status; specify the benefits which are available to QFs; and specify the transaction obligations of electric utilities with respect to QFs. The information provided to the Commission under Parts 131 and 292 is identified as Form 556. In addition, the Commission is amending its regulations providing exemptions to qualifying facilities; among other things, certain entities will be subject to the provisions of Section 205 of the FPA and Part 35 of the Commission's regulations. The information provided to the Commission under Part 35 is identified as FERC-516.

The Commission is submitting these reporting requirements to OMB for its review and approval under Section 3507(d) of the Paperwork Reduction Act.²⁷ Comments were solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. Comments were received noting that the NOPR only mentioned costs associated with filing a revised Form 556, and does not address the new applications and reports that will be required due to the elimination of certain exemptions from the FPA for QFs. Below we have revised the estimates provided in the NOPR to account for the elimination of exemptions.

Burden Estimate: The Public Reporting burden for the requirements proposed here are as follows:

Data Collection	Number of Respondents	No. of Responses	Hours Per Response	Total Annual
FERC Form 556				
FERC Certification	27	1	4	108
Self-Certification	270	1	38	10,260
Sub Totals	297			10,368 *
FERC-516				
205 filings	100	1	183	18,300
Electric quarterly reports (initial)	100	1	230	23,000
Electric Quarterly Reports (later)	100	3	6	1,800
Change of status	100	1	3	300
Sub-totals	100			43,400

*Off-setting changes to FERC-556; no change to current burden.

Total Annual Hours for Collection: (Reporting + recordkeeping (if appropriate)=43,400 hours (excludes the 10,368 hours for FERC-556).

Information Collection Costs: Costs for FERC-516=\$15,190,000 (43,400 hours @ \$350 an hour). Costs for FERC-556=\$3,591,000 (10,260 hours at \$350 an hour) + \$37,800 (108 hours @ \$350 an hour=\$3,628,800. (The hourly rate includes attorney fees, engineering consultation fees and administrative support.)

Title: FERC Form 556 “Cogeneration and Small Power Production”

Action: Proposed Collections

OMB Control No: 1902-0075

Respondents: Business or other for profit

Frequency of Responses: On occasion

Necessity of the Information: This Final Rule adopts the Congressional mandate found in Section 1253(a) of EAct 2005 to implement the establishment of criteria for new qualifying cogeneration facilities; and the elimination of ownership limitations. By amending its regulations, the Commission is satisfying the statutory mandate and also 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. The information collected under 18 C.F.R. Parts 131 and 292 is used by the Commission to determine whether an application for certification (Commission 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. The information collected under 18 C.F.R. Part 35 is used by the Commission to carry out its statutory responsibility to assure that electric rates are just and reasonable. Sufficient detail must be obtained for the Commission to make informed decisions concerning appropriate cost and rate levels and to aid customers and other parties who may wish to challenge costs and rates. A public utility must obtain Commission authorization for all rates and charges for wholesale sales and transmission of electric energy in interstate commerce. The Commission is authorized to investigate the rates charged by public utilities for such sales and transmission. If, after investigation, the Commission determines that the rates are unjust and unreasonable or unduly discriminatory or preferential, the Commission is authorized to determine and prescribe the just and reasonable rates.

Internal review: The Commission has reviewed the requirements pertaining to qualifying small power production and cogeneration facilities and determined the proposed requirements are necessary to meet the statutory provisions of EAct 2005, PURPA and the FPA.

These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission

has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426 [Attention: Michael Miller, Office of the Executive Director, Phone: (202) 502-8415, fax: (202) 273-0873, e-mail: <michael.miller@ferc.gov>.

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V. Environmental Analysis

118. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.²⁸ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. As explained above, this Final Rule interprets amendments made to PURPA by EAct 2005, and clarifies the applicability of these amendments to QFs; it does not substantially change the effect of the legislation. Accordingly, no environmental consideration is necessary.²⁹

VI. Regulatory Flexibility Act Analysis

119. The Regulatory Flexibility Act of 1980 (RFA)³⁰ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. In the NOPR, we stated that many, if not most, QFs to which this rule would apply do not fall within the definition of small entities, citing the RFA's definition that a small entity is "a business that is independently owned and not dominant in its field of operation."³¹ The Non-Utility QF Group, however, argues that the Commission's proposals will impact small entities. It argues that it is likely that a majority of QFs are owned in whole, or at least up to 50 percent, by small entities. It argues that under Small Business Administration (SBA) standards, an electric production firm is considered "small" if its output does not exceed 4 million MWh per year. It also argues that the forms and applications that will be required due to the modification of exemptions, including Section 203 applications, Section 205 tariffs, electronic quarterly reports and triennial market power reports, will cause a significant impact on a substantial number of small entities.

120. First, we note that certain rules are exempt from the RFA's requirements; exempt rules include interpretive rules, general statements of policy, or rules of agency organization procedure and practice. Interpretive rules "generally interpret the intent expressed by Congress, where an agency does not insert its own judgments or interpretations in interpreting a rule and simply regurgitates statutory language." This Final Rule to a large extent is an interpretive rule; Congress directed the Commission in Section 1253 of EAct to revise our regulations governing new cogeneration facilities, and we have responded by following our statutory mandate.

121. Moreover, many QFs, although certainly not all, would not be considered “small,” even under the SBA's standards. Also, while there will be QFs that are small and that will be affected by the Final Rule, we also have included numerous provisions in the Final Rule designed to reduce the Final Rule's impact on such small entities. First, in response to commenters, the Final Rule provides that facilities 20 MW or smaller shall remain exempt from Sections 205 and 206 of the Federal Power Act (this is an increase from five MW or smaller as proposed in the NOPR). The Final Rule further provides that sales that occur pursuant to existing contracts will continue to be exempt from Section 205 of the FPA. In addition, the Final Rule also provides a rebuttable presumption that new cogeneration facilities that are 5 MW or smaller satisfy both the requirement that the thermal output of a new cogeneration facility is used in a productive and beneficial manner and the requirement that the electrical, thermal, chemical, and mechanical output of a new cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes. The Final Rule also provides that a qualifying facility shall retain its exemption from Sections 205 and 206 of the Federal Power Act when its power sales are made pursuant to a state regulatory authority's implementation of PURPA. This will mean that many QF power sales will continue to be exempt from Sections 205 and 206 of the Federal Power Act.

122. The Final Rule also interprets PURPA to permit the Commission to exempt QFs from the newly enacted Public Utility Holding Company Act of 2005, and, accordingly, exempts QFs from that statute. In addition, to the extent the proposed regulations remove now-unnecessary regulations such as ownership limitations for qualifying cogeneration and small power production facilities, the proposed regulations will be beneficial to QFs.

VII. Document Availability

123. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page <<http://www.ferc.gov>> and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

124. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

125. User assistance is available for eLibrary and the Commission's web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or (202) 502-8222 (email at <FERCOnlineSupport@ferc.gov>), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 (E-Mail the Public Reference Room at <public.referenceroom@ferc.gov>).

VIII. Effective Date

126. These regulations are effective March 17, 2006.

The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a “major rule” as defined in Section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects in 18 C.F.R. Parts 131 and 292

Electric power, Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By the Commission.

Magalie R. Salas,

Secretary.

[Note:] The following Appendix will not be published in the *Code of Federal Regulations*.

Appendix**List of Petitioners Requesting Clarification or Submitting Comments**

American Chemistry Council

American Electric Power Service Corporation jointly with AEP Texas North Company, AEP Texas Central Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and Wheeling Power Company (collectively, AEP)

American Forest & Paper Association (American Forest & Paper)

American Public Power Association (APPA)

American Wind Energy Association (AWEA)

ARIPPA

California Electricity Oversight Board (CEOB)

Calpine Corporation (Calpine)

CE Generation, LLC (CE Generation)

Cinergy Solutions, Inc. (Cinergy)

Cogeneration Association California jointly with Energy Producers and Users Coalition, Cogeneration Coalition of Washington, and Nevada Independent Energy Coalition (collectively, QF Parties)

Cogentrix Energy, inc. (Cogentrix) jointly with Goldman Sachs Group, Inc. (Goldman

Sachs) (collectively, Independent Sellers)
Constellation Energy Group, Inc. (Constellation)
Council of Industrial Boiler Owners (CIBO)
Delta Power Company, LLC (Delta Power) jointly with Juniper Generation, LLC (Juniper), and California Cogeneration Council (California Cogen)
Department of Housing and Urban Development
Dow Chemical Company (Dow)
Edison Electric Institute (EEI)
Edison Mission Energy jointly with Edison Mission Marketing & Trading, Inc., Midwest Generation EME, LLC (collectively, Edison Mission Energy) (intervention only)
Electric Power Supply Association (EPSA)
Electricity Consumers Resource Council (ELCON) jointly with American Iron and Steel Institute (AISI) (collectively, Industrial Consumers)
Enel North America, Inc. (Enel)
Entergy Services, Inc. jointly with Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; and Entergy New Orleans, Inc. (collectively, Entergy)
Environmental Protection Agency
The Fertilizer Institute (Fertilizer Institute)
Florida Industrial Cogeneration Association (Florida Industrial Cogeneration)
GE Energy Financial Services (GE)
Granite State Hydropower Association, Inc. (Granite State Hydropower)
Illinois Landfill Gas Coalition (Illinois Landfill Gas)
Indeck Energy Services, Inc. (Indeck)
Kentucky Public Service Commission (Kentucky Commission)
Marina Energy, LLC (Marina Energy)
National Association of Regulatory Utility Commissioners (NARUC)
National Rural Electric Cooperative Association (NRECA)
New York State Electric & Gas Corporation (NYSEG) jointly with Rochester Gas and Electric Corporation (Rochester G&E)
Non-Utility QF Group
North Carolina Eastern Municipal Power Agency (NCEMPA)
Occidental Chemical Corporation (Occidental)
Oklahoma Corporation Commission (Oklahoma Commission)
Oklahoma Gas and Electric Company (OG&E)
Pacific Gas and Electric Company (PG&E)
Primary Energy Ventures LLC (Primary Energy)
Process Gas Consumers Group Electricity Committee (Electricity Committee)
Progress Energy, Inc. (Progress Energy)
Public Service Company of New Mexico (PSNM) jointly with Texas-New Mexico Power Company (TNP)
Public Service Electric and Gas Company jointly with PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Global L.L.C. (collectively, PSEG)
Public Utility Commission of Ohio (Ohio Commission)
Ridgewood Renewable Power, LLC (Ridgewood)
Solar Turbines Incorporated (Solar Turbines)

Southern California Edison Company (SoCal Edison)
 Transmission Access Policy Study Group (TAPS)
 U.S. Combined Heat and Power Association (USCHPA)
 U.S. Environmental Protection Agency (EPA)
 Xcel Energy Services Inc. (Xcel)
 York County Solid Waste and Refuse Authority (York County)

¹ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

² Pub. L. No. 109-58, §1253, 119 Stat. 594, 967-70 (2005).

³ Form 556 is set forth in 18 C.F.R. §131.80 (2005).

⁴ 16 U.S.C. §§824 *et seq.* (2000).

⁵ 15 U.S.C. §79 (2000); Pub. L. No. 109-58, §§1261-77, 119 Stat. 594, 972-78 (2005).

⁶ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, 70 *Fed. Reg.* 60456 (October 18, 2005), *FERC Statutes and Regulations* ¶32,590 (2005).

⁷ *Id.*

⁸ *See* 18 C.F.R. §131.80, Part C, 15(i) (2005).

⁹ QF applicants may provide studies or testimony to support compliance with this new standard.

¹⁰ *See* NOPR at P 14.

¹¹ *Id.* at P 11.

¹⁵ 18 C.F.R. §388.112 (2005).

¹⁶ To the extent that commenters suggest that the Commission change its regulations containing criteria applicable to existing cogeneration facilities, those suggestions are inconsistent with Section 210(n)(2) of PURPA, which states that the Commission does not have the authority to change the criteria for existing QFs:

“Notwithstanding rule revisions under paragraph (1), the Commission's criteria for qualifying cogeneration facilities in effect prior to the date on which the Commission issues the final rule required by paragraph (1) shall continue to apply to any cogeneration facility that —(A) was a qualifying cogeneration facility on the date of enactment of subsection (m) [*i.e.*, August 8, 2005], or (B) had filed with the Commission a notice of self-certification, self-recertification or an application for Commission certification under 18 C.F.R. §292.207 prior to the date on which the Commission issues the final rule required by paragraph (1) [*i.e.*, the date of issuance of this Final Rule].”

¹⁷ Recently built cogeneration facilities have been dominated by natural gas fired technologies. Their construction has been driven by lower capital costs in comparison to coal facilities and the anticipation of moderately priced natural gas. A coal-fired facility, in contrast, typically will recover its more substantial investment over a longer period of time. While newer coal-fired generation technologies could offer greater fuel efficiency and better environmental performance than older designs, they also require greater capital investment. It is not the intent of the Commission to discourage more economic coal-fired generation technologies. Commenters also feel that applying an efficiency standard to coal-fired facilities is likely to impose additional barriers for cogeneration at coal-fired facilities, undercutting the underlying statutory directive to encourage cogeneration by hampering the flexibility of coal-fired cogeneration units to shutdown their facilities for repairs, or engage in other maintenance. Therefore, the Commission will impose no new

efficiency standards for new coal-fired cogeneration facilities at this time.

¹⁸ 18 C.F.R. §292.207 (2005).

¹⁹ 18 C.F.R. §292.207 (d)(1)(iii) (2005).

²⁰ 18 C.F.R. §292.207 (a)(1)(iv) (2005).

²¹ 18 C.F.R. §292.207 (a)(1)(ii) (2005).

²² Pub. L. No. 109-58, §§1281-83, 119 Stat. 594, 978-80 (2005).

²³ See Pub. L. No. 109-58, §§1261-77, 119 Stat. 594 972-78 (2005).

²⁴ As we discuss below, such sales may be otherwise exempt because they are from facilities 20 MW or smaller or because they are made pursuant to a state regulatory authority's implementation of PURPA.

²⁵ 16 U.S.C. §824 a-1(a)(2).

²⁶ 5 C.F.R. §1320.13 (2005).

²⁷ 44 U.S.C. §3507(d) (2000).

²⁸ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 *Fed. Reg.* 47897 (December 17, 1987), *FERC Statutes and Regulations, Regulations Preambles 1986-1990* ¶30,783 (1987).

²⁹ 18 C.F.R. §380.4 (a)(2)(ii) (2005).

³⁰ 5 U.S.C. §§601 - 12 (2000).

³¹ 15 U.S.C §632 (2000).

Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671-A, May 30, 2006, Docket No. RM05-36-001, 18 CFR 292, 71 FR 30585

[30,400]

71 FR 30585 (May 30, 2006)

18 C.F.R. Part 292

[Docket No. RM05-36-001; Order No. 671-A]

Revised Regulations Governing Small Power Production and Cogeneration Facilities

(Issued May 22, 2006)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: In this order on rehearing, the Federal Energy Regulatory Commission (Commission) reaffirms its determinations and grants clarification in part of Order No. 671, which amended the Commission's regulations governing small power production and cogeneration facilities.

EFFECTIVE DATE: The Final Rule and order on rehearing will become effective June 29, 2006.

FOR FURTHER INFORMATION CONTACT: Paul Singh (Technical Information), Office of Energy Markets and Reliability, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 502-8576.

Samuel Higginbottom (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 502-8561.

Eric D. Winterbauer (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 502-8329.

SUPPLEMENTARY INFORMATION:

1. On February 2, 2006, the Federal Energy Regulatory Commission (Commission) issued Order No. 671, ¹ in which the Commission revised its regulations governing qualifying small power production and cogeneration facilities. Specifically, the

Commission, among other things, eliminated certain exemptions from rate regulation that were previously available to qualifying facilities (QFs). Several parties have requested rehearing or clarification. For the reasons discussed below, we deny the requests for rehearing and grant clarification in part.

Introduction

2. Order No. 671 was issued in response to the Energy Policy Act of 2005 (EPAAct 2005),² which modified in relevant part section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). Specifically, Order No. 671 sought to: (1) ensure that new qualifying cogeneration facilities are using their thermal output in a productive and beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or institutional purposes; and that there is continuing progress in the development of efficient electric energy generating technology; (2) amend Form 556³ to reflect the criteria for new qualifying cogeneration facilities; (3) eliminate ownership limitations for qualifying cogeneration and small power production facilities; and (4) amend the exemptions available to QFs from the requirements of the Federal Power Act (FPA)⁴ and the Public Utility Holding Company Act of 1935 (PUHCA 1935).⁵ ARIPPA,⁶ the National Rural Electric Cooperative Association (NRECA) and the Non-Utility QF Group have requested rehearing.

Exemption of QFs from FPA Section 205/206 Authority

Background

3. In Order No. 671, the Commission stated that in light of significant changes that have occurred in the industry since the first QF facilities were introduced and in light of changing electric markets and resulting market power issues that have arisen in recent years, it was no longer necessary or appropriate to completely exempt QFs from Sections 205 and 206 of the FPA.⁷ However, the Commission clarified that QFs would continue to have an exemption from Sections 205 and 206 of the FPA when a sale is made pursuant to a state regulatory authority's implementation of PURPA. In addition, to avoid creating the hardship that removal of exemptions might cause for smaller QFs, the Commission provided that facilities 20 MW or smaller would remain exempt from Sections 205 and 206 of the FPA.

Requests for Rehearing

4. ARIPPA argues against the imposition of rate regulation on QFs that are not owned by electric utilities. It argues that the rule change is a “bait-and-switch,” in that it would impose rate regulation on QF owners who had been induced to invest in and develop QFs by the exemption from the state and federal rate regulation.

5. ARIPPA points to the Commission's statement that “a complete exemption is not necessary to encourage the development” of cogeneration.⁸ It emphasizes the word

“development,” noting that this might be a reasonable basis for a rule that newly-built QFs would not enjoy exemptions from rate regulation, but argues that the statement does not address the issue of the Commission's treatment of those who invested in such facilities in the past in reliance on the exemption from rate regulation. It argues that the Commission's statement that QF's had no reasonable expectation that the rules would not be amended is wrong. It argues that that was the inducement for developers to invest.

6. ARIPPA argues that the Commission cites to no record for its assertion that non-QF sales by QFs could potentially have a significant market effect. It argues that the Commission did not cite to a single indication that one or more non-utility QFs under common ownership and control have achieved or could achieve market power. It argues that Commission's assertion is mere speculation.

7. ARIPPA argues that the exception for QFs selling pursuant to a state avoided-cost regime is inconsistent with other parts of the existing rule. It argues that it is vague and that the uncertainty it will create will stymie future development, despite Congress' continuing charge to the Commission to continue to encourage development. It contends that it is unclear how much variance from a state avoided-cost regime is tolerable and how much crosses the line and would cause the QF to lose its exemption from federal rate regulation. It questions whether investors will be willing to initiate development knowing that the process may be affected by such uncertainties. It also questions whether it is in the public interest for the Commission to set up what it sees as barriers and disincentives to settlement of disputes arising during contract negotiations between utilities and QFs.

8. NRECA, on the other side, argues that all power sales by QFs owned by Commission-regulated public utilities should be subject to Sections 205 and 206 even if the sales were made pursuant to a state's implementation of PURPA. It states that Order No. 671 continues to exempt from Sections 205 and 206 any sales made pursuant to a state PURPA implementation plan, even if the QF is owned by a public utility.¹⁰ It argues that there is no policy reason why such wholesale sales of power from QFs owned by public utilities should be exempt from Commission review under Sections 205 and 206, while all other wholesale sales by such public utilities (*i.e.*, from resources other than QFs) are subject to such review.

9. NRECA argues that all sales by QFs owned by public utilities should be subject to the Commission's rate authority, whether such sales are pursuant to an avoided cost rate or not. NRECA also states that the filing of avoided cost contracts with the Commission will enhance oversight and transparency, while not requiring

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filing creates a risk of market power abuse.

10. NRECA further argues that all QFs that make non-PURPA sales should be subject to Sections 205 and 206, no matter how small. It states that it is sensitive to the needs of smaller QFs, but that a QF as small as 5 MW could have a substantial impact upon a

small distribution cooperative. NRECA states that small QFs that believe they are too small to handle public utility regulation may continue to make sales pursuant to a state PURPA implementation plan, and continue to be exempt from Section 205 and 206 (unless they are owned by a public utility). NRECA adds that, on the other hand, if small QFs want the flexibility available to utilities with market-based rates and feel that they are large enough and sophisticated enough to sell at market-based rates, they should be subject to Sections 205 and 206, like any other public utility that sells power at market-based rates.

11. NRECA argues that, under Order No. 671, if a large public utility owned a 20 MW QF, it could make power sales from that QF without any Commission review. It further argues that, if the facility were not a QF, the public utility would not be able to make such a sale without the Commission's express approval. It argues that this underscores the potential for market power abuse and affiliate transaction abuse that could occur if Order No. 671 is not changed.

12. The Non-Utility QF Group argues that the Commission should increase the threshold for exemption from Sections 205 and 206 of the FPA from 20 MW to 30 MW. First, it argues that the change would simplify Commission regulation by maintaining a consistent 30 MW threshold for all FPA exemptions as they apply to qualifying small power production facilities. Second, it argues that, in PURPA, Congress determined that 30 MW was a critical threshold for small power production facilities, and notes that Congress did not disturb that threshold in EPAAct 2005. Thus, it argues, the Commission already has a ready statutory reference for a 30 MW threshold, while the 20 MW threshold is more arbitrary. Third, it argues that the total installed generation capacity for all qualifying cogeneration plants under 30 MW, combined with the total installed generation capacity of all qualifying small power production facilities under 30 MW, totals a mere 7,095.5 MW.¹¹ It argues that this represents less than 0.7 percent of the total installed generation capacity in the U.S. in 2004. It argues that, accordingly, exemptions for QFs less than 30 MW would not detract from the purposes of Sections 205 and 206 of the FPA, and would serve both administrative efficiency and Congressional mandates to avoid utility-type regulation of entities having *de minimis* market presence.

Commission Determination

13. We disagree that any original “bargain” has been reneged on, or that the Commission has engaged in what ARIPPA refers to as a “bait and switch.” The Commission granted very broad exemptions from the FPA (and state laws) in order to remove the disincentive of utility-type regulation from QFs. Exemptions from FPA Sections 205 and 206 rate regulation were necessary to encourage the development of QFs. However, at that time the Commission had no way to predict how markets would develop in the decades to follow. When the Commission first granted the exemptions from Sections 205 and 206 of the FPA in 1980, there was no market for electric energy produced by non-traditional generators and thus such generators were rare. However, prompted originally by PURPA, markets for electric energy produced by non-traditional generators have developed. Now

that these markets are in existence and provide a forum for sales of electric energy produced by non-traditional generators, the same level of encouragement for QFs is no longer necessary; access to these markets provides encouragement. Accordingly, it is no longer necessary to completely exempt QFs from Sections 205 and 206 of the FPA in order to encourage development of QFs.

14. Moreover, given these changes to energy markets, there will be times when

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Commission oversight of QF sales is appropriate and necessary under Section 205 and 206 of the FPA. The passage and implementation of EPAct 2005 has provided us an opportunity to now provide for such oversight.

15. We remain unpersuaded that eliminating exemptions will upset the legitimate expectations of QF owners, lenders and investors. As we stated in Order No. 671, the exemptions previously granted were always subject to revision and QFs had no justifiable expectations that, no matter the changes in circumstances, changes in the regulatory regime would not occur. In addition, the Commission has already taken significant steps to ease any adverse impact. Specifically, the Commission recognized that expectations reflected in current contracts should be protected, and did so by grandfathering the exemption from Sections 205 and 206 of the FPA for existing contracts.¹² However, on a prospective basis, the need for oversight of QF sales is a compelling reason to subject new contracts to rate regulation under Section 205 and 206 of the FPA.

16. ARIPPA's argument that Order No. 671's changes to the exemptions from Sections 205 and 206 of the FPA will discourage future development of non-traditional generation is misplaced. The large number of non-QF independent generators that have developed in recent years, addressed in the many orders granting them market-based rate authority under Section 205 of the FPA, indicate that the exemptions from Sections 205 and 206 are not necessary to promote non-traditional generation.

17. We find unpersuasive the arguments made by NRECA that even sales made by utility-owned QFs that are subject to a state's PURPA implementation plan should nevertheless be subject to Section 205 and 206 regulation. Our goal in part was and is to close the gap that had developed in the regulatory regime that allowed some QF sales to avoid any rate regulation.¹ We believe that having QF sales regulated at the state level is sufficient, and will allow us to close the regulatory gap while not dramatically or inappropriately increasing the regulatory burden on QFs.

18. Likewise, we find unpersuasive the arguments of the Non-Utility QF Group and NRECA to change the threshold for Section 205/206 exemptions. The Non-Utility QF Group argues that the threshold should be increased to 30 MW; NRECA argues that all non-PURPA sales should be regulated no matter how small the QF. In Order No. 671, we attempted to strike a balance by ensuring that QF sales are regulated by either the states or the Commission while at the same time easing the burden on the smallest facilities.¹⁴

In the NOPR, the Commission originally suggested that the exemptions should remain in effect for QFs under 5 MW. Most commenters supported the exemption for QFs under 5 MW, while some suggested a higher figure.¹⁵ In response to those comments, the Commission raised the threshold to 20 MW.¹⁶ The 20 MW threshold strikes a reasonable balance by protecting the smallest facilities while ensuring that sales by larger QFs are subject to Commission oversight.¹ The arguments presented by the Non-Utility QF Group are simply not compelling enough to persuade us to raise the threshold further. In addition, we reject arguments by NRECA to make all non-PURPA sales subject to rate regulation, no matter how small the QF. We believe that an exemption from regulation is still appropriate to ease the regulatory burden for the smallest QFs.

Self-Certification

Background

19. In Opinion No. 671, the Commission retained the option to self-certify for

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new cogeneration facilities. The Commission also stated that self-certifications and self-recertifications of new cogeneration facilities would now be noticed in the *Federal Register*, in order to enhance the visibility of self-certifications for interested parties. The Commission further stated that a facility should not be able to claim QF status without having made any filing with the Commission. Accordingly, the Commission amended its regulations to expressly require that a facility claiming QF status must file either a notice of self-certification or an application for Commission certification.¹⁸

Requests for Rehearing

20. NRECA argues that the Commission should not permit new cogeneration facilities to self-certify. It states that the “fundamental use” and “presumptively useful” standards are subjective and that there are no guidelines established yet on how the standard will be applied. It contends that, although the Commission has stated that these factors will require a case-by-case review, self-certification will be meaningless if the Commission accepts a new cogeneration facility's unsupported representation in a self-certification that it satisfies subjective standards. It argues that, consequently, new cogeneration facilities should at the present time be required to submit an application and obtain a Commission determination as to its QF status.¹⁹

21. NRECA further argues that the Commission's proposal in Order No. 671 to notice self-certifications and self-recertifications in the *Federal Register* is insufficient to ensure that new cogeneration facilities satisfy the new standards for QF status, given the inherently subjective and case-by-case nature of the application of such new standards. It contends that, because QFs frequently file self-certifications before they have approached an electric utility for interconnection or power sales, electric utilities would be compelled to monitor every self-certification filing in order to determine whether the QF is planning

to locate in the electric utility's service territory. It further argues that, until the new standards are better developed, it will be unclear on what basis an electric utility could challenge a QF's qualifying status. It contends that only electric utilities with significant litigation resources will be in position to protect themselves from inappropriate self-certifications, and that small cooperatives will be at a disadvantage.

Commission Determination

22. We deny rehearing. We find the processes and safeguards included in Order No. 671 to be sufficient. As we noted in Order No. 671, the Commission has the authority to review a self-certification.²⁰ With this authority, the Commission is able to review the self-certifications of new cogeneration facilities to ensure their compliance with the new standards. NRECA argues that, for the first self-certifications, there will be no prior cases that provide guidelines on how to satisfy the standards. We think EPAAct 2005's statutory language and the newly-adopted regulations provide a sufficient starting point, and we also expect such case law to develop quickly so that QFs and electric utilities will have further guidance on what is necessary to meet the new standards.

23. In addition, we disagree with NRECA's argument that publication of notice in the *Federal Register* will not help to ensure that prospective QFs comply with the new standards. Publication of such notices will enhance the visibility of self-certifications and self-recertifications for interested parties. We expect that such visibility will allow attempted self-certifications and self-recertifications of new cogeneration facilities that fail to meet the new standards set forth in Order No. 671 to be spotted quickly, and so help to ensure that such facilities satisfy the new standards in Order No. 671.

PUHCA Clarification

Background

24. In Order No. 671, the Commission stated that it interprets PURPA to permit it to exempt QFs from the Public Utility Holding Company Act of 2005 (PUHCA 2005)²¹ in 18 C.F.R. §292.602.

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The Commission stated that, accordingly, revised 18 C.F.R. §292.602 would now provide that a QF shall not be considered an "electric utility company" as defined by PUHCA 2005. We also stated in Order No. 671 that, consistent with recent actions on FPA Section 203,²² QFs would be considered "electric utility companies" for purposes of Section 203(a)(2) of the FPA.²³

Requests for Rehearing

25. The Non-Utility QF Group argues that there is a tension between Order No. 671 and Order No. 669²⁴ in how the two orders relate to transactions involving entities that only

own QFs and exempt wholesale generators (EWGs) for purposes of Section 203(a)(2) of the FPA. It states that, in Order No. 669, the Commission explained that, regardless of their status under PUHCA 2005, QFs (and EWGs) will be regarded as “electric utility companies” for purposes of Section 203(a)(2), which addresses the acquisition of securities by “holding companies” as defined in PUHCA 2005.²⁵ It notes that the Commission also stated that, while most QFs themselves remain exempt from Section 203, holding companies will require Commission approval pursuant to Section 203 in order to acquire an interest in a QF or an EWG.²⁶ Finally, it notes that the Commission in Order No. 669 stated that this would hold true even if the holding company were a holding company solely by reason of its ownership interest in QFs, EWGs and foreign utility companies (FUCOs).

26. The Non-Utility QF Group states that, while it understands why the Commission would want some review of acquisitions of large QFs by holding companies having real generation or transmission market power, it disagrees with the Commission's suggestion in Order No. 669 that holding companies otherwise exempted by Congress from PUHCA 2005, *i.e.*, owners only of QFs, EWGs and FUCOs, should be subject to Section 203 requirements. It argues that this assertion represents a potential dramatic increase in regulatory oversight over independent companies that own precisely the types of smaller, non-traditional generating plants that Congress has long sought to encourage. It argues that it is “silly” to require every 500 KW landfill gas or hydroelectric plant to be subject to Section 203 just because it is being acquired by the owner of another small QF.

27. The Non-Utility QF Group argues that a better balance is provided by Order No. 671. It argues that, by exempting QFs from PUHCA 2005's definition of “electric utility company,” a QF would not be an “electric utility company” under PUHCA 2005, and therefore its upstream 10 percent owners would not be “holding companies” under PUHCA 2005—and therefore would not be “holding companies” for purposes of Section 203(a)(2) of the FPA.²⁷

Commission Determination

28. The Non-Utility QF Group is correct that there was an inconsistency in the treatment of QFs with regards to their status under PUHCA 2005. However, the Commission has corrected this inconsistency in its order on rehearing of Order No. 667,²⁸ the Final Rule which amended the Commission's regulations to implement the repeal of PUHCA 1935 and the enactment of PUHCA 2005. In that order on rehearing, the Commission clarified that QFs will not be excluded from the definition of “electric utility company” but added that the Commission intends nevertheless to exempt QFs

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from PUHCA 2005 and most FPA requirements pursuant to the Commission's PURPA authority to grant such exemptions.²⁹ Accordingly, we will on rehearing here revise 18 C.F.R. §292.602 to remove the statement that a QF is not an “electric utility company” within the meaning of PUHCA 2005, and to provide an exemption from PUHCA 2005.

As to FPA Section 203, the definition of “electric utility company” in that context was addressed in Order No. 669-A.³⁰

The Commission orders:

Rehearing is hereby denied and clarification is hereby granted in part, as discussed in the body of this order.

List of Subjects

18 C.F.R. Part 292

Electric Power Plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By the Commission.

Magalie R. Salas,

Secretary.

¹ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 *Fed. Reg.* 7852 (February 15, 2006), *FERC Statutes and Regulations* ¶131,203 (2006).

² Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

³ 18 C.F.R. §131.80.

⁴ 16 U.S.C. §§824 *et seq.*

⁵ 15 U.S.C. §79; *See* Pub. L. No. 109-58, 1261-77, 119 Stat. 594, 972-78 (2005).

⁶ ARIPPA, formerly known as the Anthracite Region Independent Power Producers Association, states that it is a not-for-profit association comprising fourteen independent power producers in Pennsylvania that generate approximately 1,346 MW of electrical power burning coal mining refuse.

⁷ 16 U.S.C. §§824d, 824e.

⁸ *Id.* at 6 (*citing* Order No. 671 at P 96).

⁹ NRECA Request for Rehearing at 5.

¹⁰ *Id.* (*citing* Order No. 671 at P 99).

¹¹ Non-Utility QF Group Request for Rehearing at 4-5 (*citing* U.S. Department of Energy Annual Electric Generator Report (2004)).

¹² Order No. 671 at P 97.

¹³ *Id.* at PP 95-96.

¹⁴ *Id.* at P 98.

¹⁵ *Id.* at P 87.

¹⁶ *Id.* at P 98.

¹⁷ The 20 MW threshold adopted in Order No. 671 is also consistent with the 20 MW size limit for small generating facilities found in Order No. 2006. *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, 70 *Fed. Reg.*

34,190 (June 13, 2005), *FERC Statutes and Regulations, Regulations Preambles 2001-2005* ¶31,180 at P 75 (2005), *order on reh'g*, Order No. 2006-A, 70 *Fed. Reg.* 71,760 (November 30, 2005), *FERC Statutes and Regulations, Regulations Preambles 2001-2005* ¶31,196 (2005).

¹⁸ *Id.* at PP 78-83.

¹⁹ NRECA Request for Rehearing at 8.

²⁰ Order No. 671 at P 78.

²¹ Pub. L. No. 109-58, 1261-77, 119 Stat. 594, 972-78 (2005).

²² 16 U.S.C. §824b.

²³ Order No. 671 at P 102.

²⁴ *Transactions Subject to FPA Section 203*, Order No. 669, 71 *Fed. Reg.* 1348 (January 6, 2006), *FERC Statutes and Regulations, Regulations Preambles 2001-2005* ¶31,200 (2005), *order on reh'g*, Order No. 669-A, 71 *Fed. Reg.* 28,422 (May 16, 2006), *FERC Statutes and Regulations* ¶31,214 (2006).

²⁵ See Non-Utility QF Group Request for Rehearing at 5.

²⁶ *Id.* (citing Order No. 669 at PP 59-60 and 70).

²⁷ *Id.* at 6 (citing Order No. 671 at PP 92-94).

²⁸ *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, 70 *Fed. Reg.* 75,592 (December 20, 2005), *FERC Statutes and Regulations, Regulations Preambles 2001-2005* ¶31,197 (2005), *order on reh'g*, Order No. 667-A, 71 *Fed. Reg.* 28,446 (May 16, 2006), *FERC Statutes and Regulations* ¶31,213 (2006).

²⁹ See Order No. 667 at P 14 n. 31.

³⁰ Order No. 669-A at PP 41-54.

ATTACHMENT E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
[Docket No. IC09-914-000]

COMMISSION INFORMATION COLLECTION ACTIVITIES (FERC-914);
COMMENT REQUEST; EXTENSION

(March 30, 2009)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed information collection and request for comments.

SUMMARY: In compliance with the requirements of section 3506(c) (2) (a) of the Paperwork Reduction Act of 1995 (Pub. L. No. 104-13), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the specific aspects of the information collection described below.

DATES: Comments on the collection of information are due June 1, 2009.

ADDRESSES: Comments may be filed either electronically or in paper format, and should refer to Docket No. IC09-914-000. Documents must be prepared in an acceptable filing format and in compliance with Commission submission guidelines at <http://www.ferc.gov/help/submission-guide.asp>.

Comments may be eFiled. The eFiling option, under the Documents & Filings tab on the Commission's home web page (www.ferc.gov), directs users to the eFiling web page. First-time users follow the eRegister instructions on the eFiling web page to establish a user name and password before eFiling. Filers will receive an emailed confirmation of their filed comments. Commenters filing electronically should not make a paper filing. If electronic filing is not possible, deliver original and 14 paper copies of

the filing to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

Parties interested in receiving automatic notification of activity in this docket may do so through eSubscription. The eSubscription option under the Documents & Filings tab on the Commission's home web page directs users to the eSubscription web page. Users submit the docket numbers of the filings they wish to track and will subsequently receive an email notification each time a filing is made under the submitted docket numbers. First-time users will need to establish a user name and password before eSubscribing.

Filed comments and FERC issuances may be viewed, printed and downloaded remotely from the Commission's website. The eLibrary link found at the top of most of the Commission's web pages directs users to FERC's eLibrary. From the eLibrary web page, choose General Search, and in the Docket Number space provided, enter IC09-914 then click the Submit button at the bottom of the page. For help with any of the Commission's electronic submission or retrieval systems, email FERC Online Support: ferconlinesupport@ferc.gov, or telephone toll-free: (866) 208-3676 (TTY (202) 502-8659).

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by telephone at (202)502-8663, by fax at (202)273-0873, and by e-mail at ellen.brown@ferc.gov .

SUPPLEMENTARY INFORMATION: FERC is requesting comments on the FERC-914⁹, "Cogeneration and Small Power Production - Tariff Filings", OMB Control No.

⁹ Normally, these requirements and burden would be included in FERC-516, "Electric Rate Schedule Filings" (OMB Control No.1902-0096). However, FERC-516 is currently the subject of OMB review, so the Commission will continue to track these

1902-0231. The information filed in FERC-914 enables the Commission to exercise its wholesale electric rate and electric power transmission oversight and enforcement responsibilities in accordance with the Federal Power Act, the Department of Energy Organization Act (DOE Act) and EPOA 2005.

In Orders 671 and 671-A,¹⁰ the Commission revised its regulations that govern qualifying small power production and cogeneration facilities. Among other things, the Commission eliminated certain exemptions from rate regulation that were previously available to qualifying facilities (QFs). New qualifying facilities may need to make tariff filings if they do not meet the new exemption requirements of 18 CFR Part 292.

Section 205(c) of the FPA requires that every public utility have all of its jurisdictional rates and tariffs on file with the Commission and make them available for public inspection, within such time and in such form as the Commission may designate. Section 205(d) of the FPA requires that every public utility must provide notice to FERC and the public of any changes to its jurisdictional rates and tariffs, file such changes with FERC, and make them available for public inspection, in such manner as directed by the Commission. In addition, FPA section 206 requires FERC, upon complaint or its own motion, to modify existing rates or services that are found to be unjust, unreasonable,

requirements (and the related burden hours) separately under FERC-914 [formerly labeled “FERC-914(516)”]. FERC-914 covers the tariff filing requirements under 18 CFR Part 35 for those qualifying facilities that do not meet the exemption requirements in 18 CFR Part 292.

In the future, FERC plans to incorporate the FERC-914 reporting requirements and related burden into the FERC-516.

¹⁰ Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 (2006); and Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order 671-A, 71 FR 30585 (May 30, 2006), in Docket No. RM05-36.

unduly discriminatory or preferential. FPA section 207 further requires the Commission upon complaint by a state commission and a finding of insufficient interstate service, to order the rendering of adequate interstate service by public utilities, the rates for which would be filed in accordance with FPA sections 205 and 206.

FERC implemented the Congressional mandate of EPAct 2005 to establish criteria for new qualifying cogeneration facilities by: (1) amending the exemptions available to qualifying facilities from the FPA and from PUHCA [resulting in the burden imposed by FERC-914, the subject of this Notice]; (2) ensuring that these facilities are using their thermal output in a productive and beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or industrial purposes; and there is a continuing progress in the development of efficient electric energy generating technology; (3) amending the FERC Form 556¹¹ to reflect the criteria for new qualifying cogeneration facilities; and (4) eliminating ownership limitations for qualifying cogeneration and small power production facilities. FERC satisfied the statutory mandate and 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.

ACTION: The Commission is requesting a three-year extension of the current expiration date for the FERC-914Error: Reference source not found, with no changes to the reporting requirements.

BURDEN STATEMENT: Public reporting burden for this collection is estimated at:

¹¹ The FERC-556 is cleared separately as OMB Control No. 1902-0075 and is not a subject of this Notice.

FERC Data Collection -FERC-914	Number of Respondents Annually (1)	Number of Responses Per Respondent (2)	Average Burden Hours Per Response (3)	Total Annual Burden Hours (1)x(2)x(3)
FPA Section 205 filings	100	1	183	18,300
Electric quarterly reports (initial)	100	1	230	23,000
Electric quarterly reports (later)	100	3	6	1,800
Change of status	100	1	3	300
Total				43,400

The estimated total annual cost to respondents is \$2,676,966.10 [43,400 hours divided by 2,080 hours¹² per year, times \$128,297¹³ equals \$2,676,966.10]. The cost per respondent is \$26,769.66. The estimated burden covers the qualifying facilities required to file electric quarterly reports, change of status filings, and tariff filings to comply with section 205 of the Federal Power Act (FPA).

The reporting burden includes the total time, effort, or financial resources expended to generate, maintain, retain, disclose, or provide the information including: (1) reviewing instructions; (2) developing, acquiring, installing, and utilizing technology and systems for the purposes of collecting, validating, verifying, processing, maintaining, disclosing and providing information; (3) adjusting the existing ways to comply with any previously applicable instructions and requirements; (4) training personnel to respond to a collection of information; (5) searching data sources; (6) completing and reviewing the collection of information; and (7) transmitting, or otherwise disclosing the information.

The estimate of cost for respondents is based upon salaries for professional and

¹² Number of hours an employee works each year.

¹³ Average annual salary per employee.

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 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 any one particular function or activity.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g. permitting electronic submission of responses.

Kimberly D. Bose,
Secretary.