

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 2, 34, 35, 41,
131, 292, 294, 382, and 385

RIMS Electric

(Docket No. RM92-12-000)

Streamlining of Regulations Pertaining to
Parts II and III of the Federal Power Act and the
Public Utility Regulatory Policies Act of 1978

ORDER NO. 575

FINAL RULE

(Issued January 13, 1995)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations governing public utilities and qualifying facilities. The final rule revises and clarifies Commission policies regarding: rate filings by public utilities under the Federal Power Act; issuances of securities and assumptions of liabilities by public utilities, licensees and others; and procedural and technical rules governing qualifying facilities. The final rule is intended to streamline the Commission's processing of its workload and reduce regulatory burdens on the electric utility and qualifying facility industries.

EFFECTIVE DATE: This rule is effective [insert date 30 days after publication in the Federal Register].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Streamlining of Regulations Pertaining)
to Parts II and III of the Federal) Docket No. RM92-12-000
Power Act and the Public Utility)
Regulatory Policies Act of 1978)

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Streamlining of Regulations Pertaining)
to Parts II and III of the Federal) Docket No. RM92-12-000
Power Act and the Public Utility)
Regulatory Policies Act of 1978)

ORDER NO. 575

FINAL RULE

(Issued January 13, 1995)

I. INTRODUCTION

On November 16, 1992, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) in which the Commission proposed to revise its regulations regarding: (a) rate filings by public utilities under the Federal Power Act (FPA); (b) assumptions of liabilities and issuances of securities by public utilities, licensees, and certain other entities; and (c) procedural and technical rules governing qualifying facilities. 1/ The Commission requested that interested persons submit written comments no later than January 15, 1993. Forty entities submitted comments. 2/

1/ Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, Notice of Proposed Rulemaking, 57 FR 55176 (Nov. 24, 1992), IV FERC Stats. & Regs. ¶ 32,489 (1992), errata adding Appendix, 57 FR 58168 (Dec. 9, 1992), IV FERC Stats. & Regs. ¶ 32,491 (1992).

2/ The commenters are: American Cogeneration Association (American Cogen); American Forest and Paper Association (American Forest and Paper); American Gas Association (AGA);
(continued...)

The Commission is now adopting a final rule revising its regulations to streamline the processing of the Commission's workload and to reduce regulatory burdens on the electric utility and qualifying facility industries.

II. PUBLIC REPORTING BURDEN

The final rule establishes new reporting requirements, modifies existing reporting requirements and eliminates those requirements that are now obsolete. On balance, the Commission believes that the overall burden on industry and individuals will be lessened over time by these proposed changes. The Commission

2/ (...continued)

American Iron and Steel Institute (American Iron and Steel); Anthracite Region Independent Power Producers Association (Anthracite IPPs); Applied Energy Services Corporation (Applied Energy); Arizona Public Service Company (Arizona Public Service); Atlantic City Electric Company (Atlantic Electric); Baltimore Gas & Electric Company (Baltimore Gas & Electric); Public Utilities Commission of the State of California (CPUC); Consumers Power Company (Consumers Power); Curran, Corbett & Stiles; Delmarva Power & Light Company (Delmarva); Detroit Edison Company (Detroit Edison); Steven A. Duff; Duke Power Company (Duke Power); Edison Electric Institute (EEI); Electric Generation Association; Florida Power & Light Company (Florida P&L); General Electric Company (General Electric); Gulf States Utilities Company (Gulf States); Long Island Lighting Company (LILCO); National Independent Energy Producers (Independent Energy Producers); New England Power Company (NEP); New York State Electric & Gas Company (NYSEG); Niagara Mohawk Power Corporation (Niagara Mohawk); Oxbow Power Corporation (Oxbow); Pennsylvania Power & Light Company (Pennsylvania P&L); Ridgewood Power Corporation (Ridgewood); RW Power Partners, L.P. (RW Partners); San Diego Gas & Electric Company (SDG&E); Southern California Edison Company (Southern California Edison); Southern Company Services, Inc. (Southern Companies); Tenaska, Inc. (Tenaska); Texaco Cogeneration and Power Company (Texaco); Texas-New Mexico Power Company (Texas-New Mexico); United States Small Business Administration (Small Business Administration); UtiliCorp United, Inc. (UtiliCorp); Utility Systems Florida; and Donald L. Warner.

seeks to simplify and streamline its requirements to reduce the burden on respondents including utilities, 3/ and/or persons seeking the following: obtaining Commission certification or filing a notice of the qualifying status of their cogeneration facilities and small power producers; obtaining Commission approval to issue securities or assume obligations or liabilities; responding to the Commission's audits of their financial records; filing in response to the assessment of Commission's annual charges; submitting contingency plans in preparation of energy shortages.

The current public reporting burden for these information collections is estimated to average the following number of hours per response: FERC-516 976 hours for the 234 respondents that complete a filing; FERC-523 120 hours for the 60 respondents that complete a filing; FERC-525 193.25 hours per response for the 83 respondents that respond to audit review; FERC Form 556 6.2 hours for 332 respondents that complete an application for certification; FERC-582 4 hours for 179 respondents who prepare and submit remuneration for annual charges assessed on them by the Commission; and FERC-585 76 hours per response for average of 6 respondents who annually have submitted changes to contingency plans (out of the 110 utilities with plans on file). These estimates include the time for reviewing instructions, searching

3/ As used in reference to the Part 34 regulations, the term "utility" means public utility, licensee and other entities subject to the provisions of the FPA.

existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The changes in Part 34 (FERC-523) will reduce the reporting burden by 10 hours per filing. The changes in Part 35 (FERC-516) will increase the reporting burden by 0.1 hours per filing. The changes in Part 292 (FERC-556) will increase the reporting burden by 0.77 hours per filing for notices of self-certification. However, these changes will reduce the reporting burden for applications for Commission certification by 2.5 hours per filing. This reflects a reduction in the amount of analysis to determine whether the facility is a qualifying facility. The results from the changes in Parts 294 (FERC-585) and 382 (FERC-582) on the reporting burden are difficult to quantify, but should, over time, result in a reduction of the reporting burden. The changes in Part 41 (FERC-525) will not affect the reporting burden.

With respect to the utilities and persons filing information under FERC-523, the Commission believes that there will be an average burden decrease due to the elimination of several requirements and increases in the thresholds for the reporting of information to meet other requirements. For the additional information that will be required there should be a minimal burden increase as a result, because much of the information is already collected by industry in other contexts. The final rule simplifies the provisions for the issuance of short-term notes and drafts with maturities of a year or less and deletes an

after-the fact filing requirement. Further, the final rule simplifies the procedures for the placement of securities thereby streamlining the regulatory process.

Likewise, the final rule deletes the requirement to include a copy of the corporate charter or articles of incorporation, because a statement of corporate purposes will provide the necessary information. However, the final rule will require the submission of a Statement of Cash Flows and Interest Coverage containing data on an actual basis for the same twelve-month period. This information is to be submitted in a format already prescribed in FERC Form No. 1. The Commission has instituted this requirement to facilitate the preparation of financial statements to be submitted as part of the application because the utilities already prepare quarterly financial statements and may use such statements as the basis for the information required to be submitted. The use of the FERC Form No. 1 format will relieve utilities of the necessity of compiling data in a format that has limited applicability.

For the information to be filed in Part 35 and collected under the heading FERC-516, the Commission will require more information than is currently required on small rate increases for requirements services. However, the Commission believes that the additional information will allow for more efficient processing of applications and, by reducing or eliminating the need for extensive discovery, eliminate protracted proceedings. The final rule creates a new abbreviated filing option for small

increases in rates for non-coordination, firm power and transmission services.

Concerning FERC-525, the final rule modifies shortened procedures for hearings on a utility's accounts, records and memoranda. The Commission seeks to reduce the amount of litigation, particularly the number of hearings when the material facts are not in dispute.

The Commission estimates that the public reporting burden for the other filing requirements under this proposed final rule will reduce the existing reporting burden. The requirements for the certification of small power production and cogeneration facilities as qualifying facilities under Part 292 of the regulations has been revised and clarified to reflect changing industry conditions and the Commission's experience with the qualifying facilities program. In particular, the Commission intends to act within 90 days on the filing of an application for certification, or within 90 days of the filing of the supplement or amendment to the application. This will allow the application process to be conducted in a timely fashion and with some certainty to the applicant as to when the Commission deems an application complete.

In the NOPR, the Commission proposed a standardized application form, FERC Form 556, to facilitate successful applications for Commission certification of qualifying status. Form 556 allows cogenerators and small power producers to report the specific characteristics of their facilities and provides a

step-by-step application of pertinent regulations to their facilities. To provide greater assurance to lenders, electric utilities and state regulatory institutions, the final rule also adopts the use of the FERC Form 556 information requirement format for notices of self-certification. Through the use of Form 556, the self-certification process will be similar to the Commission certification process, for it will incorporate sufficient substantive information. But the notice of self-certification will remain a simple procedure that is both quick and economical. There will be no Commission review or filing fee, and the process should promote discussions between the applicants, electric utilities and affected regulatory commissions to resolve any problems. To make Form 556 easier to use, the Commission is eliminating redundancies and, wherever possible, cross-referencing items to related sections of the Commission's regulations or stating the underlying Federal Power Act (FPA) or Commission requirement.

In the proposed rule, the Commission also sought to make it easier to determine the energy sources that certain qualifying small power production facilities may use. To make it easier to certify a qualifying facility, the Commission also proposed to list specific energy sources that it had previously approved for treatment as waste. In the final rule, the Commission publishes a list of waste energy inputs already approved by the Commission. In addition, the Commission is also streamlining its waste determination process for those energy inputs that do not appear

on the list by changing its approach to require that the proposed waste fuel source only have little or no commercial value.

In its changes to Part 382 of the regulations concerning the submission of annual charges and the information collected under FERC-582, the final rule clarifies the Commission's requirements by making the calculation of annual charges consistent with the classification of transaction volumes as reported on the FERC Form 1.

For the information collected under FERC-585 under Part 294 of the Commission's regulations, the final rule provides a public utility with the option of not separately reporting its contingency plans if it already includes certain provisions in its wholesale rate schedules. Otherwise, the public utility must file a brief statement, summarizing its contingency plans. In the event the public utilities avail themselves of this option, it would reduce the number of annual respondents and total burden.

Comments regarding these burden estimates or any other aspects of these collections of information, including suggestions for reducing the burden, can be sent to the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E. Washington, D.C. 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415]; and to the Office of Information and Regulatory Affairs, Office of Management and Budget [Attention: Desk Officer for Federal Energy Regulatory Commission], FAX: (202) 395-5167.

III. DISCUSSION

For the reasons discussed below, the Commission hereby deletes or revises the following regulations:

A. Part 2 - General Policy and Interpretations: Section 2.4(d) - Initial Rate Schedules

The Commission noted in the NOPR that § 2.4(d) provides that an initial rate schedule can be suspended and an interim rate established, and that both can be made subject to refund. However, the United States Court of Appeals for the District of Columbia Circuit has held that the Commission does not have authority to suspend initial rate filings. ^{4/} Accordingly, in the NOPR the Commission proposed to delete this provision from the regulations. Only Southern Companies commented on this proposed change, and they agree that the deletion of the provision is appropriate. ^{5/} For the reasons given in the NOPR, and described above, the final rule will delete this provision from the Commission's regulations.

B. Part 34 - Application For Authorization Of The Issuance Of Securities Or The Assumption Of Liabilities

1. § 34.1(c)(1) - Exemptions if state regulates security prior to issuance

Under sections 19, 20 and 204 of the FPA, ^{6/} utilities, licensees, and certain other entities are required to obtain

^{4/} Middle South Energy, Inc. v. FERC, 747 F.2d 763 (D.C. Cir. 1984).

^{5/} Southern Companies also disagrees with the Commission's interpretation of what constitutes an initial rate; however, that issue is beyond the scope of this proceeding.

^{6/} 16 U.S.C. 812, 813, 824c.

Commission authorization to issue securities or to assume any obligation or liability with respect to the securities of another person. 7/ The NOPR proposed revising § 34.1(c)(1) by clarifying that section. No one commented on this proposed change; we will incorporate the proposed change in the final rule to make it clear that if an agency of a state in which a utility is organized and operating approves or authorizes, in writing, the issuance of securities prior to their issuance, the utility is exempt from the provisions of §§ 19, 20 and 204 of the FPA and the regulations under 18 CFR Part 34 with respect to the issuance of such securities.

2. § 34.1(c)(2) - Exemptions for short-term notes or drafts

The NOPR proposed amending § 34.1(c)(2), which relates to exempting from the Commission's requirements the issuance or renewal of short-term notes or drafts, to simplify the provisions

7/ There are certain exceptions to this requirement. Under section 204(e) of the FPA, a public utility does not require Commission authorization to issue, renew, or assume debt with a maturity date of not more than one year, if the debt, together with all of the other debt having a maturity of one year or less that the utility has then outstanding, does not exceed five percent of the par value of the utility's securities then outstanding.

Under section 204(f) of the FPA, a public utility does not require Commission authorization to issue securities or assume debt if the State commission in which it is organized and operating regulates the issuance of its securities.

Under section 318 of the FPA, a utility that is subject to the requirements of the Public Utility Holding Company Act is not subject to the requirements of the FPA with respect to the issue, sale, or guarantee of a security, or assumption of obligation or liability.

and to delete an unnecessary, after-the-fact filing requirement. The Commission proposed to revise the language of this regulation to read as follows:

Under section 204(e) of the FPA, the issuance, renewal or assumption of liability on a note or draft maturing not more than one year after such issuance, renewal or assumption of liability is not subject to the provisions of this Part if the note or draft aggregates, along with all other then-outstanding notes and drafts, not more than five percent of the:

- (A) Par value of the then-outstanding securities of the utility and,
- (B) In the case of no par value securities, the fair market value of such securities.

Baltimore Gas & Electric, EEI, Gulf States, and Pennsylvania P&L commented on the proposed change. Baltimore Gas & Electric, EEI and Gulf States suggest revising the proposed language to make it clear that the exemption does not apply to notes and drafts with maturities of more than one year.

We agree with these comments and will amend the text of § 34.1(c)(2) to avoid any confusion as to the securities to which the regulations apply.

EEI and Gulf States suggest that the regulations not use the "par value" of the then-outstanding securities in determining the value of a company's then-outstanding securities because the par value may be significantly lower than the issue price or current

market value of securities. Pennsylvania P&L also recommends that the Commission provide a valuation date.

The arguments with regard to the use of par value are not persuasive. Section 204(e) of the FPA refers to "par value of the other securities then outstanding." 8/ It is clear from this language that the statute requires the use of "par value" if the security has a par value. We have no authority to recognize current market value or issue price as the measure of the amount of securities "then outstanding" if there is a par value stated. However, in the case of securities having no par value, we believe that fair market value is appropriate.

As to a specific date for the 5 percent measurement, although the precise timing of the issuance of securities is wholly within the purview of utility management, we will clarify the language to indicate that the 5 percent test would be applied as of the date of the issuance or renewal of the securities or assumption of the liabilities.

3. § 34.2 - Placement of securities

The NOPR proposed amending § 34.2, to rename the section and to allow for the placement of securities by either competitive bid or negotiated placement. The proposed amendment recognized exemptions from these requirements, simplified the placement procedures and streamlined the regulatory process. The Commission proposed to revise the title and language of this regulation as follows:

8/ 16 U.S.C. 824c(e).

Section 34.2 - Placement of securities

(a) Method of issuance. Upon obtaining authorization from the Commission, utilities may issue securities by either a competitive bid or negotiated placement, provided that:

(i) Competitive bids are obtained from at least two prospective dealers, purchasers or underwriters; or

(ii) Negotiated offers are obtained from at least three prospective dealers, purchasers or underwriters; and

(iii) The utility:

(A) Accepts the bid or offer that provides the utility with the lowest cost of money for fixed or variable interest or dividend rate securities, or

(B) Accepts the bid or offer that provides the utility with the greatest net proceeds for securities with no specified interest or dividend rates or,

(C) Has filed for and obtained authorization from the Commission to accept bids or offers other than those specified in (iii)(A) or (iii)(B) above.

(b) Exemptions. (i) Multiple bids or offers are not required for the issuance of securities:

(A) To existing holders of securities on a pro rata basis;

(B) When the utility receives an unsolicited proposal to purchase its securities; or

(C) With maturities of one year or less.

(ii) The utility may request exemption from the multiple bid or offer rule when the utility believes such an exemption is appropriate, based on the facts and circumstances of the particular issuance.

(c) Prohibitions. No securities shall be placed with any person who:

(i) Has performed any service or accepted any fee or compensation with respect to the proposed issuance of securities; or

(ii) Would be in violation of section 305(a) of the FPA.

Baltimore Gas & Electric suggests that we change § 34.2(b) so that this section will clearly provide exemptions from the multiple bid or offer requirements of § 34.2(a). EEI, Gulf States and UtiliCorp suggest that we include within the exemptions from negotiated bid and placement requirements particular types of securities (treasury stock and securities "backing up" pollution control debt issued by a third party, for instance).

These comments have merit, and we will modify the final rule accordingly. We will not, however, include treasury stock among the list of exempted securities; we are not persuaded that a blanket exemption is justified for treasury stock. For all practical purposes, the issuance of treasury stock is not

substantially different from the issuance of new shares of common stock.

EEI and Gulf States suggest that we delete the prohibition in § 34.2(c)(1) against accepting bids from or entering into negotiations with persons that have accepted a fee for services performed in connection with the proposed issuance of securities. We reject this recommendation. However, we note that proposed § 34.2(c)(1) did not include language (which is currently in this paragraph of our regulations) indicating that it involves services performed prior to the submission of bids or the beginning of negotiations. The proposed rule, like the existing rule, should contain this language. Upon further consideration, the final rule will include this language in the regulations.

EEI and Gulf States suggest that we codify the Commission's policy of allowing utilities to issue securities or assume obligations or liabilities over a two-year period. EEI and Gulf States are correct that it is the Commission's policy to allow companies to issue securities at any time within a two-year period, without any additional authorization from the Commission. ^{9/} Our policy regarding the two-year authorization period is clear and working well. We do not think that the requested codification is necessary. The matter is best dealt with through the Commission's authorization process, leaving the Commission the flexibility to address the facts and circumstances in the

^{9/} See Montana-Dakota Utilities Company, 21 FERC ¶ 62,358 (1982).

filings on a case-by-case basis and, where appropriate, to grant authorizations for periods different than the basic two-year period. Accordingly, we will not adopt the suggestion.

4. § 34.3 - Contents of application for issuance of securities

The NOPR proposed amending § 34.3, which governs the contents of an application to issue securities. No one commented on this aspect of the proposed rule, and we will adopt the proposed change.

UtiliCorp suggests that an application also include a draft order, prepared by the applicant. We will reject this suggestion. The inclusion of a requirement that applications include a draft order will increase the burden on the applicants without substantially aiding the Commission in its processing of filings.

5. § 34.4 - Required exhibits

a. Section 34.4(a), Exhibit A

The Commission proposed to delete the current language in paragraph (a) and to substitute the following:

The applicant must file the statement of corporate purposes from its articles of incorporation.

The Commission stated that it has found that the information currently required in paragraph (a) is not necessary for the processing of a securities application. A statement of corporate purposes will provide the information necessary without the need for applications to include the entire corporate charter or

articles of incorporation. No one commented on the proposed change to Exhibit A; we will adopt the change as proposed.

b. Sections 34.4(c) and (d), Exhibits C, D and E

The Commission proposed to delete paragraph (c), and to redesignate paragraphs (d) and (e) as paragraphs (c) and (d), respectively. The Commission also proposed to revise newly-designated paragraphs (c) and (d) and to add a new paragraph (e).

The Commission noted that current paragraph (c) requires a statement of control over the utility by firms issuing securities or supplying electrical equipment and that the Commission can obtain this information from other existing sources.

The NOPR proposed that the newly-designated and revised paragraphs (c) and (d) would require that a balance sheet and income statement be submitted for the twelve-month period ending with the most recent calendar quarter. New paragraph (e) would require the submission of a four-column Statement of Cash Flows and Interest Coverage, containing data on an actual basis for the same twelve-month period, and on a pro-forma basis for each of the next two succeeding 12-month periods.

The Commission proposed these changes to facilitate the preparation of financial statements to be submitted as part of the application because the utilities already prepare quarterly financial statements and may use such statements as the basis for the information required to be submitted. The Commission expected that the addition of the statement of cash flows and

interest coverage would facilitate the processing of applications under Part 34.

Baltimore Gas & Electric and Consumers Power suggest that we change the proposed regulations to allow for the submission, for Exhibits C, D, and E, of financial statements for periods other than those ending with the latest calendar quarter, if such statements are the latest available statements. We agree with this suggestion and will, in large part, adopt it. We recognize that financial statements other than for the latest calendar year quarter may be available, and we will revise the proposed language to require the filing of financial statements for the most recent 12-month period, provided that the period ended no more than 4 months prior to the date of the filing of the application.

Consumers Power suggests that we allow utilities to present their financial statements to us in the format required by the Securities and Exchange Commission (SEC). We will not adopt this suggestion. The Commission's information needs are different than the information needs of the SEC. The use of information prepared in a SEC format presents problems from a number of perspectives: for instance, the consolidation of certain majority-owned subsidiaries, the aggregation of detailed financial information and the use of different reporting standards. Information reported to the SEC may include the utility and certain consolidated, majority-owned subsidiary companies. As a result, the financial statements would include

mixtures of financial information on the regulated utility and the consolidated, majority-owned subsidiaries, as if it were financial information of the utility. The Income Statement would not, therefore, present the utility's stand-alone results of operations. Further, information reported to the SEC is aggregated in a summary fashion without the detailed financial information presented on a basis consistent with the classifications in the Uniform System of Accounts. (For instance, the Commission requires that accumulated deferred income taxes be classified among four accounts depending on the type of the deferral; the SEC, however, allows deferred income taxes to be netted in a single amount.) Another area of concern is the reliance upon different reporting standards. For instance, the SEC allows currently maturing long-term debt to be classified as a current liability; the Commission requires that long-term debt, regardless of the maturity, to be classified as long-term debt until retired. We have configured our information formats, which include FERC Form No. 1, to meet our regulatory responsibilities. Utilities reporting to us must submit their information to us in a form more suited to our needs. 10/ Accordingly, we will continue to require that utilities prepare the required financial statements consistent with this Commission's FERC Form No. 1 and Uniform System of Accounts.

10/ See Electronic Filing of FERC Form No. 1 and Delegation to Chief Accountant; Notice of Intent to Act and Response to Comments, 59 FR 1687, 1689 (Jan. 12, 1994).

Baltimore Gas & Electric, Consumers Power, EEI, Pennsylvania P&L, Gulf States, Texas-New Mexico and UtiliCorp object to the submission of the proposed projected cash flow statement in Exhibit E. These commenters assert that these forecasts are unreliable and that the filing of such information would expose utilities to potential liability. They also note that the SEC allows but does not require the filing of projected financial statements. Pennsylvania P&L suggests that we change proposed Exhibit E by adding a line entitled either "Interest Coverage" or "Times Interest Earned" to provide a location for the coverage ratio.

We agree with these comments. We will delete the requirement for the projected cash flow statement. We will also revise Exhibit E, Statement of Cash Flows and Interest Coverage, to require the submission of a Statement of Cash Flows in the form prescribed in the FERC Form No. 1, followed by the interest coverage calculation as proposed in the NOPR. Adoption of the FERC Form No. 1 format will relieve utilities of the necessity of compiling data in a format that has limited applicability. Further, utilities may be able to use the Statement as included in the FERC Form No. 1, depending upon the timing of the filings, thus further reducing the burden of compliance.

The final rule clarifies the interest coverage calculation worksheet required in Exhibit E by adding a line entitled "Interest Coverage" as suggested and a "division" sign at the end of the line entitled "Total Interest Expense" and an "equals"

sign at the end of the line entitled "Income Before Interest and Income Taxes."

c. Sections 34.4(g) and (h), Exhibits G and H

The NOPR proposed to delete paragraphs (g) and (h). The Commission noted that the information currently required by paragraph 34.4(g) is directed toward competitively-bid securities placements, which the Commission intends that its regulations should no longer require. The pre-issuance filing contemplated by paragraph 34.4(h) will no longer be necessary, since the Commission intends to authorize applicants to issue securities under conditions specified under proposed section 34.2. The Commission pointed out that it will, therefore, only be necessary that applicants provide the Commission with a report of their securities issuances after the fact under the provisions of existing section 131.43 and revised section 131.50.

No one commented on the proposed changes to Exhibits G and H; we will adopt those changes as proposed.

6. § 34.10 - Reports

In the NOPR, the Commission proposed to revise its rules to require applicants to file reports under § 131.43 and § 131.50 no later than 30 days after the sale or placement of long-term debt or equity securities or the entry into guarantees or assumptions of liabilities. The Commission has received no comments regarding this proposal and will adopt it unchanged.

7. § 34.11 - Unopposed Applications to Issue Securities and/or Assume Liabilities

In the NOPR, the Commission proposed to revise Part 34 by adding a new § 34.11 to provide for authorization of unopposed applications for authorization of the issuance of securities or assumption of liabilities upon the terms and conditions and for the purposes set forth in the application unless, within 90 days after the date of the application, the Commission issues an order delaying the effectiveness of the transaction, setting the matter for hearing or taking other action. The NOPR proposed the rule in order to eliminate needless regulation and aid the processing of unopposed applications, while preserving the right of interested parties to oppose the applications.

Baltimore Gas & Electric, Consumers Power, Detroit Edison, EEI, Gulf States and Utilicorp commented on the proposed 90-day period for automatic approval of security issuances (i.e., without Commission action). Several commenters ^{11/} suggested different periods - 30, 45 or 60 days after the date of the application, or 15 days after publication of the notice. Utilicorp noted that the proposal more than doubled the time presently taken to process most applications. Utilicorp also noted that, if the Commission adopts an automatic mechanism for the processing of these applications, utilities will have to obtain written assurances for their lenders that the Commission has a "self executing" rule, provide copies of the rule to the

^{11/} The commenters are Baltimore Gas & Electric, Consumers Power, Detroit Edison, EEI, Gulf States.

lenders and then provide a "date stamped" copy of the filing made with the Commission. The utilities would then have to prove that no one had protested their applications and that the Commission did not issue an order within the 90-day period that would preclude the automatic issuance.

Utilicorp's comments concerning an automatic approval mechanism are well taken. Utilities and their lenders rely on the certainty that a Commission order confers. The proposed automatic approval would introduce an element of uncertainty into the approval process and place a greater burden upon utilities to provide adequate assurances to their lenders. At this juncture, we believe the uncertainty and the concomitant burden upon lenders and utilities outweigh the time and resources that the Commission would save in preparing and issuing orders. Accordingly, we will not adopt the proposed automatic approval mechanism.

8. Part 131 - Forms

Section 131.50

The NOPR proposed to rename § 131.50 to read "Report of proposals received." The NOPR also proposed to delete the current language of § 131.50 and to revise the language of § 131.50 to read as follows:

Section 131.50 Report of Proposals Received. No later than 30 days after the sale or placement of long-term debt or equity securities or the entry into guarantees or assumptions of liabilities (collectively referred to

as "placement") pursuant to authority granted under Part 34, the applicant shall file a summary of each proposal received for the placement. Each proposal accepted shall be indicated. The information to be filed shall include:

- (a) Par or stated value of securities;
- (b) Number of units (shares of stock, number of bonds) issued;
- (c) Total dollar value of the issue;
- (d) Life of the securities, including maximum life and average life of sinking fund issues;
- (e) Dividend or interest rate;
- (f) Call provisions;
- (g) Sinking fund provisions;
- (h) Offering price;
- (i) Discount or premium;
- (j) Commission or underwriter's spread;
- (k) Net proceeds to company for each unit of security and for the total issue;
- (l) Net cost to the company for securities with a stated interest or dividend rate.

The revision of this regulation represents a reclassification of information previously reported as Exhibit H under § 34.4. The NOPR noted that this information is necessary to analyze compliance with the Commission's regulations and

orders authorizing placement. No one commented on this proposed revision, and we will adopt it.

C. Part 35 - Filing of Rate Schedules

1. Sections 35.13(a)(2)(i)(A) and (B) - Rate increases of less than \$200,000, regardless of customer consent, and rate increases below \$1,000,000, with customer consent.

The Proposed Rule

The NOPR proposed revising the abbreviated filing requirements of §§ 35.13(a)(2)(i)(A) and (B), involving certain rate increases of less than \$200,000, regardless of customer consent, and rate increases below \$1,000,000, with customer consent. The revised sections would require public utilities filing relatively small rate increases for requirements services to submit more information than the regulations currently require. This new information would include, *inter alia*, a cost of service analysis for an historical test year, a complete derivation of all allocation factors and special assignments, and a complete calculation of revenues for the test period and for the first twelve months after the proposed effective date. The Commission's preliminary view was that the proposed filing requirements would allow the Commission to process these applications more efficiently and would eliminate unnecessarily protracted proceedings (including, *e.g.*, extensive discovery in proceedings set for trial-type hearing) that are attributable solely to the fact that the existing filing requirements for these applications require insufficient data from which to determine whether the proposed rates are cost-justified.

The NOPR also proposed to afford filing utilities an opportunity to file additional cost data and supporting testimony in the event that the Commission suspends the proposed rate increase and orders a hearing.

The NOPR retained the existing abbreviated filing requirements for short-term and non-firm coordination sales rates in § 35.13(a)(2)(ii).

The NOPR also proposed to revise § 35.13(h)(24) to require that companies submit Statement AX (other recent and pending rate changes) only if the proposed rate design tracks retail rates. This proposed change was intended to streamline the public utility's rate presentation and expedite Commission review by eliminating submission of information not generally needed for Commission review.

Comments

Several commenters ^{12/} express concern that the proposed regulations will increase the time and costs associated with preparing rate filings, and thereby discourage utilities from entering into small transactions for the sale or transmission of power, which will in turn result in a less competitive bulk power market.

Many commenters also express concerns or uncertainty about the number and variety of filings subject to the proposed

^{12/} Arizona Public Service, Atlantic Electric, Baltimore Gas & Electric, Delmarva, LILCO, NEP, Pennsylvania P&L, Southern Companies.

regulations. 13/ The commenters recommend that the Commission narrowly define the class of rate filings subject to the proposed rule to include only those filings for which the Commission must have additional information to properly and expeditiously perform its duties under the FPA. 14/

Other commenters express the view that the new filing requirements are vague. 15/ EEI recommends that the regulations state with greater specificity the information that public utilities must file.

With respect to filings based on retail rate decisions, NYSEG asserts that it is unclear what calculations would have to be provided to show how all retail rate treatments are factored into the cost of service. If the Commission changes the abbreviated filing requirements, NYSEG requests that the Commission clarify its specific requirements regarding information to be provided for filings based on retail rates.

13/ E.g., Delmarva, Detroit Edison, NEP.

14/ Some commenters infer that a large number and variety of filings would be subject to the new rules. EEI asserts that the changed regulations would greatly increase the regulatory burden of all applicants, while saving time and effort in only a small number of cases. Some commenters conclude that the Commission proposed to modify the abbreviated filing requirements for coordination rates. Commenters such as NEP and Southern Companies focus on the increased filing requirements for small rate increases.

15/ EEI and several other commenters infer that the Commission is now requiring companies to submit Statements AA through BM. Detroit Edison argues that it would be burdensome and expensive to calculate thirteen-month average plant balances, and Southern Companies interprets the proposed regulations to require the use of end-of-year balances instead of thirteen-month averages.

The Commission's Response

We agree with the commenters that the Commission should attempt to minimize regulatory burdens and improve the flexibility accorded public utilities covered by its rules. However, contrary to the statements of many commenters, the proposed regulations do not change the abbreviated filing requirements for most proposed rate increases. Neither do the proposed regulations require companies to file comprehensive cost of service statements (Statements AA-BM). Rather, the proposed regulations require only that a company that files a small rate increase for non-coordination services support the calculations it makes, explain why it makes those calculations, and show the revenue impact of the proposed rates on its customers.

Based on concerns expressed, however, we will make several changes to the proposed regulations to more clearly define the class of filings subject to the rule and the information that must be submitted in order for the Commission to perform its preliminary analyses of small, non-coordination filings. Finally, the Commission reiterates that any company may request waiver of the filing requirements for good cause.

Filings Covered by the Rule

Many of the commenters express uncertainty concerning the types of rate increase filings that are affected by the proposed regulations.

We agree with the commenters that the Commission should more clearly define the class of filings subject to the new rule.

The Commission's intent is to create a new, abbreviated filing option for small increases in rates for non-coordination, firm power and transmission services, particularly small requirements rate increase filings that are based on a fully distributed cost of service analysis (sometimes known as a "net plant" cost of service). ^{16/} The Commission will revise the regulations to identify the class of filings covered by new § 35.13(a)(2)(i) as power or transmission services that are: (1) not covered by the filing requirements of § 35.13(a)(2)(ii); and (2) for which the rate increase being sought is less than \$200,000 (without customer consent) or less than \$1 million (with customer consent).

We will also change our regulations to permit utilities to file under § 35.13(a)(2)(ii) rate increases, without regard to the size of the proposed increase, for firm coordination and interchange services.

Filing Requirements

EEl maintains that if the Commission decides to adopt new filing requirements for small rate increases, then greater clarity and specificity in the filing requirements is needed to avoid confusion and errors in responding to the changes. We

^{16/} In most but not all cases, rates developed under a net plant approach are customer-specific, in that costs are first allocated to each wholesale customer group based on the demand and energy loads it imposes on the company, after which customer group-specific rates are developed based on the customer group's projected billing determinants. See generally Southern Company Services, Inc., 61 FERC ¶ 61,339 at 62,337-38 (1992), reh'g denied, 63 FERC ¶ 61,217 (1993), appeal pending, No. 93-1165 (D.C. Cir. filed Feb. 11, 1993).

agree. However, we disagree with EEI that the Commission should or must explain, at the level of detail used in the current § 35.13(h), what is expected. Such specificity would unduly increase the regulatory burden on most utilities that file under this subparagraph. To meet EEI's concerns and those of other commenters, we will make the following changes.

First, the final rule provides that filing utilities should submit cost of service, allocation, revenue, fuel clause and rate design data that are "consistent with the requirements" of other paragraphs of Part 35 that require similar information. The final rule also requires filing utilities to explain in narrative form how and why various calculations are made to develop the proposed rates. 17/

Second, the NOPR proposed to make § 35.13(a)(2)(i) mandatory rather than optional, thereby precluding utilities from electing to file comprehensive Period I statements, as allowed under § 35.13(a)(1). The revised regulation makes clear that the filing utility may elect to file under either paragraph.

Third, the revised regulation clarifies the two-stage filing process proposed in the NOPR. A utility that elects to file under revised § 35.13(a)(2)(i) need not submit a comprehensive filing when it makes its initial submittal, but it must support all calculations that are not derived directly from Form 1, and

17/ Narrative statements should address the rate design and allocation factors employed in the filing, explain all pro forma adjustments to test period data, and describe specific costs or rate components that are drawn from retail rate decisions.

explain how it has functionalized, classified and allocated its costs. Should the Commission set the proposed increase for hearing, the filing utility will be afforded a reasonable opportunity to file testimony and exhibits to fully support the reasonableness of its proposed rates. This approach minimizes regulatory burdens while allowing the applicant to balance the expense of preparing a comprehensive filing versus the risk of not initially sustaining its burden of proof with an abbreviated filing.

Fourth, the NOPR used the terms "historical test year" and "test period" interchangeably and without reference to the definition of Period I applicable to other paragraphs of § 35.13. The revised regulation adds a definition for "Test Period," deletes references to the "historical test year" and provides that utilities that file under this subparagraph must use as the test period the most recent calendar year for which actual data are available. Utilities that elect to use a non-calendar year test period must file rate increases under § 35.13(d).

The Commission notes that proposed § 35.13(a)(2)(i) inadvertently eliminated the requirement that utilities submit rate design information and the general information now required for all abbreviated rate change filings. The final rule requires submission of the general information specified in paragraphs (b), (c)(2) and (c)(3) of § 35.13 and in § 35.12(b)(2), while the information required by § 35.13(c)(1), § 35.12(b)(5) and §

35.13(h)(37) is elicited as part of the revenue data, allocation data and rate design information requirements.

The final rule also requires that filings under §§ 35.13(a)(2)(i) and (ii) comply with Commission precedent and policy.

2. Other Changes to § 35.13

The Commission will eliminate § 35.13(a)(2)(ii)(B) of the proposed regulations 18/ and make corresponding editorial changes to § 35.13(a)(2)(iii)(A). Section 35.13(a)(2)(ii)(B) cross-references rate decrease filings made under § 35.27 pursuant to the 1987 reduction in federal corporate income tax rates under the Tax Reform Act of 1986. However, § 35.27 was eliminated in a previous rulemaking. 19/ Therefore, this section is now superfluous.

A cross-reference to § 35.13(a)(2)(ii) has been added to § 35.13(d)(1), mirroring the existing reference to subparagraph (a)(2)(i). In addition, existing paragraph (d)(1), as printed in the 1994 Code of Federal Regulations, omits the word "this" prior to "section" as shown by brackets in the text below:

(d) Cost of service information-(1)

Filing of Period I data. Any utility that is required under Section (a)(1) of [] section to submit cost of service information . . .

18/ It is § 35.13(a)(2)(iii)(B) in the proposed regulations.

19/ Eliminating Unnecessary Regulation, Order No. 541, 57 FR 21730 (May 22, 1992), III FERC Stats. & Regs. ¶ 30,943 (1992).

The final rule corrects these omissions.

D. Part 41 - Accounts, Records and Memoranda: Sections 41.3 and 41.7

In the NOPR the Commission proposed to change its regulations to provide that if a utility consents to a matter's being handled under the shortened procedure under § 41.3, that utility has waived any right to subsequently request a hearing under § 41.7 and may not later request such a hearing. The Commission also re-stated its policy that it will not assign proceedings for hearings when there are no material facts in dispute.

Baltimore Gas & Electric, Duke Power, EEI and Southern Companies commented on this proposed change. Baltimore Gas & Electric recognizes that the proposed change would eliminate redundancy in the Commission's regulations and supports the proposed change. Duke Power and EEI argue that, rather than streamlining the Commission's procedures, the proposed change will encourage utilities to contest more issues under § 41.7 in order to preserve the right to a full hearing.

We disagree. Persons subject to the Commission's accounting requirements have the right of election under the Commission's procedures and, under § 41.7, have a right to seek a hearing on any issue that they wish to contest. The proposed change in the Commission's regulations would merely prevent such persons from changing their minds in mid-proceeding and deciding to contest an issue that they had previously recognized involved no disputed issue of material fact. We do not think that requiring persons

to make their election of procedure at the outset of a proceeding will necessarily lead to more hearings. Rather, it will more likely reduce the number of hearings, because public utilities will no longer have the election to bring to hearing an issue that they had previously considered not to be worthy of a hearing.

Southern Companies challenges the Commission's reiteration of its policy that it will not assign proceedings for hearings where no material facts are in dispute. Southern Companies fears that the Commission may use this policy to deprive a person of the due process right to a hearing. Southern Companies' concern is misplaced. The proposed change will not deprive anyone of the right to a trial-type evidentiary hearing when such a hearing is warranted. However, as Southern Companies recognizes, a trial-type evidentiary hearing is not necessary if no material facts are in dispute. 20/

E. Proposed Procedural Modifications And Revised Definitions Under Part 292 - Regulations Under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) 21/ With Regard To Small Power Production and Cogeneration

The Commission is revising and clarifying its procedural and technical rules to reflect its experience with the qualifying facilities (QF) program. By adopting these clarifying changes, the Commission is satisfying its continuing PURPA obligation to

20/ See, e.g., General Motors Corp. v. FERC, 656 F.2d 791 (D.C. Cir. 1981); Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969).

21/ 16 U.S.C. 796(17)-(23), 824a-3.

review its policies and rules that encourage cogeneration and small power production, energy conservation, efficient use of facilities and resources by electric utilities and equitable rates for electric consumers.

1. Administration of the 90-Day Certification Period

When an applicant files an application for Commission certification of qualifying status with the Secretary under § 292.207 of the Commission's regulations, § 292.207(b)(5) provides that within 90 days of the filing of an application the Commission will issue an order granting or denying the application, setting the matter for hearing, or "tolling" the time for issuance of an order. In the NOPR, the Commission noted some confusion on the part of many applicants as to when the 90-day period starts. The Commission proposed to codify its practice by revising § 292.207(b)(3)(ii) to provide that the 90-day period for issuance of an order granting or denying an application for Commission certification of the qualifying status of a facility does not begin until an applicant has submitted all the information necessary to complete the application, along with the appropriate filing fee.

Comments:

Tenaska contends that the proposed clarification perpetuates uncertainty, since there is no provision to notify an applicant when the Commission considers the filing complete. Electric Generation Association points out that, without an explicitly announced beginning point for each application, no party can know

when, if ever, the 90-day period will expire. It suggests that setting a clear date for determining when the Commission deems an application complete would be consistent with the 60-day "deficiency" notification process for electric rate filings under § 35.2(c) of the Commission's regulations. Independent Energy Producers suggests that the Commission establish a maximum period for staff to send to an applicant any questions regarding the application. 22/

SDG&E suggests that the Commission's Federal Register notice of each supplemental filing that responds to a staff inquiry identify the project, its location, when the Commission deems the application complete, when the Commission will issue a decision or tolling order on the application, or when the Commission will

22/ Some commenters advocate an initial period ending 10 to 30 days after the filing of the application, after which the application would be treated as complete and no notification of a deficiency could be made. Some commenters further suggest that the number of deficiency inquiries be limited to two. NEP also suggests that a copy of the deficiency letter be served on the utilities with which the QF is expected to deal.

American Cogen, American Forest and Paper, American Iron and Steel, Electric Generation Association, Independent Energy Producers, SDG&E, Tenaska, and Texaco express concern that repeated requests for additional information by the Commission's staff have the effect of extending the process indefinitely. These commenters suggest that the Commission treat an application for Commission certification as automatically complete when a completed Form 556 has been filed and/or the application is otherwise literally responsive to the Commission's regulations.

deem the application granted by virtue of the passage of time.

23/

Commission Response:

While the Commission intends to process a pending application for Commission certification of qualifying status as rapidly as possible, the Commission will not further restrict its ability to evaluate such applications by providing a maximum period for considering the sufficiency of the application. 24/

23/ Atlantic Electric and EEI want the Commission to issue notices of all responses to deficiency inquiries. Electric Generation Association also proposes that the Commission delete the reference to the Commission's tolling the time for issuance of an order. Electric Generation Association contends that tolling has caused unnecessary delay in the processing of applications and that the only basis for tolling the operation of the 90-day period should be an incomplete application. As noted above, in this regard, proposed § 292.207(b)(3)(i) merely corresponds to the Commission's existing 90-day action regulation at § 292.207(b)(5). Electric Generation Association's tolling policy proposal is outside the scope of the instant proceeding.

24/ This is also consistent with the Commission's policy applicable to electric rate filings of not providing a maximum period (within the 60-day statutory review period) for considering the sufficiency of the application. Regarding the 60-day statutory review period, see Duke Power Company, 57 FERC ¶ 61,215 at 61,713 (1991); see also Southern Company Services, Inc., 60 FERC ¶ 61,297 at 61,065-66 & n.12 (1992), aff'd sub nom. Alabama Power Company v. FERC, 22 F.3d 270 (11th Cir. 1994) (any amendment or supplemental filing establishes a new filing date for the filing in question).

The steps the Commission has taken elsewhere in this proceeding to improve the QF application process, through clarifications and the establishment of step-by-step procedures to follow in Form 556, should result in more complete applications being filed in the first place. However, in the end, the speed with which the Commission processes an application depends, in addition to staff

(continued...)

Likewise, the Commission will not adopt the practice of formally notifying an applicant with respect to deficiencies by a date certain; 25/ nor will the Commission indicate by notice in the Federal Register when a filing is complete. 26/

However, the Commission will amend its regulations to provide that the Commission will act within 90 days of the filing of the application, or, if the application is supplemented or amended, within 90 days of the filing of the supplement or amendment. Commission action may include finding the application deficient, granting or denying the application, or tolling the time for action.

2. Improvements to the Self-Certification Process

In the NOPR, the Commission proposed to amend § 292.207(a)(1) to require that notices of self-certification be in the form of an affidavit signed by the facility's owner, operator or authorized representative. The Commission's intention was to provide interested financing institutions, electric utilities and state regulatory authorities with greater assurance that a self-certified cogeneration or small power production facility

24/ (...continued)

availability, primarily on the quality of the submittal, its complexity, its novelty, whether it is opposed, and the response time of the applicant to any information inquiries.

25/ In uncontested proceedings, staff informally requests additional information by telephone in order to speed the processing of an application. In contested applications, staff must resort to formal deficiency letters to obtain additional information.

26/ The Commission will continue to notice responses to deficiencies in the Federal Register.

conforms to the Commission's ownership and technical criteria. The NOPR also proposed that a self-certifying facility provide a copy of its notice of self-certification to the utility with which the cogenerator or small power producer intends to deal. These proposed revisions were intended to reduce reliance on the alternative process through which the cogenerator or small power producer submits an application for Commission certification accompanied by a filing fee.

Comments:

Southern Companies maintains that, in order for lenders and investors to derive comfort from the affidavit requirement, the Commission must ensure that a notice of self-certification with an affidavit is accurate and reliable. 27/ SDG&E suggests that the reason that more facilities have not taken advantage of the self-certification process is that the process is inadequate.

27/ Among other comments, SDG&E asserts that it is reasonable, in the absence of Commission review, to require greater specificity as to what the affidavit and notice of self-certification should pertain to. SDG&E also suggests that an affidavit requirement implies that a prior self-certification submitted without an affidavit is of dubious legal value. Electric Generation Association maintains that there is no reason to require an affidavit, since even a Commission determination on qualifying status is considered void if it is based on erroneous facts. Electric Generation Association further contends that the current regulations do not suggest that a notice of self-certification signed by an officer or partner of the developer is less trustworthy or less legally binding than a Commission certification of qualifying status. NEP observes that an affidavit will underscore the importance to the owner or operator of accurately describing its facility. The CPUC suggests that, in fairness to all interested parties, including the signatory to the affidavit, the Commission should set forth more clearly the contents of the notice of self-certification.

28/ SDG&E does not think that an affidavit is sufficient to provide the requisite level of comfort to lenders and to utilities with which the self-certifying facilities intend to interact. 29/ SDG&E points out that even under the proposed self-certification procedure, there is no substantive information requirement, no guarantee that submittals will contain the minimum information required, and no expectation that any party or the Commission will ensure that a self-certified facility meets the QF criteria. 30/

Similarly, Curran, Corbett & Stiles submits that, since the proposed self-certification process will continue to involve nothing more than file-stamping a submittal, lenders, government agencies and utilities will continue to demand proof of qualifying status for loan approvals and other crucial

28/ Ridgewood observes that it is disputes about the interpretation of the Commission's regulations by lenders, state commissions and utilities that have prevented greater reliance on the existing self-certification process.

29/ Florida P&L observes that a utility, before seriously undertaking any negotiations for integrating a QF into the utility's system, needs something more concrete than a notice of self-certification with an affidavit. Niagara Mohawk proposes that a notice of self-certification describe how a facility meets the QF criteria.

30/ Southern California Edison notes that the affidavit does not provide ongoing assurance that a facility will continue to meet the QF criteria. In this regard, Florida P&L suggests that the Commission adopt a standardized annual or biennial affidavit reporting requirement. Niagara Mohawk also proposes that the Commission allow a utility to periodically inspect the QF's operations. These monitoring proposals are outside the scope of the instant rulemaking proceeding.

transactions, and cogenerators and small power producers will continue to apply for Commission certification. 31/

SDG&E suggests that the self-certification process would be more meaningful if it were more like the full Commission certification process. SDG&E urges the Commission to require that a notice of self-certification incorporate the Form 556 information as the Commission has proposed for applications for Commission certification. 32/ SDG&E also asks the Commission to amend § 292.207 to provide that, unless a person files an objection with the Commission within 90 days, the utility must meet its QF obligations under § 292.303. 33/

31/ American Forest and Paper maintains that the affected utility also will likely continue to want a Commission certification. Tenaska predicts that lenders will not rely on an affidavit, as long as the alternative, Commission certification process is available. AGA and Utilicorp state that lenders will not assume the risk to finance QF projects that do not undergo a full Commission certification process.

32/ Atlantic Electric and EEI also favor a requirement to include Form 556 information. SDG&E contends that, contrary to what the Commission had anticipated when it issued its existing QF regulations, there has not always been a free flow of information between utilities and potential QFs.

SDG&E also maintains that a utility which does not believe that a self-certified facility is qualified does not have to purchase the electrical output from the facility.

33/ Curran, Corbett & Stiles asks the Commission to state that a notice of self-certification constitutes prima facie evidence that the facility is a QF. Curran, Corbett & Stiles also suggests that the Commission either indicate that the application conforms to the requirements of § 292.203 or, within a certain time period, issue a specific finding to the contrary. American Cogen and Electrical Generation Association suggest that the Commission reinforce the self-certification process by stating in the preamble to this rule and/or in § 292.207 that self-certification has

(continued...)

Arizona Public Service and SDG&E suggest that the Commission require self-certifying cogenerators and small power producers to provide copies of their submittals to electric utilities with which they intend to interconnect for the purpose of transmitting and selling electric power; and (b) from which they intend to purchase supplementary, standby, backup and maintenance power.

34/ Arizona Public Service also suggests that self-certifying cogeneration and small power producers specify their anticipated service needs so that utilities may better plan and prepare their local and system facilities, and obtain any necessary regulatory approvals. 35/

33/ (...continued)

the equivalent legal effect of a Commission certification. Independent Energy Producers suggests that the Commission delineate what situations call for Commission certification, in order to convince lenders to rely more on self-certification.

34/ Florida P&L notes that the Commission's current regulations at § 292.207(c)(1) require that a cogenerator or small power producer that chooses to self-certify must provide the electric utility purchaser with at least 90 days' advance notice of the transaction.

35/ Detroit Edison suggests that a notice of self-certification include a notice, suitable for publication in the Federal Register, that sets out the pertinent data regarding the application. Detroit Edison submits that publication of such a notice would allow interested parties to bring errors in the application to the Commission's attention. Detroit Edison also suggests that the applicant provide the appropriate state commission and the affected utility with a copy of any notice of self-certification, or application for Commission certification or recertification filed with the Commission. Similarly, Atlantic Electric, Arizona Public Service, EEI, Florida P&L, LILCO, NEP and SDG&E suggest that either the Commission or the applicant apprise affected parties (including the regulatory commission of each state where the QF and the affected utility is located) of any QF
(continued...)

Commission Response:

As the commenters observe, some lenders, regulators and utilities appear to have been unwilling to rely on the self-certification process because they did not think that the process provided them with sufficient information to independently verify the qualifying status of the subject facility. Many of the commenters have argued that simply adding an affidavit to the notice of self-certification would not instill enough confidence to make the self-certification process more authoritative.

The Commission continues to believe that self-certification should be retained as an option; it is unnecessary to conduct a full review of each facility, even in instances where outside lenders and investors will be involved. However, in consideration of the various comments, and in recognition of the various other clarifications being made in this final rule, the Commission will not adopt the proposed affidavit requirement. Instead, the Commission will modify the self-certification process to: (a) incorporate the Form 556 information requirement that the Commission is also adopting for applications for Commission certification; and (b) require that cogenerators and small power producers provide copies of the notice of self-certification to each affected state commission and to each

35/ (...continued)

submittal or any Commission deficiency letter, through Federal Register notice and/or by sending each a copy of the document.

affected electric utility. ^{36/} The self-certifying cogenerator or small power producer must also specify the utility services that it intends to request (see item 3b of Form 556).

If electric utilities do not agree that a notice of self-certification is valid, they may challenge QF status by filing a petition for a declaratory order. If lenders, etc. are not convinced, they will continue to require that the potential QF facility obtain Commission certification of QF status before financing a project.

The formal completion and submission of Form 556 to demonstrate that a facility conforms with the Commission's QF criteria will not constitute a substantive burden on those selecting the self-certification process. A cogenerator or small power producer submitting a notice of self-certification under the current regulations already must analyze the characteristics of its facility to determine whether it meets the Commission's qualifying criteria. The completion of Form 556 will assist both novice and experienced cogenerators and small power producers. It will serve as a step-by-step guide to determining whether a proposed facility qualifies for certification. Many notices of

^{36/} Affected state commissions are the regulatory commissions of the states where the QF and any affected electric utilities are located. An affected utility is an electric utility to which the QF intends to interconnect, transmit and sell electric energy, or from which the QF intends to purchase supplementary, standby, back-up or maintenance power.

self-certification recently filed with the Commission have incorporated similar documentation.

Through the use of Form 556, the self-certification process will be similar to the Commission certification process, because it will incorporate sufficient substantive information to allow an affected commission or electric utility to challenge the notice of self-certification.

The self-certification process will largely remain a simple, quick and economical procedure. There will continue to be no Commission review or filing fee, and the process should promote discussions between self-certifying cogenerators or small power producers and the affected electric utilities and regulatory commissions. These discussions should provide the parties an opportunity to timely and informally resolve any problems. The final rule revises proposed § 292.207(a)(1)(ii) accordingly.

3. Revocation of qualifying status

Proposed § 292.207(d)(1) provided that the Commission may revoke the qualifying status of a QF that it has certified under § 292.207, if the facility fails to comply with any of the facts or representations that it presented in its application for Commission certification. ^{37/} The NOPR further provided that,

^{37/} The Commission's regulations do not provide for revocation of a notice of self-certification. Other entities (e.g., electric utilities) may: (1) move for revocation of a Commission certification of QF status; or (2) file a petition for a declaratory order that a self-certified or Commission-certified facility does not comply with all applicable QF requirements. See, e.g., UNIGAS Corp., 67 FERC ¶ 61,142 (1994).

before undertaking any substantial alteration or modification of a qualifying facility that has been certified under § 292.207, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. The NOPR provided that the small power producer or cogenerator should accompany the application for recertification with supporting material, notice and a filing fee.

Comments:

American Forest and Paper maintains that revocation of qualifying status under proposed § 292.207(d)(1) pertains only to material facts or representations, and even then, only to reliance on the Commission's order on qualifying status. It notes that the Commission has held on a number of occasions that the failure of a facility to operate in accordance with any of the facts or representations presented in an application for Commission certification does not necessarily affect the continued qualifying status of the facility. Rather, the failure affects only the legal force of the Commission's certification order that relied on those facts and representations. 38/

EEl reads proposed § 292.207(d)(1) as allowing any person to request that the Commission revoke the qualifying status of a facility. NEP suggests that the owners of qualifying facilities

38/ See, e.g., *Sithe/Independence Power Partners, L.P.*, 61 FERC ¶ 61,212 at 61,786 (1992).

should provide filings under § 292.207(d) (2) to the utilities with which they interconnect.

Finally, NYSEG and Niagara Mohawk argue that the Commission should make it clear that a utility may deem a facility to be ineligible for PURPA benefits even if the Commission has not decertified the facility. They reason that, if a notice of self-certification is sufficient to qualify facilities for PURPA benefits, and Commission certification is not necessary, then utilities should be able to declare facilities ineligible for PURPA benefits without any action on the Commission's part. NYSEG and Niagara Mohawk also suggest that the Commission amend § 292.207(d) (1) to provide that, after gathering sufficient data demonstrating that a facility is not a QF, a utility may file an affidavit to that effect with the Commission.

Commission Response:

The Commission agrees with American Forest and Paper's assessment of the consequences of a facility's failing to operate as represented in the cogenerator's or small power producer's application for Commission certification. The Commission will amend proposed § 292.207(d) (1) to make it clear that a facility may continue to be qualified despite changed circumstances, provided that the facility continues to meet the qualifying criteria. 39/

39/ Under proposed § 292.207(d) (1) any person with standing to do so may request the Commission to revoke the qualifying status of a facility. See Liquid Carbonic Industries Corp. v. FERC, 29 F.3d 697 (D.C. Cir. 1994) with regard to standing to contest a QF certification.

The Commission will not require owners of facilities to provide a copy of a filing made under § 292.207(d)(2) directly to each utility that transacts business with the facility because the Commission will publish notice of such filings in the Federal Register. The final rule clarifies and revises § 292.207(d)(1) accordingly.

Regarding Niagara Mohawk and NYSEG's argument that a utility may deem a facility to be ineligible for PURPA benefits, we note that, in Independent Energy Producers Association, Inc. v. California Public Utilities Commission, 36 F.3d 848 (9th Cir. 1994), the court struck down, as preempted by federal law, a CPUC program that allowed electric utilities to suspend payment of contractually-authorized rates in favor of lower, alternative rates when QFs do not meet the applicable operating and efficiency standards. The court found that the Commission has exclusive authority to determine whether a QF is in compliance with the applicable operating and efficiency standards. Id. at 853-59. The court added that it is the Commission's responsibility to decertify QFs -- not the state's responsibility. Id. at 855, 859. While the Commission may take up this matter in the future, we will not delay this proceeding in order to address it at this time.

4. Pre-Authorized Recertification

The Commission proposed at § 292.207(a)(2) to provide for streamlined Commission recertification of certain minor changes to those facilities which the Commission had already accorded

qualifying status under § 292.207(b). The NOPR proposed that a cogenerator or small power producer would simply report such a change in the form of a letter describing the change in sufficient detail to enable the Commission to readily determine that the modification falls within the scope of a list of pre-approved minor changes. A report of a pre-authorized change would not require a filing fee. 40/

Comments:

Detroit Edison requests that the pre-authorized recertification procedure provide for notice in the Federal Register and/or service of the application for recertification upon each affected utility and state commission. Detroit Edison submits that this would provide state commissions and utilities with information for system planning and would allow state commissions and utilities to bring to the Commission's attention special circumstances regarding a particular facility and/or factual errors in an application for recertification. EEI, Atlantic Electric and NEP also recommend publishing notices of recertification in the Federal Register and request that the Commission direct cogenerators and small power producers to

40/ The Commission proposed that if it approves the change(s), it would return the report stamped "approved." The proposed rule further provided that if the Commission does not approve the proposed change(s), it would treat the report as a full § 292.207(b) filing and assess a filing fee.

provide copies of the notice directly to all affected parties.

41/

SDG&E would limit pre-authorized changes to those changes involving name, installation or operation date, or change to power generation equipment. It argues that, except for these changes, meaningful evaluation of a facility's continued adherence to the Commission's standards cannot occur unless the owner or operator of the facility supplies sufficient information to conduct an analysis. Based on this reasoning, SDG&E contends that the Commission should generally require a cogenerator or a small power producer to apply for a Commission determination under § 292.207(d)(2) that a change to its facility will not result in revocation of qualifying status. Alternatively, SDG&E suggests that the cogenerator or small power producer provide notice to the Commission of the change in the form of an affidavit. In either case, SDG&E recommends that the cogenerator or small power producer provide an updated Form 556 and a copy of the filing to each affected utility.

EI contends that some of the proposed pre-authorized changes can have a significant effect on purchasing and wheeling utilities. EI states, for example, that a change in the maximum net power production capacity of a QF can affect utility obligations regarding the amount of power to be purchased and the amount of backup and maintenance power that the utility must

41/ NEP also suggests that applicants also provide a copy of any filing under § 292.207(d)(2) to each of the utilities with which the QF is expected to transact business.

provide to the QF; that a location change can affect a utility's point of interconnection with the QF, as well as a utility's transmission and distribution system requirements; or that a change in the QF's fuel could affect the facility's performance and reliability.

Southern California Edison is concerned that some of the proposed pre-authorized changes (i.e., changes with regard to site, thermal load, fuel use, plant size, cogeneration thermal host or prime-mover technology) may result in a new QF project and may have a significant effect on a contracting utility. It urges the Commission to delete these changes from the Commission's list of automatically approved, pre-certified changes. 42/

Southern Companies is concerned about the effects that a change in location may have on utility planning, and on transmission and distribution systems, in the absence of adequate notice to the utility. Detroit Edison points out that a change in location of a QF may affect the local utility's ability to accommodate the facility, especially since the Commission's pre-authorized change proposal seems to contemplate that a QF may move from the service territory of one utility to that of another, or even move from one state to another.

42/ Southern California Edison notes that the CPUC has instructed utilities not to accept certain modifications under existing power purchase contracts in the absence of corresponding concessions from the cogenerator or small power producer. Southern California Edison is concerned that the Commission's treatment will conflict with the CPUC's directive.

On the other hand, Tenaska suggests that the Commission's list of automatically approved, pre-certified changes should be even more expansive. It proposes that the Commission permit a change in power generation equipment whenever there is no material or substantial change in capacity or operating characteristics of the facility. Tenaska also urges that the Commission extend to coal, other fossil fuels, and waste the pre-authorized changes permitted for oil and natural gas usage by a cogeneration facility.

American Cogen and Electric Generation Association propose additional pre-approvals: (a) for changes within an existing corporate structure; (b) for changes in the equity interests (to ensure that the facility continues to comply with the ownership requirements of § 292.206); and (c) for changes in the steam host that do not affect levels of thermal output or the operating and efficiency values of the facility.

EEl recommends that the Commission clarify that a self-certified cogenerator or small power producer also may file a notice of self-recertification with regard to the Commission's pre-authorized changes and that such minor changes will not result in a self-certified facility's losing its qualifying status. 43/

43/ EEI observes that proposed § 292.207(a)(2)(i) limits reports of pre-authorized minor changes to those QFs previously certified by the Commission, and that this seems to suggest that a self-certified facility might be subject to revocation of qualified status as a consequence of the institution of similar minor changes. In addition, EEI
(continued...)

Commission Response:

In consideration of the comments, the Commission will adopt the proposed rule with the modifications discussed below. The Commission will pre-authorize ownership changes within a corporate family that do not affect the ultimate upstream derivative ownership in the facility (§ 292.207(a)(2)(i)(A)).

44/ The Commission will also pre-authorize changes in the steam host when there is no change in the thermal application or process (§ 292.207(a)(2)(i)(M)), and extend its pre-authorization of changes in oil and natural gas use by a cogeneration facility to other fuels (§ 292.207(a)(2)(i)(E)). 45/

The Commission will not adopt EEI's suggestion that the Commission extend the pre-authorized changes to the self-certification procedure. The Pre-authorized Commission recertification procedure is not available to a self-certified facility because, under self-certification, the owner or operator of the facility is free to report any change.

43/ (...continued)

states that § 292.207(a)(2)(ii) is confusing because of its reference to the term "application." According to EEI, the term makes it appear to require that a § 292.207(d)(2) filing, which pertains to a change that will not result in the revocation of qualifying status, is mandatory for a Commission certified facility but discretionary for a self-certified facility. Yet, EEI argues, § 292.207(d)(2) seems to suggest that a filing under that section is discretionary for all QFs.

44/ We encourage applicants to describe such ownership changes with the aid of a corporate relationship chart.

45/ Because there is no efficiency standard applicable to the use of other fuels by a cogeneration facility, any change in the use of such fuels also warrants pre-authorization.

We are also deleting the proposed regulatory text which stated that the Commission would return these submittals stamped "approved." The deleted text is inconsistent with the new procedure that pre-approves certain types of changes.

Finally, because of concerns about the effect on utility planning and utility systems, the Commission will require that cogenerators and small power producers provide affected utilities and state commissions a copy of any report of pre-authorized changes filed under § 292.207(a)(2).

The Commission declines to adopt the CPUC's proposal that it indicate which modifications the Commission considers too fundamental to include in a list of pre-approved changes. The intent of adopting a list of pre-authorized changes in the final rule is to authorize changes that are sufficiently minor for purposes of QF status that it is unnecessary to obtain specific Commission approval each time such changes are made. If a change is not included on the list, then the pre-authorized change procedure cannot be used, and the cogenerator or small power producer must apply for recertification or file a notice of self-recertification.

The final rule revises § 292.207(a)(2) accordingly.

5. Qualifying Transmission and Interconnection Equipment

The Commission proposed to amend the definition of the term "qualifying facility" to include transmission lines, transformers

and switchyards to reflect Commission precedent. 46/ As proposed, cogenerators, small power producers and utilities could use such equipment only to transmit qualifying power from the QF to the purchasing electric utility and to transmit supplementary, standby, backup and maintenance power from an electric utility to the QF.

Comments:

NEP contends that a generic rule that allows transmission equipment to be a component of a QF is ill-advised. NEP and Pennsylvania P&L suggest that the Commission should continue to consider this issue on a case-by-case basis. NEP is concerned that, under a generic rule, electric utilities may find themselves in the difficult situation of needing to tap into QF transmission lines and obtain wheeling in order to serve load growth in their own service territories. NEP is also concerned that the presence of qualifying transmission facilities might affect: (a) a utility's transmission and distribution plans; (b) public safety; and (c) the environment.

Pennsylvania P&L is concerned that codification of the QF transmission line and interconnection lines precedent could result in the exemption of more transmission lines from state

46/ See, e.g., Clarion Power Company (Clarion), 39 FERC ¶ 61,317 (1987); Kern River Cogeneration Company, 31 FERC ¶ 61,183 (1985) (Kern River); Malacha Power Project, Inc. (Malacha), 41 FERC ¶ 61,350 (1987); see also, Oxbow Geothermal Corporation, 67 FERC ¶ 61,193 (1994) (Oxbow) (granting recertification when the QF leased spare transmission capacity to an adjacent QF and disclaiming FPA jurisdiction over the lease).

environmental siting review. It notes that the State of Pennsylvania does not regulate QF-owned transmission lines.

47/ Southern California Edison is concerned that the proposed definition may cause conflicts with state and local authorities that regulate the construction, ownership and/or operation of transmission facilities, despite the Commission's clarification in the NOPR with respect to the continued applicability of Federal, state and local siting and environmental requirements to such equipment. Edison, Arizona Public Service and EEI ask the Commission to clearly state in the final rule that Federal, state and local siting requirements continue to apply to QF-owned transmission lines.

EEI also observes that the proposed reference to the use of qualifying transmission and interconnection equipment for "qualified power" sales by QFs is ambiguous, since the term is undefined. EEI further observes that the reference is unnecessary because the Commission is only concerned about power sales by the QF portion of a facility. Finally, EEI submits that one could interpret the proposed definition of qualifying facility to prohibit a QF's use of qualifying transmission and interconnection facilities to purchase power other than supplementary, standby, maintenance and backup power for the non-qualifying portions of a facility. EEI suggests that the Commission did not intend to be so restrictive in its definition.

47/ This is Pennsylvania's choice. Certification does not exempt QFs from environmental siting requirements.

American Cogen, American Iron and Steel, General Electric, Independent Energy Producers, and Texaco want to expand the permitted uses of qualifying transmission and interconnection facilities to include transmission and wheeling of a QF's power to other parties. Texaco suggests that the Commission should include in the definition of a qualifying facility any facilities that deliver electric energy to third parties, such as thermal hosts or other entities, and any facilities that provide transmission access under the provisions of the Energy Policy Act of 1992.

American Cogen contends that, whether a QF is selling electric energy at retail to industrial customers is irrelevant for the purpose of determining QF status. American Cogen argues that it would make no sense to deny qualifying status to the transmission and/or interconnection portion of a facility merely because the facility is engaged in power sales to end users. American Cogen says that the Commission's inquiry has been focused on and should continue to focus on whether a facility meets the fuel use standard, operating and efficiency standards and ownership criteria. American Iron and Steel contends that restricting the use of qualifying transmission and interconnection equipment to transactions with utilities would be contrary to precedent. 48/

48/ American Iron and Steel refers to PRI Energy Systems, Inc., (PRI Energy), 26 FERC ¶ 61,177 (1984); Oxbow Geothermal Corporation, 36 FERC ¶ 61,398 (1986); and Union Carbide Corp., 48 FERC ¶ 61,130, reh'g denied, 49 FERC ¶ 61,209

(continued...)

American Iron and Steel also suggests that, since PURPA does not bar retail sales where such sales are permissible under state law, the Commission should clarify the definition of a QF to provide for qualifying status of transmission and interconnection facilities and similar facilities that provide power to non-utility parties. Otherwise, American Iron and Steel argues, by precluding qualifying transmission and interconnection facilities where a QF transmits electric energy to retail customers, the Commission would place restrictions on state authority over retail sales, a restriction that Congress sought to prevent under PURPA.

AGA counters that the Commission should not permit the transmission and wheeling of electric energy for and to third parties over qualifying transmission facilities, because § 210 of PURPA only encourages the local generation of alternative energy. According to AGA, PURPA does not encourage the transmission of alternative sources of electric energy to third parties.

Commission Response:

The Commission will codify its precedent concerning qualifying transmission lines and interconnection equipment at § 292.101(b)(1). The Commission is not changing the case-by-case disposition of applications for the certification of qualifying facility status that include transmission lines and interconnection facilities.

48/(...continued)

(1989), affirmed sub nom., Gulf States Utilities Co. v. FERC, 922 F.2d 873 (D.C. Cir. 1991) (Union Carbide).

The Commission also agrees with the suggestions of several commenters that it should more fully codify Commission precedent by clarifying or expanding the defined uses of transmission lines and interconnection facilities. PURPA does not preclude QFs from selling at retail. 49/ However, transmission lines or interconnection facilities that are found to be part of a QF -- whether used for wholesale or retail sales -- may be used only for the purpose of effectuating the QF's sale of power; transmitting other QFs' power; transmitting standby, maintenance, supplementary and backup power to other QFs; 50/ or transmitting back-up power, etc. to the QF or its thermal users in appropriate circumstances. 51/ In other words, the final rule will allow the transmission and interconnection components of the QF to serve the same users that are served by the power production components of QFs, to serve other QFs, and to serve the backup, etc. needs of the QF, and its thermal host, in appropriate circumstances. The Commission's modified definition of qualifying facility will, accordingly, recognize that QFs may use transmission lines and interconnection facilities to exchange electric power without regard to the nature of the purchaser of the QF's power. 52/

49/ See PRI Energy, supra, n.48.

50/ See Oxbow, supra, n.46.

51/ See Union Carbide, supra, n.48.

52/ Purchasers that receive electric energy over the QF's transmission lines and interconnection facilities may be
(continued...)

EEI's reference to the qualifying "portion" of an entire facility is unclear. It is, therefore, difficult to evaluate EEI's concern that the proposed revised definition of a QF may overly restrict the allowable types of power purchases that qualifying transmission lines and interconnection facilities may transmit. In any event, the Commission, in this proceeding, is simply codifying its practice and precedent concerning the transmission lines and interconnection facilities of a QF.

With respect to Texaco's suggestion to expand the facilities covered in the definition to those used to provide transmission access under the provisions of the Energy Policy Act, 53/ the suggestion is beyond the scope of this rulemaking. 54/

The Commission agrees with Southern California Edison, EEI and Arizona Power that it is appropriate to modify the definition of qualifying facility to make it clear that Federal, state and

52/ (...continued)

directly or indirectly interconnected purchasing utilities as contemplated in, e.g., Kern River; Western Massachusetts Electric Company, 59 FERC ¶ 61,091, reh'g denied, 61 FERC ¶ 61,182 (1992), and Sections 292.303(a) and (d) of the Commission's regulations; they may also be affiliated and unaffiliated thermal hosts in accord with, e.g., Kern River; Alcon (Puerto Rico), 38 FERC ¶ 61,301 (1987), affirmed, Puerto Rico Elec. Power Auth. v. FERC, 848 F.2d 243 (D.C. Cir. 1988); and Union Carbide; or they may be retail customers, when permitted by state law, in accord with PRI Energy.

53/ The Energy Policy Act became effective on October 24, 1992. Pub. L. No. 102-486, 106 Stat 2776 (1992). The Commission issued the NOPR in this proceeding on November 16, 1992.

54/ However, the Commission's preliminary view is that a QF that is a transmitting utility, see 16 U.S.C. 793(23), would not lose its qualifying status if the Commission ordered the QF to provide transmission services under FPA section 211.

local siting and environmental requirements apply to such transmission lines and interconnection facilities.

The final rule revises § 292.101(b)(1) accordingly.

6. Power Production Capacity

In the NOPR, the Commission proposed to add a new § 292.202(s), which would codify Commission precedent regarding the power production capacity of a QF. The Commission proposed to determine a QF's maximum net sendout based on the safe and reliable operation of the facility. The Commission also proposed to measure the QF's power production capacity at the point of delivery to the transmission system of the interconnected utility. 55/

Comments:

Commenters recommended that the Commission measure power production capacity at each point of interconnection with each purchaser, 56/ or at the first point of interconnection with the transmitting utility. 57/ The CPUC suggests that electric power output must be net of any parasitic loads.

55/ Net output determines whether small power production facilities that are not eligible solar, wind, waste or geothermal facilities as defined by § 3(17)(E) of the FPA, conform to the 80 MW size limit of § 292.204(a) and whether their owners and operators are eligible for regulatory exemptions provided at § 292.601 and 292.602 of the Commission's regulations. See, e.g., Malacha Power Project, Inc., 41 FERC ¶ 61,350 (1987); Massachusetts Refusetech, Incorporated, 25 FERC 61,406 (1983); Power Developers, Inc., 32 FERC ¶ 61,101 (1985), rehearing denied, 34 FERC ¶ 61,136 (1986); and Penntech Papers, Inc., 48 FERC ¶ 61,120 (1989).

56/ Comments of American Cogen.

57/ Comments of Independent Energy Producers.

Southern California Edison suggests that the Commission define power production capacity in terms of the expected operating conditions during the period when the purchasing utility most needs power, taking into account factors such as ambient temperature at the time of system peak load and the QF's power commitment. 58/ Southern California Edison is also concerned that one could construe the proposed § 292.202(s) language to allow the owners and operators of QFs to choose to purchase power to meet a facility's auxiliary load requirements in order to artificially increase the amount of power sendout.

General Electric suggests case-specific treatment for cogeneration facilities that employ gasifiers. 59/

On November 29, 1993, as supplemented on December 3, 1993, Granite State Hydropower Association (Granite State Hydropower), whose members own or operate approximately 40 small hydroelectric projects in New Hampshire, filed an "emergency" motion for clarification or to reopen this proceeding and rescind the proposal to codify decisions. 60/ Granite State Hydropower opposes codification of the Commission's decisions in Power

58/ According to Southern California Edison, its QF power purchase contracts specify the amount of electric power which it can rely on at the time of its maximum system peak demands. Southern California uses such contract capacity in its long-term system planning because the QF capacity amount reflects expected operating conditions rather than the most favorable operating conditions.

59/ A gasification system converts coal, waste and other by-product materials to fuel gas, which may be burned in a power production facility.

60/ We shall treat their motion as a comment on the NOPR.

Developers, Inc., 61/ and Turners Falls Limited Partnership.
62/ at least insofar as it might apply to hydroelectric small power production facilities that are in operation when such codification might take effect. 63/ Granite State Hydropower requests that the Commission either rescind the proposed rule or clarify that it would apply such a change in eligibility requirements to future hydroelectric small power production facilities only.

Commission Response:

The Commission notes that in two pending proceedings 64/ issues have been raised concerning the policy set forth in Turners Falls. The Commission is reviewing those issues and will address them in those proceedings. The Commission is not prepared at this time to issue a final rule regarding the policy set forth in Turners Falls. The Commission may, in the future, codify its policy on this matter after it has had more experience with the issue. The Commission will not adopt the proposed definition of power production capacity at this time.

61/ 32 FERC ¶ 61,101 (1985) (Power Developers).

62/ 55 FERC ¶ 61,136 (1991) (Turners Falls).

63/ According to Granite State Hydropower, the New Hampshire Public Utility Commission (New Hampshire Commission) has interpreted the eligibility restrictions of Turners Falls to have, in effect, overruled the New Hampshire Commission's 1981 regulations implementing PURPA and certain of this Commission's Part 292 regulations.

64/ Carolina Power & Light Company, v. Stone Container Corp., Docket Nos. EL94-62-000 and QF85-102-005; Connecticut Valley Light & Power Company v. Wheelabrator Claremont Company, Docket Nos. EL94-10-000 and QF86-177-001.

7. Increased Specificity of the Qualifying Facility Filing Requirements: Form 556

In the NOPR, the Commission proposed a standardized application form (Form 556) to facilitate successful applications for Commission certification of qualifying status. The Commission intended that Form 556 would also make small power producers and cogenerators more aware of the QF standards that apply to their facilities; under the current regulations one must examine the history of related cases and the language of the pertinent regulations to be sure of the specific standards that apply to particular facilities. To make this effort less burdensome to applicants, Form 556 allows cogenerators and small power producers to report the specific characteristics of their facilities. The form also provides for the step-by-step application of pertinent regulations to their facilities. When accurately completed, Form 556 should readily reveal whether a facility substantially complies with the applicable criteria, and reduce the number of Staff inquiries for more information from applicants.

Comments:

With respect to the general requirement for Form 556, SDG&E suggests changing the title of Form 556 to make it clear that it applies to proposed, as well as to existing facilities. American Cogen cautions that verifying the useful thermal output of proposed facilities (item 14a): (a) will be an extremely cumbersome procedure; (b) will, of necessity, be based on

approximations; and (c) may raise utility concerns, prompt premature interventions, and cause administrative difficulties.

Southern California Edison recommends that applicants include an updated Form 556 with each filing submitted under § 292.207(d)(2) in connection with a substantial modification to a facility. AGA urges the Commission to dispense with the detailed information requirements and request only the most basic technical information. 65/ American Forest and Paper maintains that identification of the utility that will purchase and/or wheel the facility's qualified power (item 3b) is unnecessary, since that information has nothing to do with qualifying status.

Arizona Public Service proposes that the QF specify the name of each affected utility customer, as well as the magnitude of its displaced load. SDG&E proposes that the applicant describe in writing the operation of the principal components of the facility, and that the applicant also address supplementary firing devices and incorporate a detailed thermodynamic heat balance diagram. 66/ SDG&E recommends that Form 556 require an applicant to more narrowly specify the facility's electric

65/ While the Commission notes that AGA's suggestion that the Commission change its policy and rely on minimal information is beyond the scope of this proceeding, its proposal would undercut the Commission's efforts to reduce the incidence of incomplete filings.

66/ This information should be provided in Form 556, items 4a and 10.

power production capacity in terms of the qualified portion of the facility instead of simply on a stand-alone basis (item 4b).

American Forest and Paper asks the Commission to delete the proposed inquiry into the total energy input of a facility (items 4d and 5). It notes that, for a small power production facility, item 7 addresses compliance with the fossil fuel use limits and that, for a cogeneration facility, the fuel used is relevant only for compliance with the efficiency standard. According to American Forest and Paper, item 11, concerning operating and efficiency values for cogeneration, should apply only to oil or natural gas fueled cogeneration facilities.

EEl recommends that the Commission broaden its consideration of waste energy input (item 4d) to include the Commission's "no current commercial value" test or a United States Department of the Interior, Bureau of Land Management (BLM) waste determination. SDG&E recommends that the Commission add new item 4e, which would require a description of the QF's point of delivery with the purchasing utility. It also suggests that Form 556 require an applicant to present the facility's energy input (item 5) in terms of "lower heating value." 67/

67/ Lower heating value refers to the amount of useful heat energy that can be obtained during the combustion process, since the latent heat of water vaporization in the combustion of hydrocarbon fuels is not recoverable. Order No. 69, FERC Stats. and Regs., Regulations Preambles 1977-1981 ¶ 30,134 at 30,937. Section 292.202(m) requires that one use lower heating value to measure the energy input of oil or natural gas. SDG&E also asks the Commission to require an applicant to specify the conversion factor that it uses to convert the higher heating value to the lower heating value.

EEI suggests that the Commission make its determination of the amount of total energy input into a small power production facility (Item 7) in terms of Btu/lb. or Btu/cubic ft. of gas at standard temperature and pressure and that Form 556 require an applicant to specify the annual Btu consumption of primary fuel. EEI notes that Form 556 does not define eligible and non-eligible small power production facilities (Item 8). 68/

American Cogen maintains that a cogeneration system cycle diagram depicting the physical arrangement of system components (item 10) is often premature and burdensome, since certification often occurs before selecting a general contractor and completing the detailed layout. American Cogen also contends that small facilities, under 2 MW, should be exempt from the cycle diagram requirement. The CPUC, observing that items 10 and 14 address cogeneration system input and output values, suggests that it would be useful to directly relate each input and output value to the cycle diagram to show more clearly what each value represents. 69/ SDG&E suggests that, for absorption chiller thermal applications, there should be specification of the heat that will be sent to the chiller's cooling tower, and any factor

68/ Under section 3(17)(E) of the FPA, eligible facilities are certain solar, wind, waste and geothermal powered small power production facilities that are not capped at the PURPA 80 MW size limit, for which a filing regarding QF status had been submitted to the Commission by the end of 1994 and for which the construction must generally commence before the end of 1999.

69/ The Commission agrees that there should be a correlation between the input and output information provided in items 10 and 14.

converting the chilled water in terms of net Btu cooling output to net heat input to the chiller, as well as the relevant flow rates, temperature, pressure, and enthalpy.

SDG&E suggests that the Commission should require an applicant to specify the entity that will purchase the useful thermal energy output from the facility and any affiliation such entity may have with the cogenerator (item 12). SDG&E further recommends that the description of any heat dump, exhaust bypass or other such device for dumping, transferring or applying heat to something other than the designated useful thermal energy output application, be provided in writing along with a simple diagram (item 13). AGA contends that, since distribution heat losses are an inherent and unavoidable characteristic of thermal consumption and are not a function of how thermal energy is created, Form 556 should not call for calculations of distribution heat losses.

EEI proposes that, if the Commission decides that applicants must include a completed Form 556 with all QF related filings, the Commission specify the type of filing that the Form 556 submission pertains to (e.g., Commission recertification, self-recertification, or pre-authorized change). EEI also suggests a requirement that, at all times, proper and accurate metering or other measuring and recording will be conducted to verify continuing compliance with the operating and efficiency standards. American Forest and Paper contends that the routine Federal Register notice accorded applications for Commission

certification should be sufficient to alert nearby utilities and other interested parties about potential QF obligations.

Commission Response:

Applications for Commission certification under § 292.207(b) must include Form 556. Further, because the final rule will require filings under § 292.207(d)(2) to conform to the requirements of § 292.207(b), filings under § 292.207(d)(2) will include a completed and current Form 556. The Commission will also require that notices of self-certification under § 292.207(a)(1) include a completed Form 556. However, the final rule does not require applicants to include Form 556 with pre-authorized change filings under § 292.207(a)(2). To do so would be inconsistent with the notion that pre-authorized changes do not require additional Commission review.

Concerning EEI's comments about verification of compliance with operating and efficiency standards, the Commission notes that cogenerators and small power producers are responsible for installing adequate monitoring equipment to ensure compliance with the Commission's regulations.

In response to American Forest and Paper's comment that Federal Register notice should suffice for applications for Commission certification, as we noted above, the adoption of Form 556 is intended to benefit QFs by facilitating successful applications for Commission certification and making cogenerators and small power producers more aware of QF standards. American Forest and Paper's comments concerning notice to affected

utilities does not account for these benefits. Moreover, as discussed elsewhere in this final rule, the Commission is requiring a completed Form 556 for each self-certification filing, which, at revised item 3b, will specify the purchasing and wheeling utilities, if known. Since the Commission does not publish notices of self-certification in the Federal Register, the Commission will require that applicants provide copies of notices of self-certification to each affected utility and state commission.

We decline to adopt American Cogen's proposal to exempt facilities under 2 MW from the cycle diagram requirement. A cycle diagram is a minimal showing of the operation of the cogeneration process.

We decline to adopt SDG&E's suggestion that applicants specify several factors related to absorption chiller thermal applications. The Commission has held that PURPA does not require the thermal use to be the most efficient; the requirement is that it be "useful." 70/

Concerning AGA's comment that Form 556 should not require calculations of distribution heat losses, the Commission recognizes that accounting for inefficiencies of heating and cooling equipment is burdensome and unnecessary. Form 556 will not require that applicants specify this information.

70/ See Bayside Cogeneration, L.P., 67 FERC ¶ 61,290 at 62,007 & n.7 (1994).

The Commission will publish Form 556 in Part 131 of the Commission's regulations. To help focus attention on the relevant standards, the Commission will divide the form into three parts. Part A, entitled "General Information To Be Submitted By All Applicants" (items 1-6), covers: (a) the identity of the applicant; (b) the type of facility (small power or cogeneration); (c) the expected or actual installation and operation dates, (d) the fuel input and power output; and (e) the identity of the relevant utilities with which the facility will transact business. Part B, entitled "Description Of the Small Power Production Facility" (items 7-8), concerns certain restrictions on use of oil, natural gas and coal and the one-mile limit on common fuel supplies shared by multiple facilities. Part C, entitled "Description Of the Cogeneration Facility" (items 9-15), concerns compliance with, inter alia, the operating and/or efficiency standards, and contains sections that specifically pertain to topping-cycle (items 13-14b) and bottoming-cycle (item 15) facilities.

To make Form 556 easier to use, the Commission is eliminating redundancies and, wherever possible, cross-referencing items to related sections of the Commission's regulations or stating the underlying FPA or Commission requirement.

The Commission is also modifying the title of Form 556 to indicate that applicants must complete up-to-date Forms 556 for

both existing and proposed facilities. 71/ The Commission is requiring a description of the operation of the principal components of the facility (item 4a). The Commission is clarifying the reference to eligible small power production facilities (item 8) with an explanation and a reference to § 3(17)(E) of the Federal Power Act. The Commission is also requiring that an applicant specify the identity of the thermal host; but the Commission is not requiring that in all cases applicants must divulge their affiliation with the cogenerator (item 13). 72/

The Commission is also not requiring applicants to specify the utility load that a QF will displace, since it is sufficient for utility planning and system operating purposes that

71/ The Commission is not requiring owners and/or operators of facilities that have applications for certification pending before the Commission, or that the Commission has already certified, or that have already filed a notice of self-certification to file Form 556 unless they file for Commission recertification or self-recertification after the effective date of this final rule.

With respect to facilities not yet built or operating, small power producers and cogenerators must present the relevant information, to the extent possible, in the form of planned compliance. If the small power producer or cogenerator does not supply sufficient information, the Commission will not be able to certify the facility, or the information in a notice of self-certification will not be adequate to ensure that the facility is a QF.

72/ The affiliate relationship between the cogenerator and the thermal host is not relevant unless the thermal application or process, or the end product produced with the aid of the thermal output from the facility, is not common. Since most thermal applications or processes, and/or the end products produced with the aid of such, are common, this information is usually not necessary.

applicants identify all of the utilities with which they expect to transact business. The Commission's practice has long required that applicants provide information on thermal delivery losses and any thermal energy return, in order to determine the amount of the useful thermal energy output of the facility (item 14a). Experienced cogenerators have routinely provided this information. The Commission is not eliminating this critical requirement. 73/ The final rule clarifies Form 556 accordingly.

F. Proposed Technical Modifications For Qualifying Small Power Production and Cogeneration Facilities Under Part 292

1. Calendar Year Fossil Fuel Use and Operating and Efficiency Value Calculations

The Commission's current rules require cogeneration facilities to meet the operating and efficiency standards on a

73/ Section 292.202(h), as revised in this final rule, defines thermal energy in terms of thermal energy: (1) which is made available to an industrial or commercial process (net of any heat contained in condensate return and/or makeup water); (2) which is used in a heating application (e.g., space heating, domestic hot water heating); or (3) which is used in a space cooling application (i.e., steam or hot water used by an absorption chiller). Item 14a will contain these three categories.

Line losses and heat exchanging equipment losses must be deducted from the total thermal energy actually consumed. For example, any thermal energy rejected by an absorption system at the input to the chiller must be deducted from the useful thermal output, since what is rejected is not used for cooling purposes. Also, the proper location of the metering equipment at the host site can eliminate the need to calculate line losses.

calendar year basis. 74/ Small power production facilities must meet a similar requirement with respect to the proportion of fossil fuel use.

The NOPR proposed to convert the existing calendar year operating and efficiency standards (for cogeneration facilities 75/) and the current calendar year fossil fuel standard (for small power production facilities 76/) to 12-month standards, because many QFs have experienced difficulty meeting the standards during the first calendar year of operation. For example, if a cogeneration facility first produces electric energy late in the year, it may not have enough time under normal operation during the remainder of the calendar year to meet the Commission's operating and/or efficiency standards. Likewise, it may miss the peak thermal usage of its host(s), and so may be

74/ See, e.g., Everett Energy Corporation, 45 FERC ¶ 61,314 (1988).

75/ The current operating standard requires all topping-cycle cogeneration facilities to have at least a 5 percent operating value with regard to useful thermal energy output [§ 292.205(a)]. Oil or gas-fired topping-cycle cogeneration facilities are also subject to an efficiency standard [§ 292.205(a)]. The useful electric power output of the facility plus one-half the useful thermal energy output must be no less than 42.5 percent of the total energy input of natural gas or oil. If the useful thermal energy output is less than 15 percent of the total energy output (*i.e.*, the operating value is less than 15 percent), the efficiency value must be 45 percent rather than 42.5 percent. For supplementary fired bottoming-cycle facilities, the useful electric power output must be at least 45 percent of the total oil and natural gas input [§ 292.205(b)(1)].

76/ The use of coal, oil and natural gas by qualifying small power production facilities is limited to certain purposes and cannot exceed 25 percent of the total fuel input [§ 292.204(b)(2)].

unable to comply with the Commission's operating and/or efficiency standards for that calendar year.

In the NOPR, the Commission proposed to base its determination of whether a QF meets the Commission's technical standards in its first year of operation by examining the facility's operation for a period of 12 consecutive months beginning with the date on which the QF first produces electric energy. The Commission proposed to base subsequent determinations upon each ensuing 12-month period. Accordingly, the Commission proposed to replace the phrase "during any calendar year" in §§ 292.204(b)(2), 292.205(a) and 292.205(b) with the phrase "on a consecutive 12-month basis beginning with the date the facility first produces electric energy."

Comments:

American Forest and Paper suggests a 60 to 90-day grace period beginning with the first production of electric energy to permit the completion of facility testing. Upon commercial operation, the 12-month standard would apply. Independent Energy Producers suggests that the Commission apply the new 12-month standard to consecutive 12-month periods, rather than to rolling 12-month periods beginning with each month.

Pennsylvania P&L suggests that the Commission apply the 12-month standard only to new QFs in order to minimize administrative problems with existing QFs whose power purchase contracts may be based on calendar year periods. SDG&E and Southern California Edison suggest that the Commission continue

to apply the existing calendar year standard, beginning with the first full calendar year of a QF's operation and apply the new 12-month standard only to the initial period of operation. 77/ SDG&E and Southern California Edison believe that this would respond to the Commission's concern about the difficulties QFs initially encounter in their operation and make it easier for utilities to monitor the operation of a large number of QFs.

78/

Commission Response:

American Forest and Paper's proposal to establish a 60-90 day grace period for new facilities is beyond the scope of this proceeding and the Commission will not adopt it.

77/ Southern California Edison also suggests that, since certain combined-cycle configurations have characteristics of both topping-cycle and bottoming-cycle facilities, the Commission should make the operating and efficiency standards for combined-cycle facilities the same as for topping-cycle facilities. The Commission considers combined-cycle installations to be topping-cycle facilities subject to the operating and efficiency standards applicable to such facilities.

Southern California Edison suggests that the Commission should also require combined cycle facilities to calculate the efficiency value to take into account total energy input. The Commission includes the total energy input of only oil or natural gas to such topping cycle facilities in the calculation of the efficiency value.

78/ SDG&E also contends that the current operating and efficiency standards have failed to encourage alternative energy development and conservation and suggests that the Commission should initiate a new rulemaking proceeding to raise the operating and the efficiency standards. At this juncture, however, the Commission is primarily concerned with codifying QF precedent and otherwise streamlining its QF regulations. It is not prepared to initiate another generic QF proceeding at this time.

The Commission is revising its regulations to require that the technical standards be measured during the first year of operation, on a consecutive 12-month basis beginning with the date the facility first produces electric energy. A new facility can fail to meet the technical standards in any period from one to 11 months as long as the facility meets the technical standards for the 12-month period. Compliance with the technical standards will be required on a calendar year basis beginning with the first full calendar year of operation following the date of initial electric power production. 79/ This should simplify compliance with contracts and regulations. The final rule revises the Commission's operating, efficiency and small power fuel use standards accordingly.

2. Clarification of the Sequential Use of Energy Requirement

In the NOPR, the Commission proposed to clarify its requirements pertaining to cogeneration facilities' sequential use of energy and useful thermal energy output. The Commission, therefore, proposed to define sequential use of energy in a new § 292.202(t); in the final rule, this new section is designated § 292.202(s). The NOPR also proposed to codify Commission

79/ Under this approach, small power producers and cogenerators will account for the early period of a QF's operation under both the 12-month standard and the calendar year standard. For example, with respect to a facility that first produces power on July 1, 1994, conformance with the 12-month standard will be necessary for the 12-month period ending June 30, 1995. In addition, conformance with the calendar year standard will be necessary for that facility for the calendar year ending December 31, 1995.

precedent that: (a) a topping-cycle installation must subsequently use some of the reject heat from the electric power production process for a useful thermal purpose; and (b) that the useful portion of thermal energy output refers to the heat used in a heating or cooling application or made available to a commercial or industrial process. 80/ In the case of a bottoming-cycle cogeneration installation, where all of the energy is first used for a commercial or industrial process, the Commission proposed that the facility must subsequently use some of the reject heat to produce electric power.

Comments:

EEl refers to a multiple turbine cogeneration configuration in which some of the turbines are sequentially producing electric power and useful thermal output, and other turbines are only producing electric power. EEl contends that the latter turbines should not qualify because they do not save fuel. Southern Companies also maintains that sequential energy use must remain central to the qualifying cogeneration facility concept. AGA approves of the Commission's discussion in the NOPR on this

80/ Under the Commission's proposal, a topping-cycle cogenerator applicant would provide a mass, heat balance (cycle) diagram to demonstrate sequentiality, an adequate level of useful thermal energy output, and conformance with the operating and efficiency standards. Cycle diagrams delineate average annual hourly energy flows at various points of the cogeneration facility (including points of fuel input and working fluid input), accounting for hourly and seasonal variations, and conditions such as temperature, pressure and enthalpy (heat content) at these inputs, at the outputs of the prime movers, and at delivery points to the thermal application/process, and account for losses between the cogenerator and the host.

matter, because it contemplates that useful thermal energy will be extracted at any point along a chain of linked turbines rather than from every turbine in a multi-turbine topping-cycle installation.

SDG&E asks the Commission to specify a minimum percentage threshold for sequentially produced useful thermal energy output. It submits that the setting of a minimum threshold would better promote the conservation and efficiency goals of PURPA. SDG&E also recommends that the Commission exclude from the operating and efficiency values of a facility the incremental electrical and thermal output related to any supplementary firing in a combined-cycle (topping-cycle) extraction turbine configuration. SDG&E contends that to allow supplementary firing when only a token portion of the thermal input is converted to useful thermal energy output is not an efficient use of energy.

American Cogen suggests that the Commission require facilities to account for inefficiencies in the thermal host's equipment with greater specificity. However, if the Commission's intent is to net out such inefficiencies from the useful thermal energy output at each point of interconnection with the thermal process or application, American Cogen contends that accounting for such inefficiencies is onerous and should not be adopted. Electric Generation Association raises similar concerns. Independent Energy Producers suggests that the Commission use an approach similar to that proposed for waste fuels and provide a

non-exclusive list of useful thermal purposes to help reduce any uncertainty.

SDG&E is concerned that the proposed revised definition of useful thermal energy output does not exclude heat dumped or rejected after delivery to the process, and that space and domestic water heating and cooling uses have not been included in useful thermal energy output. ^{81/} SDG&E also suggests that a modified independent business purpose test be applied to determine the usefulness of novel thermal applications or processes.

Commission Response:

With regard to the concerns of EEI, Southern Companies and American Cogen, the Commission's final rule both maintains the sequential use of energy concept and permits a QF to extract useful thermal energy at any point along a chain of turbines as long as the turbines are linked in a sequential energy flow. While SDG&E believes that the proposed definition of sequential use of energy was too vague, the Commission notes that the new definition explicitly considers the operating standard with respect to topping-cycle cogeneration facilities. Under the operating standard, 5 percent of the total energy output of a topping-cycle cogeneration facility must be useful thermal energy output in order for a facility to meet the sequentiality requirement.

^{81/} (See Electrodyne Research Corporation, 32 FERC ¶ 61,102 (1985) (Electrodyne)).

The Commission agrees with American Cogen and Electric Generation Association that it is unduly burdensome for cogenerators to compile data on net useful thermal energy output that accounts for host equipment inefficiencies, and that this requirement would not be consonant with streamlining the QF regulations. It is not practical to account for inefficiencies related to each piece of host equipment. The Commission, however, agrees with SDG&E's proposal to clarify the definition of useful thermal energy output to clearly account for such common applications as space heating and space cooling, and domestic water heating.

The Commission declines to adopt Independent Energy Producers' proposal to create a non-exclusive list of useful thermal energy output applications and processes similar to the proposed list for waste fuels. Since, by design, most thermal applications and processes are common and, therefore, presumptively useful, a listing of permitted thermal applications/processes would be virtually impossible to compile. Also, any such list would likely exclude unforeseen variations of previously allowed thermal applications/processes that would also fall within the presumptively useful category.

SDG&E has raised a concern about separate firing in combined cycle facilities, in which fuel is used to produce steam, some of which is directly used in the thermal application/process and some of which is used in an extraction turbine generator to produce additional electric energy and subsequently additional

thermal output. As long as the direct and indirect use of thermal output amounts to 5 percent of the facility's total energy output, the facility meets the operating standard and the sequential use of energy requirement. The Commission does not allow the use of duct burners (i.e., separate firing of heat recovery boilers) solely to produce electric power in condensing turbine configurations. 82/ In response to SDG&E's suggestion to modify the independent business purpose test, the Commission, has not proposed to modify its Electrodyne standard in this proceeding. Thus, SDG&E's proposal is beyond the scope of the instant proceeding.

The final rule adopts § 292.202(s) accordingly.

3. Section 292.204(a) - Criteria for Small Power Production Facilities

In the NOPR, the Commission proposed to amend § 292.204(a) of its regulations to reflect the addition by Congress of subsection 3(17)(E) of the Federal Power Act (FPA) pursuant to the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990, as subsequently amended in 1991 (the Incentives Act). Subsection 3(17)(E) temporarily removed the otherwise applicable subsection 3(17)(A) 80 MW size limitation on eligible small power production facilities.

Eligible facilities are those solar, wind, waste and geothermal powered small power production facilities for which either a notice of self-certification, or an application for

82/ See Adolf Coors Company, 34 FERC ¶ 61,209 (1986).

Commission certification, was submitted to the Commission by December 31, 1994. In addition, construction of eligible facilities must commence not later than December 31, 1999, or, if not by then, reasonable diligence must be exercised toward the completion of such facilities taking into account all factors relevant to their construction.

Comments:

EEl suggests that the Commission require that operators of eligible facilities provide evidence that they have made a good faith effort toward the timely completion of such facilities by December 31, 1999, taking into account all factors relevant to their construction, in order to maintain eligibility for exemption from the size restriction.

Independent Energy Producers expresses concern that under the Incentives Act, as amended, existing small power production facilities of greater than 80 MW may lose their qualifying status if they must be recertified subsequent to December 31, 1994. They request that the Commission clarify that recertification of an existing eligible solar, wind, waste or geothermal small power production facility larger than 80 MW after December 31, 1994, will not endanger that project's qualifying status. Independent Energy Producers asserts that it would be unreasonable to interpret the Incentives Act, as amended, to take away existing benefits from a project which otherwise meets all eligibility requirements simply because it undergoes modification or some other change in circumstances, not related to the size cap,

requiring a subsequent filing some time during the project's useful life. Such modifications include minor changes in a project's size, transmission routing, or ownership and occur frequently, according to Independent Energy Producers.

Commission Response:

In adding Subsection 3(17)(E) to the FPA, Congress only required that applicants exercise reasonable diligence toward the completion of construction of eligible small power production facilities, in those instances when construction has not commenced by December 31, 1999. In deciding to allow eligible small power producers to start construction after December 31, 1999, Congress obviously considered the potential for delays, yet, notably, it did not establish a requirement that construction be completed by any particular date. Therefore, it would not be appropriate for the Commission to adopt EEI's suggestion to require in all cases eligible small power producers to demonstrate reasonable diligence to complete construction of eligible facilities by December 31, 1999.

In response to Independent Energy Producers, we do not believe that an eligible solar, wind waste or geothermal facility will lose QF status if, subsequent to December 31, 1994, such facility either files a notice of self-recertification or an application for Commission recertification, as long as the project is not fundamentally altered from the project described

in the notice of self-certification or application for Commission certification filed prior to January 1, 1995. 83/

The Commission will retain the proposed regulatory text for 18 CFR 292.204(a).

4. Waste

In the NOPR the Commission proposed to drop the existing definition of "waste" as a by-product material. 84/ The Commission intended to make it easier to determine the energy sources that certain qualifying small power production facilities can use. To make it easier to certify a qualifying facility, the Commission also proposed to list specific energy sources that it had previously approved for treatment as waste. 85/

83/ At this juncture, the Commission believes it is appropriate to determine whether a project has been fundamentally altered on a case-by-case basis.

84/ PURPA does not define the term "waste." In the preamble to its final rule implementing PURPA, the Commission defined waste as "by-product materials other than biomass." FERC Stats. and Regs., Regulations Preambles, 1977-1981 ¶ 30,134 at 30,934. In Kenvil Energy Corporation (Kenvil), 23 FERC ¶ 61,139 (1983), the Commission found that, to be waste, an energy source must be both a by-product and have no commercial value. Subsequently, the Commission found that applying the by-product test is not only cumbersome, but also is not needed to address the issue of what constitutes waste. For example, in Big Horn Energy Partners, 38 FERC ¶ 61,265, order on rehearing, 40 FERC ¶ 61,305 (1987) (Big Horn), the Commission certified as waste, coal which was not a true by-product of the coal mining operation but was simply not extracted because it was unwanted.

Section 292.202(a) defines "biomass" as any organic material not derived from fossil fuels.

85/ The Commission intended that its waste list not be exclusive.

Comments:

EEI and Southern Companies are concerned that eliminating the by-product test in the revised definition of waste may encourage the deliberate creation of a waste material. Each recommends that an energy source not qualify as waste unless it would otherwise exist in the absence of the QF that will rely on it.

American Iron and Steel, Utility Systems Florida, Anthracite IPPs and Independent Energy Producers suggest that whether the owner or operator of a QF pays for the energy source, incurs costs associated with its removal and transportation to the QF, and adds value by way of upgrade, should not affect the determination of commercial value. American Iron and Steel proposes that the Commission consider commercial value in the context of its value to potential purchasers other than owners and operators of QFs. Anthracite IPPs observes that upgrades, such as cleaning and washing, might be necessary before a QF can use a waste. Utility Systems Florida notes that almost everything has some commercial value after it is cleaned, and suggests that the Commission define waste in terms of an energy source that is both an environmental hazard and has little or no commercial value.

American Iron and Steel, EEI and Southern Companies urge the Commission to state that, once the Commission determines that a QF's energy source is waste, the Commission will continue to treat that energy source as waste even if the waste subsequently

acquires commercial value. They maintain that this approach is necessary to maintain the QF's qualifying status.

The CPUC, EEI and Southern Companies propose that the Commission periodically review and update its list of waste materials. 86/ Anthracite IPPS and Applied Energy argue that it is unnecessary to limit petroleum coke and used rubber tires to that which cannot be commercially marketed, since the Commission has already listed each item as waste. 87/ American Iron and Steel suggests that the Commission specifically list coke oven gas and blast furnace gas as waste. 88/

Ridgewood and RW Partners suggest that the Commission include on the list of waste environmentally problematic

86/ The CPUC notes that the proposed waste list is based upon market data for the period 1987 through 1991. EEI is concerned that technology may quickly cause a listed waste to acquire some economic value. Southern Companies, concerned about delay, recommends that the Commission establish a list of wastes but not include the list in the Commission's regulations. Southern Companies suggests that the Commission invite public comment on the list and update the list periodically.

87/ Anthracite IPPs cites Sunlaw Energy Corp., 37 FERC ¶ 62,255 (1986) and Exeter Energy Limited Partnership, 48 FERC ¶ 62,135 (1985). Applied Energy cites Ultrapower, Inc., 34 FERC ¶ 62,144 (1986), GWF Power Systems Company, Inc., 45 FERC ¶ 62,159 (1988), and the Commission's discussion of petroleum coke without regard to its commercial value at FERC Stats. and Regs., Regulations Preambles 1977-1981 ¶ 30,134 at 30,934. In that latter discussion, the Commission also referred to refinery gas and plastics as additional examples of waste.

88/ American Iron and Steel states that these gases cannot be marketed outside the steel industry due to low Btu content, intermittent production, and capture and storage problems. It also suggests that the Commission consider including as waste steel industry process gases such as Corex off-gas and direct steel making off-gas.

substances such as used crankcase oil and other used petroleum products. 89/ Anthracite IPPs recommends that the Commission include on the waste list coal "fines," regardless of their BTU content. 90/ It argues that fines are extremely difficult to handle because of their small particle size and their tendency to become difficult to handle when wet. 91/ Anthracite IPPs also proposes that the list be expanded to include subbituminous coal or blends of bituminous and subbituminous coal, regardless of whether such material is in place or is a refuse. 92/

89/ Ridgewood, RW Partners, Utility Systems Florida, Donald L. Warner and Steven Anthony Duff maintain that listing used crankcase oil as waste would provide an incentive for its proper disposal, reduce its role as an environmental nuisance, encourage its recycling for use in electric generation, help reduce oil imports, and remove skepticism among lenders as to the status of self-certified facilities that rely on it.

90/ Fines are small or powdery-sized particles of coal that result from coal mining, sizing or processing operations.

91/ Anthracite IPPs further states that utilities do not specifically purchase fines, and that fines are typically in the form of silt comprised of coal fines and ash materials from coal washing operations and are disposed of in settling or slurry ponds.

92/ Subbituminous coal has a lower heat content than bituminous coal, averaging 9,000 Btu/lb.

Anthracite IPPs also proposes that the Commission regard as waste: (1) top or bottom anthracite coal, and (2) subbituminous and bituminous coal that the United States Department of the Interior's Bureau of Land Management (BLM) has determined to be waste, including any of this coal with the same characteristics that may extend onto non-Federal or Indian land not under the BLM's jurisdiction. Anthracite IPPs notes that, since BLM jurisdiction only extends to Federal or Indian lands, the waste list's reference to BLM approved wastes on such lands is redundant.

(continued...)

Commission Response:

The Commission is simplifying the qualifying status determination of facilities that use waste energy inputs in two ways. First, the Commission is publishing a list of waste energy inputs that the Commission has previously approved. Second, the Commission is streamlining its waste determination process for those energy inputs that do not appear on the list, by changing its two-part Kenvil approach (i.e., application of a "by-product test" in conjunction with a "little or no current commercial value" test) to require only that the proposed waste fuel source have little or no current commercial value.

Section 292.204(b) requires that, for a waste-fueled qualifying small power production facility, 75 percent or more of the total energy input to the facility must be waste. 93/ Determining whether a facility meets this criterion will entail an evaluation of the average quality characteristics of the fuel, if the fuel is a waste fossil fuel energy input to a facility, or

92/ (...continued)

Anthracite IPPs also wants the Commission to provide in its regulations that any coal source not listed as a waste in the Commission's regulations may qualify as waste upon a showing that it has no commercial value. Anthracite IPPs also wants all references to Btu or ash content to refer to average values so that variations in Btu or ash content will not preclude a potential fuel source from qualifying.

93/ Section 292.204 reads in relevant part, as follows:

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

a description of the facility's energy input if it is not using a waste fossil fuel.

The final rule will provide that even if the owner and/or operator of a QF pays for a material and incurs expenses to transport and upgrade it, the material is a waste if no other sector of the Nation's economy uses the material; but, if there is a demand for the material, other than in the QF industry, the material is considered to have commercial value and is, therefore, not waste under the "little or no commercial value" test. The Commission will not consider value to the cogenerator or small power producer as commercial value. Should a waste material acquire commercial value after the Commission has certified a facility that uses such material, or after a small power producer or cogenerator has filed a notice of self-certification referring to such material, the facility will not lose its qualifying status because the material from which it generates electric energy has acquired commercial value. 94/

94/ The Commission rejects Southern Companies' suggestion that the Commission publish updated lists of waste materials without revising its regulations. Under Southern Companies' recommended procedure, there would still be notice and comments and the Commission would still frequently have to update its list of waste materials. The Commission would be taking on an additional administrative burden without saving any time.

It would be impractical to establish a special update procedure for the waste list. Since various materials may gain or lose commercial value over time, a detailed listing of waste materials could require frequent revisions of the Commission's regulations.

The requirement that the waste energy input exist in the absence of the QF industry will allow the Commission to regard as waste those materials that are not by-products of industrial processes but are nevertheless unwanted, while precluding the creation of contrived energy inputs for the sole purpose of having the Commission view them as "waste."

It is virtually impossible to develop a simplified determination procedure that will work perfectly to determine what is waste. There may, for example, be substances that the Commission has not listed as waste and do not qualify as waste under the "no commercial value" component of the test that, nevertheless, may truly be waste. The Commission will consider reasonable proposals for the special treatment of specific materials as "waste," on a case-by-case basis.

The Commission will list petroleum coke and used rubber tires as waste, without reference to their commercial marketability. ^{95/} The Commission will also add refinery off-gas and plastic to the list of those materials that it regards as waste. The Commission will consider the average Btu and ash content of coal located in refuse ponds when determining whether it is waste.

^{95/} Petroleum coke is a by-product of the oil refining process that is very low in volatile matter, usually high in sulfur content, and an environmentally hazardous waste. Used rubber tires, while high in heat content, are not burned in conventional boilers, do not represent an energy source for electric utilities, and are detrimental to the environment.

The Commission notes that it currently accepts BLM determinations regarding waste coal located both within BLM's jurisdiction and located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicants show that the latter refuse is an extension of a portion of the relevant coal seam (e.g., top or bottom coal) or other refuse source (e.g., refuse pile) determined to be waste by BLM. However, since reference to Federal or Indian lands serves to clarify the extent of BLM's jurisdiction for all applicants, the Commission sees no reason to modify the regulatory text in this regard.

96/

The Commission will not list as waste: anthracite and bituminous coal fines; subbituminous coal; blends of bituminous and subbituminous coal having an average heat value greater than 9,500 Btu per pound with an average of 25 percent or more ash content; or used crankcase oil or other used petroleum products.

97/

96/ See Big Horn.

97/ Some Anthracite and bituminous coal fines, when dried and where transportation distances are short, have a high Btu content and commercial value. Some public utilities and various other entities use anthracite silt ponds as a source of fuel. See Electrodyne. Form 423 data for 1992 suggest that electric utilities purchase subbituminous coal with a heat content of 9,500 Btu per pound and an ash content of more than 25 percent.

Used crankcase oil is currently reprocessed for use as an industrial boiler fuel, in asphalt production and cement kilns. It is also refined for use in lubricants and for reuse as motor oil.

(continued...)

In this proceeding, the Commission does not intend to make generic rulings on specific materials that it has not previously considered. With respect to materials which the Commission has not listed as "waste," an applicant is always free to submit a showing that in a particular case the material has little or no current commercial value and would not exist in the absence of the QF industry.

Finally, in light of the Commission's treatment of waste natural gas for cogeneration purposes, 98/ the final rule will provide that a cogeneration facility may use a waste that meets the definition of § 292.202(b) as an energy input without considering the waste fuel's energy input to the cogeneration facility in computing its efficiency value under § 292.205.

The Commission agrees with Anthracite IPPs' suggestions that any coal source not listed as a waste in the Commission's regulations may qualify as waste upon a showing that it has little or no commercial value and that all references to Btu or ash content refer to average values.

The final rule revises and clarifies §§ 292.202(b) and 292.205 accordingly.

97/ (...continued)

The Commission lacks sufficient information to support a generic finding that hot gases, such as oxygen furnace off-gas and hot blast furnace air, have no commercial value.

98/ Red Top Cogeneration Project, L.P., 62 FERC ¶ 61,205, reh'g denied, 65 FERC ¶ 61,044 (1993).

G. Part 294 - Procedures for Shortages of Electric Energy and Capacity Under Section 206 of Public Utilities Regulatory Policies Act

In the NOPR, the Commission proposed to modify § 294.101(b) to provide that a public utility need not file with the Commission a contingency plan for accommodating shortages of electric energy or capacity affecting its firm power wholesale customers, or modify such a contingency plan already on file with the Commission, if the public utility includes certain provisions in the appropriate wholesale rate schedule. The Commission also proposed to modify § 294.101 by adding a new paragraph (f), which would provide that, if a public utility includes in its rate schedule provisions that it will report anticipated shortages of electric energy or capacity to appropriate state regulators and to its wholesale customers, then the public utility need only report to the Commission the nature and projected duration of the anticipated capacity or energy supply shortage and furnish a list of the firm power or wholesale supply customers likely to be affected by the shortage.

EEl, NEP and Southern Companies support the proposed revisions to the Commission's reporting requirements. Baltimore Gas & Electric asks the Commission to eliminate the requirement to report to the Commission anticipated shortages of electric energy and/or capacity for those public utilities that file an Integrated Resource Plan or least-cost plan containing the required information with their State regulatory authorities.

The Commission declines to adopt Baltimore Gas & Electric's suggestion. As the Commission noted in the NOPR, § 202(g) of the FPA requires that public utilities file contingency plans for shortages with the Commission as well as with any appropriate state regulatory authority. To satisfy § 202(g), it is not enough for public utilities to file contingency plans with state regulatory authorities only; they must also file with this Commission contingency plans that affect wholesale customers.

The proposed rule simply gives a public utility the option of not separately reporting its contingency plans if it already includes certain provisions in its wholesale rate schedules. Otherwise, the public utility must file a brief statement, summarizing the public utility's contingency plans. If a public utility does not avail itself of the new rate schedule option, it will merely have to summarize how, under the plan that it files with the state, it will treat its wholesale customers in the event of a shortage of electric energy. The Commission does not consider this requirement burdensome, and the requirement will satisfy the Commission's obligation to ensure that a public utility will treat its wholesale customers in a fair and non-discriminatory manner in the event of a shortage of electric energy. Accordingly, the Commission adopts the changes to Part 294 as proposed in the NOPR.

H. Part 382 - Annual Charges

The proposed rule would modify §§ 382.102 and 382.201, which pertain to the requirement that public utilities report total

annual adjusted sales for resale megawatt-hours and total annual coordination sales megawatt-hours for the purposes of computing annual charges. Under the proposed rule, public utilities that are exempt from filing Form 1 would be subject to the annual charge regulations and would be assessed annual charges. ^{99/} The proposed rule also would change definitions in the annual charge regulations to allow for calculation of annual charges consistent with the classification of transactions volumes as reported on Form 1. The proposed rule would also revise the regulations to state how the Commission proposes to calculate annual charges.

Comments

EI requests a fuller explanation of the Commission's proposed changes in the calculation of annual charges and of how those contemplated changes will interact with the elimination of certain filing fees proposed in Docket No. RM92-17-000. ^{100/} EI also recommends that the Commission bill applicants directly for filings that are unusually extensive or that require an extraordinary amount of the Commission's time and effort to process.

^{99/} The Commission has determined that the annual charge obligation also applies to all public utility power marketers. Morgan Stanley Capital Group, Inc., 69 FERC ¶ 61,175 (1994), reh'g pending.

^{100/} Subsequent to the filing of EI's comments, the Commission issued a final rule in Docket No. RM92-17-000 revising its filing fee structure. See Elimination of Filing Fees, Order No. 548, 58 FR 2968 (Jan. 7, 1993), III FERC Stats. & Regs. ¶ 30,960 (1993).

NEP expresses concern that the proposed change in the formula for calculating utilities' annual charges may produce dramatic increases in the assessments on individual public utilities. NEP asks the Commission to defer adoption of the proposed change in the annual charge formula until the utilities have an opportunity to assess the likely effect of the change.

Southern Companies comments that public utilities, whether or not they file a Form 1, should pay annual charges.

Commission's Response

With respect to EEI's comments, the rule eliminating certain filing fees does not affect the fact that utilities are assessed annual charges. With respect to EEI's and NEP's comments, the proposed rule changed some definitions and explained how transaction volumes would be reported. However, the proposed rule does not change the formula for calculating annual charges. The proposed rule is clarifying in nature, linking the reporting of transaction volumes to specific statistical classifications on Form 1.

We will deny NEP's request that we defer adopting the change in the annual charge regulations. Public utilities have had approximately two years since the issuance of the NOPR to assess the effect of the change. Further deferral of action is unwarranted.

Accordingly, we will adopt the final rule as proposed.

I. Part 385 - Rules of Practice and Procedure

The proposed rule deleted Rule 717, § 385.717, which expired by its own terms on May 21, 1986, and deleted cross-references to Rule 717 contained in other rules. EEI supports the deletion of Rule 717, and there were no comments opposing the deletion of Rule 717. Accordingly, we will adopt the final rule as proposed.

IV. ENVIRONMENTAL STATEMENT

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment. 101/ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. 102/ No environmental consideration is necessary for the promulgation of a rule that is clarifying, corrective, or procedural or that does not substantially change the effect of legislation or regulations being amended or applies to accounting orders, the establishment of just and reasonable rates, the issuance and purchase of corporate securities or corporate regulation. 103/ The final rule is clarifying and procedural in nature. It merely makes clerical and clarifying changes and deletes reporting requirements and regulations that the

101/ Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulations Preambles 1987-1990, ¶ 30,783 (1987).

102/ 18 CFR 380.4.

103/ 18 CFR 380.4(a)(2)(ii), 380.4(a)(15)-(16).

Commission has decided are no longer necessary or that refer only to: (a) the establishment of just and reasonable rates; or (b) the issuance and purchase of corporate securities.

Section 201 of PURPA includes "waste" as an allowable primary energy source for qualifying small power production facilities. To the extent the Commission is revising the definition of "waste," incorporating an illustrative list of waste energy sources, this action merely codifies current Commission practice; it does not substantially change the effect of the underlying legislation.

Accordingly, neither an environmental assessment nor an environmental impact statement is necessary.

V. REGULATORY FLEXIBILITY CERTIFICATION

The Regulatory Flexibility Act 104/ requires rulemakings to either contain a description and analysis of the impact the proposed rule will have on small entities or to certify that the rule will not have a substantial economic impact on a substantial number of small entities. The final rule removes unnecessary and obsolete regulations. The only additional reporting requirements that the Commission is adopting will serve to reduce discovery burdens and improve processing of filings. The Commission's newly adopted regulations governing QFs merely clarify and codify Commission precedent. Finally, since the final rule is designed to reduce regulatory burdens, the Commission expects that any impact on small entities affected by the final rule will be

104/ 5 U.S.C. 601-612.

beneficial. Accordingly, the Commission certifies that these proposed rules, if adopted, will not have "a significant economic impact on a substantial number of small entities."

The Small Business Administration supports the substance of the proposed rule and, specifically, agrees that the proposed rule will be beneficial to QFs. However, the Small Business Administration maintains that the Commission should perform a regulatory flexibility analysis under the Regulatory Flexibility Act. According to the Small Business Administration, unless the Commission can demonstrate that the beneficial effects of the rule will not be significant, the Commission must prepare a final regulatory flexibility analysis pursuant to section 604 of the Regulatory Flexibility Act. The Small Business Administration contends that such an analysis may lead to further methods of reducing the regulatory burdens imposed on small generators of electricity.

The Commission finds that the proposed rules will assist small businesses in a significant but unquantifiable manner and that further regulatory flexibility analysis is unnecessary.

VI. INFORMATION COLLECTION STATEMENT

The Office of Management and Budget's (OMB) regulations 105/ require that OMB approve certain information collection requirements imposed by an agency. The information collection requirements in the final rule are contained in FERC-516 "Electric Rate Filings" (1902-0096), FERC-523 "Applications to

105/ 5 CFR 1320.12.

Issue Securities" (1902-0043), FERC 525 "Financial Audits" (1902-0092), FERC-556 "Application for Certification of Qualifying Status as a Small Power Production Facility or Cogeneration Facility" (1902-0075), FERC-582 "Oil, Gas and Electric Fees and Annual Charges" (1902-0132) and FERC-585 "Reports on Electric Energy Shortages and Contingency Plans Under PURPA 206" (1902-0138).

The respondents are: utilities and persons wishing to issue securities, or assume obligations or liabilities as a guarantor, endorser, or surety, in accordance with sections 19, 20 and 204 of the FPA; to file rate schedules showing all rates and charges pertaining to any transmission or sale of electric energy in interstate commerce in accordance with sections 15, 19, 20, 205, 206 and 207 of the FPA; ensure their financial records comply with accounting, financial reporting and other regulations established under mandates of the FPA; submit contingency plans with regard to shortages of electric energy or capacity; submit payment for charges of costs incurred by the Commission to process industry filings; and to obtain Commission certification or file a notice of the qualifying status of their small power production and cogeneration facilities.

The Commission uses the data collected in these information requirements to carry out its regulatory responsibilities pursuant to the Federal Power Act, Public Utility Regulatory Policies Act of 1978, and the Interstate Commerce Act. The Commission's Office of Electric Power Regulation uses the data

for determination of electric rate filings submitted by industry, applications for certification of qualifying cogeneration and small power production facilities and appropriate procedures in the event of shortages of electric energy. The Office of Financial Management uses the data for compilation of annual charges. The Office of the Chief Accountant uses the data to ensure that industry has followed the appropriate procedures for issuing securities or assumptions of liabilities obligations and to ensure that jurisdictional companies comply with the Uniform System of Accounts. Respondents would be public utilities, licensees or QF applicants who desire certification of their facility.

The Commission is submitting to the Office of Management and Budget a notification of these changes. Interested persons may obtain information on these reporting requirements by contacting the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, DC 20426 [Attention: Michael Miller, Information Services Division, (202) 208-1415]. Comments on the requirements of this final rule can also be sent to the Office of Information and Regulatory Affairs of OMB [Attention: Desk Officer for Federal Energy Regulatory Commission]. FAX: (202) 395-5167.

In consideration of the foregoing, the Commission is amending Parts 2, 34, 35, 41, 131, 292, 294, 382, and 385, Chapter I, Title 18, Code of Federal Regulations, as set forth below.

PART 2 -- GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for Part 2 is revised to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 42 U.S.C. 4321-4361, 7101-7352.

2. In § 2.4, Paragraph (d) is removed and paragraphs (e), (f), (g) and (h) are redesignated paragraphs (d), (e), (f) and (g), respectively.

PART 34 -- APPLICATION FOR AUTHORIZATION OF THE ISSUANCE OF SECURITIES OR THE ASSUMPTION OF LIABILITIES

3. The authority citation for Part 34 is revised to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

4. In § 34.1, paragraphs (c) (1) and (c) (2) are revised to read as follows:

§ 34.1 Applicability; definitions; exemptions in case of certain State regulation, certain short-term issuances and certain qualifying facilities.

* * * * *

(c) Exemptions. (1) If an agency of the State in which the utility is organized and operating approves or authorizes, in writing, the issuance of securities prior to their issuance, the utility is exempt from the provisions of sections 19, 20 and 204 of the Federal Power Act and the regulations under this part, with respect to such securities.

(2) This part does not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing one year or less after the date of such issue, renewal, or assumption of liability, if the aggregate of such note or draft and all other then-outstanding notes and drafts of a maturity of one year or less on which the utility is primarily or secondarily liable, is not more than 5 percent of the par value of the other then-outstanding securities of the utility as of the date of issue or renewal of, or assumption of liability on, the note or draft. In the case of securities having no par value, the par value for the purpose of this part is the fair market value, as of the date of issue or renewal of, or assumption of liability on, the note or draft.

* * * * *

5. Section 34.2 is revised to read as follows:

§ 34.2 Placement of securities.

(a) Method of issuance. Upon obtaining authorization from the Commission, utilities may issue securities by either a competitive bid or negotiated placement, provided that:

(1) Competitive bids are obtained from at least two prospective dealers, purchasers or underwriters; or

(2) Negotiated offers are obtained from at least three prospective dealers, purchasers or underwriters; and

(3) The utility:

(i) Accepts the bid or offer that provides the utility with the lowest cost of money for securities with fixed or variable interest or dividend rates, or

(ii) Accepts the bid or offer that provides the utility with the greatest net proceeds for securities with no specified interest or dividend rates, or

(iii) The utility has filed for and obtained authorization from the Commission to accept bids or offers other than those specified in paragraphs (a) (3) (i) or (a) (3) (ii) of this section.

(b) Exemptions. The provisions of paragraph (a) of this section do not apply where:

(1) The securities are to be issued to existing holders of securities on a pro rata basis;

(2) The utility receives an unsolicited offer to purchase the securities;

(3) The securities have a maturity of one year or less; or

(4) The securities are to be issued in support of or to guarantee securities issued by governmental or quasi-governmental bodies for the benefit of the utility.

(c) Prohibitions. No securities will be placed with any person who:

(1) Has performed any service or accepted any fee or compensation with respect to the proposed issuance of securities prior to submission of bids or entry into negotiations for placement of such securities; or

(2) Would be in violation of section 305(a) of the Federal Power Act with respect to the issuance.

6. In § 34.3, the heading and introductory text are revised, the word "and" is added at the end of paragraph (e)(5), the phrase "; and" is removed at the end of paragraph (e)(6), and replaced by a period, paragraphs (e)(7), (f) and (g) are removed and paragraphs (h), (i), (j), (k), (l), (m) and (n) are redesignated as paragraphs (f), (g), (h), (i), (j), (k) and (l), respectively to read as follows:

§ 34.3 Contents of application for issuance of securities.

Each application to the Commission for authority to issue securities shall contain the information specified in this section. In lieu of filing the information required in paragraphs (e), (i) and (j) of this section, a specific reference may be made to the portion of the registration statement filed under § 34.4(f), which includes the information required in these paragraphs.

* * * * *

7. In § 34.4, paragraph (a) is revised, paragraphs (c), (g) and (h) are removed, paragraphs (d) and (e) are redesignated as paragraphs (c) and (d), respectively, and revised, and a new paragraph (e) is added to read as follows:

§ 34.4 Required exhibits.

(a) Exhibit A. The applicant must file the statement of corporate purposes from its articles of incorporation.

* * * * *

(c) Exhibit C. The Balance Sheet and attached notes for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application, on both an actual basis and a pro forma basis in the form prescribed for the "Comparative Balance Sheet" of FERC Form No. 1, "Annual Report for major electric utilities, licensees and others." Each adjustment made in determining the pro forma basis must be clearly identified.

(d) Exhibit D. The Income Statement and attached notes for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application, on both an actual basis and a pro forma basis in the form prescribed for the "Statement of Income for the Year" of FERC Form No. 1, "Annual Report for major electric utilities, licensees and others." Each adjustment made in determining the pro forma basis must be clearly identified.

(e) Exhibit E. A Statement of Cash Flows and Computation of Interest Coverage on an actual basis and a pro forma basis for the most recent 12-month period for which financial statements have been published, provided that the 12-month period ended no more than 4 months prior to the date of the filing of the application. The Statement of Cash Flows must be in the form prescribed for the "Statement of Cash Flows" of the FERC Form No.

1, Annual Report for major electric utilities, licensees and others," followed by a computation of interest coverage, in the form of the following worksheet:

Federal Energy Regulatory Commission

OMB Control No. 1902-0043

Worksheet for Computation of Interest Coverage

Actual for the
Year Ended
mm-dd-yy

Pro Forma for
the Year Ended
mm-dd-yy

Net income

Add: Interest on Long-Term Debt
Interest on Short-Term Debt
Other Interest Expense
Total Interest Expense

Federal and State Income Taxes

Income Before Interest and Income Taxes

Computation of Interest Coverage

Total Interest Expense +
Income Before Interest and Income Taxes =
Interest Coverage

*

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8. Section 34.10 is revised to read as follows:

§ 34.10 Reports.

The applicant must file reports under § 131.43 and § 131.50 of this chapter no later than 30 days after the sale or placement of long-term debt or equity securities or the entry into guarantees or assumptions of liabilities pursuant to authority granted under this part.

PART 35 -- FILING OF RATE SCHEDULES

9. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

10. In § 35.13, paragraph (a) (2) (i) is revised, paragraphs (a) (2) (ii) and (a) (2) (iii) are redesignated as paragraphs (a) (2) (iii) and (a) (2) (iv) and newly designated (a) (2) (iii) is revised, a new paragraph (a) (2) (ii) is added, paragraph (d) (1) introductory text is revised and paragraph (h) (24) is revised to add a sentence at the end of the paragraph, to read as follows:

§ 35.13 Filing of changes in rate schedules.

(a) General rule.

* * * * *

(2) Abbreviated filing requirements.

(i) For certain small rate increases. Any utility that files a rate increase for power or transmission services not covered by paragraph (a) (2) (ii) of this section may elect to file under this paragraph instead of paragraph (a) (1) of this section,

if the proposed increase for the Test Period, as defined in paragraph (a) (2) (i) (A) of this section, is equal to or less than \$200,000, regardless of customer consent, or equal to or less than \$1 million if all wholesale customers that belong to the affected rate class consent.

(A) Definition: The Test Period, for purposes of paragraph (a) (2) (i) of the section, means the most recent calendar year for which actual data are available, the last day of which is no more than fifteen months before the date of tender for filing under § 35.1 of the notice of rate schedule.

(B) Any utility that elects to file under this subparagraph must file the following information, conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility:

(1) A complete cost of service analysis for the Test Period, consistent with the requirements of paragraph (h) (36), Statement BK, of this section.

(2) A complete derivation and explanation of all allocation factors and special assignments, consistent with the information required in § 35.12 (b) (5).

(3) A complete calculation of revenues for the Test Period and for the first 12 months after the proposed effective date, consistent with the requirements of paragraph (c) (1) of this section.

(4) If the proposed rates contain a fuel cost or purchased economic power adjustment clause, as defined in § 35.14, the

company must provide the derivation of its base cost of fuel (Fb) and its monthly fuel factors (Fm) for the Test Period and the resulting fuel adjustment clause revenues. If any pro forma adjustments affect the fuel clause in any way, the company must show the impact on Fm, kWh sales in the base period (Sm), Fb and kWh sales in the current period (Sb), as well as on fuel adjustment clause revenues.

(5) Rate design calculations and narrative consistent with the information required in paragraph (h) (37) of this section and in § 35.12(b) (5).

(6) The information required in paragraphs (b), (c) (2) and (c) (3) of this section and in § 35.12(b) (2).

(C) Data shall be reconciled with the utility's most recent FERC Form 1. If the utility has not yet submitted Form 1 for the Test Period, the utility shall submit the relevant Form 1 pages in draft form.

(D) The utility may make pro forma adjustments for post-Test Period changes that occur before the proposed effective date and that are known and measurable at the time of filing. The utility shall provide a narrative statement explaining all pro forma adjustments.

(E) If the utility models its filing in whole or in part on retail rate decisions or settlements, the utility must provide detailed calculations and a narrative statement showing how all retail rate treatments are factored into the cost of service.

(F) If the Commission sets the filing for hearing, the Commission will allow the company a specific time period in which to file testimony, exhibits, and supplemental workpapers to complete its case-in-chief. While not required under this subpart, a utility may elect to submit Statements AA through BM for the Test Period in accord with the requirements of paragraphs (d), (g) and (h) of this section.

(ii) Rate increases for service of short duration or for interchange or coordination service. Any utility that files a rate increase for any service of short duration and of a type for which the need and usage cannot be reasonably forecasted (such as emergency or short-term power), or for service that is an integral part of a coordination and interchange arrangement, may submit with its filing only the information required in paragraphs (b), (c) and (h) (37) of this section and in § 35.12(b) (2) and (b) (5), conforming its submission to any rule of general applicability and to any Commission order specifically applicable to such utility.

(iii) For rate schedule changes other than rate increases. Any utility that files a rate schedule change that does not provide for a rate increase or that provides for a rate increase that is based solely on a change in delivery points, a change in delivery voltage, or a similar change in service, must submit with its filing only the information required in paragraphs (b) and (c) of this section.

* * * * *

(d) Cost of service information-(1) Filing of Period I data. Any utility that is required under paragraph (a)(1) of this section to submit cost of service information, or that is subject to the exceptions in paragraphs (a)(2)(i) and (a)(2)(ii) of this section but elects to file such information, shall submit Statements AA through BM under paragraph (h) of this section using:

* * * * *

(h) Cost of service statements. * * *

(24) Statement AX - Other recent and pending rate changes. * * * Notwithstanding any other provision of this section, Statement AX is required to be filed only if the proposed rate design tracks retail rates.

* * * * *

PART 41 -- ACCOUNTS, RECORDS AND MEMORANDA

11. The Authority citation for Part 41 is revised to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 42 U.S.C. 7101-7352.

12. Section 41.3 is amended by adding a sentence at the end of the section to read as follows:

§ 41.3 Facts and argument. * * * If a person consents to the matter being handled under the shortened procedure, that person has waived any right to subsequently request a hearing under § 41.7 and may not later request such a hearing.

13. Section 41.7 is revised to read as follows:

§ 41.7 Assignment for oral hearing.

Except when there are no material facts in dispute, when a person does not consent to the shortened procedure, the Commission will assign the proceeding for hearing as provided by Subpart E of Part 385 of this chapter. Notwithstanding a person's not giving consent to the shortened procedure, and instead seeking assignment for hearing as provided for by Subpart E of Part 385 of this chapter, the Commission will not assign the proceeding for a hearing when no material facts are in dispute, The Commission may also, in its discretion, at any stage in the proceeding, set the proceeding for hearing.

PART 131 - FORMS

14. The authority section for Part 131 is revised to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

15. SUBCHAPTER D is amended by revising the heading of the subchapter, by revising § 131.50 and by adding § 131.80, to read as follows:

SUBCHAPTER D - APPROVED FORMS, FEDERAL POWER ACT AND PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978
PART 131 - FORMS

* * * * *

§ 131.50 Reports of proposals received. No later than 30 days after the sale or placement of long-term debt or equity securities or the entry into guarantees or assumptions of

liabilities (collectively referred to as "placement") pursuant to authority granted under Part 34 of this chapter, the applicant must file a summary of each proposal or proposals received for the placement. The proposal or proposals accepted must be indicated. The information to be filed must include:

- (a) Par or stated value of securities;
- (b) Number of units (shares of stock, number of bonds) issued;
- (c) Total dollar value of the issue;
- (d) Life of the securities, including maximum life and average life of sinking fund issue;
- (e) Dividend or interest rate;
- (f) Call provisions;
- (g) Sinking fund provisions;
- (h) Offering price;
- (i) Discount or premium;
- (j) Commission or underwriter's spread;
- (k) Net proceeds to company for each unit of security and for the total issue;
- (l) Net cost to the company for securities with a stated interest or dividend rate.

* * * * *

§ 131.80 FERC Form No. 556, Certification of qualifying facility status for an existing or a proposed small power production or cogeneration facility

(See § 292.207 of this chapter.)

FERC FORM 556
OMB No. 1902-0075
Expires _____

CERTIFICATION OF QUALIFYING FACILITY STATUS
FOR AN EXISTING OR A PROPOSED
SMALL POWER PRODUCTION OR COGENERATION FACILITY

(To be completed for the purpose of demonstrating up-to-date conformance with the qualification criteria of Section 292.203(a)(1) or Section 292.203(b), based on actual or planned operating experience)

General instructions:

Part A of the form should be completed by all small power producers or cogenerators. Part B applies to small power production facilities. Part C applies to cogeneration facilities. All references to sections are with regard to Part 292 of Title 18 of the Code of Federal Regulations, unless otherwise indicated.

PART A

**GENERAL INFORMATION TO BE SUBMITTED BY
ALL APPLICANTS**

1a. Full name:

Docket Number assigned to the immediately preceding submittal filed with the Commission in connection with the instant facility, if any: QF____-____-____

Purpose of instant filing (self-certification or self-recertification [Section 292.207(a)(1)], or application for Commission certification or recertification [Sections 292.207(b) and (d)(2)]):

- 1b. Full address of applicant:
- 1c. Indicate the owner(s) of the facility (including the percentage of ownership held by any electric utility or electric utility holding company, or by any persons owned by either) and the operator of the facility. Note that any combination of direct and/or indirect electric utility or electric utility holding company ownership cannot exceed 50 percent of the total ownership [Sections 292.206 and 292.202(n)]. For non-electric utility owners, identify the upstream owners, including owners holding 10 percent or more of the equity interest of such non-electric utility owners. Additionally, state whether or not any of the non-electric utility owners or their upstream owners are engaged in the generation or sale of electric power, or have any ownership or operating interest in any electric facilities other than qualifying facilities. In order to facilitate review of the application, the applicant may also provide an ownership chart identifying the upstream ownership of the facility. Such chart should indicate ownership percentages where appropriate.
- 1d. Signature of authorized individual evidencing accuracy and authenticity of information provided by applicant:
2. Person to whom communications regarding the filed information may be addressed:
- Name:
Title:
Telephone number:
Mailing address:

3a. Location of facility to be certified:

State:
County:
City or town:
Street address (if known):

3b. Indicate the electric utilities that are contemplated to transact with the qualifying facility (if known) and describe the services those electric utilities are expected to provide:

utilities interconnecting with the facility and/or providing wheeling service [Section 292.303(c) and (d)]:

utilities purchasing the useful electric power output [Sections 292.101(b) (2), 292.202(g) and 292.303(a)]:

utilities providing supplementary power, backup power, maintenance power, and/or interruptible power service [Sections 292.101(b) (3) and (8), 292.303(b) and 292.305(b)]:

4a. Describe the principal components of the facility including boilers, prime movers and electric generators, and explain their operation. Include transmission lines, transformers and switchyard equipment, if included as part of the facility.

4b. Indicate the maximum gross and maximum net electric power production capacity of the facility at the point(s) of delivery and show the derivation.

- 4c. Indicate the actual or expected installation and operation dates of the facility, or the actual or expected date of completion of the reported modification to the facility:
- 4d. Describe the primary energy input (e.g., hydro, coal, oil [Section 292.202(l)], natural gas [Section 292.202(k)], solar, geothermal, wind, waste, biomass [Section 292.202(a)], or other). For a waste energy input that does not fall within one of the categories on the Commission's list of previously approved wastes, demonstrate that such energy input has little or no current commercial value and that it exists in the absence of the qualifying facility industry [Section 292.202(b)].
5. Provide the average annual hourly energy input in terms of Btu for the following fossil fuel energy inputs, and provide the related percentage of the total average annual hourly energy input to the facility [Section 292.202(j)]. For any oil or natural gas fuel, use lower heating value [Section 292.202(m)]:
- Natural gas:
 - Oil:
 - Coal (applicable only to a small power production facility):
6. Discuss any particular characteristic of the facility which the cogenerator or small power producer believes might bear on its qualifying status.

PART B

DESCRIPTION OF THE SMALL POWER PRODUCTION FACILITY

7. Describe how fossil fuel use will not exceed 25 percent of the total annual energy input limit [Sections 292.202(j) and 292.204(b)]. Also, describe how the use of fossil fuel will be limited to the following purposes to conform to Federal Power Act Section 3(17)(B): ignition, start-up, testing, flame stabilization, control use, and minimal amounts of fuel required to alleviate or prevent unanticipated equipment outages and emergencies directly affecting the public.

8. If the facility reported herein is not an eligible solar, wind, waste or geothermal facility, and if any other non-eligible facility located within one mile of the instant facility is owned by any of the entities (or their affiliates) reported in Part A at item 1c. above and uses the same primary energy input, provide the following information about the other facility for the purpose of demonstrating that the total of the power production capacities of these facilities does not exceed 80 MW [Section 292.204(a)]:

Facility name, if any (as reported to the Commission):
Commission Docket Number: QF____-____-____
Name of common owner:
Common primary energy source used as energy input:
Power production capacity (MW):

An eligible solar, wind, waste or geothermal facility, as defined in Section 3(17)(E) of the Federal Power Act, is a

small power production facility that produces electric energy solely by the use, as a primary energy input, of solar, wind, waste or geothermal resources, for which either an application for Commission certification of qualifying status [Section 292.207(b)] or a notice of self-certification of qualifying status [Section 292.207(a)] was submitted to the Commission not later than December 31, 1994, and for which construction of such facility commences not later than December 31, 1999, or if not, reasonable diligence is exercised toward the completion of such facility, taking into account all factors relevant to construction of the facility.

PART C

DESCRIPTION OF THE COGENERATION FACILITY

9. Describe the cogeneration system [Sections 292.202(c) and 292.203(b)], and state whether the facility is a topping-cycle [Section 292.202(d)] or bottoming-cycle [Section 292.202(e)] cogeneration facility.
10. To demonstrate the sequentiality of the cogeneration process [Section 292.202(s)] and to support compliance with other requirements such as the operating and efficiency standards (item 11 below), provide a mass and heat balance (cycle) diagram depicting average annual hourly operating conditions. Also, provide:

Using lower heating value [Section 292.202(m)], all fuel flow inputs in Btu/hr., separately indicating fossil fuel

inputs for any supplementary firing in Btu/hr. [Section 292.202(f)]:

Average net electric output (kW or MW) [Section 292.202(g)];

Average net mechanical output in horsepower [Section 292.202(g)];

Number of hours of operation used to determine the average annual hourly facility inputs and outputs; and

Working fluid (e.g., steam) flow conditions at input and output of prime mover(s) and at delivery to and return from each useful thermal application:

Flow rates (lbs./hr.):
 Temperature (deg.F):
 Pressure (psia):
 Enthalpy (Btu/lb.):

11. Compute the operating value [applicable to a topping-cycle facility under Section 292.205(a)(1)] and the efficiency value [Sections 292.205(a)(2) and Section 292.205(b)], based on the information provided in and corresponding to item 10, as follows:

P_t = Average annual hourly useful thermal energy output
 P_e = Average annual hourly electrical output
 P_m = Average annual hourly mechanical output
 P_i = Average annual hourly energy input (natural gas or oil)
 P_s = Average annual hourly energy input for supplementary firing (natural gas or oil)

Operating standard = 5% or more

Operating value = $P_t / (P_t + P_e + P_m)$

Efficiency standard applicable to natural gas and oil fuel used in a topping-cycle facility:

= 45% or more when operating value is less than 15%, or 42.5% or more when operating value is equal to or greater than 15%.

$$\text{Efficiency value} = \frac{(P_e + P_m + 0.5P_t)}{P_s}$$

Efficiency standard applicable to natural gas and oil fuel used for supplementary firing component of a bottoming-cycle facility:

= 45% or more

$$\text{Efficiency value} = \frac{(P_e + P_m)}{P_s}$$

FOR TOPPING-CYCLE COGENERATION FACILITIES

12. Identify the entity (i.e., thermal host) which will purchase the useful thermal energy output from the facility [Section 292.202(h)]. Indicate whether the entity uses such output for the purpose of space and water heating, space cooling, and/or process use.
13. In connection with the requirement that the thermal energy output be useful [Section 292.202(h)]:

For process uses by commercial or industrial host(s), describe each process (or group of similar processes using the same quality of steam) and provide the average annual hourly thermal energy made available to the process, less process return. For a complex system, where the primary steam header at the host-side is divided into various sub-uses, each having different pressure and temperature characteristics, describe the processes associated with each sub-use and provide the

average annual hourly thermal energy delivered to each sub-use, less process return from such sub-use.

Provide a diagram showing the main steam header and the sub-uses with other relevant information such as the average header pressure (psia), the temperature (deg.F), the enthalpy (Btu/lb.), and the flow (lb./hr.), both in and out of each sub-use.

For space and water heating, describe the type of heating involved (e.g., office space heating, domestic water heating) and provide the average annual hourly thermal energy delivered and used for such purpose.

For space cooling, describe the type of cooling involved (e.g., office space cooling) and provide the average annual hourly thermal energy used by the chiller.

FOR BOTTOMING-CYCLE FACILITIES

14. Provide a description of the commercial or industrial process or other thermal application to which the energy input to the system is first applied and from which the reject heat is then used for electric power production.

PART 292 -- REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

16. The authority citation for Part 292 is revised to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

17. In § 292.101, paragraph (b) (1) is revised to read as follows:

§ 292.101 Definitions.

* * * * *

(b) Definitions. * * *

(1) Qualifying facility means a cogeneration facility or a small power production facility that is a qualifying facility under Subpart B of this part.

(i) A qualifying facility may include transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment), if:

(A) such lines and equipment are used to supply power output to directly and indirectly interconnected electric utilities, and to end users, including thermal hosts, in accordance with state law; or

(B) such lines and equipment are used to transmit supplementary, standby, maintenance and backup power to the qualifying facility, including its thermal host meeting the criteria set forth in Union Carbide Corporation, 48 FERC ¶ 61,130, reh'g denied, 49 FERC ¶ 61,209 (1989), aff'd sub nom., Gulf States Utilities Company v. FERC, 922 F.2d 873 (D.C. Cir. 1991); or

(C) if such lines and equipment are used to transmit power from other qualifying facilities or to transmit standby,

maintenance, supplementary and backup power to other qualifying facilities.

(ii) The construction and ownership of such lines and equipment shall be subject to any applicable Federal, state, and local siting and environmental requirements.

* * * * *

18. In § 292.202, paragraphs (b), (d), (e) and (h) are revised and paragraph (s) is added to read as follows:

§ 292.202 Definitions. * * *

(b) Waste means an energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry. Should a waste energy input acquire commercial value after a facility is qualified by way of Commission certification pursuant to § 292.207(b), or self-certification pursuant to § 292.207(a), the facility will not lose its qualifying status for that reason. Waste includes, but is not limited to, the following materials that the Commission previously has approved as waste:

- (1) Anthracite culm produced prior to July 23, 1985;
- (2) Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more;
- (3) Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more;

(4) Top or bottom subbituminous coal produced on Federal lands or on Indian lands that has been determined to be waste by the United States Department of the Interior's Bureau of Land Management (BLM) or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that the applicant shows that the latter coal is an extension of that determined by BLM to be waste.

(5) Coal refuse produced on Federal lands or on Indian lands that has been determined to be waste by the BLM or that is located on non-Federal or non-Indian lands outside of BLM's jurisdiction, provided that applicant shows that the latter is an extension of that determined by BLM to be waste.

(6) Lignite produced in association with the production of montan wax and lignite that becomes exposed as a result of such a mining operation;

(7) Gaseous fuels, except:

(i) Synthetic gas from coal; and

(ii) Natural gas from gas and oil wells unless the natural gas meets the requirements of § 2.400 of this chapter;

(8) Petroleum coke;

(9) Materials that a government agency has certified for disposal by combustion;

(10) Residual heat;

(11) Heat from exothermic reactions;

(12) Used rubber tires;

(13) Plastic materials; and

(14) Refinery off-gas.

* * * * *

(d) Topping-cycle cogeneration facility means a cogeneration facility in which the energy input to the facility is first used to produce useful power output, and at least some of the reject heat from the power production process is then used to provide useful thermal energy;

(e) Bottoming-cycle cogeneration facility means a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy application or process, and at least some of the reject heat emerging from the application or process is then used for power production;

* * * * *

(h) Useful thermal energy output of a topping-cycle cogeneration facility means the thermal energy:

(1) that is made available to an industrial or commercial process (net of any heat contained in condensate return and/or makeup water);

(2) that is used in a heating application (e.g., space heating, domestic hot water heating); or

(3) that is used in a space cooling application (i.e., thermal energy used by an absorption chiller).

* * * * *

(s) Sequential use of energy means:

(1) for a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts

in a thermal application or process to conform to the requirements of the operating standard; or

(2) for a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process, at least some of which is then used for power production.

19. In § 292.204, paragraphs (a)(1) and (b)(2) are revised to read as follows:

§ 292.204 Criteria for qualifying small power production facilities.

(a) **Size of the facility.**

(1) **Maximum size.** There is no size limitation for an eligible solar, wind, waste or facility, as defined by section 3(17)(E) of the Federal Power Act. For a non-eligible facility, the power production capacity for which qualification is sought, together with the power production capacity of any other non-eligible small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

* * * * *

(b) **Fuel use.**

* * * * *

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of

fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

20. In § 292.205, paragraphs (a)(1), (a)(2)(i) introductory text, and (b)(1) are revised to read as follows:

§ 292.205 Criteria for qualifying cogeneration facilities.

(a) **Operating and efficiency standards for topping-cycle facilities.**

(1) **Operating standard.** For any topping-cycle cogeneration facility, the useful thermal energy output of the facility must be no less than 5 percent of the total energy output during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy.

(2) **Efficiency standard.** (i) For any topping-cycle cogeneration facility for which any of the energy input is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility plus one-half the useful thermal energy output, during the 12-month period beginning with the date the facility first produces

electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy, must:

* * * * *

(b) Efficiency standards for bottoming-cycle facilities.

(1) For any bottoming-cycle cogeneration facility for which any of the energy input as supplementary firing is natural gas or oil, and the installation of which began on or after March 13, 1980, the useful power output of the facility during the 12-month period beginning with the date the facility first produces electric energy, and any calendar year subsequent to the year in which the facility first produces electric energy must be no less than 45 percent of the energy input of natural gas and oil for supplementary firing.

* * * * *

21. In § 292.207, paragraphs (a), (b) and (d) are revised to read as follows:

§ 292.207 Procedures for obtaining qualifying status.

(a) **Self-certification and pre-authorized Commission recertification.**

(1) Self-certification. (i) A small power production facility or cogeneration facility that meets the applicable criteria established in § 292.203 is a qualifying facility.

(ii) The owner or operator of a facility or its representative self-certifying under this section must file with the Commission, and concurrently serve on each electric utility with which it expects to interconnect, transmit or sell electric

energy to or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected utility is located, a notice of self-certification which contains a completed Form 556.

(iii) Subsequent notices of self-recertification for the same facility may reference prior notices or prior Commission certifications, and need only refer to changes which have occurred with respect to the facility since the prior notice or the prior Commission certification.

(iv) Notices of self-certification or self-recertification will not be published in the Federal Register.

(2) Pre-authorized Commission recertification. (i) For purposes of paragraph (b) of this section, the following alterations or modifications are not considered substantial alterations or modifications and will not result in revocation of qualifying status previously granted by the Commission pursuant to paragraph (b) of this section:

(A) A change which does not affect the upstream ownership of the facility;

(B) A change in the installation or operation date;

(C) A change in the manufacturer of the power generation equipment selected for the facility's installation when there is no change in capacity or operating characteristics;

(D) A change in the location of a cogeneration facility, or a small power production facility, if the new location would not

cause the facility to violate the 80 MW limitation of § 292.204(a)(1);

(E) A decrease in the amount of natural gas or oil or any change in the amount of other fuel used by a cogeneration facility, provided that the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued;

(F) A decrease in the amount of fossil fuel used by a small power production facility;

(G) A change in the primary energy source of a small power production facility, provided that the facility continues to comply with the requirements of § 292.204;

(H) An additional use of a cogeneration facility's thermal output, if the original uses are as stated when the certification order was issued;

(I) An increase in the efficiency value of a cogeneration facility or an increase in the operating value of a cogeneration facility determined in accordance with § 292.205;

(J) A decrease in the power production capacity of a small power production facility;

(K) A change in the power production capacity of a cogeneration facility if the efficiency value and the operating value calculation for the facility remain at or above the values stated when the certification or recertification order was issued; or

(L) A change in the purchaser of the cogeneration facility's thermal output, when there is no change in the specified thermal application or process.

(ii) The owner or operator of a qualifying facility that has been certified under paragraph (b) of this section must file with the Commission notice of each change listed in this subsection, and must concurrently serve a copy of such notice on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power, and the State regulatory authority of each state where the facility and each affected electric utility is located.

(b) Optional procedure. (1) Application for Commission certification. In lieu of the certification procedures in paragraph (a) of this section, an owner or operator of a facility or its representative may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by Part 381 of this chapter.

(2) General contents of application. The application must include a completed Form 556.

(3) Commission action. (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll

the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

(ii) For purposes of paragraph (b) of this section, the date an application is filed is the date by which the Office of the Secretary has received all of the information and the appropriate filing fee necessary to comply with the requirements of this Part.

(4) Notice. (i) Applications for certification filed under paragraph (b) of this section must include a copy of a notice of the request for certification for publication in the Federal Register. The notice must state the applicant's name, the date of the application, a description of the facility for which qualification is sought and, if known, the names of the electric utilities to which the facility expects to interconnect, transmit or sell electric energy, or from which the facility expects to purchase supplementary, standby, back-up and maintenance power. This description must include:

(A) A statement indicating whether such facility is a small power production facility or a cogeneration facility;

(B) The primary energy source used or to be used by the facility;

(C) The power production equipment and capacity of the facility; and

(D) The location of the facility.

(ii) The notice must be in the following form:

(Name of Applicant)

Docket No. QF-

NOTICE OF APPLICATION FOR COMMISSION CERTIFICATION OF
QUALIFYING STATUS OF A (SMALL POWER PRODUCTION) (COGENERATION)
FACILITY

On (date application was filed), (name and address of applicant) filed with the Federal Energy Regulatory Commission an application for certification (or recertification) of a facility as a qualifying (small power production) (cogeneration) facility pursuant to § 292.207(b) of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

[Description of facility.]

[Names of the electric utilities with which the facility expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up and maintenance power (if known).]

Any person who wishes to be heard or to object to granting qualifying status should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure. A motion or protest must be filed within __ days after the date of publication of this notice and must be served on the

applicant. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. A person who wishes to become a party must file a motion to intervene. Copies of this application are on file with the Commission and are available for public inspection.

* * * * *

(d) Revocation of qualifying status (1)(i) If a qualifying facility fails to conform with any material facts or representations presented by the cogenerator or small power producer in its submittals to the Commission, the notice of self-certification of the qualifying status of the facility, pre-authorized Commission re-certification notice, or Commission order certifying the qualifying status of the facility may no longer be relied upon. At that point, if the facility continues to conform to the Commission's qualifying criteria under this part, the cogenerator or small power producer may file either a notice of self-recertification of qualifying status pursuant to the requirements of paragraph (a)(1) of this section, a pre-authorized Commission recertification notice pursuant to the requirements of paragraph (a)(2) of this section, or an application for Commission recertification pursuant to the requirements of paragraph (b) of this section, as appropriate.

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the

facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may revoke the qualifying status of a self-certified qualifying facility upon the filing of a petition for a declaratory order that the self-certified qualifying facility does not meet applicable requirements for qualifying facilities.

(2) Prior to undertaking any substantial alteration or modification of a qualifying facility which has been certified under paragraph (b) of this section, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. This application for Commission recertification of qualifying status should be submitted in accordance with paragraph (b) of this section.

PART 294 -- PROCEDURES FOR SHORTAGES OF ELECTRIC ENERGY AND CAPACITY UNDER SECTION 206 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978

22. The authority citation for Part 294 is revised to read as follows:

Authority: 5 U.S.C. 553; 16 U.S.C. 791a-825r; 42 U.S.C. 7107-7352.

23. In § 294.101, paragraphs (b) (5) and (f) are added as follows:

§ 294.101 Shortages of electric energy and capacity.

* * * * *

(b) Accommodation of shortages.

* * * * *

(5) Notwithstanding any other provision of this section, a public utility need not file the statement with the Commission if the public utility provides in its rate schedules to firm power wholesale customers that:

(i) During electric energy and capacity shortages it will treat without undue discrimination or preference, prejudice, or disadvantage firm power wholesale customers; and

(ii) It will report any modifications to its contingency plans for accommodating shortages within 15 days to:

- (A) the appropriate State regulatory agency and
- (B) to the affected wholesale customers.

* * * * *

(f) Report of anticipated shortage.

Notwithstanding any other provision of this part, if a public utility provides in its rate schedule that it will make such reports to the appropriate state regulatory agency and to its firm power wholesale requirements customers, then it need only report to the Commission the nature and projected duration of the anticipated capacity or energy supply shortage and supply a list of the firm power wholesale customers affected or likely to be affected by the shortage. Upon receiving the public utility's report of anticipated shortage of electric energy or capacity, the Commission will decide what further reports, if any, to require.

Part 382 -- Annual Charges

24. The authority citation for Part 382 is revised to read as follows:

Authority: 5 U.S.C 551-557; 15 U.S.C 717-717w, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

25. In § 382.102, paragraphs (h), (i), (j) and (k) are revised, paragraphs (l), (m) and (n) are removed, and paragraphs (o), (p), (q), (r) and (s) are redesignated (l), (m), (n), (o) and (p), respectively to read as follows:

§ 382.102 Definitions

* * * * *

(h) Long-term firm sales and transmission activities means the portion of the Commission's electric regulatory program devoted to the regulation of long-term firm sales and transmission.

(1) Long-term firm sales are the jurisdictional sales of capacity and energy under contracts that do not anticipate service interruptions, and are of five years or more duration. The capacity and energy must be available to a resale customer at all times during the period covered by a commitment, even under adverse conditions. This includes sales supplying the full requirements or partial requirements of a customer, and sales of energy from unit or system capacity of a long-term duration (five years or more) under contracts that do not anticipate service interruptions when capacity is operationally available. These

sales are those reported in the FERC Form No. 1 in Account 447 as Sales-for-Resale transactions with statistical classifications of RQ, LF or LU or sales determined on a basis consistent with FERC Form No. 1 reporting for those public utilities exempt from § 141.1 of this chapter.

(2) Long-term firm transmission is jurisdictional transmission of capacity and energy under contracts that do not anticipate service interruptions, and are of one year or more duration. This transmission is that reported in the FERC Form No. 1 in Account 456 as Transmission for Others transactions with the statistical classification of LF or transmission for others determined on a basis consistent with FERC Form No. 1 reporting for those public utilities exempt from § 141.1 of this chapter. All MWhs attributable to sales and transmission transactions are to be reported in their respective accounts on the FERC Form No. 1 irrespective of the method of billing.

(i) Short-term sales and transmission and exchange activities means the portion of the Commission's electric regulatory program consisting of the regulation of all jurisdictional sales, exchange and transmission of capacity and energy except those described in paragraph (h) of this section. This includes exchange delivered as reported in the FERC Form No. 1 in Account 555 as Gross Exchange Delivered transactions with the statistical classification of EX or gross exchange delivered determined on a basis consistent with FERC Form No. 1 reporting for those public utilities exempt from § 141.1 of this chapter.

All MWhs attributable to sales and transmission transactions are to be reported in their respective accounts in the FERC Form No. 1 irrespective of the method of billing.

(j) Long-term firm sales and transmission megawatt-hours means the number of megawatt-hours of electrical energy associated with the transactions described in paragraph (h) of this section, and the rates, charges, terms and conditions of which are regulated by the Commission.

(k) Short-term sales and transmission and exchange megawatt-hours means the number of megawatt-hours of electrical energy associated with the transactions described in paragraph (i) of this section, the rates, charges, terms and conditions of which are regulated by the Commission.

* * * * *

26. In § 382.201, paragraph (a) and (b) are revised and the worksheet in paragraph (b) (4) (ii) is removed, to read as follows:

§ 382.201 Annual charges under Parts II and III of the Federal Power Act and related statutes.

(a) Determination of costs to be assessed against public utilities. The adjusted costs of administration of the electric regulatory program, excluding the costs of regulating the Power Marketing Agencies and any electrical programs for which separate application fees are collected, will be apportioned between long-term firm sales and transmission activities and short-term sales and transmission and exchange activities in proportion to the total staff time dedicated to each. The amount apportioned to

long-term firm sales and transmission activities will constitute long-term firm sales and transmission costs, and the amount apportioned to short-term sales and transmission and exchange activities will constitute short-term sales and transmission and exchange costs.

(b) Determination of annual charges to be assessed against public utilities.

(1) The long-term firm sales and transmission costs determined under paragraph (a) of this section will be assessed against each public utility based on the proportion of the long-term firm sales and transmission megawatt-hours of each public utility in the immediately preceding reporting year (either a calendar year or fiscal year, depending on which accounting convention is used by the public utility to be charged) to the sum of the long-term firm sales and transmission megawatt-hours in the immediately preceding reporting year of all public utilities being assessed annual charges.

(2) The short-term sales and transmission and exchange costs determined under paragraph (a) of this section will be assessed against each public utility based on the proportion of the short-term sales and transmission and exchange megawatt-hours of each public utility in the immediately preceding reporting year (either a calendar year or fiscal year, depending on which accounting convention is used by the public utility to be charged) to the sum of the short-term sales and transmission and

exchange megawatt-hours in the immediately preceding reporting year of all public utilities being assessed annual charges.

(3) The annual charges assessed against each public utility will be the sum of the amounts determined in paragraphs (b)(1) and (b)(2) of this section.

(4) Reporting requirement. For purposes of computing annual charges, a public utility, as defined in § 382.102(b) must submit under oath to the Office of the Secretary by April 30 of each year an original and conformed copies of the following information (designated as FERC Reporting Requirement No. 582):

(i) The total annual long-term firm sales for resale and transmission megawatt-hours as defined in § 382.102(j); and

(ii) The total annual short-term sales, transmission and exchange megawatt-hours as defined in § 382.102(k).

* * * * *

PART 385 -- RULES OF PRACTICE AND PROCEDURE

27. The authority citation for Part 385 continues to read as follows:

Authority: 5 U.S.C. 551-557; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

28. In § 385.702, paragraph (b) is removed, and paragraph (c) is redesignated paragraph (b).

29. In § 385.708, in paragraph (b)(1), the phrase "and, if appropriate under Rule 717, a written revised initial decision" is removed; in paragraph (b)(2)(i), the phrase "or oral revised

initial" is removed; in paragraph (b) (3), the phrase "or, if appropriate under Rule 717, any revised initial decision" is removed; in paragraph (b) (4), the phrase "as appropriate" is removed and the phrase "or revised initial" is removed in both places where it appears; in paragraph (c), in the heading the phrase "and revised initial" is removed; in paragraph (c) (1), the phrase "or, if appropriate, the revised initial decision" is removed; in paragraph (c) (2), the phrase "or revised initial" is removed; and in paragraph (d), in the heading the phrase "and revised initial" and in the text the phrase "or, if appropriate under Rule 717, a revised initial decision" are removed.

30. In § 385.711, in the heading the phrase "or revised initial" is removed, and in paragraph (a) (1) (i), the phrase "In proceedings not subject to Rule 717," is removed, and the word "Any" is capitalized.

31. In § 385.712, in the heading the phrase "and revised initial" is removed and in paragraph (a) the phrase "or revised initial" is removed.

32. In § 385.713, in paragraph (a) (2) (i), the phrase "or, if appropriate under Rules 717 and 711, to a revised initial decision" is removed; in paragraph (a) (2) (iv), the phrase "or revised" is removed; and in paragraph (a) (3), the phrase "or any revised initial decision under Rule 717" is removed.

33. Section 385.717 is removed.