

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****18 CFR Parts 131 and 292**

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

Revised Regulations Governing Small Power Production and Cogeneration Facilities

Issued February 2, 2006.

AGENCY: Federal Energy Regulatory Commission, DOE.**ACTION:** Final rule.

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

DATES: *Effective Date:* The rule will become effective March 17, 2006.

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

I. Introduction

1. On August 8, 2005, the Energy Policy Act of 2005 (EPAAct 2005)¹ was signed into law. Pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), as modified by section 1253 of EPAAct 2005,² the Federal Energy Regulatory Commission (Commission) hereby issues a rule that (1) ensures that new qualifying cogeneration facilities are using their thermal output in a productive and

beneficial manner; that the electrical, thermal, chemical and mechanical output of new qualifying cogeneration facilities is used fundamentally for industrial, commercial, residential or institutional purposes; and that there is continuing progress in the development of efficient electric energy generating technology; (2) amends Form 556³ to reflect the criteria for new qualifying cogeneration facilities; (3) eliminates ownership limitations for qualifying cogeneration and small power production facilities; and (4) amends the exemptions available to qualifying facilities (QFs) from the requirements of the Federal Power Act (FPA)⁴ and the Public Utility Holding Company Act of 1935 (PUHCA).⁵

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

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

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

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

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

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

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

(F) Eliminates the ownership limitations for all QFs;

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

(H) Clarifies that there is a rebuttable presumption that an existing QF does not become a "new cogeneration facility" when it files an application for

³ Form 556 is set forth in 18 CFR 131.80 (2005).

⁴ 16 U.S.C. 824 *et seq.* (2000).

⁵ 15 U.S.C. 79 (2000); Pub. L. 109–58, §§ 1261–77, 119 Stat. 594, 972–78 (2005).

⁶ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, 70 FR 60456 (Oct. 18, 2005), FERC Stats. & Regs. ¶ 32,590 (2005).

recertification reflecting either a change in ownership or a change in operation.

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

II. Notice of Proposed Rulemaking

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

III. Discussion*A. Productive and Beneficial*

1. Background

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

2. Comments

7. Most commenters support the Commission's proposal to eliminate the "presumption of usefulness" standard in determining whether the thermal energy output of a new cogeneration facility is used in a "productive and beneficial" manner. The California Electricity Oversight Board (CEOB) notes that the irrebuttable presumption has resulted in default granting of qualifying status to applicants even where there was no real need for the thermal output. Delta Power Company, *et al.*, support the elimination of the irrebuttable presumption of usefulness. They suggest, moreover, that the

⁷ *Id.*

¹ Energy Policy Act of 2005, Pub. L. 109–58, 119 Stat. 594 (2005).

² Pub. L. 109–58, § 1253, 119 Stat. 594, 967–70 (2005).

Commission apply a rebuttable presumption that both a thermal use is “genuine and legitimate” and “productive and beneficial” if a facility demonstrates that its thermal output would be supplied to the host from other means; a challenger would have the opportunity to prove otherwise. Primary Energy Ventures LLC (Primary Energy) and U.S. Combined Heat and Power Association (USCHPA) support a case-by-case review of the “productive and beneficial” standard. Both commenters believe a QF applicant should support the application with adequate reference to the business and economic circumstances of the individual facility. North Carolina Eastern Municipal Power Agency (NCEMPA) advocates that the Commission continue to apply the “presumptively useful” standard to small QFs because the alleged abuses have occurred in the context of large “PURPA machines.”

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

9. Cinergy Solutions, Inc. (Cinergy) argues that the presumption of usefulness for common industrial or commercial applications of thermal energy should be rebuttable only when a new thermal host is being developed in conjunction with the development of the cogeneration facility and the

presumption should remain irrebuttable when an economically self-sustaining thermal host already exists at the site. Cinergy states that the presumption of usefulness, whether rebuttable or irrebuttable, should depend on the circumstances of the thermal host. Cinergy advocates that the presumption of usefulness should be irrebuttable where a thermal host is in existence prior to the development of a cogeneration facility. Finally, Cinergy notes that a change to a rebuttable presumption creates unnecessary uncertainty and could substantially reduce usage and the effectiveness of the self-certification process.

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

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

12. Cogentrix Energy, Inc. and Goldman Sachs Group, Inc. (collectively, Independent Sellers), state that the Commission has not proposed any ascertainable standards to assist cogenerators in determining whether they will meet the new requirements that will be set forth in 18 CFR 292.205(d). They point out that the Commission’s existing standard is an ascertainable one in that if the use of the thermal output constitutes a common industrial or commercial application then it is presumptively useful and no further analysis is required. The presumptively useful standard provides

regulatory certainty that is critical to entities that invest in cogeneration facilities. Cogentrix argues that a rebuttable presumption of usefulness creates uncertainty that would harm investment in cogeneration.

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

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

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

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

the costs and risks of the regulatory process.

3. Commission Determination

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

18. Form 556 is being amended to include a new section in which a new

cogeneration QF applicant must show “the thermal energy output of the cogeneration facility is used in a productive and beneficial manner.”⁸ The initial burden of demonstrating compliance with this new standard is on the new cogeneration QF applicant.

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

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

proposed use is genuine, and not merely to allow the applicant to achieve QF status, *i.e.*, a “sham”; a detailed economic analysis will not be necessary in most cases. However, the Commission reserves the right to require additional support when appropriate.

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

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

23. We note that the Commission does not intend to change current standards related to the thermal output for existing cogeneration facilities; as discussed later in the Final Rule, the standards for new cogeneration facilities adopted herein will apply to new cogeneration facilities and not existing cogeneration facilities.

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

25. We address here two circumstances: Certification of new cogeneration facilities; and post-certification challenges after the new cogeneration facilities have been certified. We clarify that, in proceedings for Commission certification of new cogeneration facilities, if certain uses of thermal output were previously considered “presumptively useful” under the prior regulations and case precedent, they will be considered “productive and beneficial” uses, but those who oppose certification will have the opportunity to demonstrate that the thermal output is not, in fact, being used in a productive and beneficial manner.

⁸ See 18 CFR 131.80, part C, 15(i) (2005).

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

However, once the Commission has granted a new cogeneration facility certification based on the new standard adopted herein, the issue of that particular QF's use of its thermal output is determined, even if the economics of a particular use may change over time. Unless there are changes in the way the QF operates, such that it does not operate as described in the application for certification, and thus no longer meets the statutory criteria, a QF may continue to rely on the Commission's certification of its facility even if the economics of the particular use have changed over time. Thus, after a QF has been certified by the Commission, absent a change in the operations of the facility, a purchaser of the electrical output of a new cogeneration facility may not return to the Commission to allege that the thermal output of a facility is not "productive and beneficial."

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

B. Fundamentally Requirement

1. Background

27. Section 210(n)(1)(A)(ii) of PURPA requires the Commission to revise § 292.205 of its regulations to ensure the electrical, thermal, and chemical output of a new cogeneration facility is used fundamentally for industrial, commercial, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility. The NOPR proposed to incorporate the language of section 210(n)(1)(A)(ii) of PURPA as § 292.205(d)(ii) of the Commission's regulations, and to apply this language on a case-by-case basis to determine

whether a new cogeneration facility can be considered a qualifying cogeneration facility. In addition, the Commission proposed adding the term "mechanical" output to the statutory criteria, because this has traditionally been a part of the Commission's analysis of cogeneration output, and is consistent with the statutory language.

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

2. Comments

29. Many commenters favor a case-by-case evaluation of compliance to the new "fundamentally" requirement, and argue (1) that the different operating characteristics of QFs and cogenerators render the use of a specific standard unworkable, (2) that the Congressional language in the new section 210(n)(1)(A)(ii) of PURPA to "[take] into account technological, efficiency, economic, and variable thermal energy requirements, as well as State laws applicable to sales of electric energy from a qualifying facility to its host facility" clearly contemplates a case-by-case evaluation, (3) that any "bright-line" test will, by its nature, be prone to becoming outdated, (4) that the Commission does not currently have sufficient experience with the new "fundamentally" requirement to develop specific standards (although it may in the future), and (5) that the standards proposed by the utilities generally seem to be designed to discourage cogeneration. Some of these commenters also argue that the Final Rule should provide additional detail on how the case-specific determination will be made, or that the Final Rule should include specific "safe harbors" that will decrease the risk and uncertainty associated with planning and constructing a cogeneration facility.

30. Many other commenters favor a specific, numerical standard, arguing (1) that a case-by-case evaluation will necessarily lead to large amounts of uncertainty and litigation, both for new cogeneration applicants and for utilities, (2) that Congress required the

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

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

32. EEI and others point out that some commenters advocate taking essentially no action whatsoever in response to new section 210(n)(1)(A)(ii) of PURPA, and argue that this cannot be the intent of Congress. Instead, they argue, the structure of the language in the statute suggests that the entire output of a cogeneration facility is to be aggregated, and that by calculating the percentage of the facility's output used for industrial, commercial or institutional purposes, the Commission can determine whether the new "fundamentally for" test has been met. In particular, EEI recommends a two-part test: First, a minimum threshold of 67 percent of the

cogenerator's total energy output, over the course of 12 months; and second, if the facility will generate electricity on a continuous basis, the cogenerator should also demonstrate that the facility has not been "oversized." Others argue that it has not been shown how a 67 percent "total energy output operating standard" follows from the "fundamental" use requirement, and that such a restrictive standard may eliminate certain applications that could otherwise meet the fundamental use criteria through other means. EEI responds by stating that the Commission could establish a case-by-case waiver process for unique technologies and industrial processes, where the applicant would have the opportunity to demonstrate that such a waiver is warranted. EEI also states that the notion of safe harbors is compatible with its recommendations, so long as such safe harbors are not absolute.

33. Other types of numeric tests are also advocated by various commenters. FICA recommends that any cogeneration facility, regardless of fuel use, owned or operated by and appurtenant to an industrial mining or manufacturing operation, where at least 25 percent of the electric energy or 25 percent of the thermal energy is consumed in such industrial operation, is in compliance with the "fundamentally" requirement. Cinergy proposes that, if the Commission decides to establish a numerical standard as urged by EEI and others, the standard be set at 25 percent.

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

35. As discussed in more detail below, some commenters urge the Commission to consider that it may often be legitimate for a cogeneration plant to have considerably more electric generation capacity than is needed for consumption by the thermal host, and the existence of such excess generation capacity does not indicate that such output is "intended" fundamentally for

sale to an electric utility. Some commenters argue that EPA 2005 and PURPA clearly recognize that QF facilities will often produce a steady stream of electricity for sale to third parties, as evidenced by the must-take and competitive market opportunities that Congress has required be available to QF's.

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

37. Several commenters indicate that they agree with the Commission's statement in the NOPR that Congress intended in EPA 2005 to discourage so-called PURPA machines, but go on to argue that PURPA machines came to exist as a direct result of specific avoided cost policies by certain states, and by the inability of independent power producers to interconnect to the grid without obtaining QF status. This Commission and state regulatory authorities have enacted policies such that conditions are now different, they argue, and thus significant changes to the Commission's regulations are not necessary. Others agree with the Commission's statement in the NOPR, but argue that the Commission must be precise in crafting its regulatory language so that QFs which bear absolutely no resemblance to PURPA machines are not inadvertently captured by the new rules.

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

39. Delta Power, *et al.*, argue that the application of the new requirements should focus on whether a facility is built to supply a thermal product that would be generated or procured from

another fuel-consuming source in the absence of cogeneration, and that facilities that meet this standard should be presumed to have satisfied the new requirements unless a challenger demonstrates otherwise.

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

41. USCHPA also points out that facilities are increasingly being built to serve multi-family housing complexes, apartment buildings, public housing projects and other residential applications. They argue that, in the same manner as the Commission has appropriately added "mechanical" energy to the listed types of useful energy output Congress listed in EPA 2005, the Commission should add "residential" to the valid purposes for which a QF can intend its energy outputs other than sales of electricity to a utility.

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

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

so cannot have been the intent of Congress.

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

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

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

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

3. Commission Determination

47. As an initial matter, we address certain requests for clarification. First, we agree that many residential uses of thermal output have long been considered legitimate for the purposes of cogeneration certification, and that “residential purposes” is subsumed within “institutional purposes.” We therefore find that residential purposes should be maintained as acceptable for the purpose of satisfying the requirements of section 210(n)(1)(a)(ii), and we will revise the regulatory text in § 292.205(d)(ii) to specifically reference residential purposes. We also clarify that new cogeneration facilities will not need to have each of the enumerated individual outputs (electrical, thermal, chemical and mechanical) used for industrial, commercial, residential or institutional purposes, so long as the cumulative safe harbor standard, as discussed below, is met, or other sufficient support for certification is provided.

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

49. Turning to the central issues regarding the “fundamentally” requirement, we find no statutory basis for the suggestions by some commenters that the Commission focus solely on the goal of eliminating so-called PURPA machines instead of implementing the specific requirements of section 210(n)(1)(A)(ii) for all new cogeneration facilities. The discussion of PURPA machines in the NOPR¹¹ was intended to provide context, and not to establish a policy objective that could replace the implementation of the specific requirements of section 210(n)(1)(A)(ii). We find that section 210(n)(1)(A)(ii) requires new cogeneration facilities seeking certification to make a showing that their energy output is used

fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility. In short, we will implement the requirements of section 210(n)(1)(A)(ii) as written.

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

51. We agree with commenters who argue that the structure of the language in section 210(n)(1)(A)(ii) suggests that compliance of new cogeneration facilities with that section will generally depend on the percentage of the total, aggregated energy output that is used for industrial, commercial, residential or institutional purposes, and not sold to an electric utility. We, therefore, believe that a safe harbor should be similarly structured to capture the intent of the overall requirement. After careful consideration of various recommendations of commenters, we believe a standard of at least 50 percent is a reasonable interpretation of section 210(n)(1)(A)(ii) in light of the

¹⁰ See NOPR at P 14.

¹¹ *Id.* at P 11.

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

52. Entergy has argued that, as part of the process of demonstrating compliance with the "fundamentally" standard, the Commission should require that new cogeneration facilities, at a minimum, submit (1) average annual hourly useful electrical output in Btu/hr; (2) average annual hourly useful thermal output in Btu/hr; (3) average annual hourly useful mechanical output in Btu/hr; and (4) utilization of thermal, electrical and mechanical output along with the steam, electrical and mechanical usage diagrams for the facility. This data, Entergy argues,

should be accompanied by an affidavit of a senior officer, attesting to the accuracy of the data. We note that the first four items are already required by Items 10 and 13 of Form 556.¹³ With respect to the request to require applicants to submit an affidavit, we note that Form 556 already requires the applicant to submit with the filing the signature of an authorized individual evidencing accuracy and authenticity of information.¹⁴ This system seems to be working, and in the absence of any demonstration that it has not worked or is not working, we find that Entergy's proposal is unnecessary.

53. Many parties commented on the legitimacy of a new cogeneration facility having "excess capacity" beyond that needed to provide for the electricity needs of the host facility. These parties present various situations and circumstances, which, they argue, justify ongoing sales of electricity from a new cogeneration facility to a utility, without violation of the requirements of section 210(n)(1)(A)(ii). In particular, commenters point out (1) that some thermal hosts may require redundant generation capacity and/or redundant thermal capacity to ensure the reliability of their process; (2) that long lead times and high costs associated with siting approvals and equipment orders often make it significantly more economic to construct a large increment of capacity at one time, rather than several smaller increments as needed over time; (3) that it is generally more cost-effective for an applicant to keep a cogeneration unit operating during periods of host shutdown or curtailment; (4) that the thermal energy requirements of some thermal hosts are so large relative to their electricity requirements that optimizing electricity production from that facility generates a continuous surplus of power that can only be exported; (5) that a new cogeneration facility may require its higher capital cost to be offset in the long term with an income stream based on electric sales to the grid; (6) that it may be advantageous or necessary to all concerned for a manufacturing company to export some of its power to a utility for a short time during periods of peak demand, generally during the summer cooling season and occasionally during the winter heating season; (7) that power plants are extremely capital intensive and the maximum economies of scale are found at the largest end of an original equipment manufacturer's product line, which also typically have the best combined cycle heat rates and

lowest emission rates; and (8) that cogenerators must size their plants to be able to provide for the largest expected steam demand of the customer, but also must size the steam turbine to be able to take the excess steam created when the steam host reduces its steam needs. Some commenters also point out that certain states require that a cogeneration facility provide all of its output to the local utility, and that the local utility provide electricity to the industrial host, and that such requirements should not disqualify a new cogeneration facility from eligibility for QF status.

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

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

¹² See Pub. L. 109-58, § 1253(a), 119 Stat. 595, 970 (2005) (adopting new section 210(n)(1)(B)).

¹³ 18 CFR 131.80 (2005).

¹⁴ 18 CFR 131.80, part A (2005).

make an affirmative section 210(n)(1)(A)(ii) finding for facilities employing modern, efficient technologies, both in order to encourage cogeneration under section 210(a) and to specifically encourage continuing progress in the development of efficient electric energy generating technology under section 210(n)(1)(A)(iii).

56. Several commenters have requested that the Commission limit the applicability of the “fundamentally” requirement to topping-cycle cogeneration facilities. While section 210(n)(1)(A)(ii), as a matter of law, applies to both new topping-cycle and new bottoming-cycle cogeneration facilities, we believe that many, if not most, bottoming-cycle cogeneration facilities will readily satisfy the requirements of section 210(n)(1)(A)(ii). The very nature of bottoming-cycle facilities is that they utilize waste heat from a thermal process to produce electric energy, as opposed to the consumption of a scarce fuel source. If the fuel utilized in a bottoming-cycle facility is merely enough to run the thermal process and has not been augmented for the purposes of power production, the facility clearly should satisfy the requirements of section 210(n)(1)(A)(ii) that the electrical, thermal, chemical and mechanical output of the facility is used fundamentally for industrial, commercial, residential or institutional purposes; in any event, such facilities may satisfy the requirements of section 210(n)(1)(A)(ii) by virtue of our discretion to make an affirmative finding after taking into account technological, efficiency, economic, and variable thermal requirements.

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

58. We disagree with commenters who advocate a change to the

Commission’s existing operating standard. The language of section 210(n)(1)(A)(ii) does not in our view direct a change to the operating standard, and we do not believe that an increase in the operating standard is necessary at this time.

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

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

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

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

1. Background

62. Section 210(a)(1)(A)(iii) of PURPA requires that all new cogeneration facilities seeking QF status demonstrate “continuing progress in the

development of efficient electric energy generating technology.” The NOPR proposed that the Commission’s regulations repeat the statutory language. In addition, the NOPR proposed to (1) retain the existing operating standard for all cogeneration facilities; (2) retain the existing efficiency standards for oil cogeneration facilities for which any of the energy input is natural gas or oil, but (3) apply an efficiency standard to new coal-burning cogeneration facilities.

2. Comments

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

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

65. Although Indeck does not object to increased efficiency standards for new cogeneration QF plants, they must be reasonable, and based on clear and definite standards. NARUC states that the Commission should take care to encourage the use of better technology and not prevent the use of any improved technologies by setting the standards unreasonably high. Any standard the Commission adopts must recognize that

¹⁵ 18 CFR 388.112 (2005).

the requirement of greater efficiency is a technological, not an environmental standard. USCHPA states that requiring QFs to implement a "best available technology" standard would result in fearsome costs and constraints. Primary Energy states the rule should embrace the philosophy that deployment of existing technology in innovative and creative ways defines continuing progress in achieving greater overall resource efficiency. The Cogeneration Association California states that requiring each applicant to demonstrate that it would contribute to this "continuing progress" standard might discourage the continued use of well-established technologies proven to produce efficiencies, but which may no longer be considered "progressive."

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

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

3. Commission Determination

68. Section 210(n)(1)(A)(iii) of PURPA requires the Commission to issue rules to ensure "continuing progress in the development of efficient electric energy generating technology." As an initial matter, upon review of the comments on

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

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

70. We find persuasive the EPA comments that there is little, if any, need to alter existing PURPA criteria or processes. The EPA states that CHP (combined heat and power) remains one of the most significant opportunities to improve the efficiency and reduce the environmental impact of United States energy production and it is critical that this rulemaking advance, not constrain, these opportunities. The EPA further states that since CHP systems are inherently more efficient than the alternative (separate heat and power generation) they always improve total efficiency, reduce fossil fuel

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

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

consumption, and therefore advance the objectives of EPAct 2005. We find the comments of Solar Turbines compelling as well. Solar Turbines, a manufacturer of generation equipment, states that, while its products have standard efficiencies greater than 60 percent, their PURPA efficiency is less than 50 percent. They are still much more efficient than conventional separate electric and thermal generation (49 percent conventional/34 percent PURPA efficiency), however. Solar Turbines states that the existing PURPA standard of 42.5 percent LHV/38.6 percent HHV is sufficient to ensure efficient CHP systems and still accommodate the wide range of technologies and applications. Therefore, the Commission will retain the existing operating and efficiency standards for new cogeneration facilities.¹⁷

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

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

D. Self Certification

1. Background

73. In the NOPR, the Commission invited comments on whether the Commission's self-certification

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

procedures¹⁸ should be available to new cogeneration facilities in light of the criteria proposed for certification of new cogeneration facilities as QFs.

2. Comments

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

75. Some commenters argue that self-certification should remain an option for certain new cogeneration facilities. American Forest & Paper asserts that self-certification should remain available to new cogeneration facilities where there is (1) a traditional manufacturing use, (2) the facility fits into safe harbor provisions, and (3) employs a proven or innovative cogeneration technology. NCEMPA believes the self-certification procedures should remain available for small QFs (e.g., 5 MWs or smaller) because the substantial burden associated with complying with new certification procedures may greatly discourage development of small QFs. The York County Solid Waste and Refuse Authority (York County) asserts self-certification should remain available to new cogeneration facilities except for those facilities owned largely or wholly by traditional utilities.

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

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

comfort level with the characteristics of their facilities.

3. Commission Determination

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

79. Nevertheless, we note that the Commission's currently effective regulations do not make explicit the Commission's authority to revoke the QF status of self-certified QFs absent the filing of a petition for declaratory order that the self-certified QF does not meet the applicable requirements for QF status.¹⁹ Given that EPA Act 2005 calls for greater Commission scrutiny of QF status, we will modify § 292.207(d)(1)(iii) of the Commission's regulations to provide that the Commission may on its own motion revoke the QF status of self-certified and self-recertified QFs.

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

81. Pursuant to § 292.207(a) of the Commission's regulations, "[a] small power production facility or cogeneration facility that meets the applicable criteria established in § 292.203 is a qualifying facility." There

is no express requirement in § 292.203 that a facility make a filing to satisfy the requirements for QF status. While the current Commission's regulations do state that an owner or operator of a self-certifying facility "must" file a "notice of self-certification which contains a completed Form 556,"²¹ the Commission has interpreted this requirement as being for record keeping purposes, and not necessary for QF status.

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

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

¹⁸ 18 CFR 292.207 (2005).

¹⁹ 18 CFR 292.207(d)(1)(iii) (2005).

²⁰ 18 CFR 292.207(a)(1)(iv) (2005).

²¹ 18 CFR 292.207(a)(1)(ii) (2005).

facility, in particular, will obtain and retain QF status.

E. Exemptions

1. Background

84. In the NOPR, the Commission noted that, in implementing section 210(e)(1) of PURPA, which provides that the Commission shall prescribe rules under which QFs are exempt in whole or in part, from the FPA, from PUHCA, from state laws respecting rates or respecting the financial or organization regulation of electric utilities, or from any combination of the foregoing, the Commission granted very broad exemptions from the FPA, PUHCA and state laws in order to remove the disincentive of utility-type regulation from QFs. The Commission stated that in the context of this rulemaking proceeding it found it appropriate to reexamine the broad exemptions from the FPA granted to QFs, partly because those broad exemptions may no longer be needed, and partly because the Commission through experience realized that the broad exemptions it granted QFs removed a large number of generation sales from any regulatory oversight. The Commission therefore proposed to eliminate the exemptions from sections 205 and 206 of the FPA that the Commission previously granted, except for the exemptions from sections 205 and 206 that are for sales that are governed by state regulatory authorities. In addition, the Commission proposed that QFs would not be exempt from new sections 220, 221 and 222 of the FPA that were added to the FPA by sections 1281 (Electric Market Transparency), 1282 (False Statements) and 1283 (Market Manipulation) of EPAct 2005.²²

2. Comments

85. As a general matter, the QFs were opposed to lifting of the total exemption from sections 205 and 206 of the FPA in the current regulations. First, those opposed argue that in deciding to build the generating facility, the owners relied on the existence of the exemption. For example, the Electric Power Supply Association argues that FPA rate regulation of existing contracts will upset long-standing expectations and create unnecessary disruptive uncertainty regarding the financial integrity of numerous QFs. ARIPPA argues that the Commission's proposal amounts to a "bait-and-switch" on investors who were encouraged to build and operate renewable small power production facilities and cogeneration

facilities. Occidental Chemical Corporation (Occidental) adds that the Commission's proposal creates incentives for utilities to challenge all existing QF contracts, which will result in litigation. They also argue that subjecting all non-PURPA sales to regulation under the FPA is unnecessary and would discourage the development of cogeneration.

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

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

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

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

90. Utilities, on the other hand, generally support limiting the exemptions from the FPA. AEP, for example, argues that no QF should be exempt from the FPA, noting that QFs have the ability to participate in the economic dispatch process within an RTO. The California Electricity Oversight Board comments that the Commission should not exempt any QF

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

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

3. Commission Determination

92. We will eliminate certain exemptions that were previously granted to QFs as proposed in the NOPR. However, we will clarify that QFs will retain the exemption from sections 205 and 206 of the FPA when a sale is made pursuant to a state

²² Pub. L. 109-58, §§ 1281-83, 119 Stat. 594, 978-80 (2005).

regulatory authority's implementation of PURPA. The Final Rule will also essentially retain the pre-existing exemption from PUHCA so that a QF will not be considered "an electric utility company" under the new Public Utility Holding Company Act of 2005.²³

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

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

95. When the Commission first granted the exemptions from sections 205 and 206 of the FPA in Order No. 69, there was no market for electric energy produced by non-utility generators. Indeed this was a primary reason that PURPA was enacted. The Commission wrote its regulations, including the provisions for exemptions from sections 205 and 206, with the expectation that all sales of electric energy from QFs would take place as a result of the section 210 of PURPA purchase obligation, and that they would take place pursuant to state regulatory authority implementation of the

Commission's avoided-cost rules under PURPA. Thus, there was no expectation that QFs would make sales that, by virtue of the Commission's granting a broad exemption from sections 205 and 206 of the FPA, would be subject to neither this Commission's nor a state regulatory authority's oversight. However, largely as a result of PURPA, markets for electric energy produced by non-traditional power producers developed. And QFs participated in those markets and began to make sales that were not subject to either Commission or state regulatory authority oversight.

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

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

98. As we also stated in the NOPR, we are aware that partial removal of exemptions might create a hardship for smaller QFs, particularly those owned by individuals or small businesses. The Commission stated that we would consider that at least some of the exemptions previously granted in § 292.601 should remain in effect for

smaller QFs, such as those under five MW. Numerous commenters suggested that the Commission should consider larger facilities, such as 20 MW or 30 MW facilities, to be small facilities for purposes of retaining the exemptions from section 205 and 206 of the FPA. We agree, and modify our proposal so that the Final Rule provides that facilities 20 MW or smaller shall remain exempt from sections 205 and 206 of the FPA. However, when an existing contract for sales from a facility expires, sales from the facility, whether pursuant to a renewal of the existing contract or pursuant to a new contract, will be subject to sections 205 and 206, unless otherwise exempt.²⁴

99. In the NOPR we also stated that a QF which sells electric energy pursuant to a state regulatory authority avoided-cost ratemaking regime would remain exempt from sections 205 and 206 of the FPA. In response to comments, we clarify the regulatory language to make clear that a QF will retain exemption from sections 205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA (as opposed to the proposed regulations "pursuant to a state regulatory authority avoided cost regime"). We believe that this is appropriate because "avoided cost regime" is not defined and could be interpreted to include state programs that are not grounded in PURPA. Moreover, many sales made pursuant to bilateral contracts between QFs and electric utilities (including contracts at market-based rates) are made pursuant to a state regulatory authority's implementation of PURPA. The change in language, providing exemptions for QF sales made pursuant to a state regulatory authority's implementation of PURPA, will ensure that such sales from QFs, even where they happen to be pursuant to a bilateral contract and at market-based rates, will continue to be exempt from sections 205 and 206 of the FPA.

100. EEI states that the elimination of the ownership requirements should not permit a qualifying facility to sell electric energy other than electric energy produced by itself or another qualifying facility and still retain QF status. EEI comments that paragraph 25 of the NOPR should be deleted and the Commission should maintain the "net output rule." According to EEI, the net output rule requires a utility to purchase only a QF's net output production, *i.e.*,

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

²³ See Pub. L. 109-58, §§ 1261-77, 119 Stat. 594 972-78 (2005).

the QF's total capacity minus the power the QF requires to operate its generating facility (often called station use or auxiliary load). EEI argues that if a QF's sales to a utility are not limited to its net output, then the QF in essence would be getting credit for more capacity than it is displacing on the utility's system. EEI states that QFs, whether or not they are majority-owned by utilities, should not be able to take advantage of PURPA to buy power from a utility at one price and sell it back to the utility at a higher price. EEI's comments are supported by NYSEG, Rochester, Progress Energy, SoCal Edison, PSNM, TNP, PG&E and Entergy Services, Inc.

101. We disagree with EEI that the elimination of the ownership requirement should be interpreted to preclude a QF from selling electric energy other than electric energy produced by itself or another QF without losing QF status. The loss of QF status in the past by a facility that sold non-QF power, such as power in excess of the net capacity of a facility, rested on the statutory and regulatory ownership requirements for QF status. Removal of the ownership prohibition removes the bar to a QF selling non-QF electric energy while retaining QF status. However, as we explained in the NOPR, any non-QF electric energy sold by a QF must be sold pursuant to the FPA. Before making sales of non-QF power, the QF must obtain authority pursuant to section 205 of the FPA to make such sales, if a QF has not already obtained such section 205 authority. To the extent that EEI and others are concerned that a QF will attempt to substitute lower-cost non-QF electric energy for the electric energy that utilities are purchasing pursuant to the purchase obligation of section 210 of PURPA, the Commission does not believe that such purchases are required by PURPA. What electric utilities are required to purchase is the "electric energy from such facilities"²⁵ which the Commission interprets to mean electric energy produced by the QF and not non-QF electric energy which the QF has purchased or has produced itself through a process that does not satisfy the technical requirements for QF status. Thus, for example, if a cogeneration QF decides to produce electric energy through non-sequential supplemental firing or a small power production QF decides to produce electric energy by burning a non-small power fuel, the electric energy would not be subject to the PURPA purchase obligation and the sales of such electric energy should not be exempt from

sections 205 and 206 of the FPA. Similarly, purchase and re-sale of non-QF power produced by others would not be exempt from sections 205 and 206 of the FPA. Whether such purchases are otherwise required by an agreement between a utility and a QF is a separate matter of contract law, however.

102. In addition, we reject proposals to eliminate the QF exemption from the FPA section 203(a)(i) filing requirements. We are not persuaded such a change to our existing practice is called for. With respect to the NOPR proposal to eliminate the QF exemption from PUHCA, we have rethought this proposal in light of the Public Utility Holding Company Act of 2005. We interpret PURPA to permit us to exempt QFs from the Public Utility Holding Company Act of 2005 in § 292.602 of our regulations. Section 292.602 will thus provide that a QF shall not be considered an "electric utility company" as defined by the Public Utility Holding Company Act of 2005. However, consistent with our recent actions on FPA section 203, QFs will be considered an "electric utility company" for purposes of 203(a)(2) of the FPA.

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

F. General Requirements for Qualification and Ownership Criteria

1. Background

104. Section 1253(b) of EPAAct 2005 amended sections 3(17)(C) and 3(18)(B) of the FPA by eliminating the ownership limitations for QFs previously contained in those sections. Section 292.206 of the Commission's regulations was designed to implement the prior statutory requirement that a qualifying cogeneration or small power production facility must be owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities). In the NOPR, the Commission proposed to implement section 1253(b) of EPAAct 2005 by eliminating § 292.206 from its regulations, and thus eliminating the ownership limitations for all QFs—both existing and new.

105. Section 292.203 lists the general requirements for qualification status. Section 292.203(a)(3) requires that a small power production facility must "[m]eet[] the ownership criteria

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

2. Comments

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

3. Commission Determination

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

G. Form 556

1. Background

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

²⁵ 16 U.S.C. 824a-1(a)(2).

status, the Commission nevertheless believed that an applicant for QF status should inform the Commission of the identity of its owners, and their percentage interests. The Commission believed that this information would help the Commission determine in the future, as it gained experience subsequent to the enactment of EPAct 2005, whether the exemptions from the FPA and state laws should continue to be available to all QFs, especially those affiliated with traditional utilities, transmission providers and other power producers. It would also allow the Commission to better monitor for undue discrimination or preference both in the provision of transmission service and sales for resale in interstate commerce.

2. Comments

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

3. Commission Determination

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

H. Other Issues With Respect to Section 210(n)

1. Background

111. A number of commenters have asked the Commission to define what a "new cogeneration facility" is for purposes of EPAct 2005. Specifically, they want the Commission to clarify that an existing QF does not become subject to the requirements of newly

added section 210(n) of PURPA when it files for recertification.

2. Comments

112. ELCON and many other commenters maintain that change in ownership or other modifications should not convert an "existing facility" to "new facility" on recertification. They request that the regulations clarify that the new standards apply only to "new facilities," those being built and *first* certified after the EPAct 2005 effective date. They argue that the requirements of section 210(n) of PURPA should not apply to facilities that are requesting recertification.

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

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

3. Commission Determination

115. Initially, we note that the regulatory text adopted in § 292.207(d) defines what cogeneration facilities will be considered new cogeneration facilities. In addition, we clarify that there is a rebuttable presumption that an existing QF does not become a "new cogeneration facility" for purposes of the requirements of newly added section 210(n) of PURPA merely because it files for recertification. However, we caution that changes to an existing cogeneration facility could be so great (such as an increase in capacity from 50 MW to 350 MW) that what an applicant is claiming to be an existing facility should, in fact, be considered a "new" cogeneration facility at the same site.

IV. Information Collection Statement

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

117. The Commission is amending its regulations to implement section 1253(a) of the EPAct 2005; specifically, its regulations governing qualifying small power production and cogeneration facilities. The Commission's regulations, in 18 CFR Parts 131 and 292, specify the certification procedures that must be followed by small power production and cogeneration facilities seeking QF status; specify the criteria that must be met; specify the information which must be submitted to the Commission in order to obtain QF status; specify the benefits which are available to QFs; and specify the transaction obligations of electric utilities with respect to QFs. The information provided to the Commission under Parts 131 and 292 is identified as Form 556. In addition, the Commission is amending its regulations providing exemptions to qualifying facilities; among other things, certain entities will be subject to the provisions of section 205 of the FPA and part 35 of the Commission's regulations. The information provided to the Commission under part 35 is identified as FERC-516.

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

²⁶ 5 CFR 1320.13 (2005).

²⁷ 44 U.S.C. 3507(d) (2000).

QFs. Below we have revised the estimates provided in the NOPR to

account for the elimination of exemptions.

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

| Data collection | Number of respondents | Number of responses | Hours per response | Total annual hours |
|----------------------------------|-----------------------|---------------------|--------------------|--------------------|
| FERC Form 556 ..... | ..... | ..... | ..... | ..... |
| FERC Certification | 27 | 1 | 4 | 108 |
| Self-Certification | 270 | 1 | 38 | 10,260 |
| Subtotals | 297 | ..... | ..... | * 10,368 |
| FERC-516 ..... | ..... | ..... | ..... | ..... |
| 205 filings | 100 | 1 | 183 | 18,300 |
| Electric quarterly reports | ¹ 100 | 1 | 230 | 23,000 |
| ..... | ² 100 | 3 | 6 | 1,800 |
| Change of status | 100 | 1 | 3 | 300 |
| Subtotals | 100 | ..... | ..... | 43,400 |

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

¹ Initial.

² Later.

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

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

Title: FERC Form 556 "Cogeneration and Small Power Production".

Action: Proposed Collections.

OMB Control No.: 1902-0075.

Respondents: Business or other for profit.

Frequency of Responses: On occasion.

Necessity of the Information: This Final Rule adopts the Congressional mandate found in section 1253(a) of EPAct 2005 to implement the establishment of criteria for new qualifying cogeneration facilities; and the elimination of ownership limitations. By amending its regulations, the Commission is satisfying the statutory mandate and also satisfying its continuing obligation to review its policies encouraging cogeneration and small power production, energy conservation, efficient use of facilities and resources by electric utilities and equitable rates for energy customers. The information collected under 18 CFR Parts 131 and 292 is used by the Commission to determine whether an application for certification (Commission certification or self-certification) meets the criteria for a qualifying small power production facility or a qualifying cogeneration facility under its regulations and eligible to receive the benefits available to it under PURPA. The information

collected under 18 CFR part 35 is used by the Commission to carry out its statutory responsibility to assure that electric rates are just and reasonable. Sufficient detail must be obtained for the Commission to make informed decisions concerning appropriate cost and rate levels and to aid customers and other parties who may wish to challenge costs and rates. A public utility must obtain Commission authorization for all rates and charges for wholesale sales and transmission of electric energy in interstate commerce. The Commission is authorized to investigate the rates charged by public utilities for such sales and transmission. If, after investigation, the Commission determines that the rates are unjust and unreasonable or unduly discriminatory or preferential, the Commission is authorized to determine and prescribe the just and reasonable rates.

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

These requirements conform to the Commission's plan for efficient information collection, communication and management within the energy industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Michael Miller, Office of the

Executive Director, Phone: (202) 502-8415, fax: (202) 273-0873, e-mail: michael.miller@ferc.gov.

V. Environmental Analysis

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

VI. Regulatory Flexibility Act Analysis

119. The Regulatory Flexibility Act of 1980 (RFA)³⁰ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. In the NOPR, we stated that many, if not most, QFs to which this rule would apply do not fall within the definition of small entities, citing the RFA's definition that a small entity is "a business that is independently owned and not dominant in its field of operation."³¹ The Non-Utility QF Group, however, argues that the Commission's proposals will impact small entities. It argues that it is likely

²⁸ *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987) FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

²⁹ 18 CFR 380.4(a)(2)(ii) (2005).

³⁰ 5 U.S.C. 601-12 (2000).

³¹ 15 U.S.C. 632 (2000).

that a majority of QFs are owned in whole, or at least up to 50 percent, by small entities. It argues that under Small Business Administration (SBA) standards, an electric production firm is considered "small" if its output does not exceed 4 million MWh per year. It also argues that the forms and applications that will be required due to the modification of exemptions, including section 203 applications, section 205 tariffs, electronic quarterly reports and triennial market power reports, will cause a significant impact on a substantial number of small entities.

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

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

sales are made pursuant to a state regulatory authority's implementation of PURPA. This will mean that many QF power sales will continue to be exempt from sections 205 and 206 of the Federal Power Act.

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

VII. Document Availability

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

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

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

VIII. Effective Date

126. These regulations are effective March 17, 2006.

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

List of Subjects in 18 CFR Part 131 and 292

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

By the Commission.

Magalie R. Salas,
Secretary.

■ In consideration of the foregoing, the Commission amends parts 131 and 292, chapter I, title 18, Code of Federal Regulations, as follows:

PART 131—FORMS

■ 1. The authority citation for part 131 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.

■ 2. In § 131.80, part A1a. through 1c. is revised part C.15, and a new undesignated center heading For New Cogeneration Facilities immediately before part C.15 are added to read as follows:

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

* * * * *

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. 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.

* * * * *

Part C—Description of the Cogeneration Facility

* * * * *

For New Cogeneration Facilities

15. For any cogeneration facility that was either not certified as a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification, self-recertification or an application for Commission certification under § 292.207 of this chapter prior to February 2, 2006, also show:

- (i) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner; and
- (ii) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

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

■ 3. The authority citation for part 292 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.

■ 4. In § 292.203, paragraphs (a) and (b) are revised to read as follows:

§ 292.203 General requirements for qualification.

(a) *Small power production facilities.* Except as provided in paragraph (c) of this section, a small power production facility is a qualifying facility if it:

- (1) Meets the maximum size criteria specified in § 292.204(a);
- (2) Meets the fuel use criteria specified in § 292.204(b); and

(3) Has filed with the Commission a notice of self-certification, pursuant to § 292.207(a); or has filed with the Commission an application for Commission certification, pursuant to § 292.207(b)(1), that has been granted.

(b) *Cogeneration facilities.* A cogeneration facility, including any diesel and dual-fuel cogeneration facility, is a qualifying facility if it:

- (1) Meets any applicable operating and efficiency standards specified in § 292.205(a) and (b); and

(2) Has filed with the Commission a notice of self-certification, pursuant to § 292.207(a); or has filed with the Commission an application for Commission certification, pursuant to § 292.207(b)(1), that has been granted.

* * * * *

■ 5. In § 292.205, paragraph (d) is added to read as follows:

§ 292.205 Criteria for qualifying cogeneration facilities.

* * * * *

(d) *Criteria for new cogeneration facilities.* Notwithstanding paragraphs (a) and (b) of this section, any cogeneration facility that was either not certified as a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification, self-recertification or an application for Commission certification or Commission recertification as a qualifying cogeneration facility under § 292.207 of this chapter prior to February 2, 2006, and which is seeking to sell electric energy pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, must also show:

- (1) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner; and
- (2) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.

(3) *Fundamental use test.* For the purposes of satisfying paragraph (d)(2) of this section, the electrical, thermal, chemical and mechanical output of the cogeneration facility will be considered used fundamentally for industrial, commercial, or institutional purposes and not intended fundamentally for sale to an electric utility if at least 50 percent of the aggregate of such output, on an annual basis, is used for industrial, commercial, residential or institutional purposes. In addition, applicants for facilities that do not meet this safe harbor standard may present evidence to the Commission that the facilities should nevertheless be certified given state laws applicable to sales of electric energy or unique technological, efficiency, economic, and variable thermal energy requirements.

(4) For purposes of paragraphs (d)(1) and (d)(2) of this section, a new

cogeneration facility of 5 MW or smaller will be presumed to satisfy the requirements of those paragraphs.

(5) For purposes of paragraph (d)(1) of this section, where a thermal host existed prior to the development of a new cogeneration facility whose thermal output will supplant the thermal source previously in use by the thermal host, the thermal output of such new cogeneration facility will be presumed to satisfy the requirements of paragraph (d)(1).

■ 6. Section 292.206 is removed.

■ 7. In § 292.207, paragraphs (a)(1)(iv), and (d)(1)(iii) are revised to read as follows:

§ 292.207 Procedures for obtaining qualifying status.

* * * * *

- (a) * * *
- (1) * * *

(iv) Notices of self-certification or self-recertification, other than for new cogeneration facilities, will not be published in the **Federal Register**. Notices of self-certification or self-recertification of new cogeneration facilities will be published in the **Federal Register**; such self-certifications and self-recertifications should include a form of notice suitable for publication in the **Federal Register**.

* * * * *

- (d) * * *
- (1) * * *

(iii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a self-certified or self-recertified qualifying facility if it finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities.

* * * * *

■ 8. In § 292.601, paragraph (c) is revised to read as follows:

§ 292.601 Exemption of qualifying facilities from the Federal Power Act.

* * * * *

(c) *General rule.* Any qualifying facility described in paragraph (a) of this section shall be exempt from all sections of the Federal Power Act, except:

- (1) Sections 205 and 206; however, sales of energy or capacity made by qualifying facilities 20 MW or smaller, or made pursuant to a contract executed on or before March 17, 2006 or made pursuant to a state regulatory authority's implementation of section 210 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 824a–1, shall be exempt from scrutiny under sections 205 and 206;

(2) Section 1–18, and 21–30;

(3) Sections 202(c), 210, 211, 212, 213, 214, 220, 221 and 222;

(4) Sections 305(c); and

(5) Any necessary enforcement provision of part III of the Federal Power Act (including but not limited to sections 306, 307, 308, 309, 314, 315, 316 and 316A) with regard to the sections listed in paragraphs (c)(1), (2), (3) and (4) of this section.

■ 9. In § 292.602, paragraphs (b) and (c) are revised to read as follows:

§ 292.602 Exemption of qualifying facilities from certain State law and regulation.

* * * * *

(b) *Exemption from the Public Utility Holding Company Act of 2005.* A qualifying facility described in paragraph (a) of this section or a utility geothermal small power production facility shall not be considered to be an "electric utility company" as defined in section 1262(5) of the Public Utility Holding Company Act of 2005, 42 U.S.C. 16451(5).

(c) *Exemption from certain State laws and regulations.*

(1) Any qualifying facility shall be exempted (except as provided in paragraph (b)(2)) of this section from State laws or regulations respecting:

(i) The rates of electric utilities; and

(ii) The financial and organizational regulation of electric utilities.

(2) A qualifying facility may not be exempted from State laws and regulations implementing subpart C.

(3) Upon request of a state regulatory authority or nonregulated electric utility, the Commission may consider a limitation on the exemptions specified in paragraph (b)(1) of this section.

(4) Upon request of any person, the Commission may determine whether a qualifying facility is exempt from a particular State law or regulation.

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

Appendix: List of Petitioners Requesting Clarification or Submitting Comments

American Chemistry Council
 American Electric Power Service Corporation jointly with AEP Texas North Company, AEP Texas Central Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, and Wheeling Power Company (collectively, AEP)
 American Forest & Paper Association (American Forest & Paper)
 American Public Power Association (APPA)
 American Wind Energy Association (AWEA)
 ARIPPA

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

Public Service Electric and Gas Company jointly with PSEG Power LLC, PSEG Energy Resources & Trade LLC, and PSEG Global L.L.C. (collectively, PSEG)
 Public Utility Commission of Ohio (Ohio Commission)
 Ridgewood Renewable Power, LLC (Ridgewood)
 Solar Turbines Incorporated (Solar Turbines)
 Southern California Edison Company (SoCal Edison)
 Transmission Access Policy Study Group (TAPS)
 U.S. Combined Heat and Power Association (USCHPA)
 U.S. Environmental Protection Agency (EPA)
 Xcel Energy Services Inc. (Xcel)
 York County Solid Waste and Refuse Authority (York County)

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR 870

[Docket No. 2005N-0506]

Medical Devices; Cardiovascular Devices; Classification of Implantable Intra-Aneurysm Pressure Measurement System

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is classifying the implantable intra-aneurysm pressure measurement system into class II (special controls). The special control that will apply to the device is the guidance document entitled "Class II Special Controls Guidance Document: Implantable Intra-Aneurysm Pressure Measurement System." The agency is classifying the device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for the device.

DATES: This rule is effective March 17, 2006.

FOR FURTHER INFORMATION CONTACT: Nelson Anderson, Center for Devices and Radiological Health (HFZ-450), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301-443-8282, ext. 171.

SUPPLEMENTARY INFORMATION: