Federal Energy Regulatory Commission
February 2, 2006 Commission Meeting
Statement of
Chairman Joseph T. Kelliher

E-2 (PURPA Rule)

Today, the Commission issues final rules to implement provisions of the Energy Policy Act of 2005 that amend the qualifying facility thermal efficiency and ownership provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA). These rules should limit the potential for abuse under PURPA, curtail sham transactions, and prevent new PURPA "machines".

The Energy Policy Act provisions relating to qualifying facility thermal efficiency reflect a concern about past abuse in PURPA with respect to sham uses and PURPA machines. Congress wanted to guard against certification of qualifying facilities whose thermal output was for contrived purposes, which were designed primarily to sell power and not to produce thermal output for a thermal host, and whose primary purpose was electrical power output.

For this reason, Congress directed the Commission to issue rules to ensure that new qualifying cogeneration facilities are using their thermal output in a productive and beneficial manner, and that their electrical, thermal, chemical and mechanical output is fundamentally used for industrial, commercial, or institutional purposes. These changes are intended prevent certification of qualifying facilities that rely on sham uses of thermal, electrical, and chemical output in order to exploit the PURPA mandatory purchase obligation.

In response, when it analyzes the use of a new cogeneration facility's thermal output, the Commission will no longer apply a "presumptively useful" standard that was essentially an irrebuttable presumption. The Commission will instead examine the use of a cogeneration facility's thermal output to assure that it is used in a productive and beneficial manner.

With respect to implementation of the fundamental use provisions, the final rule adopts a case-by-case approach, which provides the Commission flexibility to appropriately address various facilities and circumstances. However, we also adopt a safe harbor to provide greater regulatory certainty, improve administrative ease, and make the certification process more objective. Under the safe harbor, at least 50 percent of the aggregated energy output of the facility is to be used for industrial, commercial, institutional or residential purposes. Facilities that fall within the safe harbor will automatically be deemed to comply with the fundamental use standard. The Commission may certify a qualifying facility that does not fall within the safe harbor, but the burden will be on the applicant to demonstrate that it meets the fundamental use standard.

The final rule retains the option of self-certification of qualifying facilities, but provides that notices of self-certification and recertification will be published in the *Federal Register*, which is a departure from current practice. In addition, the final rule modifies Commission regulations to provide that the Commission may on its own motion revoke the qualifying facility status of self-certified and recertified qualifying facilities if we find they do not meet the applicable requirements. That should limit the potential for abuse.

We also act to close a regulatory gap relating to market-based wholesale power sales made by qualifying facilities outside of PURPA contracts, or non-PURPA sales. When the Commission originally implemented PURPA, it granted very broad exemptions from the Federal Power Act and other federal and state laws. Since then, we have become concerned about the potential for abuse in unregulated wholesale power sales by qualifying facilities outside the structure of PURPA. We have reexamined the rationale for the broad exemption from the Federal Power Act and determined that it removed a large number of wholesale power sales from *any* regulatory oversight. We proposed to eliminate the exemptions from sections 205 and 206 of the Federal Power Act that the Commission previously granted, except for the sales governed by state commissions. We do not affect existing wholesale power contracts, however. We also clarify that the new Federal Power Act provisions relating to market manipulation, false statements, and market transparency apply to qualifying facilities as well as other wholesale power sellers.

The Energy Policy Act also eliminated the ownership limitations for qualifying cogeneration and small power production facilities, and the final rule conforms our regulations to this statutory change.

The Commission has a continuing duty under PURPA to have in place such rules as are necessary to encourage cogeneration and small power production. We believe this proposed rule is consistent with that duty, as well as our new responsibility under the Energy Policy Act.

I support the final rule.