

119 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 292

(Docket No. RM07-11-000)

Applicability of Federal Power Act Section 215 to Qualifying Small Power Production
and Cogeneration Facilities

(Issued May 18, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is revising its regulations governing qualifying small power production and cogeneration facilities (QFs), to eliminate the exemption of QFs from the requirements of section 215 of the Federal Power Act. From a reliability perspective, there is not a meaningful distinction between QF and non-QF generators that warrants a generic exemption of QFs from reliability standards.

EFFECTIVE DATE: The rule will become effective [insert date 30 days after publication in the **FEDERAL REGISTER**].

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Applicability of Federal Power Act Section 215
to Qualifying Small Power Production and
Cogeneration Facilities

Docket No. RM07-11-000

ORDER NO. 696

FINAL RULE

(Issued May 18, 2007)

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) revises its regulations governing qualifying small power production and cogeneration facilities, to eliminate the exemption of QFs from the requirements of section 215 of the Federal Power Act.¹ From a reliability perspective, there is not a meaningful distinction between QF and non-QF generators that warrants a generic exemption of QFs from reliability standards.

2. A number of commenters in this proceeding also submitted comments in the rulemaking in Docket No. RM06-16-000 concerning mandatory reliability standards for the bulk-power system; they submitted comments in both proceedings concerning the

¹ 16 U.S.C. 824o.

appropriate compliance registry criteria for QFs to be subject to reliability standards.² In this proceeding we find that QFs should not, as a general matter, be exempt from reliability standards; we are changing our regulations accordingly. Issues concerning the treatment of individual QFs are best addressed in the North American Electric Reliability Corporation (NERC) registry process where the unique circumstances of individual QFs can be individually considered.

II. Background

3. On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAcT 2005), was enacted into law.³

EPAcT 2005 added a new section 215 to the Federal Power Act (FPA),⁴ which requires a Commission-certified Electric Reliability Organization (ERO) to develop reliability standards, which are subject to Commission review and approval. Once approved, the reliability standards become mandatory and may be enforced by the ERO, subject to Commission oversight.

4. On February 3, 2006, the Commission issued Order No. 672, which implements newly-added section 215 and provides specific processes for the certification of an entity as the ERO, the development and approval of mandatory reliability standards, and the

² The Commission has since issued Order No. 693, discussed below, adopting mandatory reliability standards.

³ Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

⁴ 16 U.S.C. 824o.

compliance with and enforcement of approved reliability standards.⁵ On April 4, 2006, NERC made two filings: (1) an application for certification of NERC as the ERO; and (2) a petition for Commission approval of mandatory reliability standards, with eight regional differences and a glossary of terms. On July 20, 2006, the Commission issued an order certifying NERC as the ERO.⁶ On October 20, 2006, the Commission issued a Notice of Proposed Rulemaking proposing to approve 83 of 107 proposed reliability standards.⁷

5. In response to the Reliability NOPR, Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC) filed comments pointing out that QFs are exempt from section 215 by virtue of § 292.601(c) of the Commission's

⁵ Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), order on reh'g, Order No. 672-A, 71 FR 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

⁶ North American Electric Reliability Corporation, 116 FERC ¶ 61,062 (2006).

⁷ Mandatory Reliability Standards for the Bulk-Power Market, 72 FR 64770 (Oct. 20, 2006), FERC Stats. & Regs. ¶ 32,608 (2006) (Reliability NOPR). The Commission subsequently approved 83 of 107 proposed reliability standards, six of the eight proposed regional differences, and the glossary of terms. The Commission found that those reliability standards met the requirements of section 215 of the FPA (and Part 39 of the Commission's regulations, 18 CFR Part 39), but that many of those reliability standards require significant improvement to address, among other things, the recommendations of the Blackout Report and therefore required NERC to submit improvements to 56 of those 83 Reliability Standards. Mandatory Reliability Standards for the Bulk Power System, Order No. 693, 72 Fed. Reg. 16416 (April 4, 2007), FERC Stats. & Regs. ¶ 31,242 (2006). (Reliability Final Rule).

regulations.⁸ CAC/EPUC suggested that the Commission intentionally exempted QFs from section 215. CAC/EPUC explained that, in Order No. 671, issued on February 2, 2006,⁹ the Commission stated that it saw no reason to exempt QFs from the newly added FPA sections 220, 221 and 222,¹⁰ and explicitly excluded those sections of the FPA from the QF exemptions contained in § 292.601 of its regulations, while making no similar mention of section 215.

6. In response to those comments, the Commission issued a notice of proposed rulemaking (NOPR) seeking comments on whether QFs should be exempt from section 215 of the FPA.¹¹ In the NOPR, the Commission pointed out that section 215(b) grants the Commission jurisdiction over “all users, owners, and operators of the bulk-power system” for “purposes of approving reliability standards. . . . and enforcing compliance with [section 215]”, and further provides that “[a]ll users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this

⁸ 18 CFR 292.601(c).

⁹ Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 2, 2006), FERC Stats. & Regs. ¶ 31,203 (2006), order on rehearing, Order No. 671-A, 71 FR 30583 (May 22, 2006), FERC Stats. & Regs. ¶ 31.219 (2006).

¹⁰ 16 U.S.C. 824t-v.

¹¹ Applicability of Federal Power Act Section 215 to Qualifying Small Power Production and Cogeneration Facilities, 72 FR 14254 (March 16, 2007), FERC Stats. & Regs. ¶ 32,613 (2007).

section.”¹² The Commission reasoned that, given the statutory directive that all users, owners and operators of the bulk-power system must comply with mandatory reliability standards under section 215, it may not be appropriate to allow QFs a continued exemption from compliance with the newly-adopted mandatory and enforceable reliability standards that apply to generator owners and operators. The Commission also stated that, from a reliability perspective, there would seem to be no meaningful distinction between QF and non-QF generators that would warrant exemption of QFs from mandatory reliability standards. The Commission continued that QF generators would seem to affect the reliability of the bulk-power system as much as non-QF generators, and so QF generators should be subject to the newly-adopted mandatory reliability standards. The Commission noted that while many QFs are small facilities, others are quite large. The Commission suggested that it saw no justification for large QFs to be exempt from mandatory reliability standards. The Commission therefore proposed to amend § 292.601(c)(3) to add section 215 to the list of FPA sections from which QFs are not exempt. The Commission also pointed out that the NERC registry criteria for inclusion of generators in the compliance registry of entities that would be subject to mandatory reliability standards are written to exclude most smaller entities, and that there are procedures to challenge a generator’s inclusion in the compliance registry

¹² 16 U.S.C. 824o(b). Section 215(b) also states that entities described in section 201(f), 16 U.S.C. 824(f), entities that are otherwise exempt from Part II of the FPA unless a provision is otherwise specifically applicable to those entities, are subject to section 215. 16 U.S.C. 824o(b).

before NERC, and if not satisfied with NERC's decision, procedures to lodge an appeal with the Commission.

III. Comments

7. On March 16, 2007, the NOPR was published in the Federal Register with comments due on or before April 16, 2007.

8. Comments supporting the proposed rule were filed by: NERC, the National Association of Regulatory Utility Commissioners (NARUC), the Edison Electric Institute (EEI), Entergy Services, Inc. (Entergy Services), Xcel Energy Services Inc, on behalf of the Xcel Energy Operating Companies (collectively, Xcel Energy),¹³ American Transmission Company LLC, FirstEnergy Companies (FirstEnergy), Southern California Edison Company (SoCal Edison), Allegheny Power and Allegheny Energy Supply Company (collectively, Allegheny Energy Companies), and Imperial Irrigation District (IID).

9. Those who support the proposed rule generally argue that including section 215 of the FPA among the FPA provisions that QFs are not exempted from is appropriate both from a statutory perspective and in terms of the impact on reliability of the bulk-power system. NERC states that, with the exemption removed, in determining whether QFs are subject to mandatory reliability standards NERC will treat QFs as it does all other

¹³ The four Xcel Energy Operating Companies are: Northern States Power Company, a Minnesota corporation, Northern States Power Company, a Wisconsin corporation, Southwestern Public Service Company, and Public Service Company of Colorado.

owners, operators and users of the bulk-power system, i.e., the decision as to whether to place an entity on the NERC compliance registry will be based on the specific circumstances of each QF. NARUC points out that there is no meaningful distinction from a reliability perspective between QF and non-QF generators that could warrant continuing to exempt QFs. EEI states that section 215 is clear on its face that all users, owners and operators of the electric production and delivery network should be subject to section 215. EEI believes that many QFs recognize their section 215 responsibilities; EEI states that it understands that many QFs have already registered with Regional Entities, which EEI states suggests that QFs understand the need to register notwithstanding the current exemption provided under section 292.601(c) of the Commission's regulations.

10. Entergy states that it fully supports the Commission's determination that QFs should not be exempt from mandatory reliability standards but states that it is concerned that NERC's registration criteria, which apply to an individual generating units that are larger than 20 MVA and that are directly connected to the bulk-power system might exempt generation facilities that are arguably not directly connected to the bulk-power system but are nevertheless material to the reliability of the bulk-power system.

Similarly, Xcel Energy agrees with the Commission's reasoning that from a reliability perspective there is no meaningful distinction between QFs and other generating facilities that warrants continuation of a QF exemption from section 215. Xcel Energy is concerned, however, that NERC's registration criteria, particularly the reference to being "directly connected to the bulk-power system" can be read to not apply to generating facilities that are interconnected at distribution voltage level. American Transmission

Company supports the proposed rule and states that “the appropriate place to consider whether a generating facility should be exempted from compliance with the mandatory reliability standards is at NERC.” IID supports the proposed rule but argues that the Commission should recognize that the ERO or the Regional Entity should be permitted to include an otherwise exempt facility on a facility-by-facility basis if it determines that the facility is needed for bulk-power system reliability. IID asks the Commission to determine that all QFs in its particular footprint are collectively material to reliability in its particular control area.

11. Comments opposing the proposed rule were filed by: CAC/EPUC, the Florida Renewable Energy Producing QFs (Florida Renewable QFs), Deere & Company (Deere), Indeck Energy Services, Inc. (Indeck), Sunray Energy Inc. (Sunray), ARIPPA,¹⁴ Hillsborough County, Florida,¹⁵ and Pasco County, Florida.¹⁶

12. CAC/EPUC suggests that the Commission has an ongoing obligation to encourage cogeneration and that this must be balanced with its obligation to protect the grid.

CAC/EPUC urges the Commission not to act on the proposed rule until it has acted on rehearing of Order No. 693 in order to make sure that the registry standards applicable to

¹⁴ ARIPPA is a regional non-profit trade association consisting of thirteen QFs and associated manufacturers, engineers, chemists and tradesmen who repair and service the units. The units are in historical coal mining regions, combust waste coal and generate under fixed price power agreements with the local utility.

¹⁵ Hillsborough County owns a 30 MW solid waste QF and has plans to add an additional 17 MW of electrical generation capacity.

¹⁶ Pasco County owns a 30 MW solid waste QF.

QFs are not overly broad. Florida Renewable QFs ask the Commission to modify the proposed rule in four respects: first, to allow QFs to qualify for a size exemption based on their output capability rather than on their nameplate capacity; second, the Commission should clarify that QFs may appeal registry designations directly to the Regional Entity in lieu of the ERO; third, the Commission should provide that QFs that by contract sell only energy and not capacity be allowed to seek a case-by-case waiver of the reliability standards even if they do not otherwise qualify for a size exemption; and fourth, the Commission should require the ERO to consider whether full compliance with mandatory reliability standards would raise QFs' costs above the avoided costs set in the QFs' contracts with purchasing utilities. Deere suggests that the Commission provide an exemption for small power production QFs 80 MW and smaller.

13. Indeck argues that the proposed rule is fundamentally flawed. Indeck states that the proposed rule fails to recognize that QFs are often not connected to the grid, operate to support important commercial or industrial operations, are subject to fuel use limitations and operating and efficiency requirements, and in most cases have little or no impact on the reliability of the bulk-power system. To remedy these supposed flaws, Indeck suggests that the Commission should continue to exempt all QFs smaller than 100 MW from section 215 of the FPA, should ignore "behind the meter" capacity of QFs, and should exempt all QFs that utilize a renewable energy source from section 215 of the FPA. Sunray states that it owns and operates two Solar Electric Generating Systems (SEGS) located in California. One of Sunray's SEGS is 14 MW and the other 30 MW. Sunray argues that requiring it to comply with mandatory reliability standards will be

economically burdensome and will provide little or no increase in the reliability of the bulk-power system. Both Indeck and Sunray also question the Commission's regulatory flexibility analysis.

14. ARIPPA argues that all of its members have been required by contract with purchasing utilities to meet reliability requirements to obtain access to the grid. ARIPPA argues that additional requirements are not necessary for its QFs. Hillsborough County and Pasco County each state that the investor-owned utilities that their respective QFs are interconnected with have control over system reliability and that the QFs have no responsibility for bulk-power system reliability. Hillsborough County and Pasco County also suggest that the Commission provide that all qualifying small power production facilities continue to be exempt from section 215 of the FPA.

15. The Commission received comments from the following entities that do not oppose the proposed rule, but ask the Commission to clarify how NERC's registration criteria will apply to QFs: the Electricity Consumers Resource Council (ELCON) and the American Iron and Steel Institute (AISI), the Council of Industrial Boiler Owners (CIBO), Kimberly Clark Corporation, PPG Industries, Inc. and Valero Energy Corporation (collectively, Joint Cogeneration Owners), American Forest & Paper Association (American Forest & Paper), Lee County, Florida, Dow Chemical Company

(Dow), California Cogeneration Council (CCC), and Midland Cogeneration Venture Limited Partnership (Midland Cogen).¹⁷

16. ELCON and AISI state that they do not oppose the registration of QFs if particular facilities are found to materially affect the reliability of the bulk-power system. ELCON and AISI state that in fact they have cooperated with NERC staff to draft registration criteria that would address the unique operational characteristics of cogenerators.

ELCON and AISI state that, unfortunately, the NOPR proposes an automatic per se rule that would force the registration of all QFs above 20 MVA/MW regardless of whether a QF's operations have any effect on reliability. ELCON and AISI also ask the Commission to recognize that NERC has applied a "netting" concept that recognizes that often QF generation never reaches the grid, or does so on a limited basis. Finally ELCON and AISI recommend that the Commission encourage the establishment of an ad hoc NERC task force that would review the criteria for determining if and when a QF has a material impact on the reliability of the bulk power system.

17. CIBO states that it supports the comments filed by ELCON. Additionally, CIBO argues that the Commission does not encourage QFs when it fails to recognize any meaningful distinction between QF and non-QF generators on matters of reliability. CIBO states that NERC's registration criteria for generators do, and should continue to, recognize that QFs are different from other generators. CIBO asks the Commission to

¹⁷ Edison Mission Energy and Pacific Gas and Electric Company each also filed comments stating that they will be affected by the proposed rule and expressing an interest in the rulemaking; neither, however, takes a position on the substance of the proposed rule.

encourage NERC in this recognition. Joint Cogeneration Owners also state that they do not oppose the registration of QFs whose operators do in fact materially affect the reliability of the bulk power system. Joint Cogeneration Owners, however, oppose what they characterize as a per se rule that would require the registration of all QFs above 20 MVA regardless of whether the QFs' operations have any effect on reliability and would fail to consider a QF's net impact on the grid.

18. American Forest & Paper states that it does not object to making those portions of reliability standards under section 215 which are appropriately applicable to QFs mandatory, but requests that the Commission clarify that the application of any reliability standards to QFs must nonetheless recognize and appropriately accommodate the distinctions between QFs and merchant or utility-owned generation. American Forest & Paper notes that almost all QFs greater than 20 MW interconnected to and operating synchronously with the grid are already subject to specific reliability and operating requirements. American Forest & Paper states that those requirements range from limitations on power factor and the maintenance of facilities, to emergency operating procedures. American Forest & Paper states that it does not object to the conversion of such requirements into mandatory standards. American Forest & Paper, however, states that it is concerned that the rush to codify reliability standards will be used as a pretext for renewed discrimination and utility interference with integrated manufacturing operations. American Forest & Paper concludes by asking the Commission to clarify that mandatory reliability standards applicable to QFs must reflect the operational and other distinctions between QFs and merchant or utility-owned generation.

19. Lee County argues that the Commission should require NERC to design a cost-benefit analysis to be applied by NERC and Regional Entities when registering smaller qualifying small power production facilities. Lee County is concerned that small power production facilities smaller than 20 MVA will be required to register on the grounds that they “materially” impact the reliability of the bulk-power system. Lee County suggests that the Commission require NERC to establish a rebuttable presumption that a small power production facility smaller than the existing NERC size thresholds does not “materially” impact the reliability of the bulk-power system. Lee County also asks the Commission to require NERC to justify registering such small power production facilities using a meaningful case-by-case analysis based on a cost benefit analysis.

20. Dow Chemical does not oppose making section 215 of the FPA applicable to QFs, but wants the Commission to clarify that NERC must retain its existing provision that measures whether a facility meets the 20/75 MVA size threshold based on the portion of a cogeneration unit’s /plant’s capacity made available to serve the bulk-power system. Dow would also like the Commission to state that directives from Reliability Coordinators, Transmission Operators, Balancing Authorities, and/or Transmission Providers need not be complied with if doing so would impair a cogeneration facility’s service obligations to its thermal host. CCC asks that the Commission require that NERC reliability criteria be applicable to QFs based upon a demonstration that the facilities are needed for reliability as defined in Order No. 693, and not based on the size of the facility. CCC also asks that the Commission clarify that NERC reliability rules must take into account regulatory requirements, operating characteristics and contractual

commitments of cogeneration facilities. Midland Cogen asks the Commission to clarify that NERC reliability criteria must accommodate the unique operating characteristics, regulatory requirements and contractual commitments of QFs. Midland Cogen also asks the Commission to provide assurances that QFs will be permitted to recover the cost of compliance with mandatory reliability standards through a grid charge to be assessed to the control area that benefits from the reliability that the facilities provide.

21. Georgia Pacific, LLC (Georgia Pacific) filed reply comments. Georgia Pacific states that it has mill and plant facilities throughout the United States and owns and operates eleven facilities that are certified as QFs, and that range in size from 7.5 MW to 140 MW. Georgia Pacific states that the majority of its QFs are cogeneration facilities that provide electric power and steam to host processes. Georgia Pacific states that because its QFs primarily produce steam and electric energy for its own use, its QFs have little or no impact on the bulk-power system. Georgia Pacific asks that the Commission in this proceeding recognize the existing 20/75 MVA NERC exclusion for smaller facilities and that such exclusion for a cogeneration facility serving behind the meter load be based on that portion of the generating unit's/plant's capacity actually made available to the bulk power system. In addition, Georgia Power would like the Commission to create an exemption from any reliability standards to the extent that complying with such standards would impair service to a QF's industrial host.

22. Xcel Energy filed reply comments arguing that this rulemaking is not the appropriate forum for evaluating technical justification for any specific QF exemption

level. Xcel Energy argues that generators seeking an exemption should do so on a case-by-case basis.

23. On May 14, 2007, Florida Renewable QFs filed supplemental comments. Florida Renewable QFs states that it seeks clarification of two issues left unresolved in the NOPR. First, Florida Renewable QFs ask the Commission to state that the Final Rule will not take effect for one year from issuance. The one-year period, Florida Renewable QFs argues, will give QFs that do not have experience with reliability standards time to develop programs for compliance with the reliability standards and will prevent undue hardship. Second, Florida Renewable asks the Commission to state that an appeal to the Commission from a NERC determination that a small generator (smaller than the usual registry criteria of 20 MVA) should be on the compliance registry would stay the effectiveness of the NERC ruling during the pendency of the appeal to the Commission.

IV. Discussion

24. As proposed in the NOPR, the Commission will amend § 292.601(c)(3) of its regulations to add section 215 to the list of FPA sections from which QFs are not exempt. Making QFs subject to reliability standards is consistent with the intent of section 215. When Congress enacted section 215, it used broad language to ensure that all those entities that could affect the reliability of the bulk power system would be subject to mandatory reliability standards. Specifically, section 215(b)(1) states that, “The Commission shall have jurisdiction, within the United States, over . . . all users, owners and operators of the bulk-power system (including the entities described in section 201(f)), for purposes of approving reliability standards established under this section and

enforcing compliance with this section.”¹⁸ Further, section 215(b)(2) provides that “All users, owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.”¹⁹ In using such broad language, Congress gave no indication that it intended to exempt any entity that could affect the reliability of the bulk-power system from the reach of mandatory reliability standards.

25. Indeed, Congress included within the scope of section 215 “the United States, a State or political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year.”²⁰ Thus Congress included within the scope of section 215 entities that are normally excluded from the Commission’s jurisdiction under Part II of the FPA. The provision providing that these otherwise jurisdictionally exempt utilities will be subject to section 215 supports our determination that Congress intended that all utilities, regardless of whether those utilities are otherwise exempt from the FPA, be subject to section 215.

26. While it is true that section 210(e) of PURPA grants the Commission broad authority to exempt most QFs from various provisions of the FPA, we cannot find that Congress intended that all entities that affect the reliability of the bulk-power system not be subject to mandatory and enforceable reliability standards. Comments submitted in

¹⁸ 16 U.S.C. 824o(b) (emphasis added).

¹⁹ Id. (emphasis added).

²⁰ 16 U.S.C. 824(f).

response to the NOPR do not convince us otherwise. Indeed, the majority of the comments filed either fully support the Commission's proposal to make QFs subject to section 215, or recognize that QFs should be subject to section 215 while expressing concerns as to the specifics of NERC's registry criteria for QFs.

27. We accordingly conclude that the addition of section 215 of the FPA to the list, contained in § 292.601(c)(3), of FPA sections from which QFs are not exempt is consistent with the Congressional directive contained in section 215 of the FPA that all users, owners, and operators of the bulk-power system be subject section 215 and thus subject to the mandatory and enforceable reliability standards.

28. In addition, we find that for reliability purposes there is no meaningful distinction between QF and non-QF generators that would warrant generic exemption of QFs from mandatory reliability standards.

29. Comments submitted in this rulemaking argue that the Commission should consider in this rulemaking a number of factors in determining whether individual QFs or classes of QFs do not materially affect the reliability of the bulk-power system and thus should be exempted from section 215 of the FPA; these factors include small size of some QFs and the fact that, while a QF may individually be large, it may deliver most of its output to behind the meter load and thus would have little effect on the bulk-power system. We do not believe that any of the factors mentioned by commenters, including small size or primarily serving behind the meter load, justifies a generic exemption from section 215 of the FPA for all facilities below a certain size, or for all facilities serving behind the meter load. While these factors may be appropriate in determining whether an

individual QF should be placed on the NERC reliability registry, they are not factors that justify exempting QFs, as a class, from section 215 of the FPA and from reliability standards. Nor are they factors that justify exempting any particular subset of QFs.

30. Whether a generation facility should be subject to reliability standards should depend on whether a generation facility is needed to maintain the reliability of the bulk-power system. The reliability criteria adopted by NERC and approved by the Commission, as well as the compliance registry process adopted by NERC and approved by the Commission, are designed to ensure that only those facilities needed to maintain the reliability of the bulk-power system are subject to the reliability standards. The ultimate decision with respect to individual generation units and/or plants is, and must be, made on a case-by-case basis. Thus, whether a particular QF or type of QF should be exempt from reliability standards is an issue that is more appropriately made in the context of NERC's establishment of registry criteria for owners and operators of generators, and in the context of NERC's compliance registry process. The reliability of the bulk-power system will be better protected by utilizing the NERC compliance registry process, which will ensure that no generator that is needed to maintain the reliability of the bulk-power system will be exempt from reliability standards, while excusing those generators that are not needed to maintain reliability.

31. NERC's compliance registry criteria for generator owner/operators encompasses:

- a. Individual generating unit > 20 MVA (gross nameplate rating) and is directly connected to the bulk power system, or
- b. Generating plant/facility > 75 MVA (gross aggregate nameplate rating) or when the entity has responsibility for any facility consisting of one or

more units that are connected to the bulk power system at a common bus with total generation above 75 MVA (gross nameplate rating), or

c. Any generator, regardless of size, that is a blackstart unit material to and designated as part of a transmission operator entity's restoration plan, or;

d. Any generator, regardless of size, that is material to the reliability of the bulk power system. [²¹]

32. In addition NERC's compliance registry criteria for generation facilities contain the following exclusions:

a. A generator owner/operator will not be registered based on these criteria if responsibilities for compliance with approved NERC reliability standards or associated requirements including reporting have been transferred by written agreement to another entity that has registered for the appropriate function for the transferred responsibilities, such as a load-serving entity, G&T cooperative or joint action agency, or

b. As a general matter, a customer-owned or operated generator/generation that serves all or part of retail load with electric energy on the customer's side of the retail meter may be excluded as a candidate for registration based on these criteria if (i) the net capacity provided to the bulk power system does not exceed the criteria above or the Regional Entity otherwise determines the generator is not material to the bulk power system and (ii) standby, back-up and maintenance power services are provided to the generator or to the retail load pursuant to a binding obligation with another generator owner/operator or under terms approved by the local regulatory authority or the Federal Energy Regulatory Commission, as applicable.[²²]

33. Finally, the registration criteria contains a provision that an organization that otherwise meets the criteria for registration need not be registered if it can be

²¹ NERC Statement of Compliance Registry Criteria (Revision 3), February 6, 2007.

²² Id.

demonstrated to NERC that the bulk power system, owner, operator, or user does not have a material impact on the bulk-power system.

34. In the Reliability Final Rule, moreover, the Commission found that NERC had set reasonable criteria for registration, and approved the compliance registry process.²³

35. Many of the comments filed in this proceeding appear to be based on a misunderstanding of what the Commission was proposing to do in this proceeding. Many of the comments submitted in response to the NOPR suggest that commenters thought that the Commission was proposing to mandate that NERC adopt registry criteria that would require all QFs over a certain size to register with the ERO or Regional Entity. All the Commission proposed to do in the NOPR, and all the Commission is doing here in the Final Rule, is to eliminate the generic exemption of QFs from section 215 of the FPA and thus from mandatory reliability standards, thus treating them like other, non-QF generators for reliability purposes. The Commission was not proposing to, and does not, require that all QFs be subject to reliability standards no matter their circumstances. Rather QFs and non-QFs alike would have an equal opportunity to not be subject to reliability standards. But that would be a case-by-case determination based on the circumstances of each case.

36. In this regard, in the Reliability Final Rule the Commission found that NERC had set reasonable criteria for registration and approved the compliance registry process;²⁴ the

²³ Reliability Final Rule, FERC Stats. & Regs. ¶ 31,242, at P 92-101.

²⁴Id.

compliance registry process provides procedures for individual generators to contest determinations by Regional Entities and the ERO. Additionally, an entity that disagrees with NERC's determination to place it in the compliance registry may submit a challenge in writing to NERC and, if still not satisfied, may lodge an appeal with the Commission.²⁵ Thus, an individual QF may appeal to the Commission if it believes it should not be required to comply with reliability standards. Florida Renewable QFs asks the Commission to rule that the filing of such an appeal by a QF smaller than 20 MVA will stay the effect of the NERC determination to place an entity on the compliance registry during the pendency of the appeal to the Commission. Whether a stay should be granted depends on a number of factors that are fact specific; such a decision is more appropriately made on a case-by-case basis. It is thus premature to decide now whether an appeal to the Commission should stay a NERC decision that a particular QF be placed on the compliance registry. We will deny Florida Renewable QF's request that we state that the filing of an appeal by a small generator will stay the effect of the NERC determination; however, this is without prejudice to any entity seeking a stay at the time it files an appeal of a NERC determination with which it disagrees.

37. The Commission notes that because of the operation of the size sections of the NERC registry criteria applicable to generators (i.e., greater than 20 MVA), only 23 percent of all QFs would meet this generally applicable threshold of 20 MVA (although

²⁵ Id. at P 101.

some other QFs may be specified as either blackstart units material to and designated as part of a transmission entity's restoration plan or as generators material to the reliability of the bulk-power system) and so would be subject to reliability standards.²⁶ While some QFs may be classified as blackstart or as "material" to the reliability of the bulk-power system, and so made subject to reliability standards, other QFs may qualify for exemptions because, despite their size, either as a QF that is a cogeneration facility that primarily serves behind the meter load such that the net capacity supplied to the bulk power system is less than the size threshold for compliance, or as a QF that has contractual arrangements to transfer responsibility for compliance with reliability standards or associated requirements including reporting to another entity that has registered with NERC. The net effect is that the universe of QFs that will be affected by this Final Rule, by virtue of operation of the NERC registry criteria, is likely to be relatively small.

V. Information Collection Statement

38. The Paperwork Reduction Act (PRA)²⁷ requires each Federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons, or continuing a collection for which the Office of Management and Budget

²⁶ See NOPR at P 6. Energy Information Administration (EIA) data identify 3,625 QFs, of which 2,423 QFs are below 20 MW (which roughly corresponds to 20 (MVA), leaving only 842 QFs that could be affected by this Final Rule. And, of these 842, only 745 – 23 percent – are interconnected to the grid.

²⁷ 44 U.S.C. 3501-3520.

(OMB) approval and validity of the control number are about to expire.²⁸ The PRA defines the phrase “collection of information” to be the “obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either -- (i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or employees of the United States; or (ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.”²⁹ OMB regulations require approval of certain information collection requirements imposed by agency rules.³⁰

39. As noted above, the Commission is amending its regulations to eliminate the exemption available to QFs from the requirements of section 215 of the FPA. Because the Commission is not adopting information collections in this Final Rule, it is not subject to OMB review under the PRA. However, the Commission will submit for informational purposes only a copy of this Final Rule to OMB.

VI. Environmental Analysis

40. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect

²⁸ 44 U.S.C. 3502(3)(A)(i); 44 U.S.C. 3507(a)(3).

²⁹ 44 U.S.C. 3502(3)(A).

³⁰ 5 CFR 1320.11.

on the human environment.³¹ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. As explained above, this proposed rule carries out the intent of legislation, specifically section 215 of the FPA. It lifts an exemption and thus makes section 215 of the FPA applicable to QFs; it does not substantially change the effect of the legislation. Accordingly, no environmental consideration is necessary.³²

VII. Regulatory Flexibility Act Analysis

41. The Regulatory Flexibility Act of 1980 (RFA)³³ generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The total universe of qualifying facilities is 3,265 entities.³⁴ Of these, 2,423 entities are below 20 MW (the threshold for applicability of the Reliability Standards is 20 MVA for an individual generating unit, or 75 MVA in aggregate for a generating plant³⁵) which leaves 842 entities that could potentially be impacted by reliability standards. Of these 842 entities, only 745 are listed as being interconnected to the grid. Accordingly, out of a total of 3265 QFs, only 745, or 23 percent would likely be

³¹ Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

³² 18 CFR 380.4(a)(2)(ii).

³³ 5 U.S.C. 601-12.

³⁴ NOPR at P 10.

³⁵ The 20 MVA threshold corresponds to 20 MW, if a unit is operating at a unity power factor.

affected by the change in regulations proposed here. Most, if not all, of the QFs that would be affected by this Final Rule do not fall within the definition of small entities,³⁶ nor do they meet the threshold criteria for applicability of the RFA to electric utilities established by the Small Business Administration, which is based on a size standard of 4 million MWh.³⁷

42. Comments filed by Indeck and Sunray argue that the Commission's analysis is deficient. They argue that, contrary to the Commission's findings, that most QFs are independently owned and operated and thus do meet the definition of "small entity." They also argue that there are many QFs whose total electric output for the preceding fiscal years does not exceed 4 million MWh. They state that is particularly true because many QFs operate only on an intermittent basis and thus "it is entirely possible that many wind, solar, run of the river hydroelectric, and cogeneration facilities with nameplate capacities well in excess of 20 MW are still protected by the RFA and that many of the 745 QFs identified as being subject to the rule are, indeed, small entities."³⁸

³⁶ The RFA definition of "small entity" refers to the definition provided in the Small Business Act, which defines a "small business concern" as a business that is independently owned and operated and that is not dominant in its field of operation. See 15 U.S.C. 632.

³⁷ The Small Business Size Standard component of the North American Industry Classification System (NAICS) defines a small utility as one that, including its affiliates, is primarily engaged in generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. See 13 CFR 121.201.

³⁸ Sunray at 11; Indeck at 9.

43. We continue to believe that, given the NERC size threshold for registering generators, few if any of the QFs that will be required to comply with reliability standards as a result of this Final Rule will be small entities. Sunray and Indeck recognize that a 20 MVA or 20 MW facility would not normally be considered small for purposes of the RFA. They argue, however, that some QFs generate so intermittently that they would be considered small. Given that the Small Business Administration's standard (4 million MWh annually) is the equivalent of a 4 MW facility, we would not expect that many 20 MW facilities would generate so intermittently that they fall within the SBA definition of a small facility. Moreover, the NERC registry criteria provide for exclusion of an entity that otherwise would meet the registry criteria, if the entity can reasonably demonstrate that it does not have a material impact on the reliability of the bulk-power system. Generators that meet the nameplate size threshold for registration, but generate so intermittently that they would be considered small entities under SBA criteria, are likely to be able to show that they do not have a material impact on the reliability of the bulk-power system and thus need not be registered. Further, we note, in the Reliability Final Rule, the Commission took steps to lessen the effect of the reliability standards on small entities in general.³⁹ While few generators affected by the reliability standards will fall within the definition of small entities, the Commission has thus taken steps to further minimize the effects on small entities while at the same time assuring the reliability of the bulk-power system.

³⁹ See Reliability Final Rule, FERC Stats. & Regs. ¶ 31,242 at P 1926.

44. Even if a very small number of QFs that fall within the definition of small are affected by this Final Rule, we believe that assuring the reliability of the bulk-power system justifies our action here.

VIII. Document Availability

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

46. 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.

47. User assistance is available for eLibrary and the Commission's website 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 at public.referenceroom@ferc.gov).

IX. Effective Date

48. We will deny Florida Renewable QFs' request that QFs be given a grace period of one year to comply with this rule. Florida Renewable QFs argues that it will be more burdensome on QFs than for other generators to comply with mandatory reliability standards because QFs were not previously subject to non-mandatory NERC reliability guidelines. We do not agree; we see no reason to delay the effectiveness of reliability standards for an entity that is needed to maintain the reliability of the bulk-power system. Moreover, all users of the bulk-power system that meet compliance registry criteria are becoming subject to mandatory reliability requirements for the first time. It is not just QFs that face compliance with mandatory reliability standards for the first time. In this regard, as several commenters point out, many QFs have been subject to some type of reliability standards, by contract or otherwise, for a long time. We therefore do not believe that QFs are in a markedly different position than other generators in terms of being prepared to comply with the reliability standards. Moreover, as we have discussed earlier,⁴⁰ the reliability standards, because of the operation of the registry criteria, will generally affect larger generation facilities, so that concern that an earlier effective date will constitute a particular burden for small facilities is misplaced. These regulations are effective [insert date 30 days after publication in the **FEDERAL REGISTER**].

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

⁴⁰ P 37, 41-43.

defined in Section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects in 18 CFR Part 292

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

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

In consideration of the foregoing, the Commission amends part 292, Chapter I, Title 18, Code of Federal Regulations, as follows:

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

1. 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.

2. In § 292.601, paragraph (c)(3) is revised to read:

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

* * * * *

(c) * * *

(3) Sections 202(c), 210, 211, 212, 213, 214, 215, 220, 221 and 222;

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