ORAL ARGUMENT IS REQUESTED

In the United States Court of Appeals for the Tenth Circuit

No. 12-9567

NORTHERN LARAMIE RANGE ALLIANCE,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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GLOSSARY

Alliance	Petitioner, Northern Laramie Range Alliance
Commission or FERC	Federal Energy Regulatory Commission
Declaratory Order	*Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (March 15, 2012), R 17
Developer	Wasatch Wind Intermountain, LLC, the parent company of two project companies: Pioneer Wind Park 1, LLC and Pioneer Wind Park II, LLC
FPA	Federal Power Act
PURPA	Public Utility Regulatory Policies Act of 1978
Rehearing Order	*Northern Laramie Range Alliance*, 139 FERC ¶ 61,190 (June 8, 2012), R 23
Wind Projects	The two wind-powered generation facilities to be constructed by Pioneer Wind Park 1, LLC and Pioneer Wind Park II, LLC

STATEMENT OF RELATED CASES

Except as noted by Petitioner in its brief, Counsel is unaware of any other prior or related cases in this or any other court.

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STATEMENT OF THE ISSUE

This case concerns the planned development of two wind-powered generating projects in Wyoming. These projects, if constructed as planned, qualify for certain regulatory benefits under the provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Assuming jurisdiction, the issue presented is:

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably determined, in a manner consistent with PURPA and the Commission's implementing regulations, that two proposed wind energy projects sited 2.5 miles apart satisfy the maximum size criteria for "qualifying

facility" status.

COUNTERSTATEMENT REGARDING JURISDICTION

Petitioner Northern Laramie Range Alliance (the "Alliance") does not have standing to appeal the challenged orders because it has not suffered, and is not in imminent peril of suffering, any justicable injury caused by the Commission's certification of the Wind Projects as qualifying facilities under PURPA. As set forth more fully in Part I of the Argument, *infra*, the Alliance's stated concern – that the Commission's affirmation of the Wind Projects' qualifying facility status might adversely affect the rates that Alliance members pay for retail electricity service – is speculative and does not present the type of direct immediate injury required for standing. *See*, *e.g.*, *First Nat'l Oil, Inc. v. FERC*, 102 F.3d 1094, 1096-97 (10th Cir. 1996) (petitioner's fear that pipeline may charge an unreasonable rate is not an unavoidable, concrete non-speculative injury). Thus, the Alliance's petition should be dismissed for lack of jurisdiction.

STATUTORY AND REGULATORY PROVISIONS

Relevant sections of PURPA, the Federal Power Act, and the Commission's implementing regulations, *see* 18 C.F.R. Part 292, are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Wasatch Wind Intermountain, LLC (the "Developer") owns the project companies, Pioneer Wind Park 1, LLC and Pioneer Wind Park II, LLC, that are developing the two wind energy projects ("Wind Projects") at issue in this case. The currently unconstructed Wind Projects are sited in Converse County, Wyoming. The Projects will have approximately 49.5 megawatts in power production capacity each, and will be sited approximately 2.5 miles apart. In 2010, the Developer self-certified each Wind Project as a small power production qualifying facility under PURPA. *See* Pioneer Wind Park 1, LLC, Revised Self-Certification Form 556, FERC Docket No. QF10-649-000 (filed Nov. 24, 2010) and Pioneer Wind Park II, LLC, Revised Self-Certification Form 556, FERC Docket No. QF10-687-000 (filed Nov. 24, 2010); *see also* Petition for Declaratory Order at Exhibit 1 (Developer's original self-certification forms for the Wind Projects), R 2.[1]

Subsequently, the Alliance filed with the Commission a petition for a declaratory order requesting that the Commission revoke the Wind Projects'

[1] "R" refers to the item number from the Certified Index to the Record filed by the Commission on September 4, 2012. "P" refers to the internal paragraph number within a FERC order. "Br." refers to the Alliance's opening brief.

qualifying facility certifications. The Alliance's sole challenge is whether the Wind Projects meet the size criteria for a qualifying facility, found in section 292.204(a) of the Commission's regulations. 18 C.F.R. § 292.204(a). The Commission's size criteria limit the power production capacity of a facility, together with the capacity of any other facility that (i) uses the same energy resource (here, wind), (ii) is owned by the same person, and (iii) is located at the same site, to no more than 80 megawatts. *Id.* § 292.204(a)(1). Under the Commission's regulations, facilities whose electrical generating equipment is within one mile are deemed to be located at the "same site," and thus their combined generating capacity must not exceed the 80 megawatt limit. *Id.* § 292.204(a)(2). Despite the Wind Projects being 2.5 miles apart, the Alliance argues that they are located at the "same site" and thus comprise a single project whose net capacity will exceed 80 megawatts. To make its argument, the Alliance seeks to challenge the Commission's one-mile rule, 18 C.F.R. § 292.204(a)(2), for determining whether facilities are located at the "same site."

The Commission rejected the Alliance's contention that the one-mile rule is a rebuttable presumption. *See Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (March 15, 2012) ("Declaratory Order"), R 17, *reh'g denied*, 139 FERC ¶ 61,190 (June 8, 2012) ("Rehearing Order"), R 23. Applying the one-mile rule, the Commission found that the Wind Projects, whose electric generating

equipment is 2.5 miles apart, are separate facilities. As such, the Commission affirmed that the Wind Projects, if built and operated as described, each meet the maximum size criteria for qualifying small power production facilities. Declaratory Order P 11, R 17; Rehearing Order P 14, R 23.

II. STATEMENT OF THE FACTS

A. Statutory And Regulatory Framework

Congress enacted PURPA to promote the development of new types of generating facilities and to conserve the use of fossil fuels. *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (unsuccessful constitutional challenge to PURPA). Because traditional utilities controlled the transmission lines and were reluctant to purchase power from non-traditional facilities, PURPA directed the Commission to promulgate rules requiring utilities to purchase power from "qualifying" cogeneration and small power production facilities. *E.g., id.*; *American Paper Inst., Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 405 (1983).

Under PURPA section 201, which added Federal Power Act section 3(17)-(18), 16 U.S.C. §§ 796(17)-(18), Congress tasked the Commission with determining which "cogeneration facilities" and "small power production facilities" are qualifying facilities entitled to the various regulatory benefits under PURPA. A "qualifying small power production facility," like each of the Wind

Projects, must meet size, fuel use, and ownership requirements. *See* Federal Power Act § 3(17)(A)-(E), 16 U.S.C. § 796(17)(A)-(E). The requirement relevant to this case, the size requirement, mandates that a "qualifying small power production facility" must have "a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts." Federal Power Act § 3(17)(A)(ii), 16 U.S.C. § 796(17)(A)(ii).

In accordance with this Congressional directive, the Commission adopted rules setting out standards and procedures for determining eligibility as a PURPA "qualifying facility." *See* 18 C.F.R. §§ 292.201-.207. These rules contain criteria for determining compliance with the 80 megawatt size restriction set forth in the statute. *Id.* § 292.204(a). Specifically, section 292.204(a) of the Commission's regulations governing the size of a qualifying facility provides:

> (1) Maximum size. Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.
>
> (2) Method of calculation.
>
> (i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

> (ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.
>
> (3) Waiver. The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

To obtain "qualifying facility" status, a project developer may either apply for Commission certification or self-certify. 18 C.F.R. § 292.207(d). A project's "qualifying facility" status may be revoked at any point if the facility does not meet the applicable requirements for a qualifying facility. *Id.* § 292.207(d)(1)(iii). When the Commission acts on a petition seeking the revocation of a facility's "qualifying facility" status, it performs essentially the same function as when it acts initially on an application for certification – it issues a declaratory order on the facility's "qualifying facility" status. Declaratory Order P 11, R 17.

B. The Wind Projects

In 2010, Pioneer Wind Park 1, LLC and Pioneer Wind Park II, LLC each filed with the Commission self-certification forms for their respective small wind power production facilities, to be located in Converse County, Wyoming. *See* Petition for Declaratory Order at Exhibit 1 (exhibit includes Developer's original Self-Certification Forms for the Wind Projects), R 2. Each Wind Project is just under 50 megawatts in size. Each Wind Project comprises 31 1.6 megawatt wind turbines with a maximum power production capacity of 49.6 megawatts. Each Wind Project stated that there are no other facilities with electrical generating

equipment located within one mile of each of their respective proposed facilities. *Id.*

C. The Alliance's Challenge To The Wind Projects' Self-Certification

In 2011, the Alliance petitioned the Commission to issue a declaratory order revoking the Wind Projects' status as qualifying facilities. The Alliance argued that the Commission should find that the two Wind Projects constitute a single facility with a total net generating capacity that exceeds the 80 megawatt statutory size limit. *See* Petition for Declaratory Order, R 2. The Alliance argued that, notwithstanding the fact that the Wind Projects are 2.5 miles apart, they are located at the "same site." Arguing that the Commission's "one-mile standard can be rebutted in situations in which other facts indicate that 'gaming' is involved," the Alliance contended that the Wind Projects should be considered to be located at the same site, thereby disqualifying each for "qualifying facility" status. *Id.* at 6.

D. The Commission's Orders

1. Declaratory Order

The Commission affirmed that the size criteria in its regulations limit a qualifying small power production facility to 80 megawatts, including the capacity of any other small power production facilities at the same site. Declaratory Order P 13 (citing 18 C.F.R. § 292.204(a)(1)), R 17. The Commission analyzed the location of the Wind Projects' facilities and found that the generating equipment of

each facility is located 2.5 miles from the generating equipment of the other facility. *Id.* n.25. Applying the one-mile rule for determining whether facilities are located at the "same site," 18 C.F.R. § 292.204(a)(2)(i), the Commission determined that the Wind Projects are separate facilities. *Id.* P 14.

Further, the Commission affirmed that the one-mile standard is a rule, not a rebuttable presumption. Declaratory Order P 17, R 17. The Commission also declined to jettison the one-mile rule based on the Alliance's allegations of "gaming." Last, the Commission explained that the purpose of the waiver provision in section 292.204(a)(3) of the Commission's regulations is to encourage small power production development by loosening the size criteria, including the one-mile rule, on small power producers (where good cause is shown). *Id.*

2. Rehearing Order

The Alliance sought rehearing of the Declaratory Order, reasserting the following arguments: (1) the two proposed Wind Projects constitute a single facility with a total net capacity that exceeds the 80 megawatt size limit for a qualifying facility; (2) the one-mile rule is a rebuttable presumption; and (3) the fact that the Developer represented the Wind Projects as a single project in other contexts and that the Wind Projects will share a single transmission interconnection is evidence that the Developer is gaming the PURPA regulations. *See* Request for Rehearing, R 18. In its order denying rehearing, the Commission

addressed and rejected each of the Alliance's arguments. Rehearing Order PP 21-27, R 23.

This appeal followed.

SUMMARY OF ARGUMENT

This is a case about two wind power generating projects that, in order to avail themselves of the statutory benefits conferred to small alternative energy projects under PURPA, complied with the Commission's regulations implementing PURPA. The Alliance, a citizen organization, seeks to stop the Wind Projects before they are built, but fails to establish a definitive injury sufficient for Article III standing. Because the Alliance's alleged injury, a possible future retail rate increase, is speculative, does not flow directly from the challenged orders, is not germane to the Alliance's organizational purpose, and is outside of PURPA's statutory "zone of interest," the Court should dismiss this appeal for lack of jurisdiction.

Assuming jurisdiction, the Commission's application of its one-mile rule for determining whether the Wind Projects each satisfied the criteria for "qualifying facility" status under PURPA was reasonable in all respects. The Commission's one-mile rule is a clear, bright-line test used to determine whether similar small power production facilities are located at the "same site." Congress expressly directed the Commission to determine what constitutes the "same site." The

Commission did so in its regulations implementing PURPA with the one-mile rule. The one-mile rule was designed as a bright-line test to help simplify the qualifying facility certification process, which in turn encourages the development of qualifying facility projects.

The Commission has never wavered in its application of the one-mile rule as a bright-line test. Because the Wind Projects are sited more than one-mile apart, under the rule, they are not located at the "same site." Under the regulations, this is the reasonable end of the Commission's inquiry. The Commission fully addressed the Alliance's challenge to the strict application of the one-mile rule and, in its expert judgment, found that the Alliance's proposal to transform the long-standing rule into a rebuttable presumption would upset the basic purpose of PURPA – to encourage the development of alternative energy projects like the Wind Projects, to the ultimate benefit of the Alliance and the broader public interest.

ARGUMENT

I. PETITIONER HAS NOT ESTABLISHED STANDING

A. The Alliance's Alleged Harm Does Not Satisfy Constitutional Standing Requirements

The Alliance "must establish standing, notwithstanding the fact that the Commission's proceedings were not subject to Article III." *Qwest Commc'ns Int'l, Inc. v. FCC*, 240 F.3d 886, 893 (10th Cir. 2001). To obtain judicial review of a

Commission order, section 313(b) of the Federal Power Act requires that the complaining party be "aggrieved." 16 U.S.C. § 825*l*(b). To be considered "aggrieved," petitioner must "demonstrate a 'present and immediate' injury in fact, or 'at least . . . a looming unavoidable threat' of injury, as a result of the FERC order." *Williams Gas Processing Co. v. FERC*, 17 F.3d 1320, 1322 (10th Cir. 1994) (petitioner's fear that gas pipeline will charge unreasonable rates is speculative and not a present or unavoidable, concrete "aggrievement") (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 823 F.2d 1377, 1381 (10th Cir. 1987)); *see also First Nat'l Oil*, 102 F.3d at 1096-97 (same).

The "irreducible constitutional minimum" of Article III standing requires a petitioner to show it has suffered an "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," that has a "causal connection" with the challenged agency action, and that "likely . . . will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotation marks omitted). A "conjectural or hypothetical" injury will not do. *Id.* at 560; *see also Williams Gas Processing*, 17 F.3d at 1322 (alleged injury must be concrete, perceptible harm of a real, non-speculative nature).

Here, the Alliance lacks standing to challenge the Commission's orders because neither the Alliance nor any of its members is injured by the

Commission's decision. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction."). The Alliance failed to address standing in its brief. However, based on statements made in its Petition for the Declaratory Order and facts asserted in its brief, the Alliance's concern is that FERC's certification of the Wind Projects as qualifying facilities "induced Rocky Mountain Power, the local power utility, to enter [into] two power purchase agreements . . . establishing pricing terms that may have the effect of increasing costs to [Rocky Mountain Power] and ratepayers, including Petitioner's members." Petition for Declaratory Order at 1, R 2; *see also* Declaratory Order P 4, R 17; Br. 5-6, 8, 16. Thus, the Alliance's claimed injury is potentially higher retail power costs. *See* Br. 6.

This alleged economic injury is speculative at best and does not directly flow from the Commission's actions in the challenged orders. *See Williams Gas Processing*, 17 F.3d at 1322 (petitioners not aggrieved where there is no evidence that they have suffered, or will unavoidably suffer, an economic injury as a result of FERC's order); *First Nat'l Oil*, 102 F.3d at 1097 (same). *See also Occidental Permian Ltd. v. FERC*, 673 F.3d 1024 (D.C. Cir. 2012) (petitioner's fear of a possible future rate increase not enough to show the requisite injury); *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 736 (D.C. Cir. 2008) (no standing where petitioner, an association, failed to show that the injury, alleged increased

retail rates, would be redressed by a favorable ruling).

Indeed, the Alliance's complaint lies not with the Commission, but rather with orders of the Wyoming Public Service Commission setting the power purchase price for qualifying wind facilities. Br. 7-8, 12, 14, 16. As the Alliance states, "PURPA left it to the several states to determine the avoided cost at which utilities would be required to purchase electricity generated by [qualifying facilities]." Br. 16 (citing 18 C.F.R. § 292.304). The Alliance complains that the Wyoming Commission's "Avoided Cost" Orders require Rocky Mountain Power "to buy energy from wind-energy [qualifying facilities] in Wyoming at prices higher than the true avoided cost mandated by PURPA." *Id.*

Moreover, many intervening acts of independent third parties are required before any risk to the Alliance members' economic interests could flow from the Wind Projects. Their economic injury is merely speculative unless and until the following actions occur. First, the Wind Projects must be built, and built as specified in the Developer's self-certifications to the FERC. Second, the price Rocky Mountain Power pays for power from the Wind Projects must be higher than the cost of power generated by traditional fossil fuel generators over the twenty-year contract term. Third, Rocky Mountain Power must petition the Wyoming Commission for a retail rate increase to recoup costs associated with the power it purchases from the Wind Projects. Fourth, the Wyoming Commission

must approve the rate increase. These outcomes are far from guaranteed and are independent of FERC's certification of the Wind Projects as qualifying facilities under PURPA.

Further, any economic harm from Rocky Mountain Power's retail rates is not directly traceable to or redressible by the challenged Commission orders. *See First Nat'l Oil*, 102 F.3d at 1097 (holding that speculation regarding the future behavior of a non-jurisdictional entity is insufficient to confer standing). The challenged orders confirm only that the Wind Projects satisfy the statutory and regulatory requirements for qualifying facility status, "*if built as described*." Rehearing Order P 14, R 23. It is the Wyoming Commission, not the FERC, which approves the rates at which Rocky Mountain Power will purchase power from the Wind Projects, and which would review and approve any pass-through of such costs to retail customers. *See also N.M. Attorney Gen. v. FERC*, 466 F.3d 120, 121-22 (D.C. Cir. 2006) (petitioners do not have standing when their alleged injury is conditional upon further agency action). Simply put, retail rates have not changed as a result of the Commission certifying the Wind Projects as qualifying facilities. *See Occidental*, 673 F.3d at 1027 (court has "always required actual, decided-upon [rates] and limitations before finding an injury"). *See also Commuter Rail Div. of the Reg'l Transp. Auth. v. Surface Transp. Bd.*, 608 F.3d 24, 31 (D.C. Cir. 2010) (alleged injuries are "not traceable" to challenged agency

decision; injuries, "should they ever occur, would result from the [agency's future] decision").

"The potential for future economic injury, even assuming it is readily quantifiable into a possible rate increase in the future, is not enough to show the requisite injury for Article III standing." *PNGTS Shippers' Group v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) (quotations omitted). Here, the Alliance has not suffered an injury, concrete or otherwise, that is in any way actual or imminent, or that is caused by the Commission's action challenged here; thus, it cannot meet the constitutional standing requirements. *See Lujan*, 504 U.S. at 560.

B. The Alliance Lacks Representational Standing

The Alliance itself is not affected by the Commission's certification of the Wind Projects. Thus, its standing must be derivative of that of its members. It is "common ground that . . . organizations can assert the standing of their members." *Summers*, 555 U.S. at 494. However, an association has representational standing only if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

The merits of the first prong, the Alliance members' failure to satisfy

Constitutional standing requirements, are discussed above. The Alliance also fails the second prong required for representational standing – that the interest it seeks to protect is germane to the association's purpose. The Alliance is not a consumer advocate. Rather, it is an association dedicated to preventing industrial development in the Northern Laramie Mountains. *See* Br. 6.

Specifically, the Alliance "is a group of nearly 900 citizens dedicated to preserving the open-space, agricultural and recreational character of the Northern Laramie Mountains in central Wyoming." Northern Laramie Range Alliance, http://www.nlralliance.org/about (last visited January 10, 2013) (copy attached as Appendix A). The Alliance's stated organizational purpose is to "oppose large-scale industrial development in the Northern Laramie Mountains of central Wyoming." Br. 6. With respect to wind generation projects, the Alliance "believe[s] that this [type of] development needs to be sited properly, and that mountains of the Northern Laramie Range should be off-limits." Northern Laramie Range Alliance, http://www.nlralliance.org/about.

Here, the Alliance's claim – protecting members from a potential retail rate increase – is wholly unrelated to the organization's mission. Thus, the Alliance does not satisfy the prerequisites for representational standing.

C. The Alliance's Concern Is Outside PURPA's Zone Of Interests

Even if the Court were to find that the Alliance meets the Article III standing

requirements, it fails to satisfy statutory prudential requirements. Specifically, the Alliance's claim falls outside "the zone of interest to be protected or regulated by the statute . . . in question." *Wyoming v. Dep't of Interior*, 674 F.3d 1220, 1231 (10th Cir. 2012) (quoting *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1450-51 (10th Cir. 1994)). *See also Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (prudential standing limitations apply to any party seeking review of a FERC order issued pursuant to PURPA).

Under the zone of interest test, the Alliance's injury – future retail rate increases – must fall within the "zone of interests" that Congress intended either to regulate or protect. *Id.* "In cases where the [petitioner] is not itself the subject of the contested regulatory action, the test denies a right of review if the [petitioner's] interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Mount Evans Co.*, 14 F.3d at 1452 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)). Although the test is not meant to be "especially demanding," the court "must look at both the specific purpose of the statute and the more general purposes of the act in which the statute is contained to determine whether [the petitioner's] injury falls within the zone of interests protected by the statute." *Id.* (quoting *Clarke*, 479 U.S. at 401).

The Alliance's asserted interest – protecting its members from higher retail

rates – is not within the zone of interests that Congress intended to protect by PURPA. *See* 16 U.S.C. § 824a-3(a); *see also FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982) (Congress enacted PURPA to reduce the dependence of electric utilities on foreign oil and natural gas, by encouraging development of alternative energy sources such as small power production facilities) (citing S.Rep. No. 95-442, p. 9 (1977)). The statute identifies the following entities as having "interests" related to PURPA: qualifying facilities, state and federal agencies with rate making authority for electric utilities, and electric utilities. *Liquid Carbonic*, 29 F.3d at 704 (second-tier industry competitor not within zone of interests protected by PURPA). Indeed, the Alliance's challenge to the certification of the Wind Projects serves to frustrate the statutory objective of PURPA. *Compare American Paper Inst., Inc.*, 461 U.S. at 417 (basic purpose of PURPA is to increase the utilization of cogeneration and small power production facilities and to reduce reliance on fossil fuels) *with* Br. 6 (Alliance seeks to foreclose the Wind Projects' development).

The Alliance suggests that PURPA was designed to "protect[] ratepayers from 'paying up' due to the mandatory purchase requirement." Br. 13-14; *see also Liquid Carbonic*, 29 F.3d at 705 (dicta suggesting that PURPA was enacted to promote alternative energy sources, in part, to control consumer costs). However, controlling consumer costs is not a stated goal of PURPA. Congress mandated that

the Commission establish regulations governing the purchase price for the output of qualifying facilities that would set rates that are "in the public interest." 16 U.S.C. § 824a-3(b)(1). However, the Supreme Court has held that, because the basic purpose of PURPA is to increase the utilization of cogeneration and small power production facilities, it was reasonable for FERC to promulgate rules that would not directly provide any rate savings to consumers because the Commission's rules more importantly provide a significant incentive for the development of non-traditional qualifying facilities – to the ultimate benefit of consumers and the broader public interest. *See American Paper Inst.,* 461 U.S. at 415-18. *See also Brazos Elec. Power Coop. Inc. v. FERC,* 205 F.3d 235, 245-46 (5th Cir. 2000) (noting that FERC has recognized that the purchase price for a qualifying facility's output might exceed the purchasing utility's avoided costs and nevertheless found such contracts necessary to encourage the development of alternative facilities as demanded by PURPA) (citing *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA*, Order No. 69, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,128 (1980)).

II. STANDARD OF REVIEW

Judicial review of agency action is narrow. *Maier, P.E. v. EPA*, 114 F.3d 1032, 1039 (10th Cir. 1997); *Symbiotics, L.L.C. v. FERC,* 110 Fed. Appx. 76, 80, 2004 WL 2095615 (10th Cir. Sept. 21, 2004) (unpublished) (appeal of FERC

hydroelectric permitting decision). Under the Administrative Procedure Act, a court may set aside an agency's decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012); *Colo. Interstate Gas Co. v. FERC*, 904 F.2d 1456, 1459 (10th Cir. 1990). The Court requires only that the agency "examine the relevant data and articulate a satisfactory explanation for its action." *Qwest Corp.*, 689 F.3d at 1225. Moreover, FERC's factual findings, if supported by substantial evidence, are conclusive. Federal Power Act § 313(b), 16 U.S.C. § 825*l*(b). *See also Gainesville Utils. Dept. v. Fla. Power Corp.*, 402 U.S. 515, 527, 529 (1971) (where there was substantial evidence to support the FERC's findings, the court of appeals erred in not deferring to FERC's expert judgment). The court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Courts review a federal agency's interpretation of its enabling statute in accordance with *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). *See Maier*, 114 F.3d at 1040. "If Congress has explicitly or implicitly delegated authority to an agency, "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statue." *Id.* (quoting *Chevron*, 467 U.S. at 844). "This deference is a product

of both an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency . . . ." *Id.* (quoting *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979)).

Deference is particularly appropriate where, as here, the "regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); *see also Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir. 1989) (when a court reviews an agency's "careful and studied conclusions of law pertaining to a matter clearly within the agency's expertise, the court will affirm those conclusions if they are reasonable") (quoting *Walker Operating Corp. v. FERC*, 874 F.2d 1320, 1332 (10th Cir. 1989)).

As explained below, the Commission's application of the one-mile rule, as set forth in its regulations, to determine whether the Wind Projects are located at the "same site" for purposes of calculating the size of the facilities, was consistent with its regulations, reasonable and fully explained, and thus should be upheld on review.

III. THE COMMISSION CORRECTLY APPLIED ITS REGULATIONS TO DETERMINE QUALIFYING FACILITY STATUS FOR THE WIND PROJECTS

A. The Alliance's Collateral Attack On The One-Mile Rule Is Impermissible And Meritless

The Alliance's case hinges on its collateral attack on the Commission's long-established regulations implementing the qualifying facility size limitation set forth in PURPA. Br. 20-22 (asserting that the one-mile rule is a "mockery of congressional intent"). As the Alliance readily acknowledges, Congress delegated to the Commission responsibility for promulgating regulations defining the criteria for obtaining qualifying facility status. Br. 21; *see also* Federal Power Act § 3(17)(A) and (C), 16 U.S.C. § 796(17)(A) and (C). The statute provides:

> "[S]mall power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility . . . and has a power production capacity which, together with any other facilities located at the same site (*as determined by the Commission*), is not greater than 80 megawatts.

16 U.S.C. § 796(17)(A) (emphasis added). Thus, with respect to the size limitation for qualifying facilities (the sole issue in this case), Congress directed the Commission to establish rules for defining when small power production facilities are located at the "same site." *Id.* The Commission did as Congress instructed.

The Commission filled the statutory gap by establishing the one-mile rule for determining when facilities are located at the "same site." *See* 18 C.F.R. § 292.204(a)(2). Contrary to the Alliance's argument, the one-mile rule does not

"rewrite" PURPA (Br. 21); rather, it furthers the statutory goal of removing impediments to the development of non-traditional generating facilities. *See FERC v. Mississippi*, 456 U.S. at 750. *See also* 16 U.S.C. § 824a-3(a) (authorizing the Commission to issue "rules as it determines necessary to encourage cogeneration and small power production").

Accordingly, the Commission's one-mile rule will be upheld so long as it is a "permissible construction" of PURPA. *See Chevron*, 467 U.S. at 843-844 (legislative regulations are entitled to deference). *See also Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000) (FERC's interpretation of PURPA (and implementing regulations and case law) is entitled to deference). There is no statutory text that supports the Alliance's claim that the one-mile rule is manifestly contrary to PURPA. The Commission, in promulgating the one-mile rule, developed a bright-line test that would encourage the development of qualifying facilities consistent with the statutory mandate. *See e.g., Small Power Production and Cogeneration Facilities – Qualifying Status*, Order No. 70, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,134, at 30,943-44 (1980) ("Order No. 70") (one-mile rule drafted to avoid discouraging development and being burdensome or confusing for applicants).

Like all bright-line tests, the one-mile rule, 18 C.F.R. § 292.204(a)(2), is a clearly defined standard composed of objective factors, which leaves little or no

room for varying interpretation. The rule plainly states: "facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought." *Id.* § 292.204(a)(2)(i). The distance between facilities is measured from the electrical generating equipment, and not other equipment associated with the generating facilities (e.g., transmission lines). *Id.* § 292.204(a)(2). Indeed, as the Alliance notes, the Commission "appl[ies] the one-mile standard mechanically," as it did to evaluate whether the Wind Projects satisfied the qualifying facility criteria. Br. 17; *see also* Br. 22.

The Alliance complains that the one-mile rule has provided a roadmap for developers seeking to build a qualifying facility eligible for the regulatory benefits conferred by PURPA. Br. 21 n.6. This is exactly what the Commission intended – to encourage the development of qualifying facilities by simplifying the qualifying facility certification process. *See* Rehearing Order P 23, R 23. The Commission enacted the one-mile rule as a bright-line test, not a rebuttable presumption (as originally proposed), upon finding the "requirement [for developers] to rebut the presumption was burdensome and confusing." Order No. 70 at 30,943-44; *see also* Rehearing Order P 24 n.56 ("construing the one-mile rule as merely a rebuttable presumption . . ., and the litigation that would inevitably follow, would hardly be consistent with [Congress'] intent"), R 23.

Here, there is no question under the one-mile rule that the Wind Projects (whose generating equipment is 2.5 miles apart) are not located at the "same site." Thus, the Alliance instead disputes the validity of the rule itself. The Alliance's challenge of the Commission's promulgation of the one-mile rule in Order No. 70, represents an improper collateral attack on this long-final rule. *See*, *e.g.*, *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) (a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding); *see also Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998) (noting that the "Commission need not revisit the reasoning of a general order every time it applies it to a specific circumstance").

B. The Commission Has Consistently Refused To Treat The One-Mile Rule As A Rebuttable Presumption

The Alliance challenges the Commission's application of the one-mile rule to the Wind Projects, suggesting that the Commission abruptly "changed course" or departed from its "prior policies." Br. 23. This assertion is false. Contrary to the Alliance's arguments (Br. 17, 24-27) the one-mile rule has always been a bright-line test.

The one-mile rule has been part of the Commission's regulations since its initial implementation of PURPA, and has never been considered to be a rebuttable presumption. *See* Order No. 70 at 30,943-44 (promulgating regulations setting size criteria for qualifying facilities). *See also Revisions to Form, Procedures, and*

Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility, Order No. 732, 130 FERC ¶ 61,214 at P 45 & n.38 (2010) (declining request to revise the one-mile rule to be a rebuttable presumption). *See also DeWind Novus, LLC*, 139 FERC ¶ 61,201, at P 25 (2012) (holding that it is well-established that the one-mile rule is a rule and not a rebuttable presumption").

In its Order No. 70 rulemaking, the Commission rejected using a rebuttable presumption and, instead, adopted the one-mile rule and added a waiver provision to "enable a small power producer or cogenerator to apply to the Commission for a waiver for good cause." Order No. 70 at 30,944; *see also* 18 C.F.R. § 292.204(a)(3) (waiver provision). This revision was intended to make the "same site" requirement less burdensome for developers. *See Windfarms, Ltd.*, 13 FERC ¶ 61,017 at p. 61,032 (1980) ("[W]here it appears that rigid application of the [one-mile] rule would classify a number of facilities as being on the same site, when a common sense conclusion would reach the opposite result, the Commission believes it is appropriate to waive the rule."). As the Commission explained here:

> [E]ven the proposed language [in the Order No. 70 rulemaking] focused on the 'applicant,' i.e., the QF, having the right to rebut the presumption and show that two facilities located less than a mile apart could both be QFs. Here, in contrast, the entity seeking the right to rebut the presumption is a third party seeking to have the Commission find that two facilities located more than a mile apart are, in fact, a single QF.

Rehearing Order P 23 n.52, R 23.

The Alliance fails to cite a single order where the Commission has not treated the one-mile rule as a bright-line test. In *El Dorado County Water Agency, et al.*, the Commission was confronted with a strikingly similar fact pattern as this case. 24 FERC ¶ 61,280 (1983) (developer applied for qualifying facility certification for three facilities where the generating equipment for each facility was located at least three miles apart). An association objected to certification of the three facilities. *Id.* at 61,577. The association urged the Commission to "modify the application of" the one-mile rule, arguing that the rule is "arbitrary and would yield 'illogical' results . . . in violation of the spirit of the Public Utility Regulatory Policies Act of 1978." *Id.* The Commission rejected the association's arguments and strictly applied the one-mile rule, holding: "The Applicant's three facilities would, in fact, be located more than one mile from each other. Therefore, under the regulations, the facilities are not considered to be located at the same site, but rather, are located at three distinct sites." *Id.* at 61,578 (finding the association's argument to be a prohibited collateral attack on the one-mile rule).

As in *El Dorado,* it is the Alliance (not the Commission) that seeks to depart from the regulations. The Commission reasonably declined the Alliance's request as counter to PURPA's statutory goals. *See* Declaratory Order P 17 (holding that the Alliance is asking FERC to act inconsistently with the regulations), R 17;

Rehearing Order P 23 (noting that it rejected use of a rebuttable presumption for certifying qualifying facilities in favor of the "less burdensome" one-mile rule), R 23. *See also Hill v. Nat'l Transp. Safety Bd.*, 886 F.2d at 1278 (court will affirm agency's conclusions if they are reasonable).

The other two orders cited by the Alliance (Br. 24-26) relate to a different regulatory provision than the one at issue here. *See* Rehearing Order P 25 (discussing *Windfarms*), R 23. In *Windfarms* and *Pinellas County*, at issue was the one-mile rule waiver provision, section 292.204(a)(3). *Windfarms, Ltd.*, 13 FERC ¶ 61,017 (1980); *Pinellas County*, 50 FERC ¶ 61,269 (1990). In these cases, the Commission articulated the factors it would consider when a developer applies for a waiver. In both cases, the Commission held that, to obtain a waiver of the one-mile rule, the developer must demonstrate that, despite the fact that the facilities are less than a mile apart, the facilities are located "in some manner distinct from the surrounding area." *Pinellas County*, 50 FERC at 61,855 (the distinction can be topographical, related to the energy source being utilized, or some other aspect); *Windfarms*, 13 FERC at 61,032 (same).

C. The Developer's Characterization Of The Wind Projects As A Single Project In Other Contexts Is Irrelevant

The Alliance argues that the Developer's representation of the Wind Projects as a single, 100 megawatt facility in other contexts is evidence that the Developer is "gaming" PURPA. Br. 8-11 (pointing to Developer's press releases and its

siting applications before the Converse County Board of County Commissioners and the Wyoming Industrial Siting Council); *see also* Br. 19-20. That a project developer, in other contexts involving other regulatory proceedings, characterizes its project as a single facility is immaterial for purposes of the Commission's PURPA regulations. *See El Dorado*, 24 FERC at 61,577-78 (certifying as individual qualifying facilities three hydroelectric facilities that use the same water source, even though the facilities obtained a single FERC hydroelectric license as an aggregated project).

Nothing in PURPA or FERC's implementing regulations requires the identification of the facilities for the purpose of certification as a small power producer be the same as in other contexts. *Id.* Further, in *El Dorado*, the Commission affirmed that the "critical test under PURPA relates to whether the facilities are located at one site rather than whether they are integrated as a project." *Id.* at 61,578 (noting that the three facilities at issue are more than one mile apart). Thus, in this case, the Commission, consistent with its regulations and precedent, reasonably considered only whether the Wind Projects are located over a mile apart.

The Alliance's reliance on a more recent FERC rulemaking to support its argument that the Commission should have taken into consideration the Developer's representation of the Wind Projects as a single project, is misplaced.

Br. 19 (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 77 (2006), *order on reh'g,* Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007), *aff'd sub nom. American Forest and Paper Ass'n v. FERC,* 550 F.3d 1179 (D.C. Cir. 2008)). *See also* Br. 27-29 (erroneously arguing that in Order No. 688 FERC recognized the potential for developers to "game" the one-mile rule).

In its Order No. 688 rulemaking, the Commission adopted a rebuttable presumption to implement regulations relieving electric utilities from the mandatory purchase obligation under PURPA. Order No. 688 at P 72. Specifically, the Commission created a rebuttable presumption that utilities remain obligated to purchase output from any "small" qualifying facility with 20 megawatts of capacity or less. *Id.* (utilities could rebut the 20 megawatt presumption). As the Commission explained here, the rebuttable presumption created in Order No. 688 is unrelated to the Commission's one-mile rule for determining if a generator even satisfies the criteria to be a qualifying facility under PURPA. Declaratory Order P 18, R 17; *see also* Rehearing Order n.59, R 23.

In Order No. 688, the Commission stated that it would not allow gaming of the new rebuttable presumption. Order No. 688 at P 77. The Commission noted

that for purposes of evaluating proximity of facilities to determine if a facility is gaming the 20 megawatt rule, the Commission "will not be bound by the one-mile standard set forth in 18 C.F.R. § 292.204(a)(2)." *Id*. P 77. The Commission explained here that nothing in the language of Order No. 688 supports an argument that the Commission would evaluate gaming in the context of determining whether facilities satisfy the requirements for qualifying facility status in the first instance. Declaratory Order P 18, R 17. As the Commission noted, the language in Order No. 688 affirms that the one-mile rule is a standard, not a rebuttable presumption, for determining whether a generator satisfies the criteria to obtain qualifying facility status. *Id.*

D. The Commission Fully Considered The Alliance's Request To Decertify The Wind Projects And Reasonably Declined To Hold A Hearing

The Alliance incorrectly asserts (Br. 30-33) that the Commission was required to hold a hearing to investigate the self-certification of the Wind Projects. As the Commission explained, in acting on a petition to decertify a qualifying facility, the Commission issues a declaratory order based solely on the information presented in the Wind Projects' self-certification forms and the Alliance's petition objecting to their qualifying facility status. Rehearing Order P 13, R 23. Nothing in PURPA, or the Commission's implementing regulations, indicates that an evidentiary hearing must be held for every petition to revoke a qualifying facility's

certification. *See Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (FERC's choice whether to hold an evidentiary hearing "is generally discretionary") (citing *Cerro Wire & Cable v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982)). Indeed, a hearing requirement would be counter to the fundamental purpose of PURPA. *See American Paper Inst.*, 461 U.S. at 420 ("Providing an opportunity for evidentiary hearings before the Commission . . . would seriously impede the very development of . . . small power production that Congress sought to facilitate.").

Moreover, a hearing was unnecessary as there are no facts in dispute. *See Pa. Pub. Util. Comm'n v. FERC*, 881 F.2d 1123, 1126 (D.C. Cir. 1989) (formal trial-type hearing is unnecessary where there are no material facts in dispute). Specifically, there is no question regarding the generating capacity of the Wind Projects (size), their fuel use, their ownership, their location, or the distance between the Projects' generating equipment. Rather, the Alliance only raised a legal question regarding the correct application of the Commission's regulations setting the size limit.

Although the Alliance belatedly alleged that the proposed layout of the wind turbines has changed (Request for Rehearing at 2, 4, R 18; Br. 9, 31-32), the change is immaterial as there is no allegation that the revised layout places one facility's turbines within a mile of the other's. *See Blumenthal*, 613 F.3d at 1145

(even with disputed factual issues, the Commission need not conduct an evidentiary hearing if it can adequately resolve the issues on a written record). Moreover, a changed turbine layout does not alter the Commission's fundamental determination that the Wind Projects, *if built as described in the self-certifications*, satisfy the requirements for qualifying facility status. *See* Declaratory Order P 11, R 17; Rehearing Order P 14, R 23. In short, as dictated by the Commission's regulations, if the Wind Projects ultimately fail to conform to any material facts presented in their self-certifications "the qualifying status of the facility may no longer be relied upon." 18 C.F.R. § 292.207(d)(1)(i).

The Alliance was heard in this case. It had an opportunity to submit its objections and the Commission carefully considered them. *See Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1425 (10th Cir. 1992) (FERC not required to hold an evidentiary hearing where parties had an adequate opportunity to present their views and the Commission had an adequate record upon which to base its decision).

The Alliance also makes the baseless assertion that the Commission, in acting on the Alliance's decertification request, failed to "look beyond" the criteria set forth in section 292 of the Commission's regulations and consider whether the Wind Projects meet "*all* applicable requirements for qualifying facilities." Br. 36. The Commission may revoke the Wind Projects' qualifying facility status "if it

finds that the self-certified or self-recertified qualifying facility does not meet the applicable requirements for qualifying facilities." 18 C.F.R. § 292.207(d)(iii). Thus, the Commission examined whether the Wind Projects meet the applicable qualifying facility requirements.

The Alliance's sole challenge to the Wind Projects' self-certifications is whether the Projects meet the size criteria set forth in section 292.204(a). Petition for Declaratory Order at 1, 6-7, R 2; Request for Rehearing 3-10, R 18. Accordingly, the Commission focused on the Wind Projects' compliance with the size criteria. *See* Declaratory Order PP 13-18, R 17; Rehearing Order PP 21-27, R 23. Nonetheless, the Commission did not limit its review to the size criteria. Rather, it evaluated whether the Wind Projects satisfy all of the criteria for qualifying facility status. *See* Declaratory Order PP 12-14, R 17. The Commission analyzed all of the representations the Developer made in the self-certifications, considered all of the Alliance's objections, and determined that the Wind Projects, if built as described, satisfy "the requirements for small power production [qualifying facility] status contained in PURPA and [the] implementing regulations." *Id.* P 11.

Ultimately, the Commission found that the generating equipment of each of the Wind Projects is 2.5 miles apart – a finding that the Alliance does not contest. *See City of Fort Morgan v. FERC*, 181 F.3d 1155, 1159 (D.C. Cir. 1999) (FERC's

factual findings are conclusive). Applying the facts to the Commission's regulation governing the size criteria, the Commission explained the basis for its determination that the Wind Projects are separate facilities and are not located at the same site for purposes of PURPA certification. Declaratory Order PP 14-16, R 17; Rehearing Order PP 21-26, R 23. Nothing more is required.

In sum, the Commission responded to the Alliance's revocation request with the analysis required. PURPA certification and decertification petitions are intended to be limited proceedings. *See Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992). As the Commission explained here:

> When the Commission acts on a petition seeking to decertify a facility's QF status, it performs essentially the same function as when it acts on an application for certification – it issues what is essentially a declaratory order on a facility's QF status. When the Commission acts on an application for certification . . . it acts on the information presented in the application and the responsive pleadings. The Commission renders what is essentially a declaratory order deciding whether the facility, as described in the application and the pleadings, meets the statutory and regulatory requirements set forth in PURPA and the Commission's implementing regulations.

Declaratory Order P 11 (citations omitted), R 17.

CONCLUSION

For the reasons stated, the petition for review should be dismissed for lack of standing. If the Court proceeds to the merits, the petition should be denied and the Commission's orders should be upheld in all respects.

Respectfully submitted,

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January 14, 2013

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28.2(C)(4), the Commission respectfully requests oral argument. Should the Court review the merits, oral argument will be useful because the appeal involves the Federal Power Act and the Public Utility Regulatory Policies Act of 1978, federal statutes which the Commission administers.

Northern Laramie Range Alliance v. FERC **Docket No. EL11-51-000**
10th Cir. No. 12-9567

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 8,272 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addenda.

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January 14, 2013

APPENDIX A

Webpage: http://www.nlralliance.org/about

NLRA
The Range
Area Map
Site Plan

NLRA

We are more than 800 members of the community in central Wyoming who care about our agriculture, wildlife, history, landscape and recreation.

What is the Northern Laramie Range Alliance? What does it stand for?

The Northern Laramie Range Alliance is a group of nearly 900 citizens dedicated to preserving the open-space, agricultural and recreational character of the Northern Laramie Mountains in central Wyoming. The Alliance position is straightforward: Large-scale industrial development – including industrial-scale wind-development - is inappropriate in the varied-use mountain areas of Wyoming's Albany, Converse and Natrona Counties. The Alliance does not oppose industrial-scale wind development per se. Indeed, it has worked with a major energy company to avoid problems in developing industrial-scale wind in the high plains. But NLRA members strongly believe that this development needs to be sited properly, and that mountains of the Northern Laramie Range should be off-limits.

Large-scale industrial development is inappropriate in the varied-use mountain areas of Wyoming's Albany, Converse and Natrona Counties.

What's happened so far?

The Alliance formed in March 2009, when it became evident that the Northern Laramies have been targeted for industrial-scale wind energy development and construction of the associated transmission infrastructure.

Over the ensuing six months, Alliance members focused their attention on Rocky Mountain Power's (RMP) plans for a new transmission corridor through the Range as part of its Gateway West Project. By late summer that year, Rocky Mountain Power agreed to reroute the proposed corridor to avoid crossing the Northern Laramies.

The Wasatch Wind industrial development proposal

Meanwhile, Wasatch Wind, Inc., a small "independent" wind energy company now headquartered in the resort town of Park City, Utah, began early in 2009 an effort to develop industrial-scale wind energy facilities across the Range. In February 2009, without making any public announcement, it applied with the Wyoming Office of State Lands and Investments for "special use" of more than 40,000 acres of State land dispersed across more than 100,000 acres of land stretching from Muddy Mountain (south of Casper) nearly to Laramie Peak (northwest of Wheatland).

At the same time, it started soliciting private owners of land in the mountains to turn over development rights on their property. Its pitch was simple: "Put the development rights at our disposal for a pittance ($5-6 per acre per year for rights worth at least double that amount) and if we get this project done you'll be in clover, with a minimum payment of $12,500 per turbine per year." When a landowner declined, Wasatch representatives said, falsely, that "your neighbors have signed up, so you'll be surrounded by turbines and not participating."

In the Boxelder-Mormon Canyon area of the mountains, just south of Glenrock, Wyoming, Wasatch's effort was aided substantially by one landowner who inherited 6,000 acres of mountain country in the mid-'90s. He and his family live more than 10 miles from (and out of sight of) the proposed facility (indeed, most of the landowners signing with Wasatch live miles from the site), but he has led the charge to convince other landowners to put their property into industrial development. Wasatch now claims to have acquired rights on approximately 27,000 acres of the Northern Laramies and says that it intends to apply for "special use" of another 2,700 acres of State land on which it would site 21 of the 62 turbines in its proposed industrial facility.

When the Alliance learned of Wasatch's initial application it notified the grazing lessees using this State land, and began intensive efforts to forestall this development. In the early fall of 2009 it approached the Board of County Commissioners of Converse County (the "Board") seeking a moratorium on industrial development more than $10 million at elevations above 5,500 feet south and west of Interstate 25, which would have protected the mountain areas of Converse County. Chaired by a wind industry consultant (organizer of "Roping the Wind" conferences sponsored in part by Wasatch Wind), however, the Board declined to adopt the proposed moratorium or otherwise protect the mountain areas of the County from this destructive development.

Public opinion is strongly against this development, despite the "public outreach" efforts that Wasatch touts in its communications. The NLRA has received just under 900 petitions opposing industrial development in the mountains. Most recently, during November-December 2010, the Alliance conducted an all-households poll in Converse County, sending to all 6,217 postal addresses in the County a polling card asking whether they support, oppose or have no opinion regarding the proposed 66-turbine Wasatch Wind development. The response rate was very high (23%) and the "no opinion" vote very low (5.4%). Of

the ballots returned (including the no-opinions), 69% County-wide and 74% in the community closest to the proposed development opposed it. Wasatch, at about the same time, conducted its own poll in Glenrock, Wyoming, the community closest to the proposed development. It gave two choices: “support” and “need more information.” It has never published the results.

Fortunately, the wind industry consultant chairing the Board lost his bid for re-election in the August 2010 Republican primary. (He has publicly acknowledged that his failure to protect the mountain areas of Converse County was the reason he lost.) Even so, in lame duck sessions of the Board prior to his departure he oversaw adoption of state-mandated wind regulations part of the provisions of which were drafted by Wasatch Wind.

This entire ridgeline would be covered in wind turbines. Is this really how we envisage the future of our range?

The Alliance’s continuing vigilance concerning other threats to the Range

While the Alliance’s most immediate concern has been to prevent the Wasatch Wind project from going forward, the NLRA is very much aware that the rest of the Northern Laramies remain unprotected by any responsible siting regimen at the county or state level. It continues to monitor closely Rocky Mountain Power’s plans for the Gateway West transmission project; while RMP has withdrawn its earlier plan to establish a new transmission corridor through the Northern Laramies, it continues considering routing skirting the western edge of the mountains in areas inappropriate for this kind of development.

At the state level, the Alliance has supported the existing moratorium on the use of the state’s power of eminent domain to force across unwilling landowners the “collector” transmission lines that connect wind farms to the main power grid. NLRA also opposes extending the soon-to-expire exemption from state sales taxes for wind farm equipment. This is because in the absence of a siting regimen that protects the varied-use mountain areas of the state (such as the Northern Laramie Range) it does not want to encourage projects such as Wasatch’s.

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ADDENDUM

STATUTES
AND
REGULATIONS

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STATUTES: **PAGE**

REGULATIONS:

injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this

reference, and for printing and binding) as are necessary to execute its functions. Expenditures by the commission shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission or by such other member or officer as may be authorized by the commission for that purpose subject to applicable regulations under chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41.

(June 10, 1920, ch. 285, pt. I, § 2, 41 Stat. 1063; June 23, 1930, ch. 572, § 1, 46 Stat. 798; renumbered pt. I, Aug. 26, 1935, ch. 687, title II, § 212, 49 Stat. 847; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; Oct. 31, 1951, ch. 654, § 2(14), 65 Stat. 707.)

CODIFICATION

All appointments referred to in the first sentence are subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5, Government Organization and Employees.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

In text, ''chapter 51 and subchapter III of chapter 53 of title 5'' substituted for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

In text, ''chapters 1 to 11 of title 40 and division C (except sections 3302, 3306(f), 3307(e), 3501(b), 3509, 3906, 4104, 4710, and 4711) of subtitle I of title 41'' substituted for ''the Federal Property and Administrative Services Act of 1949, as amended'' on authority of Pub. L. 107–217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, which Act enacted Title 40, Public Buildings, Property, and Works, and Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

AMENDMENTS

1951—Act Oct. 31, 1951, inserted reference to applicable regulations of the Federal Property and Administrative Services Act of 1949, as amended, at end of section.

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

1930—Act June 23, 1930, substituted provisions permitting the commission to appoint, prescribe the duties, and fix the salaries of, a secretary, a chief engineer, a general counsel, a solicitor, and a chief accountant, and to appoint such other officers and employees as are necessary in the execution of its functions and fix their salaries, and authorizing the detail of officers from the Corps of Engineers, or other branches of the United States Army, to serve the commission as engineer officers, or in any other capacity, in field work outside the seat of government, and the detail, assignment or transfer to the commission of engineers in or under the Departments of the Interior or Agriculture for work outside the seat of government for provisions which required the commission to appoint an executive secretary at a salary of $5,000 per year and prescribe his duties, and which permitted the detail of an officer from the United States Engineer Corps to serve the commission as engineer officer; and inserted provisions permitting the commission to make certain expenditures necessary in the execution of its functions, and allowing the payment of expenditures upon the presentation of itemized vouchers approved by authorized persons.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 793a. Repealed. Pub. L. 87–367, title I, § 103(5), Oct. 4, 1961, 75 Stat. 787

Section, Pub. L. 86–626, title I, § 101, July 12, 1960, 74 Stat. 430, authorized the Federal Power Commission to place four additional positions in grade 18, one in grade 17 and one in grade 16 of the General Schedule of the Classification Act of 1949.

§§ 794, 795. Omitted

CODIFICATION

Section 794, which required the work of the commission to be performed by and through the Departments of War, Interior, and Agriculture and their personnel, consisted of the second paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063, which was omitted in the revision of said section 2 by act June 23, 1930, ch. 572, § 1, 46 Stat. 798. The first and third paragraphs of said section 2 were formerly classified to sections 793 and 795 of this title.

Section 795, which related to expenses of the commission generally, consisted of the third paragraph of section 2 of act June 10, 1920, ch. 285, 41 Stat. 1063. Such section 2 was amended generally by act June 23, 1930, ch. 572, § 1, 46 Stat. 798, and is classified to section 793 of this title. The first and second paragraphs of said section 2 were formerly classified to sections 793 and 794 of this title.

§ 796. Definitions

The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

(1) ''public lands'' means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall not include ''reservations'', as hereinafter defined;

(2) ''reservations'' means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;

(3) ''corporation'' means any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include ''municipalities'' as hereinafter defined;

(4) ''person'' means an individual or a corporation;

(5) ''licensee'' means any person, State, or municipality licensed under the provisions of

section 797 of this title, and any assignee or successor in interest thereof;

(6) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States;

(7) ''municipality'' means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

(8) ''navigable waters'' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) ''municipal purposes'' means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality;

(10) ''Government dam'' means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;

(11) ''project'' means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) ''project works'' means the physical structures of a project;

(13) ''net investment'' in a project means the actual legitimate original cost thereof as defined and interpreted in the ''classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission'', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term ''cost'' shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission;

(14) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively;

(15) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy to consumers within the State or municipality;

(16) ''security'' means any note, stock, treasury stock, bond, debenture, or other evidence of interest in or indebtedness of a corporation subject to the provisions of this chapter;

(17)(A) ''small power production facility'' means a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which—

(i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and

(ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts;

(B) ''primary energy source'' means the fuel or fuels used for the generation of electric energy, except that such term does not include, as determined under rules prescribed by the Commission, in consultation with the Secretary of Energy—

(i) the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and

(ii) the minimum amounts of fuel required to alleviate or prevent—

(I) unanticipated equipment outages, and

(II) emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages;

(C) ''qualifying small power production facility'' means a small power production facility that the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe;

(D) ''qualifying small power producer'' means the owner or operator of a qualifying small power production facility;

(E) ''eligible solar, wind, waste or geothermal facility'' means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; but only if—

(i) either of the following is submitted to the Commission not later than December 31, 1994:

(I) an application for certification of the facility as a qualifying small power production facility; or

(II) notice that the facility meets the requirements for qualification; and

(ii) construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.[1]

(18)(A) ''cogeneration facility'' means a facility which produces—

(i) electric energy, and

(ii) steam or forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes;

(B) ''qualifying cogeneration facility'' means a cogeneration facility that the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe;

(C) ''qualifying cogenerator'' means the owner or operator of a qualifying cogeneration facility;

(19) ''Federal power marketing agency'' means any agency or instrumentality of the United States (other than the Tennessee Valley Authority) which sells electric energy;

(20) ''evidentiary hearings'' and ''evidentiary proceeding'' mean a proceeding conducted as provided in sections 554, 556, and 557 of title 5;

(21) ''State regulatory authority'' has the same meaning as the term ''State commission'', except that in the case of an electric utility with respect to which the Tennessee Valley Authority has ratemaking authority (as defined in section 2602 of this title), such term means the Tennessee Valley Authority;

(22) ELECTRIC UTILITY.—(A) The term ''electric utility'' means a person or Federal or State agency (including an entity described in section 824(f) of this title) that sells electric energy.[1]

(B) The term ''electric utility'' includes the Tennessee Valley Authority and each Federal power marketing administration.[1]

(23) TRANSMITTING UTILITY.—The term ''transmitting utility'' means an entity (including an entity described in section 824(f) of this title) that owns, operates, or controls facilities used for the transmission of electric energy—

(A) in interstate commerce;

(B) for the sale of electric energy at wholesale.[1]

(24) WHOLESALE TRANSMISSION SERVICES.—The term ''wholesale transmission services'' means the transmission of electric energy sold, or to be sold, at wholesale in interstate commerce.[1]

(25) EXEMPT WHOLESALE GENERATOR.—The term ''exempt wholesale generator'' shall have the meaning provided by section 79z–5a[2] of title 15.[1]

(26) ELECTRIC COOPERATIVE.—The term ''electric cooperative'' means a cooperatively owned electric utility.[1]

(27) RTO.—The term ''Regional Transmission Organization'' or ''RTO'' means an entity of sufficient regional scope approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[1]

(28) ISO.—The term ''Independent System Operator'' or ''ISO'' means an entity approved by the Commission—

(A) to exercise operational or functional control of facilities used for the transmission of electric energy in interstate commerce; and

(B) to ensure nondiscriminatory access to the facilities.[3]

(29) TRANSMISSION ORGANIZATION.—The term ''Transmission Organization'' means a Regional Transmission Organization, Independent System Operator, independent transmission provider, or other transmission organization finally approved by the Commission for the operation of transmission facilities.

(June 10, 1920, ch. 285, pt. I, § 3, 41 Stat. 1063; renumbered pt. I and amended, Aug. 26, 1935, ch. 687, title II, §§ 201, 212, 49 Stat. 838, 847; Pub. L. 95–617, title II, § 201, Nov. 9, 1978, 92 Stat. 3134; Pub. L. 96–294, title VI, § 643(a)(1), June 30, 1980, 94 Stat. 770; Pub. L. 101–575, § 3, Nov. 15, 1990, 104 Stat. 2834; Pub. L. 102–46, May 17, 1991, 105 Stat. 249; Pub. L. 102–486, title VII, § 726, Oct. 24, 1992, 106 Stat. 2921; Pub. L. 109–58, title XII, §§ 1253(b), 1291(b), Aug. 8, 2005, 119 Stat. 970, 984.)

REFERENCES IN TEXT

Section 79z–5a of title 15, referred to in par. (25), was repealed by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974.

AMENDMENTS

2005—Par. (17)(C). Pub. L. 109–58, § 1253(b)(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: '' 'qualifying small power production facility' means a small power production facility—

''(i) which the Commission determines, by rule, meets such requirements (including requirements respecting fuel use, fuel efficiency, and reliability) as the Commission may, by rule, prescribe; and

''(ii) which is 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);''.

Par. (18)(B). Pub. L. 109–58, § 1253(b)(2), amended subpar. (B) generally. Prior to amendment, subpar. (B) read as follows: '' 'qualifying cogeneration facility' means a cogeneration facility which—

''(i) the Commission determines, by rule, meets such requirements (including requirements respecting minimum size, fuel use, and fuel efficiency) as the Commission may, by rule, prescribe; and

''(ii) is owned by a person not primarily engaged in the generation or sale of electric power (other than

[1] So in original. The period probably should be a semicolon.

[2] See References in Text note below.

[3] So in original. The period probably should be ''; and''.

(C) the various procedures that might be used in case of an emergency outage to minimize the public disruption and economic loss that might be caused by such an outage and the cost effectiveness of such procedures.

Such study shall be completed and submitted to the President and the Congress not later than 18 months after November 9, 1978. Before such submittal the Secretary shall provide an opportunity for public comment on the results of such study.

(2) The study under paragraph (1) shall include consideration of the following:

(A) the cost effectiveness of investments in each of the components involved in providing adequate and reliable electric service, including generation, transmission, and distribution facilities, and devices available to the electric consumer;

(B) the environmental and other effects of the investments considered under subparagraph (A);

(C) various types of electric utility systems in terms of generation, transmission, distribution and customer mix, the extent to which differences in reliability levels may be desirable, and the cost-effectiveness of the various methods which could be used to decrease the number and severity of any outages among the various types of systems;

(D) alternatives to adding new generation facilities to achieve such desired levels of reliability (including conservation);

(E) the cost-effectiveness of adding a number of small, decentralized conventional and nonconventional generating units rather than a small number of large generating units with a similar total megawatt capacity for achieving the desired level of reliability; and

(F) any standards for electric utility reliability used by, or suggested for use by, the electric utility industry in terms of cost-effectiveness in achieving the desired level of reliability, including equipment standards, standards for operating procedures and training of personnel, and standards relating the number and severity of outages to periods of time.

(b) Examination of reliability issues by reliability councils

The Secretary, in consultation with the Commission, may, from time to time, request the reliability councils established under section 202(a) of the Federal Power Act [16 U.S.C. 824a(a) of this title] or other appropriate persons (including Federal agencies) to examine and report to him concerning any electric utility reliability issue. The Secretary shall report to the Congress (in its annual report or in the report required under subsection (a) of this section if appropriate) the results of any examination under the preceding sentence.

(c) Department of Energy recommendations

The Secretary, in consultation with the Commission, and after opportunity for public comment, may recommend industry standards for reliability to the electric utility industry, including standards with respect to equipment, operating procedures and training of personnel, and standards relating to the level or levels of reliability appropriate to adequately and reliably serve the needs of electric consumers. The Secretary shall include in his annual report—

(1) any recommendations made under this subsection or any recommendations respecting electric utility reliability problems under any other provision of law, and

(2) a description of actions taken by electric utilities with respect to such recommendations.

(Pub. L. 95–617, title II, § 209, Nov. 9, 1978, 92 Stat. 3143.)

CODIFICATION

Section was enacted as part of the Public Utility Regulatory Policies Act of 1978, and not as part of the Federal Power Act which generally comprises this chapter.

DEFINITIONS

For definitions of terms used in this section, see section 2602 of this title.

§ 824a–3. Cogeneration and small power production

(a) Cogeneration and small power production rules

Not later than 1 year after November 9, 1978, the Commission shall prescribe, and from time to time thereafter revise, such rules as it determines necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80 megawatts capacity, which rules require electric utilities to offer to—

(1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities[1] and

(2) purchase electric energy from such facilities.

Such rules shall be prescribed, after consultation with representatives of Federal and State regulatory agencies having ratemaking authority for electric utilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments. Such rules shall include provisions respecting minimum reliability of qualifying cogeneration facilities and qualifying small power production facilities (including reliability of such facilities during emergencies) and rules respecting reliability of electric energy service to be available to such facilities from electric utilities during emergencies. Such rules may not authorize a qualifying cogeneration facility or qualifying small power production facility to make any sale for purposes other than resale.

(b) Rates for purchases by electric utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to purchase electric energy from any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase—

(1) shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and

[1] So in original. Probably should be followed by a comma.

(2) shall not discriminate against qualifying cogenerators or qualifying small power producers.

No such rule prescribed under subsection (a) of this section shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy.

(c) Rates for sales by utilities

The rules prescribed under subsection (a) of this section shall insure that, in requiring any electric utility to offer to sell electric energy to any qualifying cogeneration facility or qualifying small power production facility, the rates for such sale—

(1) shall be just and reasonable and in the public interest, and

(2) shall not discriminate against the qualifying cogenerators or qualifying small power producers.

(d) "Incremental cost of alternative electric energy" defined

For purposes of this section, the term ''incremental cost of alternative electric energy'' means, with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.

(e) Exemptions

(1) Not later than 1 year after November 9, 1978, and from time to time thereafter, the Commission shall, after consultation with representatives of State regulatory authorities, electric utilities, owners of cogeneration facilities and owners of small power production facilities, and after public notice and a reasonable opportunity for interested persons (including State and Federal agencies) to submit oral as well as written data, views, and arguments, prescribe rules under which geothermal small power production facilities of not more than 80 megawatts capacity, qualifying cogeneration facilities, and qualifying small power production facilities are exempted in whole or part from the Federal Power Act [16 U.S.C. 791a et seq.], from the Public Utility Holding Company Act,[2] from State laws and regulations respecting the rates, or respecting the financial or organizational 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.

(2) No qualifying small power production facility (other than a qualifying small power production facility which is an eligible solar, wind, waste, or geothermal facility as defined in section 3(17)(E) of the Federal Power Act [16 U.S.C. 796(17)(E)]) which has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), exceeds 30 megawatts, or 80 megawatts for a qualifying small power production facility using geothermal energy as the primary energy source, may be exempted under rules under paragraph (1) from any provision of law or regulation referred to in paragraph (1), except that any qualifying small power production facility which produces electric energy solely by the use of biomass as a primary energy source, may be exempted by the Commission under such rules from the Public Utility Holding Company Act[2] and from State laws and regulations referred to in such paragraph (1).

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from—

(A) any State law or regulation in effect in a State pursuant to subsection (f) of this section,

(B) the provisions of section 210, 211, or 212 of the Federal Power Act [16 U.S.C. 824i, 824j, or 824k] or the necessary authorities for enforcement of any such provision under the Federal Power Act [16 U.S.C. 791a et seq.], or

(C) any license or permit requirement under part I of the Federal Power Act [16 U.S.C. 791a et seq.] any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

(f) Implementation of rules for qualifying cogeneration and qualifying small power production facilities

(1) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule (or revised rule) for each electric utility for which it has ratemaking authority.

(2) Beginning on or before the date one year after any rule is prescribed by the Commission under subsection (a) of this section or revised under such subsection, each nonregulated electric utility shall, after notice and opportunity for public hearing, implement such rule (or revised rule).

(g) Judicial review and enforcement

(1) Judicial review may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement of a rule under subsection (a) of this section in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title in the case of a proceeding to which section 2633 of this title applies.

(2) Any person (including the Secretary) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f) of this section. Any such action shall be brought only in the manner, and under the requirements, as provided under section 2633 of this title with respect to an action to which section 2633 of this title applies.

(h) Commission enforcement

(1) For purposes of enforcement of any rule prescribed by the Commission under subsection (a) of this section with respect to any operations

[2] See References in Text note below.

Subpart B—Qualifying Cogeneration and Small Power Production Facilities

AUTHORITY: Public Utility Regulatory Policies Act of 1978, (16 U.S.C. 2601, *et seq.*), Energy Supply and Environmental Coordination Act, (15 U.S.C. 791 *et seq.*), Federal Power Act, as amended, (16 U.S.C. 792, *et seq.*), Department of Energy Organization Act, (42 U.S.C. 7101 *et seq.*), E.O. 12009, 42 FR 46267, Natural Gas Policy Act of 1978, (15 U.S.C. 3301, *et seq.*).

§ 292.201 Scope.

This subpart applies to the criteria for and manner of becoming a qualifying small power production facility and a qualifying cogeneration facility under sections 3(17)(C) and 3(18)(B), respectively, of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA).

[45 FR 17972, Mar. 20, 1980]

§ 292.202 Definitions.

For purposes of this subpart:

(a) *Biomass* means any organic material not derived from fossil fuels;

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

(1) Anthracite culm produced prior to July 23, 1985;

(2) Anthracite refuse that has an average heat content of 6,000 Btu or less per pound and has an average ash content of 45 percent or more;

(3) Bituminous coal refuse that has an average heat content of 9,500 Btu per pound or less and has an average ash content of 25 percent or more;

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

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

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

(7) Gaseous fuels, except:

(i) Synthetic gas from coal; and

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

(8) Petroleum coke;

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

(10) Residual heat;

(11) Heat from exothermic reactions;

(12) Used rubber tires;

(13) Plastic materials; and

(14) Refinery off-gas.

(c) *Cogeneration facility* means equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy;

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

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

(f) *Supplementary firing* means an energy input to the cogeneration facility used only in the thermal process of a

topping-cycle cogeneration facility, or only in the electric generating process of a bottoming-cycle cogeneration facility;

(g) *Useful power output* of a cogeneration facility means the electric or mechanical energy made available for use, exclusive of any such energy used in the power production process;

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

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

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

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

(i) *Total energy output* of a topping-cycle cogeneration facility is the sum of the useful power output and useful thermal energy output;

(j) *Total energy input* means the total energy of all forms supplied from external sources;

(k) *Natural gas* means either natural gas unmixed, or any mixture of natural gas and artificial gas;

(l) *Oil* means crude oil, residual fuel oil, natural gas liquids, or any refined petroleum products; and

(m) Energy input in the case of energy in the form of natural gas or oil is to be measured by the lower heating value of the natural gas or oil.

(n) *Electric utility holding company* means a holding company, as defined in section 2(a)(7) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79b(a)(7) which owns one or more electric utilities, as defined in section 2(a)(3) of that Act, 15 U.S.C. 79b(a)(3), but does not include any holding company which is exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79c(a)(3) or 79c(a)(5).

(o) *Utility geothermal small power production facility* means a small power production facility which uses geothermal energy as the primary energy resource and of which more than 50 percent is owned either:

(1) By an electric utility or utilities, electric utility holding company or companies, or any combination thereof.

(2) By any company 50 percent or more of the outstanding voting securities of which of which are directly or indirectly owned, controlled, or held with power to vote by an electric utility, electric utility holding company, or any combination thereof.

(p) *New dam or diversion* means a dam or diversion which requires, for the purposes of installing any hydroelectric power project, any construction, or enlargement of any impoundment or diversion structure (other than repairs or reconstruction or the addition of flashboards of similar adjustable devices);

(q) *Substantial adverse effect on the environment* means a substantial alteration in the existing or potential use of, or a loss of, natural features, existing habitat, recreational uses, water quality, or other environmental resources. Substantial alteration of particular resource includes a change in the environment that substantially reduces the quality of the affected resources; and

(r) *Commitment of substantial monetary resources* means the expenditure of, or commitment to expend, at least 50 percent of the total cost of preparing an application for license or exemption for a hydroelectric project that is accepted for filing by the Commission pursuant to §4.32(e) of this chapter. The total cost includes (but is not limited to) the cost of agency consultation, environmental studies, and engineering studies conducted pursuant to §4.38 of this chapter, and the Commission's requirements for filing an application for license exemption.

(s) *Sequential use* of energy means:

(1) For a topping-cycle cogeneration facility, the use of reject heat from a power production process in sufficient amounts in a thermal application or process to conform to the requirements of the operating standard; or

(2) For a bottoming-cycle cogeneration facility, the use of reject heat from a thermal application or process,

at least some of which is then used for power production.

(Energy Security Act, Pub. L. 96-294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15 U.S.C. 791 *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, E.O. 12009, 42 FR 46267)

[45 FR 17972, Mar. 20, 1980, as amended at 45 FR 33958, May 21, 1980; 45 FR 66789, Oct. 8, 1980; Order 135, 46 FR 19231, Mar. 30, 1981; 46 FR 32239, June 22, 1981; Order 499, 53 FR 27002, July 18, 1988; Order 575, 60 FR 4857, Jan. 25, 1995]

§ 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) Unless exempted by paragraph (d), 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 standards and criteria specified in §§ 292.205(a), (b) and (d); and

(2) Unless exempted by paragraph (d), 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.

(c) *Hydroelectric small power production facilities located at a new dam or diversion.* (1) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility if it meets the requirements of:

(i) Paragraph (a) of this section; and

(ii) Section 292.208.

(2) [Reserved]

(d) *Exemptions and waivers from filing requirement.* (1) Any facility with a net power production capacity of 1 MW or less is exempt from the filing requirements of paragraphs (a)(3) and (b)(2) of this section.

(2) The Commission may waive the requirement of paragraphs (a)(3) and (b)(2) of this section for good cause. Any applicant seeking waiver of paragraphs (a)(3) and (b)(2) of this section must file a petition for declaratory order describing in detail the reasons waiver is being sought.

[Order 732, 75 FR 15965, Mar. 30, 2010]

§ 292.204 Criteria for qualifying small power production facilities.

(a) *Size of the facility*—(1) *Maximum size.* Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.* (i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought and, for hydroelectric facilities, if they use water from the same impoundment for power generation.

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

(3) *Waiver.* The Commission may modify the application of paragraph (a)(2) of this section, for good cause.

(4) *Exception.* Facilities meeting the criteria in section 3(17)(E) of the Federal Power Act (16 U.S.C. 796(17)(E)) have no maximum size, and the power production capacity of such facilities shall be excluded from consideration when determining the maximum size of other small power production facilities within one mile of such facilities.

(b) *Fuel use.* (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal

resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

(ii) Any primary energy source which, on the basis of its energy content, is 50 percent or more biomass shall be considered biomass.

(2) Use of oil, natural gas and coal by a facility, under section 3(17)(B) of the Federal Power Act, is limited to the minimum amounts of fuel required for ignition, startup, testing, flame stabilization, and control uses, and the minimum amounts of fuel required to alleviate or prevent unanticipated equipment outages, and emergencies, directly affecting the public health, safety, or welfare, which would result from electric power outages. Such fuel use may not, in the aggregate, exceed 25 percent of the total energy input of the facility during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.

(Energy Security Act, Pub. L. 96–294, 94 Stat. 611 (1980) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*, Energy Supply and Environmental Coordination Act, 15, U.S.C. 791, *et seq.*, Federal Power Act, as amended, 16 U.S.C. 792 *et seq.*, Department of Energy Organization Act, 42 U.S.C. 7101, *et seq.*; E.O. 12009, 42 FR 46267)

[45 FR 17972, Mar. 20, 1980, as amended by Order 135, 46 FR 19231, Mar. 30, 1981; Order 575, 60 FR 4857, Jan. 25, 1995; Order 732, 75 FR 15966, Mar. 30, 2010]

§ 292.205 Criteria for qualifying cogeneration facilities.

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

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

(A) Subject to paragraph (a)(2)(i)(B) of this section be no less than 42.5 percent of the total energy input of natural gas and oil to the facility; or

(B) If the useful thermal energy output is less than 15 percent of the total energy output of the facility, be no less than 45 percent of the total energy input of natural gas and oil to the facility.

(ii) For any topping-cycle cogeneration facility not subject to paragraph (a)(2)(i) of this section there is no efficiency standard.

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

(2) For any bottoming-cycle cogeneration facility not covered by paragraph (b)(1) of this section, there is no efficiency standard.

(c) *Waiver.* The Commission may waive any of the requirements of paragraphs (a) and (b) of this section upon a showing that the facility will produce significant energy savings.

(d) *Criteria for new cogeneration facilities.* Notwithstanding paragraphs (a) and (b) of this section, any cogeneration facility that was either not a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification or an application for Commission certification 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 fundamentality 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 purpose 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 (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).

[45 FR 17972, Mar. 20, 1980, as amended by Order 478, 52 FR 28467, July 30, 1987; Order 575, 60 FR 4857, Jan. 25, 1995; Order 671, 71 FR 7868, Feb. 15, 2006; Order 732, 75 FR 15966, Mar. 30, 2010; 76 FR 50663, Aug. 16, 2011]

§ 292.207 Procedures for obtaining qualifying status.

(a) *Self-certification*. The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative by properly completing a Form No. 556 and filing that form with the Commission, pursuant to § 131.80 of this chapter, and complying with paragraph (c) of this section.

(b) *Optional procedure*—(1) *Application for Commission certification*. In lieu of the self-certification procedures in paragraph (a) of this section, an owner or operator of an existing or a proposed facility, or its representative, may file with the Commission an application for Commission certification that the facility is a qualifying facility. The application must be accompanied by the fee prescribed by part 381 of this chapter, and the applicant for Commission certification must comply with paragraph (c) of this section.

(2) *General contents of application*. The application must include a properly completed Form No. 556 pursuant to § 131.80 of this chapter.

(3) *Commission action*. (i) Within 90 days of the later of the filing of an application or the filing of a supplement, amendment or other change to the application, the Commission will either: Inform the applicant that the application is deficient; or issue an order granting or denying the application; or toll the time for issuance of an order. Any order denying certification shall identify the specific requirements which were not met. If the Commission does not act within 90 days of the date of the latest filing, the application shall be deemed to have been granted.

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

(c) *Notice requirements*—(1) *General*. An applicant filing a self-certification, self-recertification, application for Commission certification or application for Commission recertification of the qualifying status of its facility must concurrently serve a copy of such

filing on each electric utility with which it expects to interconnect, transmit or sell electric energy to, or purchase supplementary, standby, back-up or maintenance power from, and the State regulatory authority of each state where the facility and each affected electric utility is located. The Commission will publish a notice in the FEDERAL REGISTER for each application for Commission certification and for each self-certification of a cogeneration facility that is subject to the requirements of § 292.205(d).

(2) *Facilities of 500 kW or more.* An electric utility is not required to purchase electric energy from a facility with a net power production capacity of 500 kW or more until 90 days after the facility notifies the facility that it is a qualifying facility or 90 days after the utility meets the notice requirements in paragraph (c)(1) of this section.

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

(ii) The Commission may, on its own motion or on the motion of any person, revoke the qualifying status of a facility that has been certified under paragraph (b) of this section, if the facility fails to conform to any of the Commission's qualifying facility criteria under this part.

(iii) The Commission may, 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.

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

[45 FR 17972, Mar. 20, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 292.207, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov*.

§ 292.208 Special requirements for hydroelectric small power production facilities located at a new dam or diversion.

(a) A hydroelectric small power production facility that impounds or diverts the water of a natural watercourse by means of a new dam or diversion (as that term is defined in § 292.202(p)) is a qualifying facility only if it meets the requirements of:

(1) Paragraph (b) of this section;

(2) Section 292.203(c); and

(3) Part 4 of this chapter.

(b) A hydroelectric small power production described in paragraph (a) is a qualifying facility only if:

(1) The Commission finds, at the time it issues the license or exemption, that the project will not have a substantial adverse effect on the environment (as that term is defined in § 292.202(q)), including recreation and water quality;

(2) The Commission finds, at the time the application for the license or exemption is accepted for filing under § 4.32 of this chapter, that the project is not located on any segment of a natural watercourse which:

(i) Is included, or designated for potential inclusion in, a State or National wild and scenic river system; or

(ii) The State has determined, in accordance with applicable State law, to possess unique natural, recreational, cultural or scenic attributes which

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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