

qualification of new dual-fuel cogeneration facilities, fuel use criteria for qualifying small power production facilities, and the exemption of qualifying facilities from sections 19 and 20 of the Federal Power Act.

EFFECTIVE DATE: May 15, 1980.

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SUPPLEMENTARY INFORMATION:

In the matter of Small Power Production and Cogeneration Facilities—Rates and Exemptions, Qualifying Status: order granting in part and denying in part rehearing of order Nos. 69 and 70, and amending regulations.

On February 19, 1980, the Federal Energy Regulatory Commission (Commission) issued Order No. 69, the "Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978" (PURPA) in Docket No. RM79-55.¹ The Commission received six applications for rehearing or reconsideration.²

¹ 45 Fed. Reg. 12214 (February 25, 1980).

² Southern Company Services, Inc. (March 14, 1980), Essex Development Association (March 14, 1980), American Electric Power Service Corporation (March 14, 1980), Edison Electric Institute (March 20, 1980), Consolidated Edison Company and Boston Edison Company (March 20, 1980), and Colorado-Ute Electric Association, Inc. (April 11, 1980).

The Commission notes that, while there is no express statutory right to rehearing of rules issued under section 210 of PURPA, there is a statutory right to rehearing of rules issued under section 201 of PURPA, which amended the Federal Power Act (FPA) by adding sections 3(17)-3(22). The Commission's view is that Congress, in incorporating by reference the enforcement provision of the Federal Power Act (Section 210h of PURPA), intended also to incorporate by reference the rehearing and judicial review provision of the Federal Power Act.

In addition, a case involving the Natural Gas Act and the Natural Gas Policy Act of 1978, the Court observed that

" * * * it is often not possible to draw a precise line separating the boundaries of the two Acts. Implementation of many NGPA Provisions requires conduct by FERC authorized under both Acts. As a result, the promulgation of rules may entail the exercise of authority under both the NGA and the NGPA. *Eccc, Inc. v. Federal Energy Regulatory Commission*, 611 F.2d 554, 564-566 (5th Cir. 1980).

The Commission notes that section 210 of PURPA and sections 3(17)-3(22) of the FPA, as added by section 201 of PURPA, are, to a large extent, interrelated. Section 201 of PURPA establishes the criteria and procedures by which a cogeneration or small power production facility can become a "qualifying" facility; section 210 of PURPA establishes rates for sales and purchases of electric power between qualifying facilities and domestic

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Dockets Nos. RM79-54 and RM79-55]

Small Power Production; Order Granting in Part and Denying in Part Rehearing of Orders Nos. 69 and 70, and Amending Regulations

Issued: May 15, 1980.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order granting in part and denying in part rehearing of order Nos. 69 and 70, and amending regulations.

SUMMARY: The Federal Energy Regulatory Commission (Commission) hereby adopts an order granting in part and denying in part petitions for amendment of Order Nos. 69 and 70. The Order amends four sections of the Commission's rules involving small power production. The amendments involve the definition of "total energy input," general requirements for

On March 13, 1980 the Commission issued in Docket No. RM79-54, Order No. 70, the "Final Rule Establishing Requirements and Procedures for a Determination of Qualifying Status for Small Power Production and Cogeneration Facilities."³ That rule established criteria and procedures whereby small power production and cogeneration facilities could determine if they were eligible to receive the rate benefits and exemptions set forth in the Commission's rules implementing section 210 of PURPA.

The Commission received four petitions for rehearing of Docket No. RM79-54.⁴

With the exception of arguments discussed below, these applications raised no new matters of fact or law.

Order No. 69

Interconnection § 292.305(c). Consolidated Edison Company (Con Ed), Boston Edison Company, and Edison Electric Institute (EEI) recommended that the Commission determine that the interconnection procedures set forth in sections 210 and 212 of the Federal Power Act (FPA) are applicable to qualifying facilities, rather than requiring electric utilities to interconnect with a qualifying facility as an act included within the obligation to purchase, and not requiring an evidentiary hearing and the rendering of certain findings required under sections 210 and 212 of the FPA. In the final rule, the Commission observed that section 212(e) of the FPA provides that no provision of section 210 of the FPA should be treated as an exclusive means of obtaining relief.⁵ The Commission interpreted this provision to mean that the existence of any authority under section 210 of the FPA to require interconnection should not be

interpreted as exclusive of any other interconnection authority available under any other law. The Commission interpreted section 210(a) of PURPA as providing a broad grant of authority to prescribe rules necessary to encourage cogeneration and small power production, including the authority to require interconnection.

In their application, Con Ed and Boston Edison argued that the fact that Congress prohibited the Commission from exempting any qualifying facility from the provisions of sections 210 or 212 of the FPA renders moot or irrelevant the express ability of the Commission to resort to other authority to require interconnections. They state that while section 210(a) of PURPA provides the FERC with a broad mandate to prescribe rules as it determines necessary, the Congress, in section 210(e) specifically prohibited the Commission from exempting any qualifying facility from the provisions of sections 210 or 212 of the FPA. As a result, Con Ed and Boston Edison claim that to read section 210(a) of PURPA as granting the "very authority specifically denied in section 210(e) of PURPA is to render the latter subsection utter surplusage."

The primary question arising from these claims is the proper interpretation of section 210(e)(3)(B) of PURPA, which provides that qualifying facilities cannot be exempted from sections 210, 211, and 212 of the FPA.

Section 210 of the FPA grants to electric utilities, Federal power marketing agencies, and qualifying cogenerators any small power producers the right to apply for a Commission order requiring interconnection. The "target" of such an interconnection order can be "any cogeneration facility, and small power production facility, or the transmission facilities of any electric utility."⁶

Thus, in the procedures set forth in sections 210 and 212 of the FPA, qualifying facilities may either be applicants for interconnection orders, or targets of such interconnection orders. These sections confer upon qualifying facilities the right to apply for interconnection orders; they also impose on qualifying facilities the obligation and liability to be subjected to interconnection orders.

Section 210(e) of PURPA sets forth categories of State and Federal laws from which qualifying facilities can be exempted. The intent of this exemption is to remove the burden associated with being subjected to regulations as an electric utility under the FPA, the Public

Utility Holding Company Act, and State laws regulating rates and financial organizations of electric utilities. The Joint Explanatory Statement of the Committee of Conference (Conference Report) accompanying PURPA states that rate regulation of qualifying facilities is to be done in a "less burdensome manner than traditional utility-rate regulation."⁷ It further notes that

[t]he establishment of utility type regulation over (cogeneration and small power production facilities) would act as a significant disincentive to firms interested in cogeneration and small power production.⁸

Thus, by exempting qualifying facilities from this type of regulation, Congress relieved them from liabilities and requirements to which others (*viz.*, non-qualifying facilities) are subject. Use of the word "exempt" in this context is consistent with its definition: "to release or deliver from some liability or requirement to which others are subject."⁹ To "exempt" qualifying facilities does not mean to deny them a privilege or right to which they would otherwise be entitled; to exempt means to relieve of undesirable responsibility or obligation.

Sections 210 and 212 provide that, if the Commission makes certain determinations, it can impose obligations on qualifying facilities, including requiring the physical connection of the qualifying facility with the applicant, the sale or exchange of electric energy, or an increase in transmission capacity necessary to carry out these provisions. The Commission believes it is from these obligations that section 210(e)(3)(B) provides that qualifying facilities may not be exempted. Unlike the interpretation proffered by Con Ed and Boston Edison this reading comports with the plain meaning of the statute and with the accepted use of the language. And because qualifying facilities remain liable to being a target to an order under sections 210 and 212 of the FPA, section 210(e)(3)(B) is not "render[ed] utter surplusage."¹⁰

Under Con Ed's and Boston Edison's reading, section 210(e)(3)(B) of PURPA would also mean that qualifying facilities may not be exempted from applying under section 210 of the FPA to the Commission for an order requiring

⁷ Conference Report in H.R. 4018, Public Utility Regulatory Policies Act of 1978, H.R. Rep. No. 1750, 95th Cong., 2d Sess. 97 (1978).

⁸ *Id.*

⁹ Webster's Third New International Dictionary (1976).

¹⁰ Petition for Rehearing and Reconsideration, Con Ed and Boston Edison, *supra* note 1, mimeo at 5.

Footnotes continued from last page utilities, and exempts qualifying facilities from certain State and Federal regulation. The relationship between the FPA and PURPA in this proceeding is thus similar to that between the NGA and the NCPA. For the reasons set forth in *Eccc*, the issues will be more clearly delineated, and the task of separating interrelated sections will be obviated. If these rulemakings are subject to review in the same forum, the Commission expects that any review of its order on rehearing in Docket Nos. RM79-54 and RM79-55, would occur in the Courts of Appeal, pursuant to section 313(b) of the FPA.

⁴ 45 FR 17959 (March 20, 1980).

⁵ Southern Company Services, Inc. (April 11, 1980), Consolidated Edison Company (April 14, 1980), Southern California Gas Company (April 14, 1980), Elizabethtown Gas Company (April 14, 1980).

⁶ Section 212(e) of the FPA states that no provision of section 210 of the FPA shall be treated "(1) as requiring any person to utilize the authority of such section 210 or 211 in lieu of any authority of law, or (2) as limiting, impairing, or otherwise affecting any other authority of the Commission under any other provision of law.

⁶ Section 210(a)(1)(A), Federal Power Act.

interconnection. The Commission notes that the ability to *apply* for an interconnection order is not a duty, liability, or requirement to which a qualifying facility is subject; it is a grant of standing to request the Commission to impose an obligation on another party (viz., a target of an interconnection order).¹¹

Under Con Ed's reading, the Commission may not "exempt" a qualifying facility from this statutory privilege. Since, as noted previously, to exempt means to relieve of liabilities, and not be excluded from rights or privileges, this interpretation does not seem consonant with the plain meaning of the statutory language.

Transmission § 292.303(d). Southern Company Services, Inc. (Southern Company), stated that § 292.303(d) appears to prohibit an electric utility transmitting from a qualifying facility to another electric utility from levying a transmission charge. This interpretation is not the one intended by the Commission. The sentence in question states that "[t]he rate for purchase by the electric utility to which such energy is transmitted . . . shall not include any charges for transmission." This phrase is intended to limit the amount that the utility to which electric energy is ultimately delivered must pay. This sentence provides that the purchasing utility need purchase this energy at a rate which reflects the costs it can avoid as a result of making such a purchase, and that any costs incurred to deliver the energy to it are the responsibility of the selling qualifying facility. (The transmitting utility may, however, agree to bear some or all of the transmission costs.)

The Commission does intend that an electric utility which *transmits* energy from a qualifying facility to another electric utility be permitted to receive reimbursement for this transmission service. As noted by Southern Company Services, this intent is expressed in the preamble, where the Commission stated:

In the case of electric utilities not subject to the jurisdiction of this Commission, these (transmission) charges should be determined under applicable State law or regulation which may permit agreement between the qualifying facility and any electric utility which transmits energy or capacity with the consent of the qualifying facility. For utilities subject to the Commission's jurisdiction under Part II of the Federal Power Act, these

charges will be determined pursuant to Part II.¹²

Southern Company recommends that these provisions be added to section 292.303(d), in place of the sentence which provides that rates for purchases shall not include any charges for transmission. The Commission believes that the provision as issued is acceptable. With this clarification, the proper interpretation should be clear.

Exemptions § 292.601(b). On March 19, 1980, Essex Development Associates (Essex) filed a Motion for Clarification of Order No. 69. Essex observed that the Commission did not exempt qualifying facilities from sections 19 and 20 of the Federal Power Act (FPA or Act). Essex stated that these sections provide the Commission with discretionary jurisdiction to regulate rates and the issuance of securities by licensees under Part I of the Federal Power Act. Essex contends that the intent of section 210 of PURPA and of Order No. 69, is to eliminate utility-type regulation of cogenerators and small power producers, without regard to the status of the facility as a licensee under Part I of the Federal Power Act. Essex requests that the Commission amend Order No. 69 to exempt qualifying facilities from sections 19 and 20 of the FPA, or that the Commission waive its rights under sections 19 and 20 to regulate a qualifying small power producer.

It should be noted that section 210(e)(3)(C) of PURPA provides that no qualifying facility may be exempted from

. . . any license or permit requirement under Part I of the Federal Power Act, any provision under such Act related to such a license or permit requirement, or the necessary authorities for enforcement of any such requirement.

The threshold question is whether this section should be interpreted to prevent the exemption of qualifying facilities from sections 19 and 20 of the Federal Power Act.

The intent of section 210(e) of PURPA, and of § 292.601 of the Commission's regulations (exemption to qualifying facilities from the Federal Power Act), is to remove the disincentive associated with utility-type regulation.¹³ In Order No. 69, the Commission exempted qualifying facilities from cost-of-service regulation of rates, and from regulation of securities to which jurisdictional public utilities are subject under Part II of the Federal Power Act. In addition,

within the statutory parameters, the Commission exempted qualifying facilities from regulation as electric utilities under the Public Utility Holding Company Act, and from State regulation of rates and financial organization.

Regulation under Part II of the Federal Power Act chiefly involves regulation of rates and financial organization, while regulation under Part I of the Act concerns the licensing of hydroelectric projects. A licensed project under Part I of the Federal Power Act may also be a qualifying small power producer, if it meets the size and ownership requirements set forth in Order No. 70.¹⁴

In pertinent part, section 19 of the Federal Power Act provides that, as a condition of a license, a licensee "developing, transmitting, or distributing power for sale or use in public service," shall abide by the rate and service regulation of any duly constituted agency of the State in which such service is provided. If power is provided in a State in which there is no authorized regulatory commission to regulate the rates for sales of power, or the issuance of securities by a licensee, jurisdiction is conferred on the Commission to regulate these matters.

Section 20 of the FPA provides that, with regard to power from a licensed project that enters interstate or foreign commerce, the rate charged shall be "reasonable, nondiscriminatory, and just to the customer," and all "unreasonable discriminatory and unjust rates" are prohibited. It provides that if any State affected has not established a commission to enforce these requirements, or to regulate the issuance of securities, or if any parties or States are unable to agree on appropriate regulation, jurisdiction is conferred on the Commission to regulate these activities.

The Commission observes that most of the provisions of Part I of the Act impose conditions and restrictions on the construction and operation of hydroelectric facilities, which require that licensed projects comply with comprehensive development of the nation's waterways. As a result, the Commission perceives no inconsistency

¹⁴ Section 292.206 of the Commission's rules provides that a facility cannot qualify if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or public utility holding companies. Section 292.204(a) provides that the power production capacity of a qualifying facility may not exceed 80 megawatts. Pursuant to § 292.601 (Order No. 69), only small power production facilities of 30 mw or less are exempted from the Federal Power Act, the Public Utility Holding Company Act, and State regulation, except biomass facilities between 30 and 80 megawatts, which are exempt from State regulation and from the Public Utility Holding Company Act.

¹¹ Indeed, the ability to apply for an order imposing an obligation to wheel or transmit power was not conferred upon qualifying facilities; thus exclusion from being an applicant is an important distinction between sections 210 and 211 of the FPA.

¹² Order No. 70 *supra*, *nimeo* at 32.

¹³ Conference Report in H.R. 4018, Public Utility Regulatory Policies Act of 1978, H.R. Rep. No. 1750, 95th Cong., 2nd Sess. 98 (1978).

in exempting licensed projects that are qualifying facilities from State and Federal regulation of rates and financial organization, and maintaining Federal regulation of the physical structure of such facilities, and their manner of operation. The Commission believes that the limitation on exemption from the Federal Power Act set forth in section 210(e)(3)(C) of PURPA was intended to ensure that licensees comply with the requirements concerning comprehensive development of waterways, and ensure that they do not build or operate hydroelectric projects in a manner inconsistent with the public interest.

Nowhere in the legislative history of section 210, or in the Conference Report, does there appear any indication that qualifying facilities that are licensed hydroelectric projects were intended to be singled out for utility-type rate or securities regulation. To subject these licensed projects to such regulation would be inconsistent with the intent of this section of PURPA—to encourage cogeneration and small power production. Thus, the Commission finds no basis to subject small power producer licensees to regulation under sections 19 and 20 of the Act, when they would otherwise be exempted from utility-type regulation at both the Federal and State levels.¹⁵

Moreover, the Commission finds no basis to believe that section 210 of PURPA was intended to grant exemption from the regulations of rates

and financial organization, and yet to retain the authority to impose regulation of rates and the issuance of securities for one class of small power producers.

Rules of statutory construction indicate that the Commission should look to the object to be accomplished, and the evils sought to be remedied.¹⁶ Moreover, a statute should be construed so as to effect its purpose.¹⁷ The Commission has cited the reference in the Conference Report regarding its disincentives associated with "utility type regulation." It further cites the Conference Report statement that

[I]t is not the intention of the conferees that cogeneration and small power producers become subject . . . to the type of examination that is traditionally given to electric utility rate applications to determine what is the just and reasonable rate that they should receive for their electric power.¹⁸

The authority contained in sections 19 and 20 of the Federal Power Act would reserve to the Commission the authority to impose this type of utility regulation on qualifying small power producer licensees. The possibility that such regulation will be imposed could reduce the encouragement of development of small power production which the Congress, in section 210 of PURPA, and the Commission, in Order No. 69, intended to provide. For the reasons set forth, the Commission finds it appropriate to exempt qualifying facilities from these sections of the Federal Power Act.

Accordingly, the Commission amends § 292.601(b)(1), so as to exempt qualifying facilities from sections 19 and 20 of the Federal Power Act.

Order No. 70

Definitions § 292.202. Sections 292.202(i) and 292.202(j), define the "total energy output" and "total energy input" of a qualifying facility. Dividing the total energy output by the total energy input indicates the efficiency of the facility.

In § 292.202(j) of the final rule, energy obtained from supplementary firing was inadvertently excluded from the definition of total energy input. Since energy from supplementary firing was not excluded from the definition of total energy output, the rule would distort the efficiency of facilities in which large amounts of energy are supplied from supplementary firing, making them appear more efficient than they are.

To correct this unintended result, the Commission is amending the definition of total energy input so that it includes

energy supplied from supplementary firing. This change will be accomplished by deleting the clause "other than supplementary firing" from the definition of total energy input.

Ownership § 292.206(b). Southern California Gas Company (SCGC) and Elizabethtown Gas Company (Elizabethtown) contend that § 292.206(b) of the Commission's rules erroneously exclude from qualifying status facilities owned by public utility holding companies that are not engaged in the generation or sale of electricity other than from cogeneration facilities or small power production facilities. Elizabethtown states that the rules do not prohibit a gas distribution utility from owning a qualifying facility.

Sections 17(C)(ii) and 18(B)(ii) of the Federal Power Act require the Commission to limit qualifying status to facilities "owned by persons not primarily engaged in the generation or sale of electric power." Section 292.206 of the Commission's rules prohibits public utility holding companies from owning more than 50 percent of the equity interest of a qualifying facility.

The Commission did not intend to prohibit companies without any electric utility interests from owning qualifying facilities. However, because public utility holding companies are subject to many special restrictions, before changing this provision of its rules, the Commission believes it appropriate to consult with the Securities and Exchange Commission to determine whether permitting gas holding companies to own qualifying facilities is consistent with that agency's regulation of holding companies.

Fuel Use § 292.204(b)(1). Southern Company takes exception to the fuel use criteria employed by the Commission in defining a qualifying small power production facility under § 292.204(b) of the rules. In the proposed rule, the term "primary energy source" was not defined. In response to several comments that standards should be established for determining the primary energy source, the Commission required in § 292.204(b)(1) of the final rule that more than 50 percent of the total energy input of a qualifying facility be from biomass, waste, renewable resources, or any combination thereof.

Southern Company states that a small power production facility which utilizes biomass, waste, or renewable resources as its "primary energy source" no more than 51 percent of the time, complies with the "sole" use requirement of the PURPA definition. Southern Company contends that this standard should be eliminated in favor of a standard which requires a small power production

¹⁵ The Commission observes that even if exemption from these provisions were not granted, the residual grant of authority to the Commission set forth in sections 19 and 20 is consistent with the rate and exemption provisions of section 210 of PURPA, and with Order No. 69. Section 210(b) provides that rates for purchases from qualifying facilities shall be "just and reasonable to the electric consumers of the electric utility and in the public interest, and shall not discriminate against qualifying facilities." Section 292.304(a) repeats these statutory requirements. Section 210(f) of PURPA and § 292.401 of the Commission's rules require that, within one year after the Commission's rules take effect, each State regulatory authority is to implement the rules issued by the Commission regarding rates for purchases and sales of electric energy and capacity between qualifying facilities and electric utilities. After State implementation takes place, compliance with section 19—whether viewed as State regulation in the first instance or residual Federal regulation—would be accomplished through the State's program implementing section 210 of PURPA, and Order No. 69. Similarly, the requirements set forth in section 20 regarding the rates for power from licensed projects are not inconsistent with the requirements of section 210 of PURPA, or Order No. 69. Again, regulation under section 210 of PURPA would constitute the vehicle for regulation under section 20 of the Act. (For qualifying small power production facilities greater than 30 mw, where the facility is subject to Commission jurisdiction under Part II of the Federal Power Act, the Commission will establish rates for purchase in accordance with the avoided cost principles set forth in § 292.304.)

¹⁶ 82 C. J. S. Statutes § 323.

¹⁷ *Id.*

¹⁸ Conference Report *supra* note 13, at 97.

facility to use a higher percentage of renewable resources, waste, or biomass.

Two provisions of the rules are involved in this issue. Section § 292.204(b)(2) provides that the oil, natural gas, and coal used by a qualifying facility may not, in the aggregate, exceed 25 percent of the total energy input of the facility during any calendar year. As discussed in the preamble¹⁹ comments received indicated that effective use of biomass or waste as fuels can require that as much as 25 percent of the heat input be from fossil fuel. To assure that these renewable resources qualify for the statutory benefits, the Commission adopted the "25 percent rule."

As noted above, § 292.204(b)(1)(i) provides that more than 50 percent of the total energy input to a qualifying small power production facility must be biomass, waste, renewable resources, or any combination thereof.

At this time, the Commission believes that there are virtually no eligible fuels which are feasible for use by a qualifying facility to fill the hiatus if it derives 50 percent of its energy input from biomass, waste or renewable resources, and 25 percent from oil, natural gas and coal. The Commission will accordingly amend this provision of its rule to require that at least 75 percent of the total energy input of a qualifying small power production facility be from biomass, waste, renewable resources, or any combination thereof.

§ 292.204(b)(2). Southern Company also contends that the Commission's 25 percent limit on fossil fuel use by qualifying facilities is too broad, and is inconsistent with national energy policy. Southern Company argues that the Commission should adopt individual standards for each category of fossil fuel use listed in section 201 of PURPA, as appeared in the notice of proposed rulemaking.²⁰

The Commission rejects this petition. The Commission based the 25 percent standard on the comments filed which generally favored a uniform aggregate standard. Commenters argued that separate standards for startups, flame stabilization and outages are unnecessarily burdensome. They also claimed that some small power production technologies would be severely constrained by one of the standards while requiring little or no fossil fuel for other purposes.

¹⁹ Order No. 70, *supra*, mimeo at 38-40.

²⁰ These categories include fuel used for ignition, startup, testing, flame stabilization, and control uses, and fuel used to alleviate or prevent unanticipated equipment outages and emergencies that would affect public health, safety or welfare. Section 3(17)(B), FPA.

Additionally, the Commission believes that to the extent oil and natural gas remain more expensive than other energy sources available to small power producers, there is an economic disincentive to use more fossil fuel than is absolutely necessary.

Southern Company stated that the Commission's rules are inconsistent with standards promulgated under the Powerplant and Industrial Fuel Use Act of 1978 (FUA). The Commission notes that the FUA is intended to encourage the burning of coal in conventional power plants and industrial fuel burning plants. In contrast, sections 201 and 210 of PURPA are intended to encourage the cogeneration and electric generation through the use of biomass, waste, and renewable resources. Coal may not be used by a qualifying small power production facility as a primary energy source. Southern Company argues that the Commission should adopt, in its rules, the definition of "primary energy source" set forth in the interim rules implementing the FUA. These rules provide that a facility's consumption of oil and gas may not exceed five percent of the facility's annual Btu output. While the use of five percent gas or oil may be sufficient in combination with coal fuel, the burning of biomass or waste can require a greater use of gas or oil. Comments indicate that if the Commission were to adopt the more stringent five percent standard, the operation of many of these energy sources would not be feasible. Consequently, the Commission does not find that its rules are inconsistent with FUA standards, and rejects this proposed revision of the rules.

§ 292.203(b) and 292.205. Southern Company and Con Ed submit that the Commission's rules are inconsistent with national energy policy in that they allow cogeneration facilities to burn oil and natural gas. Both petitioners request that the Commission amend its rules to include fuel use criteria for cogeneration facilities which the Commission determines to be qualifying cogeneration facilities. The result, they contend, of the Commission's failure to include fuel use restrictions is to authorize the burning of oil or natural gas for generation of electricity in cogeneration units, which will displace electricity generated by coal, nuclear or hydro power.

Numerous comments on this issue were submitted during the rulemaking process. First, the Commission notes that these rules do not authorize any facility to burn oil or gas in contravention of any applicable Federal, State or local laws or regulations. Rather, their effect is to make facilities,

some of which may be authorized to burn fossil fuels under other statutory authority, such as the FUA, eligible for the rate and exemption privileges set forth in section 210 of PURPA.

As noted in the preamble²¹ the Commission believes that the legislative history, Congressional intent, and national energy policy support the use of oil and gas in cogeneration facilities. Section 206(c)(3) of the Natural Gas Policy Act, authorized the Commission to exempt gas used by qualifying cogeneration facilities from incremental pricing surcharges.

Furthermore, the Commission believes that economics will make the displacement of nuclear coal or hydro generated electricity by a cogenerator using oil or natural gas a rare occurrence. In most cases, electricity generated by a cogenerator using oil or gas fuels is more expensive than electricity generated by nuclear, coal or hydro facilities. As a result, market forces, rather than an additional layer of Federal fuel use regulation, can effectively determine the appropriate use of oil or gas. For the above reasons the Commission denies the petition for amendment of this section of the rule.

Notice § 292.207. Southern Company and Con Ed petitioned the Commission to amend § 292.207 of its rules. This provision requires all qualifying facilities to furnish notice to the Commission of their status as qualifying facilities, and to provide a brief description of the facility and other pertinent data. The petitioners requested that the Commission require an applicant for certification of qualifying status intending to interconnect with a utility to furnish notice to the appropriate State regulatory authority and the utility with which it would interconnect.

The Commission has recently amended § 292.207(b)(6) of its rules.²² This amendment requires that all applications for Commission certification of qualifying status include a notice of such request for publication in the Federal Register. The Commission believes that publication will provide adequate notice of applications for qualifying status. The Commission, therefore, rejects the petitions for amendment of § 292.207 of its rules.

Southern Company also petitioned the Commission to amend § 292.207(c) of the rule. This paragraph states that an electric utility is not required to

²¹ Order No. 70, *supra*, mimeo at 24-26.

²² Amendment to Final Rule Providing That Applications For Commission Certification of Qualifying Status Contain a Notice for Publication in the Federal Register. Order No. 70-A, Docket No. RM79-54, May 5, 1980.

purchase electric energy from a qualifying facility of 500 kilowatts or more until 90 days after the facility notifies the utility that it qualifies, or that it has applied to the Commission for qualification. Southern Company contended that this section implies that a utility is derelict if it does not begin purchasing power from a qualifying facility over 500 kilowatts within 90 days after the facility has notified the utility or applied to the Commission for certification as a qualifying facility. Southern Company believes that 90 days is not a sufficient time period in which it can adjust its system to receive the generation output of the qualifying facility. Southern Company requested amending § 292.207(c) to allow for a "reasonable time" in which it must begin purchasing power from a qualifying facility.

Southern Company has erroneously interpreted § 292.207(c). Section 292.207(c) must be read in conjunction with § 292.207(b)7 and § 292.306. These sections provide that a utility is required to purchase power from a qualifying facility only if the facility meets all safety requirements, and pays for the appropriate interconnection costs as determined by the State regulatory authority. The 90-day requirement set out in § 292.207(c) establishes a minimum time period in which a utility must purchase power from a qualifying facility which has met all other applicable safety and interconnection requirements of the regulations. A utility need not purchase power from a qualifying facility until it meets these requirements, even if the 90-day period has elapsed. The Commission believes this interpretation of the regulation allows for a reasonable time period in which a utility must purchase power from a qualifying facility. Therefore, the Commission rejects the petition for amendment of this section.

Procedures for Obtaining Qualifying Status § 292.207. Con Ed states that the self-certifying procedure for obtaining qualifying status fails to inform utilities whether a particular facility is qualified. Under the proposed rule, all determinations of qualifications would have required Commission action on a case-by-case basis. Comments received indicated that when no affected party questions the eligibility of a facility, there is no need to require filing for qualification. As noted in the preamble to Order No. 70, the initiation of negotiations concerning purchase and sale arrangements allows for the flow of information between potential qualifying facilities and affected electric

utilities.²³ If a utility considers that a facility does not qualify, it is not obligated to purchase its electric output. In such cases, the facility may seek Commission certification under § 292.207(b). The Commission expects that, for the great majority of facilities requesting that utilities purchase their electric output, there will be no disagreement as to their eligibility. In questionable cases, the rules as issued provide for Commission determination of the facility's status. Thus, the Commission perceives no need to require additional paperwork in uncontested determinations.

§ 292.206(d). Con Ed requested that the Commission amend § 292.206(d) to include a mechanism for monitoring facilities to assure that the requirements for obtaining qualifying status continue to be met.

The Commission believes that the administrative costs associated with monitoring large numbers of qualifying facilities would be prohibitive. The Commission notes that section 201 of PURPA amended the Federal Power Act, and that these rules fall under the ambit of the enforcement provisions of sections 314 and 316 of the FPA. Under these provisions, an applicant that ceases to meet the requirements for qualifying status, and fails to notify the Commission pursuant to § 292.207(d)(2) may be subject to civil and criminal penalties. The Commission will investigate any complaints that qualifying requirements are not being met. As a result, the Commission believes it is not necessary to establish a monitoring system.

Environmental Effects § 292.203(c). In the Environmental Assessment (EA) issued with Docket No. RM79-54²⁴, the Commission determined that the incentives provided in this program will encourage the development of only one technology, commercial cogeneration primarily by new diesel engines, at a level where significant environmental effects may occur in the near-term. Con Ed contended that spark ignition and dual-fuel cogeneration engines will also be widely used in commercial applications and will produce a substantial environmental impact.

Con Ed's petition does not refer to the discussion contained in the Appendices to the EA, referred to in the Commission's Notice accompanying the EA. In Appendix C the Commission stated:

²³ Order No. 70, *supra*, *nimeo* at 19.

²⁴ Notice of No Significant Impact and Notice of Intent to Prepare Environmental Impact Statement, issued March 31, 1980, Docket No. RM79-54, *nimeo* at 44.

Dual-fuel engines and diesel engines are likely to be the primary equipment choice for commercial cogeneration. Combustion turbines are large (greater than about 1 MW) and cost about \$900 to \$1,000/Kw. Thus, investors would be facing equipment costs of about \$1,000,000 to install one of these units. Spark ignition engines (similar to large gasoline-fuel truck engines) are insufficiently sturdy to warrant their use in continuous duty cogeneration. Despite the low capital costs for spark ignition engines compared with those for diesel engines, repair and maintenance costs for the former are substantially higher.

Commercial cogeneration users will use natural gas as a fuel for dual-fuel engines whenever gas is available or less expensive than diesel fuel. In rural areas and in some urban areas of the Middle Atlantic region, natural gas is not available and distillate fuel use is expected. Thus, in these areas cogenerators will choose diesel engines. In large urban areas, because natural gas is available for potential cogenerators, cogenerators will install dual-fuel engines to take advantage of low-priced natural gas, even though a dual-fuel engine costs 20% to 30% more initially. We cannot precisely estimate the percent of the 2,500 MW of capacity that will be found in large urban areas. We estimate, however, that cogeneration in larger urban regions may account for 25 percent to 75 percent of the total.²⁵

If gas is available for commercial or residential use in urban areas in the Middle Atlantic region, the installation of a great number of dual-fuel cogeneration engines in these areas might adversely affect the environment. Pending further environmental analysis, the Commission has decided to require that dual-fuel cogeneration facilities obtain qualification on a case-by-case basis, pursuant to the procedures set forth in section 292.207(b) of the Commission's rules. Before permitting new dual-fuel facilities to qualify, the Commission will consider the emission characteristics of the facility, and the number of qualifying cogeneration facilities in the vicinity of the applicant.

The Commission Orders: (A) To the extent not granted above, the applications for rehearing and reconsideration of Order Nos. 69 and 70 filed by Southern Company Services, American Electric Power Service Corporation, Edison Electric Institute, Consolidated Edison Company, Boston Edison Company, Colorado-Ute Electric Association, Inc., Elizabethtown Gas Company and Southern California Gas Company are denied.

(B) Sections 292.202, 292.203, 292.204, and 292.601 are amended as set forth below effective on May 15, 1980.

(Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601, *et seq.*; Energy Supply

²⁵ EA, *supra*, Appendix C, *nimeo* at 7.

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, 3 CFR 142 (1978))

(1) Sections 1-18, and 21-30; * * *

[FR Doc. 80-15678 Filed 5-20-80; 8:45 am]

BILLING CODE 6450-01-M

In consideration of the foregoing, the Commission amends Part 292 of Chapter I, Title 18, Code of Federal Regulation, as set forth below, effective May 15 1980.

By the Commission.

Kenneth F. Plumb,

Secretary.

1. Section 292.202 is amended in paragraph (j), to read as follows:

§ 292.202 Definition.

(j) "total energy input" means the total energy of all forms supplied from external sources.

2. Section 292.203 is amended in paragraph (c) by adding at the end thereof new subparagraphs (3) and (4) to read as follows.

§ 292.203 General requirements for qualification.

(c) *Interim exclusion.* * * *

(3) Pending further Commission action, any cogeneration facility which is a new dual-fuel cogeneration facility which seeks to obtain qualifying status must follow the procedures set forth in § 292.207(b) of this section.

(4) A new dual-fuel cogeneration facility is a cogeneration facility:

(i) which derives its useful power output from an internal combustion piston engine capable of changing automatically between gas and oil operation, and

(ii) the installation of which began on or after May 15, 1980.

3. Section 292.204 is amended in paragraph (b)(1)(i) to read as follows:

§ 292.204 Criteria for qualifying small power production facilities.

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

4. Section 292.601 is amended in paragraph (b)(1), to read as follows:

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

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