

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part and 292

(Docket No. RM07-11-000)

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

(March 16, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend its regulations governing qualifying small power production and cogeneration facilities, to eliminate the exemption from the requirements of section 215 of the Federal Power Act. From a reliability perspective, there does not appear to be a meaningful distinction between QF and non-QF generators that would warrant exemption of QFs from mandatory Reliability Standards.

DATES: Comments are due [insert date 21 days after publication in the **FEDERAL REGISTER**]

ADDRESSES: You may submit comments, identified by Docket No. RM07-11-000, by one of the following methods:

- Agency web site: <http://ferc.gov>. Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures section of the Preamble.

- Mail: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street N.E., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file paper comments.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Docket No. RM07-11-000

NOTICE OF PROPOSED RULEMAKING

(March 16, 2007)

Introduction

1. The Commission is proposing to amend the exemptions available to qualifying facilities (QFs) so that they would no longer be exempt from newly-added section 215 of the Federal Power Act (FPA).¹ From a reliability perspective, there does not appear to be a meaningful distinction between QF and non-QF generators that would warrant exemption of QFs from mandatory Reliability Standards. The benefit of this proposal will be increased reliability of the North American Bulk-Power System.

Background

2. On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law.²

¹ 16 U.S.C. 824o.

² Energy Policy Act of 2005, Pub. L. No 109-58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005).

EPAAct 2005 adds a new section 215 to the Federal Power Act (FPA),³ which requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight.

3. On February 3, 2006, the Commission issued Order No. 672, which implements newly-added section 215 and provides specific processes for the certification of an entity as the ERO, the development and approval of mandatory Reliability Standards, and the compliance with and enforcement of approved Reliability Standards.⁴ On April 4, 2006, North American Electric Reliability Corporation (NERC) made two filings: (1) an application for certification of NERC as the ERO; and (2) a petition for Commission approval of Reliability Standards, with eight regional differences and a glossary of terms. On July 20, 2006, the Commission issued an order certifying NERC as the ERO.⁵ On

³ 16 U.S.C. 824o.

⁴ Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards, Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), order on reh'g, Order No. 672-A, 71 FR 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

⁵ North American Electric Reliability Corporation, 116 FERC ¶ 61,062 (2006).

October 20, 2006, the Commission issued a Notice of Proposed Rulemaking proposing to approve 83 of 107 proposed Reliability Standards.⁶

4. In response to the Reliability NOPR, Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC) filed comments pointing out that QFs are exempt from section 215 by virtue of section 292.601(c) of the Commission's regulations.⁷ CAC/EPUC suggest that the Commission intentionally exempted QFs from section 215. CAC/EPUC explain that in Order No. 671 issued on February 2, 2006,⁸ the Commission stated that it saw no reason to exempt QFs from the newly added FPA sections 220, 221 and 222,⁹ and explicitly excluded those sections of the FPA from the QF exemptions contained in section 292.601 of its regulations, while making no similar mention of section 215.

5. Section 215(b) grants the Commission jurisdiction over "all users, owners, and operators of the bulk-power system" for "purposes of approving reliability standards. . . . and enforcing compliance with [section 215]", and further provides that "[a]ll users,

⁶ Mandatory Reliability Standards for the Bulk-Power Market, 72 FR 64770 (Oct. 20, 2006), FERC Stats. & Regs. ¶ 32,608 (2006) (Reliability NOPR).

⁷ 18 CFR 292.601(c).

⁸ Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order No. 671, 71 FR 7852 (Feb. 2, 2006), FERC Stats. & Regs. ¶ 31,203 (2006), order on rehearing, Order No. 771-A, 71 FERC 30583 (May 22, 2006), FERC Stats. & Regs. ¶ 31.219 (2006).

⁹ 16 U.S.C. 824t-v.

owners and operators of the bulk-power system shall comply with reliability standards that take effect under this section.”¹⁰ Given the statutory directive that all users, owners and operators of the bulk-power system must comply with the reliability standards that take effect under section 215, it may no longer be appropriate to allow QFs a continued exemption from compliance with the newly-adopted mandatory and enforceable Reliability Standards that apply to generator owners and operators.¹¹ Moreover, from a reliability perspective, there would seem to be no meaningful distinction between QF and non-QF generators that would warrant exemption of QFs from the newly-adopted mandatory Reliability Standards. Indeed, QF generators would seem to affect the reliability of the Bulk-Power System as much as non-QF generators, and so QF generators should be subject to the newly-adopted mandatory Reliability Standards. In this regard, we note that while many QFs are small facilities, others are quite large. We see no justification for large facilities to be exempt from the newly-adopted mandatory and enforceable Reliability Standards. Accordingly, we are proposing to amend § 292.601(c)(3) to add section 215 to the list of FPA sections from which QFs are not exempt.

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

¹¹ Mandatory Reliability Standards for the Bulk-Power System, Order No. 693, 72 FR _____, (_____, 2007), FERC Stats. & Regs. ¶ _____ (2007) (issued concurrently with this NOPR).

6. The threshold for applicability of the Reliability Standards to generating units is 20 MVA (gross nameplate rating) for an individual generating unit, or 75 MVA (gross nameplate rating) in aggregate for a generating plant.¹² In addition, the Reliability Standards are applicable to: any generator, regardless of size that is a blackstart unit material to and designated as part of a transmission operator entity's restoration plan; or any generator, regardless of size, that is material to the reliability of the bulk-power system; the determination to include an otherwise exempt facility would be made on a facility-by-facility basis by the ERO or Regional Entity. However, an entity that disagrees with NERC's determination to place it in the compliance registry may submit a challenge in writing to NERC and, if still not satisfied, may lodge an appeal with the Commission. Therefore, a small entity may appeal to the Commission if it believes it should not be required to comply with the Reliability Standards. According to the Energy Information Administration (EIA), the total universe of qualifying facilities is 3,265 entities. Of these, 2,423 entities are below 20 MW (which, as noted above, roughly corresponds to the 20 MVA standard for applicability of the reliability standards), which leaves 842 entities that could be potentially impacted by the reliability standards. Of these 842 entities, only 745 are listed by EIA as being interconnected to the grid. Thus, out of a total of 3265 QFs, only 745, or 23 percent of all QFs would meet the generally

¹² Id. A 20 MVA threshold corresponds to 20 MW, if a unit is operating at a unity power factor.

applicable threshold of 20 MVA (although some other QFs may be specified as either blackstart units material to and designated as part of a transmission operator entity's restoration plan or as generators material to the reliability of the bulk-power system). In sum, while there would seem to be no basis to exempt all QFs from the mandatory and enforceable Reliability Standards, as a result of the threshold for applicability of the Reliability Standards to generating units, and based on EIA data, it appears that less than a quarter of all QFs will, in fact, be affected by our proposal to eliminate the QF exemption from the requirements of section 215 of the FPA.

Information Collection Statement

7. The Paperwork Reduction Act (PRA)¹³ requires each Federal agency to seek and obtain OMB approval before undertaking a collection of information directed to ten or more persons, or continuing a collection for which the Office of Management and Budget (OMB) approval and validity of the control number are about to expire.¹⁴ The PRA defines the phrase "collection of information" to be the "obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either -- (i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on ten or more persons, other than agencies, instrumentalities, or

¹³ 44 U.S.C. 3501-3520.

¹⁴ 44 U.S.C. 3502(3)(A)(i), 44 U.S.C. 3507(a)(3).

employees of the United States; or (ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.”¹⁵ OMB regulations require approval of certain information collection requirements imposed by agency rules.¹⁶

8. As noted above, the Commission is proposing to amend the exemption available to qualifying facilities from the requirements of section 215 of the FPA. Because the Commission is not proposing information collections in this rulemaking, it is not subject to OMB review under the PRA. However, the Commission will submit for informational purposes only a copy of this rulemaking to OMB.

Environmental Analysis

9. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.¹⁷ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. As explained above, this proposed rule carries out the intent of legislation, specifically section 215 of the FPA. It lifts an exemption and thus makes section 215 of

¹⁵ 44 U.S.C. 3502(3)(A).

¹⁶ 5 CFR 1320.11.

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

the FPA applicable to QFs; it does not substantially change the effect of the legislation. Accordingly, no environmental consideration is necessary.¹⁸

Regulatory Flexibility Act Analysis

10. The Regulatory Flexibility Act of 1980 (RFA)¹⁹ generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The total universe of qualifying facilities is 3,265 entities. Of these, 2,423 entities are below 20 MW (the threshold for applicability of the Reliability Standards is 20 MVA for an individual generating unit, or 75 MVA in aggregate for a generating plant²⁰) which leaves 842 entities that could be potentially impacted by the reliability standards. Of these 842 entities, only 745 are listed as being interconnected to the grid. Accordingly, we estimate that out of a total of 3265 QFs, only 745, or 23 per cent of all QFs would likely be affected by the change in regulations proposed here. Thus, most, if not all, QFs affected by this rule do not fall within the definition of small entities,²¹ nor do they meet the threshold criteria for applicability of the RFA to electric

¹⁸ 18 CFR 380.4(a)(2)(ii).

¹⁹ 5 U.S.C. 601-12.

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

²¹ The RFA definition of “small entity” refers to the definition provided in the Small Business Act, which defines a “small business concern” as a business that is independently owned and operated and that is not dominant in its field of operation. See 15 U.S.C. 632.

utilities established by the Small Business Administration, which is based on a size standard of 4 million MWh.²²

Comment Procedures

11. The Commission invites interested persons to submit comments on the change proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due [insert date 21 days from publication in the **FEDERAL REGISTER**]. Comments must refer to Docket No. RM07-11-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments. Comments and reply comments may be filed either in electronic or paper format.

12. Comments and reply comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments and reply

²² The Small Business Size Standard component of the North American Industry Classification System (NAICS) defines a small utility as one that, including its affiliates, is primarily engaged in generation, transmission, and/or distribution of electric energy for sale and whose total electric output for the preceding fiscal years did not exceed 4 million MWh. 13 CFR 121.201.

comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, D.C., 20426.

13. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments and reply comments on other commenters.

Document Availability

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

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

16. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or (202)502-8222 (e-mail at FERCOnlineSupport@FERC.gov), or

the Public Reference Room at (202) 502-8371, TTY (202)502-8659 (e-mail at public.referenceroom@ferc.gov).

List of subjects in 18 CFR Part 292

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

By direction of the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

In consideration of the foregoing, the Commission proposes to amend part 292, Chapter I, Title 18, Code of Federal Regulations, to read as follows.

PART 292 – REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

1. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

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

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

* * * * *

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

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