

of the total Kansas ad valorem tax reimbursements that were paid to Calvin by Panhandle. Therefore CLX requests: (1) to be relieved of its obligation to refund the Kansas ad valorem tax refunds owned by CLX's royalty interest, overriding royalty interest, and other working interest owners; and (2) Commission authorization to amortize its own refund obligation over a 5-year period.

Any person desiring to be heard or to make any protest with reference to said petition should on or before 15 days after the date of publication in the **Federal Register** of this notice, file with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rule of Practice and Procedure (18 CFR 394.214, 385.211, 385.1105, and 385.1106). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participant as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

**David P. Boergers,**  
Acting Secretary.

[FR Doc. 98-4017 Filed 2-17-98; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. EL94-10-000 and QF86-177-001; Docket Nos. EL94-62-000 and QF85-102-005; Docket Nos. EL96-1-000 and QF86-722-003]

### Order Granting Requests for Declaratory Order in Part and Denying Requests for Declaratory Order in Part, Denying Requests for Revocation of QF Status, and Announcing Policy Concerning the Regulatory Consequences and Remedies for Sales in Excess of Net Output

Issued February 11, 1998.

Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., Wheelabrator Environmental Systems Inc., Signal Environmental Systems, Inc., SES Claremont Company L.P., NH/VT Energy Corp., and Wheelabrator New Hampshire Inc., Carolina Power & Light Company v. Stone Container Corporation; Niagara Mohawk Power Corporation v. Penntech Papers, Inc.

## I. Introduction

This order addresses three cases currently before the Commission: *Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., et al.*, Docket Nos. EL94-10-000 and QF86-177-001; *Carolina Power & Light Company v. Stone Container Corp.*, Docket Nos. EL94-62-000 and QF85-102-005; and *Niagara Mohawk Power Corporation v. Penntech Papers, Inc.*, Docket Nos. EL96-1-000 and QF86-722-003. The three cases raise the following issues: (1) Whether a qualifying facility (QF), under the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Commission's PURPA regulations, may sell its gross output, as opposed to its net output (gross output less station power needs and line losses to the point of interconnection), to the utility-purchaser; and (2) if not, what are the regulatory consequences and remedies if a facility sells more output than is permissible?

In this order the Commission:

(1) Reiterates its 1991 determination that a QF may not sell in excess of its net output;

(2) Announces a Commission policy regarding the regulatory consequences of past and future sales by QFs in excess of net output; and

(3) Finds that revocation of QF status is not warranted in the three cases addressed in this order.

## II. Summary

The three cases arise because of a seeming conflict between a Commission regulation implementing PURPA and Commission precedent under PURPA. The Commission has a regulation called the "simultaneous buy-sell" rule (18 C.F.R. § 292.303(a)-(b) (1997)), which, the QFs argue, entities QF facilities to sell their gross output, and simultaneously buy station power needs from the utility-purchasers of QF power. A number of State regulatory authorities have drafted standard QF power sales contracts based on the apparent belief that the simultaneous buy-sell rule permits QFs to sell gross output to utilities and purchase back station power needs (often at a lower rate).

The utility-purchasers of QF power point to Commission precedent in stating that QFs may only sell net output. They argue that under the Commission precedent, a QF may only sell its net output; a facility that sells more than its net output cannot satisfy the ownership requirements for QF status under sections 3(17) and (18) of the Federal Power Act (FPA) and section 292.206 of the Commission's

regulations unless the incremental capacity is *solely* from cogeneration or small power production facilities. See *Turners Falls Limited Partnership*, 55 FERC ¶ 61,487 at 62,668 & n. 24 (1991) (*Turners Falls*).

The initial issue raised by the three cases is whether the QFs and the State regulatory authorities correctly have interpreted the simultaneous buy-sell rule in light of Commission precedent. In addressing this initial issue one of the questions that arises is the period of time over which a facility's output should be calculated. This question arises because a generation facility's actual output varies over time due to a number of external factors including temperature, humidity, and fuel quality. The QFs have argued that the Commission should not measure actual net output on a continuous basis but should allow QF facilities to sell up to their net capacity at any time.<sup>1</sup> This is because, if a QF buys back its station power needs, it is possible for the QF at times to sell more than its actual net output but still sell less than its certified net capacity. As a result, the period over which net output is measured will affect how much energy a QF may sell.

The second issue raised is what are the regulatory consequences and remedies if the Commission finds that a facility has sold more output than is permissible. This issue involves whether such a facility should be decertified as a PURPA QF. In addition, it presents how the Commission should calculate the rate under the FPA during any period of non-compliance and whether such rates should be applicable to all of the facility's sales during the period of non-compliance or just the incremental amount of the sale above the permissible level. Finally, we must consider whether, and if so under what circumstances, to revoke or permit the continuing applicability of PURPA regulatory exemptions (see 18 CFR §§ 292.601, .692 (1997)) during the period of noncompliance. A related question is whether to reform QF contracts with utilities for the sale of output above permissible levels.

Finally, there is an issue as to the effective date of any decision, first with respect to the three case-specific disputes before the Commission, and then with respect to any other QFs that may be selling in excess of permissible levels.

In this order, we announce that, as a legal matter, a QF may not sell in excess

<sup>1</sup> A QF's certified net capacity is the maximum net output of the facility which can be achieved safely and reliably under the most favorable conditions likely to occur over a period of several years.

of its net output. However, because of a lack of clarity in the Commission's simultaneous buy-sell rule, the Commission will not revoke the QF status of any facility which made sales in excess of net output pursuant to a contract entered into on or before the date of issuance of *Turner Falls*. We pick this date because that decision removed any ambiguity concerning the effect of such sales on a facility's QF status. We also find that a facility's net output should be measured on an hour-by-hour basis. We announce a policy regarding the regulatory consequences of past and future sales in excess of net output. Finally, in applying the legal and policy determinations announced in this order to the three cases pending before the Commission, we find that QF revocation is not warranted in any of the pending cases.

### III. Background of Pending Cases

The three cases now before the Commission all involve allegations by a purchasing electric utility that a Commission-certified QF has made sales in excess of its net output and that, therefore, the QF no longer meets the ownership requirements for QF status contained in FPA section 3(17) (C) (ii) (for a qualifying small power production facility) and FPA section 3(18) (B) (ii) (for a qualifying cogeneration facility). Those sections of the FPA were added by PURPA. They provide that QFs must be 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)." <sup>2</sup>

The three QFs with cases now before us claim, notwithstanding Commission precedent on the subject discussed below, that the Commission's rules permit the sale of gross output. They cite to the "simultaneous buy-sell" rule. Subsections 292.303(a) and (b) of our regulations provide as follows:

Electric utility obligations under this subpart.

(a) *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304 [<sup>3</sup>], any energy

<sup>2</sup> These sections are the basis of the Commission's QF ownership criteria codified in section 292.206 of the Commission's regulations. Section 292.206(a) specifies the Commission's general QF ownership rule:

A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

<sup>18</sup> CFR § 292.206(a) (1997).

<sup>3</sup> 18 CFR § 292.304 (1997) provides for rates for QF sales to utilities.

and capacity which is made available from a qualifying facility:

- (1) Directly to the electric utility; or
- (2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

(b) *Obligation to sell to qualifying facilities.* Each electric utility shall sell to any qualifying facility, in accordance with § 292.305 [<sup>4</sup>], any energy and capacity requested by the qualifying facility.

Below we discuss the particular facts and arguments raised in each of the cases.

#### A. Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., et al. (Docket Nos. EL94-10-000 and QF86-177-001)

Connecticut Valley Electric Company, Inc. (Connecticut Valley) filed a complaint against Wheelabrator Claremont Company, L.P. (Claremont).<sup>5</sup> Claremont owns and operates a biomass-fueled small power production facility in Claremont, New Hampshire. The order granting certification of the facility as a QF noted that it had an electric power production capacity of 4.5 MW. See *Signal Environmental Systems, Inc.—Claremont*, 34 FERC ¶ 62,212 (1986). Claremont's partners are all wholly-owned subsidiaries of Wheelabrator Environmental Systems, Inc., the successor in interest to Signal Environmental Systems, Inc.

The Claremont facility produces power for sale to Connecticut Valley using solid waste as an energy source. The facility began commercial operation in March 1987 and, pursuant to a Power Purchase Agreement approved by the New Hampshire Public Utilities Commission (New Hampshire Commission), has sold its entire output to Connecticut Valley. In addition, the Claremont facility has purchased sufficient electric energy from Connecticut Valley to serve its station power needs.

In its complaint, Connecticut Valley alleges that Claremont has been selling its entire gross output to Connecticut Valley, while purchasing back station power needs. Connecticut Valley claims that Claremont cannot operate as a QF in the manner specified in the Power Purchase Agreement. Connecticut Valley claims that it became aware in May 1993, that Claremont's sale of the facility's gross output of 4.5 MW to Connecticut Valley, rather than its net output of 3.9 MW, violated Commission precedent. For this reason, Connecticut Valley seeks revocation of the qualifying

<sup>4</sup> 18 CFR § 292.305 (1997) provides for rates for utility sales to QFs.

<sup>5</sup> The complaint was also filed against affiliates of Claremont, as well as against Signal Environmental Systems, Inc. (the original applicant for QF status for the facility) and its affiliates.

status of the Claremont facility, revision or reformation of the Power Purchase Agreement, a determination of the just and reasonable rates for what it claims is a wholesale power sale subject to this Commission's jurisdiction under the FPA, and refunds with interest. In the alternative, Connecticut Valley asks the Commission to reform the power sales contract to allow Claremont to sell only the net electrical output of the facility, and asks that Claremont be ordered to refund with interest all revenues it received for the sale of the incremental output between its net and gross output.<sup>6</sup>

Notice of Connecticut Valley's complaint was published in the **Federal Register**, 58 Fed. Reg. 64,301 (1993), with comments, protests, or motions to intervene due on or before January 5, 1994. Timely motions to intervene and notices of intervention were filed by Granite State Hydropower Association, Sullivan County Regional Refuse Disposal District and the Southern Windsor/Windham Counties Solid Waste Management District (collectively, the Districts), the New Hampshire Commission, National Independent Energy Producers, Southern California Edison Company, the Public Utilities Commission of the State of California, and the Center for Energy Efficiency and Renewable Technologies. An untimely motion to intervene was filed by the City of Vernon, California.

In its answer, Claremont admits that it sells its entire (gross) output to Connecticut Valley. It states that this arrangement is required by the terms of the Power Purchase Agreement and was approved by the New Hampshire Commission in settlement of litigation.<sup>7</sup> Claremont states that the simultaneous purchase and sale arrangement is fully consistent with this Commission's "simultaneous buy-sell" rule. Claremont points to the preamble to the Commission's rules implementing PURPA for the proposition that the

<sup>6</sup> Specifically, Connecticut Valley states that for the sale of the incremental output, Claremont should refund the difference between the avoided cost rate at which Claremont makes sales to Connecticut Valley, and the retail rate at which Claremont purchases station power.

<sup>7</sup> On February 23, 1983, Claremont's predecessor in interest, Connecticut Valley and the staff of the New Hampshire Commission entered into a settlement agreement which in part provided that Connecticut Valley would "purchase for twenty (20) years all energy and capacity of the [Facility] at a price of 9¢ per kilowatt hour. \* \* \*" (emphasis added). The settlement agreement (attached as Appendix 3 to the complaint) was approved by the New Hampshire Commission on March 2, 1983. The Power Purchase Agreement (attached as Appendix 4 to the complaint) subsequently was executed by the parties on December 12, 1984.

Commission intended to allow the sale of a QF's gross output when it promulgated the simultaneous buy-sell rule. Claremont claims that it is entitled to rely on the simultaneous buy-sell rule until it is amended or rescinded by the Commission. Claremont further claims that amendments to Commission regulations may not be retroactive.

Claremont also claims that the arrangement is fully consistent with the New Hampshire Limited Electrical Energy Producers Act (LEEPA), which implements PURPA in New Hampshire, as well as the New Hampshire Commission's orders implementing PURPA and LEEPA.

Claremont claims that it, as well as many other developers, relied on the Commission's simultaneous buy-sell rule in developing QF projects. Claremont states that substantial inequities would result if the Commission were to require Claremont to operate in a manner different from what had been planned when it contracted with Connecticut Valley. It notes that revocation of its QF status would harm the sanitary districts which supply fuel (solid waste) to the facility. It also notes that Connecticut Valley's petition, if granted, would have the effect of jeopardizing the QF status of other facilities in New Hampshire that, pursuant to other power sales contracts approved by the New Hampshire Commission, sell their gross output pursuant to simultaneous buy/sell provisions.

*B. Carolina Power & Light Company v. Stone Container Corporation (Docket Nos. EL94-62-000 and OF85-102-005)*

Carolina Power & Light Company (CP&L) filed a complaint and motion for revocation of QF status against Stone Container Corporation (Stone Container). Stone Container owns and operates a topping-cycle cogeneration facility located at Stone Container's linerboard mill and manufacturing plant in Florence, South Carolina. The facility contains one steam generator and one extraction/condensing steam turbine-generator. The extracted steam is used in the linerboard manufacturing process. The primary fuel for the facility is pulverized coal, supplemented with wood waste.

In its initial application for certification, Stone Container identified its net power capacity as 64.5 MW. Stone Container stated that the gross power production capacity of the facility was 68 MW and the auxiliary power requirements would be 3.5 MW. The Commission granted Stone Container's application for QF status. See *Stone Container Corporation*, 31

FERC ¶ 62,036 (1985). Subsequently, Stone Container sought recertification for a QF with an amended capacity (74.8 MW net capacity, 79 MW gross capacity, 4.2 MW auxiliary load). The Commission granted recertification. See *Stone Container Corporation*, 55 FERC ¶ 62,205 (1991).

The electricity generated by the Stone Container facility is sold to CP&L pursuant to a 20-year "Electric Power Purchase Agreement" that was executed on December 17, 1984, and was subsequently amended on March 9, 1989, and on October 14, 1992. (The Power Purchase Agreement and the amendments are attached to the complaint as Attachment 1.)

Paragraph 10(b) of the original agreement gave Stone Container the option to switch to a "buy-all/sell-all" mode of operation. In the second amendment to the agreement, Stone Container exercised its option to switch to the buy-all/sell-all mode of operation.<sup>8</sup>

CP&L claims that the switch to the buy-all/sell-all mode of operation, "[b]ecause of the configuration of the interconnection between CP&L and the Stone Container facility" (Complaint at 4), has resulted in Stone Container's selling CP&L its gross output from the facility. CP&L states that the switch to the buy-all/sell-all operation has resulted in Stone Container's losing its QF status and becoming a public utility subject to this Commission's rate regulation under the FPA.

Notice of CP&L's complaint and motion for revocation was published in the Federal Register, 59 Fed. Reg. 24,491 (1994), with comments, protests or motions to intervene due on or before June 2, 1994. Timely motions to intervene were filed by Westinghouse Electric Corporation, Gelco Corporation, Granite State Hydropower Association, and Claremont. Additionally, a number of late-filed letters containing additional comments were filed. Motions to strike some of the motions to intervene were filed, and answers to those motions were filed. Finally, motions to hold the matter in abeyance, as well as a motion to expedite, were filed.

In its answer to CP&L's complaint and motion for revocation, Stone Container states that it never has sold power to CP&L in excess of the certified qualifying capacity of the facility. Stone Container states that it has thus always been in compliance with the requirements for QF status, as interpreted by the Commission in

<sup>8</sup> Regardless of the mode of operation, paragraph 33(e) provides that the maximum amount which can be sold to CP&L is 68 MW.

*Turners Falls* and related PURPA cases. Stone Container states that the essence of CP&L's complaint is that Stone Container has sold in excess of what Stone Container refers to as its "actual net output." Stone Container urges that CP&L's interpretation of *Turners Falls* is illogical because it would attribute no meaning to the certified qualifying capacity of a facility.

Stone Container further urges that its mode of operation since 1991 has been consistent with this Commission's "simultaneous buy-sell" rule. It also states that CP&L's reference to the configuration of the interconnection is misguided, because CP&L is contractually entitled to control the configuration of the interconnection.

Finally, Stone Container argues that if it has not complied with the Commission's QF regulations in any respect, the Commission should exercise its equitable powers to grant waiver of any such violation. In this regard, Stone Container points out that any waiver would be for a limited time (beginning with the date of commencement of the buy-all/sell-all mode of operation). Stone Container alleges that CP&L should be equitably estopped from asserting that the facility has lost its QF status because CP&L proposed the simultaneously "buy-all/sell-all" provision in the contract (which Stone Container exercised) and understood what the mode of operation entailed. Stone Container further argues that any non-compliance with the Commission's regulations is the result of the Commission's departure from its PURPA regulations and precedents on which Stone Container reasonably relied.

*C. Niagara Mohawk Power Corporation versus Penntech Papers, Inc. (Docket Nos. EL96-1-000 and OF86-722-003)*

Niagara Mohawk Power Corporation (Niagara Mohawk) filed a petition for declaratory order revoking the QF status of the cogeneration facility operated by Penntech Papers, Inc. (Penntech Papers).<sup>9</sup> The Penntech Papers' facility is located in Johnsonburg, Pennsylvania. Extraction steam from the facility is used to supply the pulp and paper mill process requirements of Penntech Papers. The facility originally was certified as having 33.433 MW (net) capacity. See *Penntech Papers, Inc.*, 36

<sup>9</sup> The Penntech Papers facility is now owned by Willamette Industries, Inc. (Willamette), which purchased the Penntech Papers plant and assumed the rights and obligations under the Power Purchase Agreement with Niagara Mohawk. While Penntech Papers is now an operating division of Willamette, we will refer to Penntech Papers as the facility owner in this order.

FERC ¶ 62,073 (1986). Subsequently, Penntech Papers sought recertification to reflect, among other things, an increase in generating capacity. The Commission granted recertification to reflect the increase in capacity, except to the extent that Penntech Papers proposed to sell its entire capacity (52 MW) to Niagara Mohawk and purchase its entire auxiliary load (5.1 MW) from West Penn Power Company. See *Penntech Papers, Inc.*, 48 FERC ¶ 61,120 (1989).<sup>10</sup>

Power from the Penntech Papers facility is transmitted over a 7-mile 115 kV line to the Ridgeway substation of Pennsylvania Electric Company (Penelec). The power is then wheeled by Penelec to Niagara Mohawk. Because Niagara Mohawk informed Penntech Papers that it would not "dynamically" schedule deliveries from Penntech Paper's facility,<sup>11</sup> but would require that actual deliveries from the facility equal Penntech Papers' previously scheduled deliveries with Niagara Mohawk on an hour-by-hour basis, the transmission agreement provides that Penelec will purchase from Penntech Papers inadvertent excess generation produced by the facility. The transmission agreement also provides that Penelec will sell Penntech Papers "make-up" power for delivery to Niagara Mohawk at times of inadvertent shortfalls or reductions in facility output.

According to Niagara Mohawk, this provision for the purchase and resale of make-up power by Penntech Papers means that Penntech Papers is selling Niagara Mohawk power from sources other than cogeneration or small power production facilities, and thus cannot satisfy the ownership requirements for QF status under the holding of *Turners Falls*.

<sup>10</sup> On February 8, 1993, Penntech Papers filed a notice of self-recertification to reflect its "as built" description of the facility. In its notice of self-recertification, Penntech Papers stated that the maximum rated output of the facility would be 57,800 kW/hr. and that average power generation, net of station power needs was expected to be 45,000 kW/hr. (or 394,200 MWH per year).

<sup>11</sup> Dynamic scheduling provides the metering, telemetering, computer software, hardware, communications, engineering and administration required to allow remote generators to follow closely the moment-to-moment variations of a local load. In effect, dynamic scheduling electronically moves load out of the control area in which it is physically located and into another control area. See Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Stats. & Regs. ¶ 31,036 at 31,709–10 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Stats. & Regs. ¶ 31,048 at 30,235–36 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997) (Open Access Rule).

Notice of Niagara Mohawk's petition for declaratory order revoking QF status was published in the **Federal Register**, 60 Fed. Reg. 53,917 (1995), with comments, protests or motions to intervene due on or before November 17, 1995.

A notice of intervention was filed by the New York Public Service Commission. Timely motions to intervene were filed by Penelec and by Willamette, on behalf of Penntech Papers.

In its answer to Niagara Mohawk's petition,<sup>12</sup> Penntech Papers states that Niagara Mohawk's petition rests on significant mistakes of fact. Penntech Papers argues that Niagara Mohawk's petition represents an effort to abrogate its contract with Penntech Papers as part of its ongoing effort to renegotiate contracts with the many QFs from which it purchases.

Penntech Papers states that it has adhered to the Commission's directive in its recertification order (48 FERC at 61,424) that it may not sell the gross output of its facility. Penntech Papers states that the cogeneration facility is an integral part of its paper mill, and not a "PURPA machine." Penntech Papers states that it uses a portion of the output from its generating turbine to serve auxiliary loads (station power), uses another portion to serve loads associated with its paper mill, and sells the remainder to Niagara Mohawk at a rate of 6 cents per kilowatt hour. Penntech Papers states (at 8) that "[f] or [Niagara Mohawk's] convenience, the portion of the net cogeneration output that is sold to [Niagara Mohawk] is 'scheduled' through Penelec, the transmitting utility." In addition, under the terms of the transmission and scheduling agreement with Penelec, Penntech Papers is required to pay Penelec, as line losses, three percent of the power it delivers to Penelec.

Penntech Papers states that although its net output undeniably exceeds the amount of power sold to Niagara Mohawk, the *de minimis* amount of "inadvertent" power advanced by Penelec to Penntech Papers (amounting to less than 1.96 percent of the scheduled sales to Niagara Mohawk in 1993 and 0.69 percent of the scheduled sales to Niagara Mohawk in 1994) is done to balance the power output schedule with the amount of power wheeled and is advanced at the insistence, and for the benefit, of Niagara Mohawk. Penntech Papers argues that the inadvertent power sales to Niagara Mohawk should not be a

<sup>12</sup> The answer was filed by Willamette on behalf of Penntech Papers.

basis to decertify Penntech Papers' QF status. Penntech Papers states that this Commission has approved the transmission agreement under which Penelec advances power to Penntech Papers for inadvertent energy differentials. Penntech Papers further states that there would be no inadvertent energy differentials had Niagara Mohawk accepted dynamic scheduling.<sup>13</sup>

Penntech Papers further states that the power purchase agreement between Penntech Papers and Niagara Mohawk specifically recognizes that Penntech Papers' deliveries to Penelec would not exactly match the scheduled deliveries, and that Penelec would provide make-up power. Penntech Papers argues that it receives no benefit, and indeed loses money, from the make-up arrangement. Penntech Papers further argues that the provision for the sale of inadvertent excess generation and purchase of make-up power tends to even out over time, so that there is no continuing sale of power produced by a facility other than a QF.

#### IV. Discussion

##### A. Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR § 385.214 (1997), the notices of intervention and the timely, unopposed motions to intervene serve to make the entities which filed them parties to the proceedings in which they intervened. Further, we find good cause to grant all of the untimely or opposed motions to intervene, and will consider all supplemental pleadings, in light of the interests they raise and in order to complete all of the arguments of the parties.

##### B. Statutory and Regulatory Framework

###### 1. Statute and Regulations

As noted above, in FPA sections 3(17)(C)(ii) and 3(18)(b)(ii) Congress provided that QFs must be:

[O]wned 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) \* \* \*.

16 U.S.C. §§ 796(17)(C)(ii) and (18)(B)(ii) (1994). Section 292.206(a) of the Commission's regulations, 18 CFR § 292.206(a) (1997), tracks the statutory language almost verbatim. The current cases present the question of whether the sale of more than net output violates

<sup>13</sup> There is no requirement in our PURPA or open access regulations that an electric utility purchasing a QF's power do so under a dynamic scheduling arrangement.

the statutory and regulatory criteria for QF status.

## 2. Commission Precedent Concerning OF Output

In 1981, the year after the Commission promulgated its QF regulations, the Commission, in *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981) (*Occidental*), first addressed an issue relevant to the one now before us when it was required to address the “power production capacity” of a facility. The Commission determined that the power production capacity of a facility is:

[T]he maximum net output of the facility which can be safely and reliably achieved under the most favorable operating conditions likely to occur over a period of years. The net output of the facility is its send out after subtraction of power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, and exciters) and for other essential electricity uses in the facility from the gross generator output.

17 FERC at 61,445.<sup>14</sup>

While, in hindsight, it seems clear that the Commission in *Occidental* did not intend to permit a QF to sell in excess of its net output (i.e. its power production capacity), the issue in that case was more limited; whether the proposed facility would exceed the 80 MW limit for qualifying small power production facilities set forth in section 292.204(a).<sup>15</sup>

Four years later, in 1985, the Commission again had occasion to address qualifying facility output issues. In *Power Developers, Inc.*, 32 FERC ¶ 61,101 at 61,276 (1985), *reh'g denied*, 34 FERC ¶ 61,136 (1986) (*Power Developers*),<sup>16</sup> the application raised the issue of whether “the qualifying capacity of the facility [is] gross or net electric power production capability?” 32 FERC at 61,275.

The Commission answered net. The Commission stated that were a QF to sell its gross output to a utility at the utility’s avoided cost and purchase power for internal use from the utility, it would, in essence, be selling more power than the facility, standing alone, is capable of delivering. In other words,

<sup>14</sup> In *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987), the Commission clarified that line losses to the point of interconnection with the grid also are subtracted from gross generator output to determine the power production capacity.

<sup>15</sup> The current version of the regulation was amended to reflect the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990. Those changes are not relevant to the issues before us in these proceedings.

<sup>16</sup> See also *Penntech Papers, Inc.*, 48 FERC ¶ 61,120 (1989).

the QF would be receiving avoided cost prices for an amount of power that it does not enable the purchasing utility to avoid generating. 32 FERC at 61,276. The Commission stated that such a result would be inconsistent with the requirement of PURPA and the Commission’s implementing regulations that utilities (and their ratepayers) be in the same financial position as if they had not purchased QF power. *Id.* (citing Order No. 69, FERC Stats. & Regs., Regulations Preambles 1977–1981 ¶ 30,128 at 30,871). However, even though the Commission in *Power Developers* found implicit in its *Occidental* discussion that QF sales are limited to net output, the Commission still did not reach the specific question of whether a QF that sold in excess of net output would be found to violate the “primarily engaged” ownership limitation in the statute and our regulations.

Finally, in 1991, the Commission addressed this issue in its order in *Turners Falls*. In that order, the Commission stated, for the first time, that the prohibition against a QF’s selling in excess of its net output was based not only on policy considerations, but also on the statutory requirement that a QF be “owned by a person not a primarily engaged in the sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” 16 U.S.C. §§ 796(17)(C)(ii)–(18)(B)(ii) (1994). In *Turners Falls*, the Commission found, based on its review of the language and legislative history of PURPA and the policies underlying enactment of PURPA and issuance of the Commission’s implementing regulations, that a QF which sought to sell the incremental power in excess of its net output as non-qualifying power, would cease to be a QF, because it no longer would meet the statutory and regulatory restriction regarding utility ownership of QFs. 55 FERC at 62,667.

Before addressing the merits of the individual petitions filed with the Commission in the above-referenced proceedings, we will address the general legal and policy issues raised by these “net/gross” cases.

### C. QF Output Issues

#### 1. Can a QF Sell in Excess of Net Output?

We agree with the parties that it is not clear, on the face of the “simultaneous buy-sell” rule, that a QF is limited to selling its net output. Section 292.303(a) provides that “[e]ach electric utility shall purchase \* \* \* any energy and capacity which is made available from

a qualifying facility.” (emphasis added). Similarly, section 292.303(b) provides that “[e]ach electric utility shall sell to any qualifying facility \* \* \* any energy and capacity requested by the qualifying facility.” (emphasis added). In addition, the Commission’s statements leading up to its promulgation of the “simultaneous buy-sell” rule also were not absolutely clear as to whether the Commission intended that a QF be able to sell gross output at avoided cost while purchasing station power at the purchasing utility’s retail

The Commission first addressed the “simultaneous buy-sell” rule in its PURPA notice of proposed rulemaking. In the NOPR, the Commission discussed the situation “in which a cogenerator or small power producer desires to sell all of its output to a utility and purchase all of its needs from the utility simultaneously.” Small Power Production and Cogeneration Rates and Exemptions, FERC Stats. & Regs., Proposed Regulations 1977–81 ¶ 32,039 at 32,466 (1979). The Commission stated that this rule was necessary to encourage QFs only to the extent it applies to “new” Capacity. However, because the discussion applied to both small power production facilities (which normally have no ongoing need to purchase from a utility other than station power) and to cogenerators (which often have a need to purchase power for industrial purposes other than generation), the discussion was ambiguous about the permissibility of selling all output and simultaneously buying back station power. See also Staff Paper Discussing Responsibilities to Establish Rules Regarding Rates, and Exemptions for Qualifying Cogeneration and Small Power Production Facilities Pursuant to Section 210 of the Public Utility Regulatory Policies Act of 1978, 44 Fed. Reg. 38863, 38870 (July 3, 1979).

In Order No. 69, adopting regulations for the implementation of PURPA, the Commission indicated that the “simultaneous buy-sell” rule would be applicable to both qualifying small power production facilities and qualifying cogenerators, and again noted that avoided cost rates would normally only be available for new capacity. FERC Stats. & Regs., Regulations Preambles 1977–1981 ¶ 30,128 at 30,877. As with its NOPR statements, the Commission’s discussion was not clear about the permissibility of selling “all” output and buying back station power needs.

Moreover, it appears that several State regulatory authorities implemented PURPA based on a plausible interpretation that the “simultaneous buy-sell” rule permitted the sale of a

QF's gross output. For example, the New Hampshire Commission's standard QF sales contract contains a provision that allows for the sale of gross output and the buy back of auxiliary (station) power. From the QF filings we have received, it is apparent that there are other QF sales contracts, approved by other State regulatory authorities, that contain similar provisions.

However, as discussed above, this ambiguity was clarified to a significant degree in 1985 in *Power Developers*. There, the Commission made clear that a QF may not sell more than its net output at avoided cost rates. Finally, in 1991, in *Turner Falls*, the Commission removed any remaining ambiguity about whether the "simultaneous buy-sell" rule permitted a sale in excess of net output. The Commission clearly stated that a sale in excess of net output would deprive a facility of its QF status, unless the incremental sale was of power solely from cogeneration or small power production facilities.<sup>17</sup> See *supra* 13–14 (discussing orders). Accordingly, in these cases, the Commission removed any ambiguity and all industry participants were put on notice that the "simultaneous buy-sell" rule was not intended to permit a QF to sell its gross output to a utility at avoided cost rates, while buying back station power at a lower retail rate.

As a result, we disagree with the QFs' reading of the "simultaneous buy-sell" rule. It is clear to us that a QF facility can only sell energy and capacity from its facility which is actually available, and that, given our interpretation of what a QF is able to sell from its facility, this capacity is limited to the net output of the QF. Thus, the requirement of section 292.303(a), that an electric utility purchase any energy and capacity made available from a QF, is limited to the energy and capacity a QF actually has available, which is its net energy and capacity.

The Commission, in promulgating the simultaneous buy-sell rule, did not indicate otherwise. Indeed, the rationale behind the rule, as indicated in the preamble to Order No. 69, was as follows:

The effect of this proposed rule was to separate the production aspect of a *qualifying facility* from its consumption function. Under this approach, the electrical output of a facility is viewed independently of its electrical needs. Thus, if a cogeneration facility produces five megawatts, and

<sup>17</sup> The Commission in *Turner Falls* was not faced with a factual situation where a QF sought to sell more than its net output and the additional power was "solely from cogeneration or small power production facilities." Neither is the Commission faced with that situation in the instant cases.

consumes three megawatts, it is treated the same as another qualifying facility that produces five megawatts, and that is located next to a factory that uses three megawatts.<sup>18</sup>

In this example, the Commission clearly was considering the case of a cogeneration facility where the factory associated with the cogeneration facility consumed power generated by the facility for industrial purposes. That the example was a cogeneration facility is meaningful because a cogeneration facility, unlike a small power producer, can have electric power needs other than for station power. When a cogeneration QF supplies its industrial host's electrical needs itself, it displaces power on the system that otherwise would have been supplied by the purchasing utility. This is not true when a cogenerator or small power producer supplies its own station power; the supplying of station power by a QF does not displace power which would have otherwise been supplied by the purchasing utility.<sup>19</sup> While a qualifying cogeneration facility may sell its entire net output and buy back power from its purchasing utility for non-electric generation uses (for example, manufacturing uses) by the thermal host,<sup>20</sup> a QF, whether a cogeneration facility or small power production facility, may not sell its gross output to its purchasing utility and buy back auxiliary (internal station) power.

Indeed, while the Commission did not address whether a QF would lose its qualifying status if it sold in excess of net output in *Power Developers*, the Commission in 1985 did address the meaning of section 292.303(a) (part of the simultaneous buy-sell rule). The Commission stated:

Our regulations do not contemplate a qualifying facility selling its gross output to a utility.

<sup>18</sup> Order No. 69, Small Power Production and Cogeneration Facilities, Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, FERC Stats. & Regs., Regulations Preambles, 1977–1981, ¶ 30,128 at 30,877 (1980) (emphasis added).

<sup>19</sup> The Commission, in its brief to the United States Court of Appeals for the District of Columbia Circuit defending Order No. 69, also illustrated the validity of its simultaneous buy-sell rule with reference to a cogeneration example. *American Electric Power Service Corporation, et al. v. FERC*, Docket No. 80-1789, May 15, 1981 brief at 52. The Commission, in its brief, also recognized the significance of displacement. Brief at 58. The court, in upholding the simultaneous buy-sell rule, likewise pointed to the cogeneration example as justifying the simultaneous buy-sell rule. See *American Electric Power Service Corporation v. FERC*, 675 F. 2d. 1226, 1237 (D.C. Cir. 1982), *rev'd on other grounds sub nom. American Paper Institute v. American Electric Power Service Corporation*, 461 U.S. 402 (1983).

<sup>20</sup> See *Union Carbide Corporation*, 48 FERC ¶ 61,130, *reh'g denied*, 49 FERC ¶ 61,209 (1989).

Although section 292.303(a) states that electric utilities are required to purchase "any" energy and capacity which is made available from a qualifying facility, the Commission has interpreted the capacity of a qualifying facility for purposes of obtaining qualifying status to be its net power production output, rather than its gross output.

32 FERC at 61,276.

Accordingly, we reiterate our earlier findings that a QF can only sell its net output, and that the sale of any other power will result in the loss of QF status, unless that power is "solely from cogeneration or small power production facilities."

## 2. What Date is Appropriate for Applying the Net Output Rule for Purposes of QF Status?

As noted above, we understand that many QFs and purchasing utilities have entered into contracts which require, or permit, the simultaneous sale of gross output and the purchase back of auxiliary (internal station) power. While there may have been some ambiguity when our PURPA regulations became effective, with the issuance of *Turners Falls*, the Commission clearly enunciated that a sale of a QF's output in excess of net output would result in the loss of a facility's QF status.<sup>21</sup> Our interpretation of the statutory ownership requirements in *Turners Falls* represented "an issue of first impression."<sup>22</sup> Moreover, the decision in *Turners Falls* rested not on the plain meaning of the statutory language involved,<sup>23</sup> but on an interpretation of the statute based on policy grounds. For these reasons, we believe that it would be unfair to revoke the QF certification of any facility which is selling its gross output to a utility-purchaser, and buying back auxiliary power and/or line losses to the point of interconnection, based on a QF contract entered into on or before the date of issuance of *Turners Falls*, that is on or before June 25, 1991.

We believe that this policy is consistent with our policy against invalidating contracts for which a PURPA-based challenge was not timely raised—that is, before the contracts were executed.<sup>24</sup> In our judgment, it would

<sup>21</sup> As noted, the exception is if the incremental output sold, i.e., above net output, is solely from cogeneration or small power production facilities.

<sup>22</sup> 55 FERC at 62,667; *see also id.* at 62,672.

<sup>23</sup> The Commission stated in *Turners Falls* that "because both the statute and the legislative history are unclear, we find it appropriate to consider the policy reasons of interpreting the statute as requested by *Turners Falls*." *Id.* at 62,669.

<sup>24</sup> See *New York State Electric & Gas Corporation*, 71 FERC ¶ 61,027 at 61,117, *order denying reconsideration*, 72 FERC ¶ 61,067 (1995), *appeal dismissed*, New York State Electric & Gas

not be consistent with Congress' directive to encourage cogeneration and small power production to upset the settled expectations of parties to, and to invalidate any of their obligations and responsibilities under, such executed PURPA sales contracts.

However, we see no legitimate basis to excuse a facility that, subsequent to the date of issuance of *Turners Falls*, either entered into a contract to sell more than its net output, or executed an amendment to a pre-*Turners Falls* contract that increased output, unless that amendment was pursuant to a provision in the pre-*Turners Falls* contract that specifically authorized such amendment. We will, therefore, revoke the QF status of any facility which sells in excess of its net output pursuant to a contract entered into after the date of issuance of *Turners Falls*, unless the additional amount sold is solely from cogeneration or small power production facilities.

### 3. How Is Net Output To Be Calculated?

In order to determine if a facility has sold in excess of its net output, it is necessary to define how to measure net output. The utility-purchasers in the instant proceedings urge that net output be calculated as actual net *production* on an hour-by-basis. On the other hand, the QFs urge that net *capacity* be the measure of the limitation on a QF's sale. They argue that while QFs may not sell in excess of their certified net capacity, they should be able to sell in excess of actual net production at any moment in time. The QFs state that this is what the *Turners Falls* decision requires.

The QFs are only partially correct. *Turners Falls* does stand for the proposition that the Commission will not certify a QF to sell in excess of its net capacity and that the sale above net capacity would result in the loss of QF status. *Turners Falls*, however, also contains additional language concerning "the sale of incremental output." 55 FERC at 62,672. While *Turners Falls* clearly states that QFs are limited to selling net capacity, the order does not directly address the sale of what has been referred to in the instant proceedings as "actual net production."

Corporation v. FERC, 117 F.3d 1473 (D.C. Cir. 1997); Connecticut Light & Power Company, 70 FERC ¶ 61,012, *order denying reconsideration*, 71 FERC ¶ 61,035 at 61,153-54 (1995) (confusion regarding meaning of Commission's regulations made application of new policy to preexisting QF contracts inappropriate), *appeal dismissed sub nom.* Niagara Mohawk Power Corporation v. FERC, 117 F.3d 1485 (D.C. Cir. 1997); Southern California Edison Company and San Diego Gas & Electric Company, 70 FERC ¶ 61,215 at 61,178, *reconsideration denied*, 71 FERC ¶ 61,269 at 62,079 (1995).

We understand that purchasing utilities could reasonably read *Turners Falls* and its reference to "the sale of incremental output" to limit the sales by QFs to actual net production.

We find that the utilities' interpretation of the calculations more closely comports with Commission precedent and policy. In *Turners Falls*, the Commission interpreted PURPA to limit the certification of a QF to its net capacity. In interpreting PURPA, the Commission found that the plain language of the statute was not clear, and that the statutory history on the language involved was not clear, but that the policy underlying PURPA was dispositive. The policy which the Commission looked to was that PURPA was intended to be a "program providing for increased efficiency in the use of facilities and resources." (55 FERC at 62,670, quoting section 2 of PURPA). The Commission found that the economic distortion inherent in the sale of the incremental output, i.e., the difference between a facility's net and gross output, would be inconsistent with the intent of PURPA. The Commission further found that if it were to permit *Turners Falls* to sell the incremental output, *Turners Falls* would derive an undue benefit from its qualifying status. *Id.* As a result, while the Commission in *Turners Falls* was directly addressing how much capacity it would certify (net capacity), it based the certification decision on its finding that PURPA does not permit a sale in excess of net output. The utilities' proposal that compliance with the net/gross rule be measured by monitoring actual net output on an hour-by-hour basis more accurately measures compliance with this PURPA limitation than the QFs' proposal that compliance be measured on an annual basis.

Moreover, measuring compliance with the net/gross rule on an hour-by-hour basis is consistent with Commission precedent on measurement of a facility's net capacity. In *American Ref-Fuel of Bergen County*, 54 FERC ¶ 61,287 (1991) (*Ref-Fuel*), the Commission used a "rolling one-hour period" for measuring the size limitation (80 MW) applicable to qualifying small power production facilities. In that case, *Ref-Fuel* argued that because of the substantial variation in the heat content of solid waste, the net output of the facility would often exceed 80 MW, but that it would be able to compensate for the substantial variation in the heat content of the fuel source with an automatic control system to restore net generation to 80 MW when it exceeded 80 MW. *Ref-Fuel* stated it could maintain the 80 MW net

output level on average over a 60 minute time span measured at any point in time—the "rolling one-hour period." The Commission agreed to the rolling one-hour period, stating that:

Generation output fluctuates instantaneously and accordingly must be adjusted many times each hour to follow system load changes. System load or consumer demand typically is determined by averaging energy use over a period of time of 15 to 60 minutes.

54 FERC at 61,817. The Commission noted that Form No. 1 requires utilities to compute the net peak demand (output) on generating units by using a 60-minute measurement period and that customer demand meters typically employ measurement periods of 15, 30, or 60 minutes. *Id.* at 61,817 n.5. The Commission further noted that a 60-minute time interval for measuring power output or peak load is common in the industry. 54 FERC at 61,817. The Commission recognized that a facility's generation output varies constantly and that net output in excess of 80 MW does not automatically violate the size limitation requirement of the statute (*citing Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 at 61,445 (1981)).

Finally the Commission recognized that use of a rolling one-hour period does not offer any potential for manipulation of the maximum size limitation. This is because the facility, if it exceeds the 80 MW net production limitation at one moment, would have to adjust net production below 80 MW during part of the hour to account for the excess generation.

We believe that the rationale for using a rolling one-hour period for measuring the net production of a facility for size limitation purposes is equally applicable to measuring net production for compliance with the net/gross output rule. Contrary to the QFs' arguments, use of a one-hour period does not make the certified capacity of a facility meaningless,<sup>25</sup> and indeed is consistent with this Commission's measurement of certified capacity. We conclude that a facility's net output should be measured on a rolling-one hour period for purposes of determining whether the facility makes sales in excess of its net output. In other words, a facility cannot sell each hour more than its net output for the hour.

<sup>25</sup> The certified capacity of a QF, i.e., its net capacity, is the maximum net output that the facility can safely and reliably achieve at the point of interconnection under the most favorable operating conditions likely to occur over a period of several years.

**4. How Does Transmission of QF Power by a Third Party Utility Affect Net Output?**

The Penntech Papers case raises an issue concerning the measurement of net output in situations where QF power is transmitted by a third party to the purchasing utility. We have addressed this matter in our Open Access Rule. In Order No. 888-A, the Commission explained that:

A QF arrangement for the receipt of Real Power Loss Service or ancillary services from the transmission provider or a third party for the purpose of completing a transmission transaction is not a sale-for-resale of power by a QF transmission customer that would violate our QF rules.<sup>26</sup>

In Order No. 888-B, the Commission recently clarified the matter as follows:

[W]hile a QF can never sell more power than its net output at its point of interconnection with the grid, its location in relation to its purchaser (and thus its losses) may be relevant in the calculation of the avoided cost which it is entitled for the power it does deliver to its electric utility purchaser. However \* \* \* the receipt of Real Power Loss Service or ancillary services is not a sale-for-resale of power. Rather, they are part of the costs of transmission which the QF must bear, in the absence of an agreement to share such costs with the transmitting utility.<sup>27</sup>

In conclusion, the purchase of line loss service for losses beyond the point of interconnection or an ancillary service by a QF from a third party does not result in the QF's engaging in a sale-for-resale of power produced by a facility other than a QF, which would result in loss of QF status.

**D. Regulatory Consequences and Remedies for Sales in Excess of Net Output**

Any facility which has sold in excess of its net output, pursuant to a contract entered into after the date of issuance of *Turners Falls*, unless the incremental output is solely from cogeneration or small power production facilities, must file rates pursuant to section 205 of the FPA within 60 days of the date of publication of this order in the **Federal Register**. In that filing, the facility must indicate whether it intends to continue to make sales in excess of net output.<sup>28</sup> For facilities which state that they will discontinue the sale of output in excess of net output as of the date of their

filings, the rate for the prior sale of any output above net output will be determined using the methodology announced in *LG&E-Westmoreland Southampton*, 76 FERC ¶ 61,116 (1996) (*LG&E*), *reh'g pending*.<sup>29</sup> The rate for all amounts sold up to the facility's net output should be the contract rate reflected in the parties' agreement, assuming such rate is no higher than the applicable avoided cost rate established by the State regulatory authority or nonregulated electric utility. Facilities making section 205 filings that reflect the cessation of power sales in excess of net output may ask for all other exemptions granted QFs, and we will grant such exemptions pursuant to the policy announced in *LG&E*.

For any facility that indicates in its section 205 filing that it will continue to sell power in excess of its net output, pursuant to its current contract, we will not differentiate between past and future sales, or allow different rates for sales up to or in excess of net output. Rather, the former QF will be required to cost justify its rates for past and future periods.<sup>30</sup>

**E. Application of Policy to Pending Cases**

**1. Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., et al.**

Claremont, a small power production facility, is selling its gross capacity to Connecticut Valley and buying back auxiliary power. This sale clearly violates the prohibition on the QF sale of amounts in excess of net output enunciated in *Turner Falls* and earlier cases, and would result in the loss of QF status were it taking place pursuant to a sales contract entered into after the date (June 25, 1991) of issuance of *Turner Falls*. Here, however, the sale takes place pursuant to a contract, executed on December 12, 1984.

Pursuant to the policy articulated above in this order, we will not enforce the net/gross policy against Claremont during the term of its power purchase agreement with Connecticut Valley, assuming the contract has not been amended to increase output after the

date (June 25, 1991) of issuance of *Turners Falls*, unless that amendment was pursuant to a provision in the pre-*Turners Falls* contract that specifically authorized such amendment. Based upon this assumption, we will, therefore, not revoke the QF status of the Claremont facility or take other remedial action.

**2. Carolina Power & Light Company v. Stone Container Corporation**

The sale of QF power by Stone Container is not as clear. Stone Container represents that it has at all times limited its sale to no more than its "actual net output." The allegation by CP&L is that Stone Container, pursuant to a contract option contained in a contract entered into prior to the date of issuance of *Turners Falls*, but exercised after the date of issuance of *Turners Falls*, is at times selling in excess of actual net output.

Because Stone Container is operating pursuant to a contract executed prior to the date of issuance of *Turners Falls*, its sales will not result in the loss of QF status, even if it at times has sold in excess of its net output. While its contract was amended, after the date of issuance of *Turners Falls*, to take advantage of the option to switch to the "buy-all/sell-all" mode of operation, the exercise of the option took place pursuant to the original contract. The right to the "buy-all/sell-all" mode of operation was contained in the original, pre-*Turners Falls* contract. Depriving Stone Container of QF status in these circumstances would not be consistent with maintaining the parties' expectations when the contract was signed. Moreover, CP&L, to the extent it encouraged the switch (as represented by Stone Container), should not now be heard to claim that the mode of operation which it encouraged deprives the facility of its QF status. The time for CP&L to have objected to the "buy-all/sell-all" contractual provision was prior to its execution, and not long after its implementation.<sup>31</sup>

We therefore conclude that under the policy announced in this order, this sale does not result in the loss of Stone Container's QF status, and we will not revoke the QF status of the Stone Container facility or take other remedial action, assuming that the contract has not been further amended to increase output after the date (June 25, 1991) of issuance of *Turners Falls*, unless that amendment was pursuant to a provision in the pre-*Turners Falls* contract that specifically authorized such amendment.

<sup>26</sup>FERC Stats. & Regs. ¶ 31,048 at 30,237.

<sup>27</sup>Order 888-B, slip op. at 43-44.

<sup>28</sup>If the facility decides to sell only its net output, it could regain QF status on a prospective basis from the date it begins to sell only net output. However, whether its temporary loss of QF status would jeopardize its power sales arrangement is a matter of contract that may vary depending on the particulars of the power sales agreement.

<sup>29</sup>In *LG&E*, the Commission ordered a QF which failed to satisfy the Commission's technical requirements for QF status during a past period of non-compliance to file rates pursuant to section 205 of the FPA at a rate no higher than what the utility-purchaser would have paid for energy had it made an economic decision to purchase from the non-complying QF. In the case of a first-time failure to maintain QF status, the Commission explained that it would grant all other exemptions from regulation otherwise available to QFs.

<sup>30</sup>Of course, the former QF could seek market-based rate authority for sales pursuant to new, non-QF contracts.

<sup>31</sup>See *supra* note 24 and cases cited therein.

3. Niagara Mohawk Power Corporation v. Penntech Papers, Inc.

Niagara Mohawk argues that the Penntech Papers' purchase of power from Penelec, both of "make-up" power under a provision of Penntech Papers' transmission contract which Penelec, and line losses during transmission pursuant to the same contract, causes Penntech Papers to sell to Niagara Mohawk power from a facility other than a QF.

In Order No. 888, the Commission determined that "energy imbalance service" is one of six ancillary services which must be provided under an open access transmission tariff.<sup>32</sup> The description of "energy imbalance service" and the service provided by Penelec to Penntech Papers to correct inadvertent imbalances indicate that they are the same service. As this is an ancillary service as defined in Order Nos. 888 and 888-A, it does not constitute a sale-for-resale and does not affect Penntech Papers' QF status. Likewise, the purchase of line loss service by Penntech Papers for transmission service provided past the point of interconnection with Penelec does not affect its QF status. We will, therefore, not revoke Penntech Papers' QF status or take other remedial action.

*The Commission orders:*

(A) The petitions for declaratory order are hereby granted in part and denied in part, as discussed in the body of this order.

(B) The motion of Connecticut Valley filed in Docket Nos. EL94-10-000 and QF86-177-001 to revoke the QF status of Claremont is hereby denied.

(C) The motion of CP&L filed in Docket Nos. EL94-62-000 and QF85-102-005 to revoke the QF status of Stone Container is hereby denied.

(D) The motion of Niagara Mohawk filed in Docket Nos. EL96-1-000 and QF86-722-003 to revoke the QF status of Penntech Papers is hereby denied.

(E) Any facility which by virtue of this order is required to file rates pursuant to section 205 of the FPA shall make such a filing within 60 days of the date of publication of this order in the **Federal Register**, as discussed in the body of this order.

(F) The Secretary is hereby directed to arrange for publication of this order in the **Federal Register** as soon as possible.

<sup>32</sup> FERC Stats. & Regs. ¶31,036 at 31, 703-04; see also Order No. 888-A, FERC Stats. & Regs ¶31,048 at 30,229-34.

By the Commission.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 98-4014 Filed 2-17-98; 8:45 am]

BILLING CODE 6717-01-M

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ES97-7-002]

#### Consumers Energy Company; Notice of Amendment of Application

February 11, 1998.

Take notice that on January 27, 1998, Consumers Energy Company (Consumers), filed an amendment to its original application in this proceeding. The amendment seeks an increase of \$500 million in Consumers' current authorization to issue long-term securities for refunding and refinancing purposes. Consumers also requests waiver of the Commission's competitive bid/negotiated placement requirements for certain securities to be issued pursuant to the authorization requested in this docket.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 358.214). All such motions or protests should be filed on or before February 24, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestant parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 98-4028 Filed 2-17-98; 8:45 am]

BILLING CODE 6717-01-M

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER98-1672-000]

#### Kentucky Utilities Company, Notice of Filing

February 11, 1998.

Take notice that on January 30, 1998, Kentucky Utilities Company (KU), tendered for filing a series of supplemental contracts between KU and its wholesale requirements customers. KU requests an effective date of January 1, 1998, for these contracts.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before February 24, 1998. Protests will be considered by the Commission in

tendered for filing proposed changes in the Code of Conduct to which it has agreed to adhere in connection with its sales of electric energy and capacity at market-based rates.

The proposed changes would, among other things, extend the application of the Code of Conduct to all power marketing affiliates of GPU, Inc., and would narrow certain limitations on transactions and information sharing to transactions and sharing among such power marketing affiliates and their public utility affiliates.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rule 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before February 24, 1998. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestant parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 98-4028 Filed 2-17-98; 8:45 am]

BILLING CODE 6717-01-M

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER98-1681-000]

#### GPU Advanced Resources, Inc., Notice of Filing

February 11, 1998.

Take notice that on January 30, 1998, GPU Advanced Resources, Inc.,