

qualifying status of a QF that it has certified under § 292.207, if the facility fails to comply with any of the facts or representations that it presented in its application for Commission certification.<sup>37</sup> The NOPR further provided that, before undertaking any substantial alteration or modification of a qualifying facility that has been certified under § 292.207, a small power producer or cogenerator may apply to the Commission for a determination that the proposed alteration or modification will not result in a revocation of qualifying status. The NOPR provided that the small power producer or cogenerator should accompany the application for recertification with supporting material, notice and a filing fee.

*Comments:* American Forest and Paper maintains that revocation of qualifying status under proposed § 292.207(d)(1) pertains only to material facts or representations, and even then, only to reliance on the Commission's order on qualifying status. It notes that the Commission has held on a number of occasions that the failure of a facility to operate in accordance with any of the facts or representations presented in an application for Commission certification does not necessarily affect the continued qualifying status of the facility. Rather, the failure affects only the legal force of the Commission's certification order that relied on those facts and representations.<sup>38</sup>

EEI reads proposed § 292.207(d)(1) as allowing any person to request that the Commission revoke the qualifying status of a facility. NEP suggests that the owners of qualifying facilities should provide filings under § 292.207(d)(2) to the utilities with which they interconnect.

Finally, NYSEG and Niagara Mohawk argue that the Commission should make it clear that a utility may deem a facility to be ineligible for PURPA benefits even if the Commission has not decertified the facility. They reason that, if a notice of self-certification is sufficient to qualify facilities for PURPA benefits, and Commission certification is not necessary, then utilities should be able to declare facilities ineligible for PURPA benefits without any action on the Commission's part. NYSEG and Niagara

Mohawk also suggest that the Commission amend § 292.207(d)(1) to provide that, after gathering sufficient data demonstrating that a facility is not a QF, a utility may file an affidavit to that effect with the Commission.

*Commission Response:* The Commission agrees with American Forest and Paper's assessment of the consequences of a facility's failing to operate as represented in the cogenerator's or small power producer's application for Commission certification. The Commission will amend proposed § 292.207(d)(1) to make it clear that a facility may continue to be qualified despite changed circumstances, provided that the facility continues to meet the qualifying criteria.<sup>39</sup>

The Commission will not require owners of facilities to provide a copy of a filing made under § 292.207(d)(2) directly to each utility that transacts business with the facility because the Commission will publish notice of such filings in the **Federal Register**. The final rule clarifies and revises § 292.207(d)(1) accordingly.

Regarding Niagara Mohawk and NYSEG's argument that a utility may deem a facility to be ineligible for PURPA benefits, we note that, in *Independent Energy Producers Association, Inc. v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994), the court struck down, as preempted by federal law, a CPUC program that allowed electric utilities to suspend payment of contractually-authorized rates in favor of lower, alternative rates when QFs do not meet the applicable operating and efficiency standards. The court found that the Commission has exclusive authority to determine whether a QF is in compliance with the applicable operating and efficiency standards. *Id.* at 853-59. The court added that it is the Commission's responsibility to decertify QFs—not the state's responsibility. *Id.* at 855, 859. While the Commission may take up this matter in the future, we will not delay this proceeding in order to address it at this time.

#### 4. Pre-Authorized Recertification

The Commission proposed at § 292.207(a)(2) to provide for streamlined Commission recertification of certain minor changes to those facilities which the Commission had already accorded qualifying status

under § 292.207(b). The NOPR proposed that a cogenerator or small power producer would simply report such a change in the form of a letter describing the change in sufficient detail to enable the Commission to readily determine that the modification falls within the scope of a list of pre-approved minor changes. A report of a pre-authorized change would not require a filing fee.<sup>40</sup>

*Comments:* Detroit Edison requests that the pre-authorized recertification procedure provide for notice in the **Federal Register** and/or service of the application for recertification upon each affected utility and state commission. Detroit Edison submits that this would provide state commissions and utilities with information for system planning and would allow state commissions and utilities to bring to the Commission's attention special circumstances regarding a particular facility and/or factual errors in an application for recertification. EEI, Atlantic Electric and NEP also recommend publishing notices of recertification in the **Federal Register** and request that the Commission direct cogenerators and small power producers to provide copies of the notice directly to all affected parties.<sup>41</sup>

SDG&E would limit pre-authorized changes to those changes involving name, installation or operation date, or change to power generation equipment. It argues that, except for these changes, meaningful evaluation of a facility's continued adherence to the Commission's standards cannot occur unless the owner or operator of the facility supplies sufficient information to conduct an analysis. Based on this reasoning, SDG&E contends that the Commission should generally require a cogenerator or a small power producer to apply for a Commission determination under § 292.207(d)(2) that a change to its facility will not result in revocation of qualifying status. Alternatively, SDG&E suggests that the cogenerator or small power producer provide notice to the Commission of the change in the form of an affidavit. In either case, SDG&E recommends that the cogenerator or small power producer provide an updated Form 556 and a copy of the filing to each affected utility.

EEI contends that some of the proposed pre-authorized changes can

<sup>37</sup> The Commission's regulations do not provide for revocation of a notice of self-certification. Other entities (e.g., electric utilities) may: (1) Move for revocation of a Commission certification of QF status; or (2) file a petition for a declaratory order that a self-certified or Commission-certified facility does not comply with all applicable QF requirements. See, e.g., UNIGAS Corp., 67 FERC ¶ 61,142 (1994).

<sup>38</sup> See, e.g., Sithe/Independence Power Partners, L.P., 61 FERC ¶ 61,212 at 61,786 (1992).

<sup>39</sup> Under proposed § 292.207(d)(1) any person with standing to do so may request the Commission to revoke the qualifying status of a facility. See *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697 (D.C. Cir. 1994) with regard to standing to contest a QF certification.

<sup>40</sup> The Commission proposed that if it approves the change(s), it would return the report stamped "approved." The proposed rule further provided that if the Commission does not approve the proposed change(s), it would treat the report as a full § 292.207(b) filing and assess a filing fee.

<sup>41</sup> NEP also suggests that applicants also provide a copy of any filing under § 292.207(d)(2) to each of the utilities with which the QF is expected to transact business.