

121 FERC 61,287  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Chugach Electric Association, Inc.	Docket Nos. EL07-97-000 QF99-95-002 QF07-129-001
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Matanuska Electric Association, Inc.	Docket Nos. EL07-105-000 QF07-129-002
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ORDER REVOKING QUALIFYING FACILITY STATUS

(Issued December 21, 2007)

1. In this proceeding, two Alaska electric utilities, Chugach Electric Association (Chugach) and Matanuska Electric Association (Matanuska),<sup>1</sup> seek the revocation of the qualifying facility (QF) status of two, as yet unbuilt, QFs self-certified by Tiquon Energy, Inc. (Tiquon): the proposed Knik Arm Power Plant (KAPP) and the proposed Pioneer Energy Project (Pioneer). This order finds that neither facility meets the requirements of qualifying status under the Public Utility Regulatory Policies Act of 1978 (PURPA). We make this finding based on the fact that both facilities in question should be considered “new” cogeneration facilities and thus subject to the amended requirements for QF status enacted in the Energy Policy Act of 2005,<sup>2</sup> as implemented by Order No. 671<sup>3</sup> and codified in 18 C.F.R. § 292.205(d) (2007).

2. Under those new standards, the projected use of the thermal output is too speculative to meet the productive and beneficial standard of 18 C.F.R. § 292.205(d)(1)

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<sup>1</sup> Chugach is a rural electric cooperative and the largest electric utility in Alaska. Matanuska, also a rural electric cooperative, is a full-requirements wholesale customer of Chugach.

<sup>2</sup> Energy Policy Act of 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 594, 967-70 (2005) (EPAAct 2005).

<sup>3</sup> *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats & Regs. ¶ 31,203, *order on reh’g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

(2007). Moreover, neither facility satisfies the requirement that the total energy output of the facility is used fundamentally for industrial, commercial, residential, or institutional purposes and is not intended fundamentally for sale to an electric utility.<sup>4</sup> The self-certifications are thus inconsistent with the requirements for QF status contained in the Commission's regulations, and we will therefore revoke the self-certifications for QF status. Finally, as discussed below, we find that Matanuska owed the filing fee for its petition for declaratory order, and we will not make the requested refund.

## **I. Background**

### **A. Tiqun's Facilities and Self-Certifications**

3. Tiqun is a small privately-held Alaska corporation that was formed to develop cogeneration plants in south central Alaska. The QF status of the KAPP and Pioneer cogeneration plants, both of which Tiqun self-certified as QFs, is at issue in these proceedings.

4. According to Tiqun, the KAPP facility was originally built by the Alaska Railroad in 1952. The Alaska Railroad transferred the plant to Chugach in 1959. Chugach operated the plant and supplied electric energy and steam to the Alaska Railroad until the plant was decommissioned in 1959. The KAPP facility was initially self-certified as a qualifying cogeneration facility by Marlow Power & Steam, Inc. (Marlow) on July 27, 1999;<sup>5</sup> the KAPP facility was described as a 39.7 MW (net capacity) cogeneration facility consisting of a combination gas turbine, a two-drum (dual pressure) heat recovery boiler, an auxiliary high-pressure steam generator, two steam turbine generators, pollution equipment, primary substation for interconnection with electrical utilities and ancillary systems.

5. On May 22, 2007, Tiqun, a successor to Marlow Power and Steam, Inc.,<sup>6</sup> filed a self-recertification for the KAPP project. This recertification described a changed facility. Tiqun described the facility as a 120 MW cogeneration facility consisting of two GE LM 6000 PF Sprint gas turbine generators each with duct-fired heat recovery steam generators (HRSG), one steam turbine generator (STG), pollution control equipment,

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<sup>4</sup> 18 C.F.R. § 292.205(d)(2) (2007). In addition, as described further below legitimate questions have been raised whether all of the thermal output that Tiqun has categorized as useful in its self-certifications is in fact going to be used by a thermal host, and thus will be useful thermal output that can be included in the calculation of the operating and efficiency values used to demonstrate compliance with the operating and efficiency standards. *See* 18 C.F.R. § 292.205(a) (2007).

<sup>5</sup> Docket No. QF99-95-000 (Jul. 27, 1999) (1999 KAPP Self-Certification).

<sup>6</sup> Marlow Power and Steam, Inc. changed its name to Tiqun; Tiqun is the same company as Marlow Power and Steam, Inc.

primary substation and ancillary systems. The proposed facility, described by Tiquin, is designed to operate base-load, with no duct-firing, at about 120 MW (net capacity) with an additional 30 MW of peaking and/or spin capacity being available from duct-firing.<sup>7</sup> The 1999 KAPP Self-Certification indicated that the cogeneration facility would be installed in February 2001. In the 2007 KAPP Self-Recertification, Tiquin indicates that the cogeneration facility will be installed by January 2010. Tiquin, answering the petitions for revocation, refers to the installation as a refurbishment and expansion.<sup>8</sup> KAPP is not currently an operational cogeneration facility.

6. Separately, on April 6, 2007, Tiquin filed a self-certification for the Pioneer facility. On June 8, 2007, Commission staff issued a deficiency letter to Tiquin regarding its April 6, 2007 filing. In the deficiency letter, staff informed Tiquin that it had not provided all information required for a completed FERC Form No. 556, which is the form used to establish or maintain QF status. On June 23, 2007, in response to the deficiency letter, Tiquin submitted an amended FERC Form No. 556, self-certifying itself as a QF.<sup>9</sup> On June 26, 2007, the Commission issued a Notice of Tiquin's June 23, 2007 Filing. As relevant to this proceeding, the notice did not provide for interventions or protests to Tiquin's filing. Instead the notice provided:

A notice of self-certification [or self-recertification] does not institute a proceeding regarding qualifying facility status; a notice of self-certification [or self-recertification] provides notice that the entity making filing has determined the Facility meets the applicable criteria to be a qualifying facility. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 C.F.R. § 292.207(d)(iii).

## **B. Petitions for Revocation**

### **1. Chugach's Petition for Declaratory Order**

7. On September 12, 2007, in Docket Nos. EL07-97-000, QF99-95-002 and QF07-129-001, Chugach filed a petition for declaratory order seeking the revocation of the QF status of Tiquin's KAPP and Pioneer cogeneration facilities.<sup>10</sup> Chugach is a rural electric cooperative with its principal place of business in Anchorage. Chugach states it is the largest electric utility in Alaska. Chugach supplies much of the power requirements of three wholesale customers: Matanuska, Home Electric Association, Inc.

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<sup>7</sup> Docket No. QF99-95-001 (May 22, 2007) (2007 KAPP Self-Recertification).

<sup>8</sup> Tiquin Answer at 6.

<sup>9</sup> Docket No. QF07-129-000 (June 23) (Pioneer Self-Certification).

<sup>10</sup> Chugach also sought to intervene in the dockets in which Tiquin self-certified, or self-recertified, the cogeneration facilities as QFs.

and the City of Seward. Chugach has a peak load of 479 MW which reflects service to all the electrically interconnected areas that it refers to as the Southern Rainbelt of Alaska, except for Anchorage, which has a 177 MW peak. Chugach points out that the KAPP and Pioneer plants have a combined capacity of 220 MW and are proposed as baseload generation that would displace virtually all of Chugach's planned new base load generation.

8. Chugach states that, under Alaska's implementation of PURPA, it is obligated to purchase power from Tiquin's proposed cogeneration facilities, unless the Commission determines that the facilities do not satisfy the requirements for QF status. Chugach states that both projects should be evaluated as new projects, subject to the more stringent requirements for QF status that were the result of EPAAct 2005. Chugach argues that under those standards, neither the KAPP facility nor the Pioneer cogeneration facility meets the criteria for QF status.

## **2. Matanuska's Petition for Declaratory Order**

9. On August 31, 2007, Matanuska filed what it styled as a "motion for revocation" of the QF status of the Pioneer cogeneration facility. On September 21, 2007 Matanuska paid a filing fee under protest. Matanuska argued that, under Order No. 671, no filing fee should be charged for motions to revoke QF status.

10. Matanuska states that it is a rural electric cooperative with a service area of 3,360 square miles in southeastern Alaska, and serves more than 54,000 customers and has a peak load of 130 MW. Currently Chugach supplies all of Matanuska's power requirements and will do so through December 2014. Matanuska plans to build 200 MW of new generation to serve its baseload requirements beginning 2015. Matanuska states that Tiquin is seeking to provide Matanuska its baseload requirements pursuant to Alaska's implementation of PURPA. Matanuska argues that the Pioneer cogeneration facility is a new cogeneration facility that does not satisfy the statutory and regulatory requirements for QF status.

## **II. Notice of Filings and Responsive Pleadings**

11. Notice of Chugach's filing was published in the *Federal Register*, 72 Fed. Reg. 54,648 (2007), with interventions and protests due on or before October 12, 2007. Notice of Matanuska's filing was published in the *Federal Register*, 72 Fed. Reg. 57,314 (2007), with interventions and protests due on or before October 26, 2007. An extension of time was granted to Tiquin<sup>11</sup> to answer both petitions seeking revocation in a single answer.

12. In its answer, Tiquin states that expedited action is needed on this matter. Tiquin states that the Alaska Commission, based on Tiquin's self-certifications, has ordered

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<sup>11</sup> Tiquin also sought consolidation of the dockets.

Chugach and Matanuska to enter into good-faith negotiations for power purchase agreements, but has ruled that no binding agreement need be entered into during the pendency of Chugach's and Matanuska's challenges to the QF status of the KAPP and Pioneer cogeneration facilities. Tiquin argues that revocation of QF status is extremely rare and that the Commission has never revoked the QF status of a project that is "under development and has only filed self-certifications/self-recertifications."<sup>12</sup> Tiquin suggests that the Commission should assume that all representations in its self-certifications/self-recertifications are true, or will come true by the date each facility begins operations. Tiquin argues the Commission must base its decision in this case on the representations contained in its self-certifications alone. It argues that "if the representations in an application/certification, on their face, meet the QF standards, then the facility is a QF unless and until the facts no longer satisfy the QFs standards when the facility becomes operational."<sup>13</sup> Tiquin argues that based on the representations in the self-certifications/self-recertifications, Tiquin's proposed facilities satisfy the standards for QF status.

13. On October 26, 2007, Anchorage Municipal Light and Power (Anchorage) filed a timely notice to intervene in support of Chugach. Anchorage is a municipally-owned electric generation, transmission, and distribution utility providing service in a portion of the Municipality of Anchorage. Anchorage states that the 2007 KAPP Self-Certification indicates that KAPP's status as a qualifying facility will subject Anchorage to a variety of obligations under the Commission's regulations implementing PURPA, including the requirements to purchase power; provide supplementary power, backup power, maintenance power, and interruptible power service; interconnect with KAPP; and provide wheeling service for energy sales to other utilities in accordance with 18 C.F.R. § 292.303 and 18 C.F.R. § 292.305. Anchorage raises the same objections as Chugach does to KAPP's certification as a QF.

14. On November 9, 2007, both Chugach and Matanuska filed motions for leave to answer and answers to Tiquin's answer. Chugach argues that there is no basis for Tiquin's assertion that Chugach has not attempted to negotiate in good faith with Tiquin. Matanuska argues that Tiquin's accusation that Matanuska is attempting to avoid its PURPA obligations is based on Matanuska's legitimate challenge to Pioneer's QF status. Matanuska counters that it is being asked to negotiate an avoided-cost contract with a facility that does not satisfy the requirements for QF status and thus should not be eligible to demand such a contract.

15. Tiquin responded with a motion for leave to answer and answer to the answers of Chugach and Matanuska on November 26, 2007. Tiquin argued that the KAPP facility's size should be determined by its normal, expected mode of operation, and not by its total

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<sup>12</sup> Answer at 17.

<sup>13</sup> *Id.* at 19.

capacity with all ducts firing. Based on this criteria, Tiquin argues, the KAPP facility should be viewed as an existing QF rather than a “new” cogeneration facility for purposes of compliance with the Commission’s regulations.

### **III. Discussion**

#### **A. Procedural Matters**

16. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept Chugach, Matanuska and Tiquin’s answers because they provided information that assisted us in our decision-making process.

#### **B. Requirements for Cogeneration Facilities**

18. As an initial matter, in view of many of the arguments made by Tiquin, Matanuska, Chugach and Anchorage, we believe it appropriate to summarize the process of certifying QFs before we address the merits of the proceeding. QFs are creations of PURPA. When the Commission first implemented PURPA, it provided for two paths to QF status. The first is self-certification, the procedures for which are contained in section 292.207(a) of the Commission’s regulations.<sup>14</sup> When a small power production facility or cogeneration facility self-certifies (or self-recertifies), it certifies that it satisfies the requirements for QF status. The Commission does not formally review the self-certification. Instead, the self-certification (or self-recertification) is assigned a docket number, and Commission staff looks at the filing to determine that the self-certifier has provided the information required by our regulations.

19. This comparatively minimal review of self-certifications was an essential part of the Commission’s implementation of PURPA,<sup>15</sup> and was intended, in part, to make the certification process quick and not burdensome for the potential QF. Thus, when the Commission first implemented PURPA in Order No. 70,<sup>16</sup> the Commission rejected a

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<sup>14</sup> 18 C.F.R. § 292.207(a) (2007).

<sup>15</sup> As discussed below, when the Commission originally implemented PURPA, self-certifiers did not need to provide much information about the QF being certified in the self-certification and consequently there was virtually no review of the filing.

<sup>16</sup> *Small Power Production and Cogeneration Facilities -- Qualifying Status*, Order No. 70, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,134 (1980), *order on reh'g*, Order Nos. 69-A and 70-A, FERC Stat. & Regs., Regulations Preambles

proposal to adopt a case-by-case certification requirement for QF status, but instead provided that facilities that met the requirements for QF status need only furnish notice to the Commission of QF status.<sup>17</sup> This notice (the self-certification) was purely for informational purposes and to help the Commission monitor the market penetration of QFs. QF status, however, was established by meeting the requirements for such status and did not depend on the filing. Indeed the Commission noted that QFs and purchasing utilities could agree that a generation facility met the requirements for QF status, and the facility would qualify for the benefits of PURPA without making any filing with the Commission.

20. The Commission recognized, however, that the self-certification process would not always satisfy all those interested in a particular facility's status. Accordingly, the Commission also established, in section 292.207(b) of the regulations,<sup>18</sup> what it called (and is still called in our regulations) the "optional procedure" for QF status. Under the optional procedure, an entity could file an application with the Commission for a determination by the Commission that a facility meets the requirements for QF status. Such an application requires a filing fee.<sup>19</sup> After receiving an application for Commission certification and the required fee, the Commission assigns the filing a docket number and notices the filing in the *Federal Register*, providing the opportunity for intervention and protest. The Commission's regulations provide that it will act on such an application within 90 days of the filing (or of its supplement or amendment). The process gives those that need assurance of a facility's QF status (or lack of such status) a Commission order certifying QF status, or denying QF status. This optional procedure is commonly known as Commission certification. In its original rules, the Commission also provided that once a facility was certified by the Commission, its qualifying status could be revoked by the Commission, upon the Commission's own motion, or upon the motion of any person.<sup>20</sup> This combination of encouraging self-

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1977-1981 ¶ 30,160 (1980), *aff'd in part and vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part*, *American Paper Institute, Inc., v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

<sup>17</sup> Order No. 70, FERC Stats. & Regs. ¶ 30,134 at 30,954. In Order No. 671, the Commission has made either a self-certification, or a Commission certification, a requirement for QF status. Prior to Order No. 671, there was no requirement for either self-certification or Commission certification for a facility to have QF status; a facility was a QF if it satisfied the Commission's requirement for such status.

<sup>18</sup> 18 C.F.R. § 292.207(b) (2007).

<sup>19</sup> See *infra* notes 62-65 below.

<sup>20</sup> See 18 C.F.R. § 292.207(d)(ii) (2007). A similar opportunity for the Commission to revoke the qualifying facility status of a self-certified QF on its own motion, or on the motion of another party, was not expressly provided in the regulations;

certifications (and self-recertifications), while providing for Commission-certification (and recertification), and the opportunity to seek revocation of QF status, would assure, the Commission believed, that only those generation facilities that meet the criteria for QF status would receive and retain that status.

21. The Commission, when it first enacted its regulations, had hoped that self-certifications would be the primary means for obtaining QF status, but recognized that there would be instances in which a Commission ruling on QF status would be desirable. When the Commission later, in Order No. 575, required QFs to provide more detailed information about self-certifying (or self-recertifying) QFs, in the FERC Form 556 format, the Commission continued to encourage the self-certification process, but also recognized that there would be reasons that a QF may want or need Commission certification (including the requirement of some lenders, utilities, or state regulators that a generator seeking QF status and the benefits of PURPA be Commission-certified before the lender, utility or state regulator would take action that would make a proposed QF a reality). The Commission thus sought to make the self-certification process more informative about the nature of the self-certified QFs while keeping the process simple. The Commission said

The Commission continues to believe that self-certification should be retained as an option; it is unnecessary to conduct a full review of each facility, even in instances where outside lenders and investors will be involved. However, in consideration of the various comments, and in recognition of the various other clarifications being made in this final rule, the Commission will not adopt the proposed affidavit requirement. Instead, the Commission will modify the self-certification process to: (a) incorporate the Form 556 information requirement that the Commission is also adopting for applications for Commission certification; and (b) require that cogenerators and small power producers provide copies of the notice of self-certification to each affected state commission and to each affected electric utility. The self-certifying cogenerator or small power producer must also specify the utility services that it intends to request (*see* item 3b of Form 556).<sup>[21]</sup>

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the Commission, however, allowed others to seek the revocation of a self-certified QF by filing a petition for declaratory order.

<sup>21</sup> *Streamlining of Regulations Pertaining to Parts II and III of the Federal Power Act and the Public Utility Regulatory Policies Act of 1978*, Order No. 575, FERC Stats. & Regs. ¶ 31,014 at 31,275 (1995) (footnote omitted).



22. Since Order No. 575, the self-certification process remained unchanged until the implementation of the changes to PURPA contained in EAct 2005.<sup>22</sup> Following the enactment of EAct 2005, which imposed new requirements for QF status for “new” cogeneration facilities,<sup>23</sup> the Commission issued Order No. 671, which implemented the new requirements for QF status. As part of that implementation, for the first time, notices of some self-certifications are required to be published in the *Federal Register*. Section 292.207(a)(iv) thus provides that self-certifications or self-recertifications, other than for new cogeneration facilities, will not be published in the *Federal Register*. In addition, for the first time, the Commission required the filing of a notice of self-certification or an application for Commission certification as a requirement for QF status.<sup>24</sup>

23. When the Commission acts on an application for certification or recertification, it acts on the information presented in the application and the responsive pleadings.<sup>25</sup> The Commission renders what is essentially a declaratory order deciding whether the facility, as described in the application and the pleadings, meets the statutory and regulatory requirements set forth in PURPA and the Commission’s implementing regulations. When the Commission acts on a petition seeking to decertify a facility’s QF status, it performs essentially the same function as when it acts on an application for certification – it issues what is essentially a declaratory order on a facility’s QF status.<sup>26</sup> What we have

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<sup>22</sup> Following the Enron investigations and heightened concerns about compliance with the then statutory ownership requirements for QF status, the Commission instituted an audit of the ownership of generators claiming QF status, whether self-certified or Commission-certified. The audits have been discontinued following the repeal by EAct 2005 of the ownership requirements.

<sup>23</sup> “New” cogeneration facilities are defined as any cogeneration facility that was either not certified a qualifying cogeneration facility on or before August 8, 2005, or that had not filed a notice of self-certification, self-recertification or an application for Commission certification or Commission recertification as a qualifying cogeneration facility prior to February 2, 2006. 18 C.F.R. § 292.205(d)(1) (2007).

<sup>24</sup> See 18 C.F.R. §§ 292.203(a)(3) and 292.203(b)(2) (2007).

<sup>25</sup> *Calpine King City Cogen, LLC*, 111 FERC ¶ 61,174 at P17 (2005); *Arroyo Energy, Limited Partnership*, 62 FERC ¶ 61,257, *reh’g denied*, 63 FERC ¶ 61,198 (1993); *Cogentrix of Mayaguez, Inc.*, 59 FERC ¶ 61,159, *reh’g denied*, 59 FERC ¶ 61,392 (1992); *Inter-Power of New Yoirk, Inc.*, 55 FERC ¶ 61,387 (1991); *CMS Midland, Inc.*, 50 FERC ¶ 61,098 at p. 61,277 (1990), *reh’g denied*, 56 FERC ¶ 61,177 (1991), *aff’d sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993), *cert. denied*, 510 U.S. 990 (1993).

<sup>26</sup> See *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 94 FERC ¶ 61,207 (2001), *reh’g denied*, 95 FERC ¶ 61,120 (2001).

before us today are the petitions of two electric utilities to decertify the QF status of two unbuilt QFs. The QFs in essence rely on the representations made in the self-certifications and self-recertifications they have filed. We thus are called to analyze the representations of the self-certifiers, consider the arguments made by those seeking decertification, and render a decision on whether the KAPP and Pioneer cogeneration facilities satisfy the requirements for QF status contained in PURPA and our implementing regulations.

24. To be a QF, a cogeneration facility must first meet the definition of a “cogeneration facility” contained in section 292.202(c) of our regulations, *i.e.*, it must “produce electric energy and forms of useful thermal output (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy.”<sup>27</sup> Next, a cogeneration facility, to be a QF, must demonstrate that it meets the applicable operating and efficiency standards specified in section 292.205(a), (b) and (c) of our regulations.<sup>28</sup> In addition, a “new cogeneration facility,” to be a QF, must also meet the requirements of section 292.205(d) of our regulations,<sup>29</sup> *i.e.*, it must demonstrate that its “thermal energy output . . . is used in a productive and beneficial manner,”<sup>30</sup> and that “[t]he electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility.”<sup>31</sup>

25. In sum, we must determine whether: (1) KAPP and Pioneer meet the definition of a cogeneration facility by producing both electric energy and forms of useful thermal energy used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy; (2) whether each facility meets the Commission’s operating and efficiency standards; (3) whether both the KAPP and Pioneer facilities are subject to the requirements for “new” cogeneration facilities; and (4) if subject to those latter requirements, whether each facility’s thermal output is used in a productive and beneficial manner and whether each facility’s total energy output is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility.

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<sup>27</sup> 18 C.F.R. § 292.202(c) (2007).

<sup>28</sup> 18 C.F.R. § 292.205(a), (b) and (c) (2007).

<sup>29</sup> 18 C.F.R. § 292.205(d) (2007).

<sup>30</sup> 18 C.F.R. § 292.205(d)(1) (2007).

<sup>31</sup> 18 C.F.R. § 292.205(d)(2) (2007).

26. As explained below, we conclude that the KAPP and Pioneer Facilities are “new” cogeneration facilities, and that they do not comply with the requirements for such facilities. Accordingly, we will revoke their QF status.<sup>32</sup>

**C. Whether the Facilities Meet the Definition of Cogeneration Facility and Satisfy the Operating and Efficiency Standards**

27. The first issue is whether the proposed KAPP and Pioneer facilities meet the definition of cogeneration facilities, *i.e.*, whether they are “used to produce electric energy and forms of useful thermal output (such as heat or steam), used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy.”<sup>33</sup> It is clear that the facilities will be used to produce electricity. It is also clear that they are intended to produce “useful” thermal output. As Tiquin points out, the low level steam output of the facilities is intended to be sold to a number of customers primarily for heating purposes. The thermal output of these facilities would be presumed to be “useful.”<sup>34</sup> We thus find that the output is “useful” for purposes of meeting the definition of a cogeneration facility.

28. The second issue is whether the facilities will meet the operating and efficiency standards. The self-certifications/recertifications of the facilities contain calculations showing compliance with the operating standards. Tiquin’s calculations are based on the assumption that a certain amount of thermal output will be sold. Chugach and Matanuska point out that many of the buyers for the thermal output of the facilities are unidentified. They also point out that the identified buyers are projected to buy substantially more energy than they are currently using. If either the thermal energy use attributed to the unidentified buyers, or to the substantial increase in energy use by current users of similar thermal energy were disallowed from the operating and efficiency calculations, the facilities would fail to meet those standards. Tiquin responds that the Commission has not traditionally required unbuilt QFs to identify the buyers of a proposed facility’s thermal output in order to show compliance with the technical standards for QFs and that the Commission should accept the projections in the self-certifications as true. Chugach and Matanuska have established legitimate concerns regarding whether, once operational, the KAPP and Pioneer facilities will satisfy the operating and efficiency standards. However, because, as we discuss below, we find that the facilities do not satisfy the requirements for QF status for “new cogeneration” facilities, we need not determine here whether those facilities comply with the operating and efficiency standards.

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<sup>32</sup> See 18 C.F.R. § 292.207(d) (2007).

<sup>33</sup> 18 C.F.R. § 292.202(c) (2007).

<sup>34</sup> *E.g. Brazos Electric Power Cooperative v. Tenaska IV Texas Partners, Ltd.*, 83 FERC ¶ 61,176 at 61,726 (1998), *aff’d sub nom. Brazos Electric Power Cooperative v. FERC*, 205 F.3d 235 (5<sup>th</sup> Cir., 2000).

**D. Whether KAPP and Pioneer are New Facilities Under Order No. 671**

29. There is no dispute that Pioneer is a “new cogeneration facility.” However, contrary to the arguments presented by Chugach and Anchorage, Tiquin disputes the claim that the KAPP facility should be construed as a “new cogeneration facility” because KAPP was self-certified prior to August 8, 2005.

30. Tiquin argues that there is a presumption that KAPP is an existing QF because it was previously self-certified. Tiquin also argues that Commission staff reviewed the self-recertification of KAPP and, because it did not issue a deficiency letter, implicitly found that the facility was an “existing cogeneration facility.” In contrast, Chugach argues that KAPP, as recertified, constitutes a “new” facility due to the substantial material changes proposed in the self-recertification of that facility. Chugach argues that KAPP is increasing its output from 39.7 MW to 150.47 MW, putting a far greater burden on Chugach’s transmission system and thus decreasing reliability.<sup>35</sup> Anchorage agrees with Chugach that the KAPP facility should be viewed as a “new” cogeneration facility. Anchorage also points out that Tiquin, by filling out certain sections of FERC Form 556, in essence admitted that it was subject to the requirements for new cogeneration facilities. Tiquin counters that the size increase of the KAPP facility is not substantial enough to view the proposed facility as a “new” facility. In this regard, Tiquin also argues that the facility should be viewed as a 120 MW facility and not as the approximately 150 MW facility that Chugach describes.<sup>36</sup>

31. We find that the KAPP facility is a “new” cogeneration facility notwithstanding its previous self-certification prior to August 8, 2005. The proposed facility is a 150.47 MW net capacity facility. In this regard, the Commission requires self-certifiers to describe the facility’s gross and net capacities.<sup>37</sup> The increase in net capacity from 39.7 MW to

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<sup>35</sup> Chugach cites two cases in support of its statement that KAPP is now a new QF as a result of increasing its output and decreasing its reliability: *Two Elk Generation Partners Limited Partnership*, 85 FERC ¶ 61,265 (1998); and *Zond Pan-Aero Windsystems Partners I and Zond Pan-Aero Windsystems Partners II*, 76 FERC ¶ 61,137 (1996).

<sup>36</sup> The difference in the size descriptions is that the 150 MW is the facility’s net capacity, while the 120 MW is based on what Tiquin refers to as the facility’s normal, expected mode of operation. Tiquin’s Answer to Answers of Chugach and Matanuska at 2 (Nov. 26, 2007).

<sup>37</sup> See 18 C.F.R. § 131.80 (2007); (Form 556 question 4(b)); See also *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. P31,233 (2006), *order on reh'g*, Order No. 688-A, 119 FERC P61,305 at ¶ 104 (2007) (Net capacity is the maximum amount of power that the facility is able to produce (gross capacity) less any auxiliary load for devices that are necessary and integral to the power production process (station power)).

150.47 MW constitutes so substantial an increase in capacity (over 375%) such that it cannot be considered the same facility that was previously self-certified. Anchorage also correctly points out that Tiquin itself, in the 2007 KAPP Self-Recertification, described its compliance with section 292.207(d) of our regulations and thus effectively admitted that it was subject to those requirements. Tiquin's claim that the Commission by virtue of its staff's not questioning its self-certification somehow implicitly found that KAPP is an existing cogeneration facility is misplaced. KAPP's 2007 recertification made no claim that it should be treated as an existing facility rather than subject to section 292.207(d); in fact, Tiquin attempted to show compliance with that section. In addition, the Commission does not formally act on self-certifications/recertifications and therefore took no action that justified Tiquin's claimed reliance.<sup>38</sup> Simply put, the Commission staff's not issuing a deficiency letter to a self-certified facility does not constitute a finding as to any matter contained in such a self-certification.<sup>39</sup> In conclusion, both the KAPP and Pioneer facilities are "new cogeneration" facilities subject to the requirements of section 292.205(d) of our regulations.

**E. Whether KAPP's and Pioneer's Proposed Thermal Usage Is Too Speculative to be Considered "Productive and Beneficial"**

32. Section 292.205(d)(1) of the Commission's regulations requires that a new cogeneration facility show that "[t]he thermal output of the cogeneration facility is used in a productive and beneficial manner."<sup>40</sup>

33. The parties dispute whether Tiquin needs to name definite thermal hosts and give further details beyond the few provided in its self-certifications for KAPP and Pioneer. In this regard, Tiquin's self-certifications and self-recertification do not name a large proportion of the expected thermal hosts for the proposed facilities' thermal output.

34. Chugach and Matanuska, seeking revocation, argue that, with regard to both facilities, the thermal usage is too speculative to find that the facilities will make actual sales to thermal hosts because high percentages of the thermal energy (almost 40 percent of the thermal energy attributed to KAPP, for example) is listed as going to unidentified customers at unknown locations for unknown purposes.<sup>41</sup> Matanuska also argues that

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Any power consumed by on-site load at the location of the QF for purposes unrelated to the power production process should not be subtracted from gross capacity for purposes of reporting net capacity. Whether the facility is a Commission-certified facility or a self-certified facility, both are certified at net capacity.

<sup>38</sup> See, e.g. *Midwest Generatory, LLC*, 95 FERC ¶ 61,231 at 61,799 n.17 (2001).

<sup>39</sup> Cf. 18 C.F.R. § 388.104(a) (2007) (informal staff advice is not binding).

<sup>40</sup> 18 C.F.R. § 292.207(d)(1) (2007).

<sup>41</sup> Chugach at 23.

Tiqun has demonstrated the opposite -- that there is an insufficient market for the thermal output and that the proposed plans to sell thermal energy to thermal hosts are not technically feasible.

35. Additionally, the parties argue that Tiqun cannot demonstrate a need for its proposed loads because of a lack of infrastructure to deliver thermal energy to some of the proposed thermal hosts.<sup>42</sup> Chugach notes that, in its filing for KAPP, Tiqun has overstated the needs of its thermal hosts by a factor of 7.<sup>43</sup> Additionally, Chugach claims that KAPP's useful thermal output for use by district energy customers is arguably overstated to the extent Tiqun fails to account for distribution losses.<sup>44</sup>

36. Chugach argues that the projected thermal use is not enough to be productive and beneficial because its existence is too speculative. Also, Chugach argues that KAPP fails to meet the Commission's requirement that it account for heat losses incurred between the power plant and the heat load.<sup>45</sup> And since KAPP proposes to serve heating demands that are some distance from the facility, Chugach estimates that between 5 and 7 percent of the thermal energy generated by KAPP will be lost in distribution. In all these points, Anchorage agrees with Chugach.<sup>46</sup> In addition, Chugach, Matanuska and Anchorage all agree that there is no assurance that the thermal energy from Pioneer will be used in a productive and beneficial manner.<sup>47</sup>

37. With regard to Pioneer, Matanuska argues that it is too speculative to say that the uses that Tiqun proposes for its thermal energy, specifically, space heating and process heating, might be considered productive and beneficial. Matanuska argues that Tiqun has not provided enough detailed information and support to demonstrate whether the thermal energy is needed and whether there is a real market for the product.<sup>48</sup>

38. Tiqun responds that neither PURPA nor the Commission's regulations require it to have definitely secured a thermal host for either facility.<sup>49</sup> Tiqun points out that the

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<sup>42</sup> Chugach at 25 (Chugach notes that a district energy system that would utilize the thermal output propose has yet to be built.).

<sup>43</sup> *Id.* at 23 (Arguing that the four identified thermal hosts may use only 16.12 MMBtu/hr, as opposed to the 121.57 mmbtu/hr projected in KAPP's self-recertification).

<sup>44</sup> *Id.* at 25-26.

<sup>45</sup> *Id.* at 25-26.

<sup>46</sup> Anchorage at 15-16.

<sup>47</sup> Chugach at 32.

<sup>48</sup> Matanuska at 10.

<sup>49</sup> Tiqun at 30.

Commission has in the past approved applications for QF status where the thermal host was not identified by name.<sup>50</sup> Tiquin also argues that Order No. 575 states that, with respect to facilities not yet built or operating, small power producers and cogenerators need only provide relevant information to the extent possible, in the form of planned compliance.<sup>51</sup>

39. In Order No. 671, which post-dates Order No. 575 and reflects the directives of the Energy Policy Act of 2005, the Commission stated that it would consider factors such as the need and market for thermal product in determining whether a new cogeneration facility's thermal output is productive and beneficial.<sup>52</sup> While the Commission declined to institute a bright line test concerning what constitutes acceptable use of thermal output, the Commission indicated that the type of information it would look to would be project-specific, including the geographic location of the proposed QF. The Commission stated that a proposed new cogeneration facility, in the FERC Form 556 submitted with an application for Commission-certification or with a self-certification, must provide sufficiently detailed information for the Commission to determine compliance with the EAct 2005's new "productive and beneficial" standard.<sup>53</sup> Here, the necessary end-users of the proposed output do not appear to currently exist. Moreover, the record indicates that the infrastructure needed for getting the proposed thermal output to the market would be significant and expensive and does not currently exist. Therefore, Tiquin simply has not provided sufficient basis for the Commission to conclude that the thermal uses on which its self-certifications are based will materialize. Here we are dealing with two proposed cogeneration facilities which are located in a relatively unpopulated area and the demand for thermal output from the two facilities has simply not been established.

40. Tiquin argues that the Commission should apply standards that it applied prior to the enactment of EAct 2005, and in essence assume that its optimistic projections will come true and that the uses to which the thermal output will be put will be productive and beneficial. We disagree. Congress created the new productive and beneficial requirement as part of the statutory requirement to assure that there would be a genuine need for any proposed cogeneration facility and its thermal output. In the case before us, there are insufficiently identified uses of the thermal load for us to conclude that the thermal output will be put to a productive and beneficial purpose.

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<sup>50</sup> *Id.*; citing *Wilbur Power, LLC*, 104 FERC ¶ 61,055 at P 8 (2003). This was a request for clarification that did not name the unaffiliated entity to which the distilled water in question would be sold. However, it was understood that the distilled water would be sold to some such entity or else QF status would be lost.

<sup>51</sup> *Id.* at 30-31.

<sup>52</sup> Order No. 671 at P 17.

<sup>53</sup> EAct 2005, § 1253, 119 Stat. at 967-70 (2005).

**F. Whether the Total Energy Output of the Proposed Facilities is to be Used Fundamentally for Industrial, Commercial, Residential or Institutional Purposes and is not Intended Fundamentally for Sale to an Electric Utility**

41. New cogeneration facilities are also required to show that:

The electric, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential, or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility.<sup>[54]</sup>

42. To help determine whether facilities meet this requirement, the Commission created a safe harbor, referred to in the regulations as “the fundamental use test,” that provides that if fifty percent of the total energy output (the electric, thermal, chemical and mechanical output) of a cogeneration facility is used for industrial, commercial, residential, or institutional purposes, the total energy output will be considered fundamentally for those purposes.<sup>55</sup>

43. Both Chugach and Matanuska argue that the total energy output of both the KAPP and Pioneer facilities is, in context, intended fundamentally for sale to electric utilities. Both argue that most of the two facilities’ thermal output is too speculative to find that the total energy output will be used fundamentally for industrial, commercial, residential, or institutional purposes. Both also point out that Tiquin admits that it does not fall under the safe harbor, but would like to have attributed to it the electric usage of its proposed steam hosts. They point out that Tiquin does not have authority under Alaska law to make such sales. They oppose Tiquin’s attributing the electric sales they make to the steam host to Tiquin for purposes of satisfying the fundamental use test.

44. Chugach and Matanuska also claim that the Tiquin’s submittals raise issues about whether the projects are intended fundamentally to sell power to the electric utility. They point to the speculative nature of the steam hosts, evidence that suggests that some of the plans to sell low-grade steam are not feasible, and the fact that the size of the facilities has changed to reflect the projected power needs of Chugach and Matanuska. Under these circumstances, they argue, the total energy output of the facilities can only be considered to be “intended” fundamentally for sale to electric utilities.

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<sup>54</sup> 18 C.F.R. § 292.205(d)(2) (2007).

<sup>55</sup> *See* 18 C.F.R. § 292.205(d)(3) (2007).



45. Tiquin responds that the Commission, after its staff issued a deficiency letter stating that Tiquin had not adequately described how it would meet the fundamental use test, responded to the deficiency letter and that the self-certification was later “accepted for filing.” Tiquin implies that the Commission has already found that its facilities meet the fundamental use test.<sup>56</sup>

46. We find that neither the KAPP nor the Pioneer facilities meets the requirement that the total energy output of a cogeneration facility be used fundamentally for industrial, commercial, residential, or institutional purposes, and not be intended fundamentally for sale to an electric utility. The thermal uses of the output of the facilities are simply too speculative, given the geographic area within which they operate, to justify finding that fifty percent of the total output of the facilities will be used fundamentally for industrial, commercial, residential, or institutional purposes, and not be intended fundamentally for sale to an electric utility. Moreover, given the total electric load of the geographic area, and the size of the proposed cogeneration projects, (roughly one-third of the load) we find it impossible to conclude that the generation projects have been designed other than to produce electric energy to sell to the electric utilities.<sup>57</sup> We thus conclude that the electrical, thermal, chemical, and mechanical output of the cogeneration facilities is intended fundamentally for sale to an electric utility.

### **G. Other Matters**

47. Chugach states that, when it sold the KAPP project, it sold it to Hobbs Industries, and it contracted that Hobbs Industries and its successors would not claim PURPA benefits for the KAPP facility. Chugach points out that the Tiquin self-certifications have been signed by Randy Hobbs, the owner of Hobbs Industries and asks the Commission to find that Tiquin is bound by the contractual provision not to seek PURPA benefits for the KAPP facility. Chugach asks the Commission to rule that Tiquin may not enforce PURPA against Chugach.

48. Chugach also asks the Commission to adopt a mechanism by which Tiquin will be prevented from filing a self-recertification for the same facilities and reassert its PURPA rights.

49. Tiquin responds that the sales contract between Chugach and Hobbs Industries is a matter of state law which the Commission should not address in the context of a

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<sup>56</sup> As noted above, the Commission has previously taken no action on either the KAPP or Pioneer self-certifications/recertifications that warrants reliance by Tiquin.

<sup>57</sup> Indeed, correspondence from Tiquin, which Chugach attached to its petition for declaratory order, admits the principal purpose of its facilities is power production. *See* Chugach at Ex. F.

declaratory order proceeding addressing the QF status of Tiquin's KAPP and Pioneer facilities.

50. The contractual rights of Chugach *vis-à-vis* Hobbs Industries and its successors is not an appropriate matter to decide in this proceeding. Moreover, Chugach is correct that, once the Commission determines that Pioneer and KAPP are not QFs under the applicable statutory and regulatory standards, Tiquin may not attempt to avoid the consequences of this decision by simply filing a self-recertification of the same projects. Having litigated this matter, Tiquin is not free to seek recertification for the same facilities, absent a material change in the facts.

#### **H. Whether Matanuska Owed the Filing Fee Paid Under Protest.**

51. Matanuska asks for a refund of the filing fee that it paid with its filing to decertify the Pioneer facility. It argues that it did not file a petition for a declaratory order, but a timely motion for revocation in response to the Commission's June 26, 2007 notice of Tiquin's self-certification of the Pioneer facility.<sup>58</sup> Matanuska claims that Order No. 671 created a right in 18 C.F.R. § 292.207(d)(1)(iii) to make such a filing without the need for a filing fee.

52. Matanuska also argues that petitions are to be filed when a person is seeking, *inter alia*, any other action which is in the discretion of the Commission and for which the Commission's regulations prescribe no other form of pleading.<sup>59</sup> In this situation, argues Matanuska, it seems incongruous for the Commission to establish a specific provision for revocation of self-certifications, but then to require an entity using that provision to submit as a prerequisite the fee for a petition for a declaratory order. Finally, Matanuska argues that it should have this filing fee revoked on the alternative ground that it had insufficient notice of this filing fee when it submitted its motion for revocation.

53. We will not refund the filing fee. The Commission has held that filings seeking QF revocation should be in the form of petitions for declaratory order,<sup>60</sup> and that they require filing fees.<sup>61</sup> When an applicant requests the Commission to find that a facility

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<sup>58</sup> We emphasize that that notice, quoted earlier in this order, stated that the filing did not initiate a proceeding and that notice did not invite interventions or protests -- in contrast to more typical notices of, for example, rate filings. Rather, it specified that a separate filing under section 292.207(d)(iii) was required.

<sup>59</sup> 18 C.F.R. § 385.207(a)(5).

<sup>60</sup> *See Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 94 FERC ¶ 61,207 (2001), *reh'g denied*, 95 FERC ¶ 61,120 (2001).

<sup>61</sup> *Id.*; *see also Brazos* 83 FERC at 61,726. In both the *Hydro Investors* and the *Brazos* cases electric utilities filed "motions" for revocation pursuant to section 292.207(d)(ii) of the Commission's regulations. The Commission treated these motions

does not meet the requirements for QF status, such a request is for a declaration that the facility in question is not a QF.<sup>62</sup> Conversely, when an applicant submits a self-certification, no Commission action is required or even contemplated. Thus contrary to Matanuska's claim, the Commission is not acting on Tiquin's self-certification, which is effective upon filing, but rather is acting on Matanuska's (and Chugach's<sup>63</sup>) request that the Commission revoke QF status.

54. Furthermore, Matanuska's "lack of symmetry" argument also fails because no Commission determination or approval attaches to a self-certification (since no Commission action on these is required), in contrast to a petition to de-certify a QF which always requires a Commission determination. Thus, while the former involves minimal Commission time or resources, the latter often requires considerable Commission time and resources, thereby justifying the imposition of filing fees for the latter but not for the former. Tiquin's argument that Order No. 671 created a new right to file a motion for revocation of self-certified facilities, which does not require a filing fee, is misplaced. The principal change made by Order No. 671 with respect to motions for revocation was to give the Commission explicit authority to revoke self-certified QF status on the Commission's own motion, and to require that self-certifications of "new" cogeneration facilities be accompanied by a draft *Federal Register* notice to facilitate communication to the public that such a filing had been made. The new provisions did not change the need for an applicant to pay a filing fee if it should seek to revoke QF status.

The Commission orders:

(A) The qualifying status of Tiquin's KAPP cogeneration facility is hereby revoked, as discussed in the body of this order.

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as petitions for declaratory order and required a filing fee. We see no reason to treat "motions" for revocation filed pursuant to section 292.207(d)(iii) differently from those filed pursuant to section 292.207(d)(ii). We will treat motions filed pursuant to both sections as petitions for declaratory order and will require a fee as a predicate to processing the petitions.

<sup>62</sup> *Id.*

<sup>63</sup> The required fee accompanied Chugach's petition, without protest.

(B) The qualifying status of Tiquin's Pioneer cogeneration facility is hereby revoked, as discussed in the body of this order

By the Commission. Commissioners's Kelly and Wellinghoff concurring jointly with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Chugach Electric Association, Inc.

Docket Nos. EL07-97-000  
QF99-95-002  
QF07-129-001

Matanuska Electric Association

Docket Nos. EL07-105-000  
QF07-129-002

(Issued December 21, 2007)

KELLY and WELLINGHOFF, Commissioners, *concurring*:

This order finds that Tiquin's proposed facilities do not satisfy several of the requirements for QF status for new cogeneration facilities under the applicable Commission regulations.<sup>1</sup> In promulgating those regulations in Order No. 671, the Commission adopted a case-by-case approach to considering whether a specific cogeneration facility has met these requirements.

Based on the facts presented here, the Commission finds that Tiquin has failed to demonstrate that the thermal output of these proposed cogeneration facilities will be put to a productive and beneficial purpose or that the facilities' total energy output will be used fundamentally for industrial, commercial, residential or industrial purposes and is not intended fundamentally for sale to an electric utility. In light of the fact-intensive, case-specific review undertaken in this proceeding, we agree that it is appropriate for the Commission to revoke QF status for these facilities. Tiquin may seek recertification of these facilities in the future if there is a material change in the facts that the Commission has relied on in making these findings.

For these reasons, we respectfully concur with this order.

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Jon Wellinghoff

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Suedeen G. Kelly

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<sup>1</sup> 18 C.F.R. §§ 292.207(d)(1) and 292.207(d)(2).