



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OFFICE OF  
AIR AND RADIATION

Jeffrey Moore, Project Manager  
Rensselaer Cogeneration Facility  
Coastal Technology, Inc.  
39 Riverside Avenue  
Rensselaer, NY 12144

Dear Mr. Moore:

This letter is U.S. EPA's determination of applicability under 40 CFR 72.6(c) of the Acid Rain regulations for Fulton Cogeneration Associates, LP's ("Fulton") Rensselaer Cogeneration Facility ("Rensselaer") (Facility ID(ORISPL) 54034), in Rensselaer, New York. This determination is made in response to Fulton's letters of June 2 and July 5, 2000 requesting a determination and additional information provided in October 2002.

Background

Construction of Rensselaer began in 1992. In November 1993, Rensselaer was first synchronized to the grid and produced electricity for sale.<sup>1</sup> Fulton purchased Rensselaer from LG&E-Westmoreland Rensselaer (LG&E), the initial owner, on March 15, 1999. Rensselaer consists of a combined cycle unit (Unit 1GTDBS) that includes a combustion turbine, duct burners, a heat recovery steam generator (HRSG), and a steam turbine generator for a total of 79 MW nameplate capacity for the unit. Pipeline natural gas is the primary fuel, with No. 2 distillate oil as a backup fuel, and is combusted in both the combustion turbine and the duct burners. The exhaust from the combustion turbine is ducted into the HRSG, and natural gas is combusted at the duct burners to increase steam production from the HRSG. Steam from the HRSG is used by the steam turbine generator. In addition, steam from the HRSG was sold to the BASF Corporation's Rensselaer, New York Colorants facility under a steam sales agreement dated February 22, 1991 for use in manufacture of chemicals and for space heating. The original steam sales agreement was amended on July 7, 1998 and expired on December 31, 1999. Rensselaer now produces only electricity.

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<sup>1</sup> LG&E-Westmoreland Rensselaer, 71 FERC ¶61,129 (1995).

Sections 402(17)(A) and 405(g)(6)(A) of the Clean Air Act include provisions discussing in detail the conditions under which a cogeneration unit or an independent power production facility is exempt from the Acid Rain Program. See 42 U.S.C. 7651a(17)(A) (stating that a cogeneration unit is not a utility unit if it meets certain requirements concerning the purpose of its construction and the amount of electricity that it sells) and 42 U.S.C. 7651d(g)(6)(A) (stating that Clean Air Act Title IV does not apply to a qualifying cogeneration facility or an independent power production facility that meets certain conditions as of November 15, 1990, the date of enactment of Title IV). EPA interprets these provisions, and §§72.2 and 72.6 of the regulations implementing the provisions, to provide that a cogeneration unit used to produce electricity for sale or an independent power production facility is a utility unit and thus subject to the Acid Rain Program, unless the unit or facility meets the requirements for an exemption as set forth in §72.6(b).

Fulton states that Rensselaer was exempt from the requirements of the Acid Rain Program until January 1, 2000 under §72.6(b)(5), which exempts a qualifying facility with a qualifying power purchase commitment. According to Fulton, Rensselaer was a qualifying facility (as defined under §72.2) through 1998,<sup>2</sup> but failed to meet certain operating and efficiency standards in 1999 and lost its qualifying facility status as a result starting in 2000. Fulton therefore no longer claims that Rensselaer is an unaffected unit under §72.6(b)(5).

However, Fulton claims that Rensselaer is an unaffected unit under §72.6(b)(6), which exempts an independent power production facility with a qualifying power purchase commitment. Fulton asserts that Rensselaer is an independent power production facility (as defined under §72.2), claiming that the facility is non-recourse financed, sells all of its power at wholesale, is a new unit in that it commenced commercial operation on or after November 15, 1990, and is less than 50% owned by a public utility.

Fulton also states that Rensselaer has a qualifying power purchase commitment. The original owners of Rensselaer (LG&E) entered into a power purchase agreement with Niagara Mohawk Power Corporation (NMPC) on December 23, 1987, an agreement under which all of Rensselaer's net electrical output (estimated at about 600,000 MWh) was sold to NMPC.<sup>3</sup> Under the agreement, total planned net capacity was 79 MW, which is equal to the unit's total actual capacity. The agreement specified prices for the sale of capacity and energy to NMPC based on NMPC's avoided costs as set forth in the rate schedule, Service Classification No. 6 (SC-6). The agreement was revised on April 11, 1990 to provide for, among other things, prices based on NMPC's avoided costs under rate schedule SC-6 until the date of commercial operation of the unit and, thereafter, formula prices (which included a fixed capacity charge) set forth in the agreement. On December 21, 1990, minor changes were made to the formula prices in order to conform to the requirements of an October 31, 1990 order of the New York State Public Service Commission approving the April 11, 1990 revision contingent on such formula price

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<sup>2</sup> See Hadson Power Partners of Rensselaer, 56 FERC ¶62,192 (1991) and LG&E-Westmoreland Rensselaer, 65 FERC ¶62,185 (1993).

<sup>3</sup> See Agreement between Ultra Cogen Systems and Niagara Mohawk Power Corporation at 1 (December 23, 1987).

changes being made.<sup>4</sup> (The agreement, as revised on December 21, 1990, is referred to the “December 23, 1987 agreement”.)

On December 23, 1997, LG&E entered into the Amended and Restated Agreement, a restructured power purchase agreement with NMPC that replaced the December 23, 1987 agreement. The Amended and Restated Agreement (referred to as the “December 23, 1997 agreement”) became effective June 30, 1998 and included a cash settlement for LG&E and an Indexed Swap Agreement with NMPC in exchange for agreeing to restructure the December 23, 1987 agreement.<sup>5</sup> Whereas all of the Rensselaer’s electrical output had to be sold to NMPC under the December 23, 1987 agreement, the December 23, 1997 agreement gave LG&E or Fulton (as the successor owner of Rensselaer) the option during a specified period (the “Proxy-Market-Price-Period”)<sup>6</sup> to “put” electricity and capacity to NMPC, which was required to buy the “put” amount. LG&E or Fulton could “put” amounts up to the specified contract amounts (i.e., 672,000 MWh, which equaled about 97% of the amount of electricity the unit could generate annually operating at full load every hour, and the associated capacity). NMPC had to pay prices for energy and capacity based on NMPC’s avoided costs under rate schedule SC-6. (Effective December 1, 1999, rate schedule SC-6 based NMPC’s avoided costs on the “locational based marginal price,” which is established by the independent system operator for NYISO and is the marginal cost of supplying electricity to a specific location on the grid based on bids by wholesale generators to provide such electricity.) Any amounts that LG&E or Fulton did not “put” to NMPC could be sold to any third party to the extent the amount was first offered to and rejected by NMPC. Any amount sold to a third party was not subject to the price provisions of the agreement. However, according to Fulton, during the “Proxy-Market-Price-Period”, LG&E or Fulton “put” to NMPC virtually all of the electricity and capacity of Rensselaer.

Under the December 23, 1997 agreement, after the end of the “Proxy-Market-Price-Period,” Fulton no longer had the ability to “put” electricity and capacity to NMPC and was free to sell to third parties at negotiated prices. For any electricity and capacity purchased by NMPC from Rensselaer, NMPC had to pay the “day ahead locational based market price” for electricity and the market price for

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<sup>4</sup> On June 23, 1993, there was one other revision of the agreement, which did not affect the price provisions.

<sup>5</sup> According to Fulton, the Indexed Swap Agreement is a financial instrument designed as a hedge to protect NMPC and Fulton against electricity price variations in the New York Power Pool and to ensure that the prices actually paid by NMPC are those provided by the December 23, 1997 agreement. For purposes of this applicability determination, EPA is assuming, and conditioning the finding on Rensselaer’s exemption under §72.6(b)(5) on, the correctness of Fulton’s assertions concerning the Indexed Swap Agreement.

<sup>6</sup> The “Proxy-Market-Price-Period” extended until the establishment of the independent system operator and power exchange for the New York Power Pool (NYISO), i.e., until April 1, 2001.

capacity (if any) specified by the NYISO.<sup>7</sup> Since April 1, 2001, Fulton has been selling electrical output from Rensselaer to both NMPC and third parties. Fulton suggests that because the “day ahead locational based market price” is based on bids by wholesale generator, not negotiated by Fulton, and does not specifically address Acid Rain compliance costs, the December 23, 1987 agreement does not represent a revision that allows the passthrough of such costs. However, Fulton asks whether the December 23, 1987 agreement and the expiration of the steam sales agreement constitute changes in the identity of the electricity purchaser and the steam purchaser.

### EPA’s Determination

Section 72.6(b)(5) exempts from the Acid Rain Program a unit that: is an “independent power production facility”; has, as of November 15, 1990, a “qualifying power purchase commitment” to sell at least 15% of its total planned net capacity; and consists of units with total net output capacity not exceeding 130% of total planned net capacity. Under §72.2, an “independent power production facility” is a unit that: is nonrecourse project financed;<sup>8</sup> commenced commercial operation on or after November 15, 1990; generates electricity, at least 80 percent of which is sold at wholesale; and has 50 percent or less direct public utility ownership. Further, under §72.2, “power purchase commitment” includes, among other things, a contract that commits a utility to purchase electricity from a facility. Further, such a contract is a “qualifying power purchase commitment” only if it: is in effect on November 15, 1990; commits a utility to purchase electricity from a facility with specified terms and conditions; and is not subsequently revised to make certain changes. In particular, the contract may not be revised to make either of the following types of changes: (1) a change of the identity of the electricity purchaser and the identity of the steam purchaser and facility location after the commencement of commercial operation; or (2) to allow the costs of compliance with the Acid Rain Program to be shifted to the purchaser. 40 CFR 72.2 (definitions of “power purchase commitment” and “qualifying power purchase commitment”).

With regard to its status as an independent power production facility, Rensselaer commenced commercial operation in 1993 and, according to Fulton, is nonrecourse project financed. Fulton also states that LG&E was 50 percent owned by a non-utility and that Fulton itself is wholly owned by Coastal Power Corporation, which is not a public utility. Further, as an exempt wholesale generator under the Public Utility Holding Company Act, Fulton is required to be exclusively in the business of selling electricity at wholesale. See Fulton Cogeneration Associates, LP, 91 FERC ¶62,003 (2000) (determining that Fulton is an exempt wholesale generator); and 15 U.S.C.A. 79z-5a(a)(1) (definition of

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<sup>7</sup> The December 23, 1997 agreement refers to the “day ahead locational based market price”, but the NYISO uses the term “day ahead locational based marginal price.” According to Fulton, the terms are synonymous.

<sup>8</sup> “Nonrecourse project financed” means, among other things, that any debt used to finance the facility is secured by the facility and the revenues received by the facility. See 10 CFR 715.3.

“exempt wholesale generator”). Thus, Rensselaer appears to qualify as an independent power production facility.<sup>9</sup>

Further, the December 23, 1987 agreement required NMPC to purchase all of Rensselaer’s total planned net output capacity, which equals the unit’s actual net output capacity. In addition, the December 23, 1987 agreement was a “power sales agreement” in that it committed NMPC to buy electricity from Rensselaer under specified terms and conditions, including prices for capacity and energy. Thus, EPA agrees that Rensselaer was initially exempt from the Acid Rain Program under §72.6(b)(6).

As discussed above, the December 23, 1987 agreement was revised several times before November 15, 1990, including the April 11, 1990 revision by the parties and the October 31, 1990 revision by the New York Public Service Commission (which was implemented by the parties on December 21, 1990). The price provisions under these revisions continued to be based on NMPC’s avoided costs, or on formula rates, that did not allow for passthrough of Acid Rain Program compliance costs.

Also as discussed above, the December 23, 1987 agreement was subsequently replaced by the December 23, 1997 agreement. Under the latter agreement, during the “Proxy-Market-Price-Period” (i.e., until April 1, 2000), Rensselaer sold virtually all of its electrical output to NMPC at the prices based on NMPC’s avoided costs. Thus, the identity of the electricity purchaser did not change, and the provisions of the December 23, 1997 agreement that allowed for sales to third parties at market prices and that might have allowed pass through of Acid Rain Program compliance costs were virtually unused.

However, starting April 1, 2001 under the December 23, 1997 agreement, Rensselaer has the ability to sell to either NMPC at prices based on avoided costs or third parties at negotiated prices and, since that date, has been making third party sales. Under these circumstances, it is difficult to see how there can be a basis for concluding that Acid Rain Program compliance costs cannot be shifted to purchasers. EPA therefore finds that Rensselaer lost its exemption from the Acid Rain Program under §72.6(b)(6) as of April 1, 2001.

Further, Fulton does not claim that Rensselaer qualifies for any other exemption from the Acid Rain Program, and EPA has not identified any other exemption applicable to the facility. Rensselaer therefore became an affected unit on April 1, 2001. As an affected unit, Rensselaer must comply with all applicable requirements under the Acid Rain Program, including the requirements to apply for and receive an Acid Rain Permit (under Part 72), to monitor and report sulfur dioxide, nitrogen oxide, and carbon dioxide emissions and heat input (under Part 75) within the later of 90 unit operating days or 180 calendar days of the loss of the exemption under §72.6(b)(5)<sup>10</sup>, and to hold allowances to cover sulfur

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<sup>9</sup> For purposes of this applicability determination, EPA is assuming, and conditioning the finding on Rensselaer’s status as an independent power production facility on, the correctness of Fulton’s assertions concerning nonrecourse project financing and direct utility ownership.

<sup>10</sup> See 40 CFR 75.4(c).

dioxide emissions (under Parts 72 and 73) starting as of the monitoring and reporting deadline. EPA notes that Rensselaer has been assuming that it was an affected unit as of April 1, 2001 and has been submitting emission data and holding allowances.

This determination relies, and is contingent, on the accuracy and completeness of the representations in the June 2 and July 5, 2000 letters referenced above and the additional information provided in October 2002 and is appealable under Part 78. The applicable regulations require you to send copies of this letter to each owner or operator of Rensselaer (40 CFR 72.6(c)(1)). If you have further questions regarding the Acid Rain Program, please contact Robert Miller of EPA's Clean Air Markets Division at (202) 564-9077.

Sincerely,

/s/ (May 26, 2003)

Samuel A. Napolitano, Acting Director  
Clean Air Markets Division

cc: Reggie Parker, New York State DEP  
Gerry DeGaetano, U.S. EPA Region 2