The Commission intended to make it easier to determine the energy sources that certain qualifying small power production facilities can use. To make it easier to certify a qualifying facility, the Commission also proposed to list specific energy sources that it had previously approved for treatment as waste.⁸⁵

Comments: EEI and Southern Companies are concerned that eliminating the by-product test in the revised definition of waste may encourage the deliberate creation of a waste material. Each recommends that an energy source not qualify as waste unless it would otherwise exist in the absence of the QF that will rely on it.

American Iron and Steel, Utility Systems Florida, Anthracite IPPs and Independent Energy Producers suggest that whether the owner or operator of a QF pays for the energy source, incurs costs associated with its removal and transportation to the QF, and adds value by way of upgrade, should not affect the determination of commercial value. American Iron and Steel proposes that the Commission consider commercial value in the context of its value to potential purchasers other than owners and operators of QFs. Anthracite IPPs observes that upgrades, such as cleaning and washing, might be necessary before a QF can use a waste. Utility Systems Florida notes that almost everything has some commercial value after it is cleaned, and suggests that the Commission define waste in terms of an energy source that is both an environmental hazard and has little or no commercial value.

American Iron and Steel, EEI and Southern Companies urge the Commission to state that, once the Commission determines that a QF's energy source is waste, the Commission will continue to treat that energy source as waste even if the waste subsequently acquires commercial value. They maintain that this approach is necessary to maintain the QF's qualifying status.

The CPUC, EEI and Southern Companies propose that the Commission periodically review and update its list of waste materials.⁸⁶

Section 292.202(a) defines "biomass" as any organic material not derived from fossil fuels.

⁸⁶ The CPUC notes that the proposed waste list is based upon market data for the period 1987 through 1991. EEI is concerned that technology may quickly Anthracite IPPS and Applied Energy argue that it is unnecessary to limit petroleum coke and used rubber tires to that which cannot be commercially marketed, since the Commission has already listed each item as waste.⁸⁷ American Iron and Steel suggests that the Commission specifically list coke oven gas and blast furnace gas as waste.⁸⁸

Ridgewood and RW Partners suggest that the Commission include on the list of waste environmentally problematic substances such as used crankcase oil and other used petroleum products.89 Anthracite IPPs recommends that the Commission include on the waste list coal "fines," regardless of their BTU content.90 It argues that fines are extremely difficult to handle because of their small particle size and their tendency to become difficult to handle when wet.91 Anthracite IPPs also proposes that the list be expanded to include subbituminous coal or blends of bituminous and subbituminous coal, regardless of whether such material is in place or is a refuse.92

⁸⁷ Anthracite IPPs cites Sunlaw Energy Corp., 37 FERC ¶ 62,255 (1986) and Exeter Energy Limited Partnership, 48 FERC ¶ 62,135 (1985). Applied Energy cites Ultrapower, Inc., 34 FERC ¶ 62,144 (1986), GWF Power Systems Company, Inc., 45 FERC ¶ 62,159 (1988), and the Commission's discussion of petroleum coke without regard to its commercial value at FERC Stats. and Regs., Regulations Preambles 1977–1981 ¶ 30,134 at 30,934. In that latter discussion, the Commission also referred to refinery gas and plastics as additional examples of waste.

⁸⁸ American Iron and Steel states that these gases cannot be marketed outside the steel industry due to low Btu content, intermittent production, and capture and storage problems. It also suggests that the Commission consider including as waste steel industry process gases such as Corex off-gas and direct steel making off-gas.

⁸⁹ Ridgewood, RW Partners, Utility Systems Florida, Donald L. Warner and Steven Anthony Duff maintain that listing used crankcase oil as waste would provide an incentive for its proper disposal, reduce its role as an environmental nuisance, encourage its recycling for use in electric generation, help reduce oil imports, and remove skepticism among lenders as to the status of selfcertified facilities that rely on it.

⁹⁰ Fines are small or powdery-sized particles of coal that result from coal mining, sizing or processing operations.

⁹¹ Anthracite IPPs further states that utilities do not specifically purchase fines, and that fines are typically in the form of silt comprised of coal fines and ash materials from coal washing operations and are disposed of in settling or slurry ponds.

 92 Subbituminous coal has a lower heat content than bituminous coal, averaging 9,000 Btu/lb.

Anthracite IPPs also proposes that the Commission regard as waste: (1) Top or bottom anthracite coal, and (2) subbituminous and

Commission Response: The Commission is simplifying the qualifying status determination of facilities that use waste energy inputs in two ways. First, the Commission is publishing a list of waste energy inputs that the Commission has previously approved. Second, the Commission is streamlining its waste determination process for those energy inputs that do not appear on the list, by changing its two-part Kenvil approach (i.e., application of a "by-product test" in conjunction with a "little or no current commercial value" test) to require only that the proposed waste fuel source have little or no current commercial value.

Section 292.204(b) requires that, for a waste-fueled qualifying small power production facility, 75 percent or more of the total energy input to the facility must be waste.⁹³ Determining whether a facility meets this criterion will entail an evaluation of the average quality characteristics of the fuel, if the fuel is a waste fossil fuel energy input to a facility, or a description of the facility's energy input if it is not using a waste fossil fuel.

The final rule will provide that even if the owner and/or operator of a QF pays for a material and incurs expenses to transport and upgrade it, the material is a waste if no other sector of the Nation's economy uses the material: but. if there is a demand for the material, other than in the QF industry, the material is considered to have commercial value and is, therefore, not waste under the "little or no commercial value" test. The Commission will not consider value to the cogenerator or small power producer as commercial value. Should a waste material acquire commercial value after the Commission has certified a facility that uses such material, or after a small power

Anthracite IPPs also wants the Commission to provide in its regulations that any coal source not listed as a waste in the Commission's regulations may qualify as waste upon a showing that it has no commercial value. Anthracite IPPs also wants all references to Btu or ash content to refer to average values so that variations in Btu or ash content will not preclude a potential fuel source from qualifying.

⁹³ Section 292.204 reads in relevant part, as follows:

(b) *Fuel use*. (1)(i) The primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof, and 75 percent or more of the total energy input must be from these sources.

also is not needed to address the issue of what constitutes waste. For example, in Big Horn Energy Partners, 38 FERC ¶ 61,265, order on rehearing, 40 FERC ¶ 61,305 (1987) (Big Horn), the Commission certified as waste, coal which was not a true byproduct of the coal mining operation but was simply not extracted because it was unwanted.

 $^{^{85}}$ The Commission intended that its waste list not be exclusive.

cause a listed waste to acquire some economic value. Southern Companies, concerned about delay, recommends that the Commission establish a list of wastes but not include the list in the Commission's regulations. Southern Companies suggests that the Commission invite public comment on the list and update the list periodically.

bituminous coal that the United States Department of the Interior's Bureau of Land Management (BLM) has determined to be waste, including any of this coal with the same characteristics that may extend onto non-Federal or Indian land not under the BLM's jurisdiction. Anthracite IPPs notes that, since BLM jurisdiction only extends to Federal or Indian lands, the waste list's reference to BLM approved wastes on such lands is redundant.