

Report of The Committee On Coal Conversion

I. AGENCY ACTIONS

A. Rulemakings

The Economic Regulatory Administration ("ERA") of the Department of Energy ("DOE") completed its efforts to trim back the regulatory program under the Powerplant and Industrial Fuel Use Act of 1978 ("Fuel Use Act").¹ Final regulations pertaining to new electric powerplants and major fuel-burning installations ("MFBI's") were issued on March 31, 1982.² These regulations further simplified administrative procedures and reduced requirements for obtaining exemptions from the prohibitions of the Fuel Use Act. For example, the regulations: made it less likely that existing facilities would be deemed "new" facilities because of substantial onsite reconstruction; expanded the definition of "commercial unmarketability" and provided simpler procedures for obtaining classification of fuels as commercially unmarketable from ERA; and expanded the "Lack of Alternate Fuel Supply" certification exemption for MFBI's operated less than 600 hours per year to include MFBI's operated up to 1500 hours per year.

ERA also issued amendments to its rules pertaining to cogeneration facilities on August 5, 1982.³ The August 5 final rules expanded the definition of "cogeneration facility" to include units that generate electricity constituting more than five percent and less than 90 percent of the useful output of the facility.⁴ At the same time, the rules narrowed the definition of "electric generating unit" to reduce the likelihood of new industrial cogenerators being designated as powerplants. The regulations now exclude from the definition "any cogeneration facility from which less than 50 percent of the net annual electric power generation is sold or exchanged for resale."⁵ Lastly, the rules modified the criteria for obtaining a permanent cogeneration exemption to make it easier for units to qualify for the exemption.⁶

The most dramatic changes were made to ERA's existing facilities regulations. First, on April 7, 1982, ERA issued rules, in conformance with the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), which completely revised procedures applicable to the issuance of prohibition orders to existing electric powerplants.⁷ Under OBRA, existing statutory and administrative electric power plants are exempted from prohibitions against the use of natural gas or oil, which were formerly established or authorized by Section 301 of the Fuel Use Act. The April 7 regulations finalized new, flexible procedures under which existing electric powerplants could obtain prohibition orders on a voluntary basis.⁸

¹42 U.S.C. § 8301, *et seq.*

²47 Fed. Reg. 15,311-15 (April 9, 1982).

³47 Fed. Reg. 34,972 (August 12, 1982). DOE issued final cogeneration regulations on June 25, 1982, 47 Fed. Reg. 29,209-11 (July 6, 1982), which contained several errors characterized by DOE as "technical." These errors were corrected in the August 5 final regulations.

⁴The prior rules had established ten percent as the minimum electrical output.

⁵47 Fed. Reg. at 34,972. The regulations exclude from the phrase "sold or exchanged for resale" any "sales or exchanges to or with an electric utility for resale by the utility to the cogenerating supplier, and sales or exchanges among owners of the cogeneration facility." *Id.*

⁶The August 5 rules were revised to: permit the oil and gas savings calculation to be made on the basis of a "Regional Estimates Table" or other reasonable effort; clarify that units can meet the oil and gas savings requirement for the exemption by including facilities that are non-jurisdictional under the Fuel Use Act; and clarify the basis for qualifying under the public interest exemption.

⁷47 Fed. Reg. 17,037-46 (April 21, 1982).

⁸Voluntary prohibition orders, among other things, excuse the recipient from meeting New Source Performance Standards, pursuant to Section 111(a)(8) of the Clean Air Act.

Subsequently, on October 28, 1982, ERA issued final rules deleting virtually all of the regulations pertaining to existing MFBI's in conformance with the agency's policy of not issuing involuntary prohibition orders to such facilities.⁹ The regulations eliminated the procedures for the issuance of involuntary prohibition orders to existing MFBI's and the procedures for obtaining exemptions from such orders. However, the regulations retained a mechanism which MFBI's could utilize to obtain voluntary prohibition orders.¹⁰ In addition, the regulations added a new provision binding ERA in the future not to propose to prohibit or to prohibit by rule or order the use of oil or gas in existing MFBI's "unless and until ERA adopts [new] rules establishing regulatory requirements governing the issuance of such orders and rules in accordance with the applicable procedural and substantive requirements of law."¹¹

B. Prohibition and Exemption Proceedings

According to ERA's annual report on the Fuel Use Act,¹² the agency received a total of 21 petitions under the Act during 1982. Of these, sixteen were granted, two were withdrawn or rejected, and three remained pending. Five petitions for cogeneration exemptions were among those granted by ERA. Nine petitions seeking elimination of fuel use reporting requirements were also granted.¹³ ERA issued two final prohibition orders and one proposed prohibition order to three electric powerplants in 1982, and also completed four draft environmental impact statements (EIS's) and one final EIS.¹⁴ With regard to the effectiveness of the coal conversion program, ERA's annual report states that "it is difficult to attribute any specific reduction in petroleum or natural gas use to [the Fuel Use Act] alone."¹⁵

II. JUDICIAL PROCEEDINGS

Petitions for review of numerous interim and final Fuel Use Act regulations, which had been consolidated in a multi-party proceeding in the Fourth Circuit, were continued in abeyance throughout 1982, pending further review and revision of the regulations by ERA. On February 22, 1983, following rescission of the "existing facilities" regulations and revision to the "new facilities" regulations, the parties to the litigation filed a joint agreement for dismissal of the pending cases without prejudice. The cases were dismissed without prejudice on April 7, 1983, ending four years of litigation over ERA's Fuel Use Act regulatory program.

III. LEGISLATIVE DEVELOPMENTS

On February 28, 1983, an Administration bill which would, among other things, repeal the Fuel Use Act, was introduced in the Senate as S. 615, and the House, as H.R. 1760.¹⁶ The bill is part of comprehensive legislation to address existing natural gas problems.

⁹47 Fed. Reg. 50846-51 (November 10, 1982).

¹⁰47 Fed. Reg. at 50847.

¹¹10 C.F.R. § 501.50, 47 Fed. Reg. at 50848.

¹²In addition, ERA granted four fuel mixtures exemptions and one exemption each for lack of adequate capital, peakload, reliability of service, public interest, and site limitations.

¹³U.S. Department of Energy, *Powerplant and Industrial Fuel Use Act Annual Report (March 1, 1983)*, DOE/RG-0057/2.

¹⁴*Id.*, at 6-7.

¹⁵*Id.*, at 11.

¹⁶Natural Gas Consumer Regulatory Reform Amendments of 1983. The House bill was introduced on March 2, 1983.

J. Richard Tiano, *Chairman*
Jeffrey D. Komarow, *Vice Chairman*

Albert X. Bader, Jr.
Glen E. Clover
Paul D. Coleman
Patricia M. McEvoy

Earle H. O'Donnell
Joseph Stiles
Amy J. Watkins
Andrew D. Weissman