

135 FERC ¶ 61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

OREG 1, Inc., OREG 2, Inc., OREG 3, Inc., and
OREG 4, Inc.

Docket Nos. EL11-22-000
QF11-115-001
QF11-116-001
QF11-117-001
QF11-118-001
QF11-119-001
QF11-120-001
QF11-121-001
QF11-122-001
QF11-123-001
QF11-124-001

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR
WAIVERS AND DIRECTING REFUNDS

(Issued May 19, 2011)

1. On February 14, 2011, OREG 1, Inc., OREG 2, Inc., OREG 3, Inc., and OREG 4, Inc. (collectively, Petitioners), filed a petition for declaratory order requesting limited waivers of the small power production qualifying facility (QF) filing requirements set forth in section 292.203(a)(3) of the Commission's regulations¹ during the periods of non-compliance prior to Petitioners filing QF self-certifications.

¹ 18 C.F.R. § 292.203(a)(3) (2010) (requiring a small power production QF either to file a notice of self-certification with the Commission pursuant to section 292.207(a) of the Commission's regulations, or to file an application for Commission certification under section 292.207(b)(1)).

2. The Commission grants the requested waivers of the QF filing requirements in section 292.203(a)(3) of the regulations only to the extent that the waivers would grant most of the exemptions from the Federal Power Act (FPA), Public Utility Holding Company Act of 2005 (PUHCA) and state laws as provided in sections 292.601 and 292.602 of the regulations,² but the Commission denies the waivers to the extent that waivers would grant exemption from sections 205 and 206 of the FPA. The Commission further directs Petitioners to make time-value refunds for the periods of non-compliance with section 205 of the FPA.

I. Background

3. The Petitioners are direct, wholly-owned subsidiaries of Ormat Nevada, Inc., which is a direct, wholly-owned subsidiary of Ormat Technologies, Inc. (Ormat), a publicly-traded company in the geothermal and recovered energy power business. The Petitioners are affiliated, special purpose entities that together own and operate ten waste heat recovery generation QFs in North Dakota, South Dakota, Montana, Minnesota, and Colorado. Nine of the QFs each have a maximum net power production capacity of 7.43 MW and are located at compressor stations on the Northern Border Pipeline Company system; and one QF, the OREG 4, Inc. facility, has a net capacity of 4.1 MW and is located at a compressor station on the Trailblazer Pipeline Company system.³

4. Petitioners acknowledge that they failed to comply with the section 292.203(a)(3) filing requirement, which was adopted in Order No. 671⁴ as part of the Commission's implementation of the Energy Policy Act of 2005. The Petitioners ultimately filed their QF self-certifications on January 25, 2011.⁵ However, the ten QFs variously commenced

² 18 C.F.R. §§ 292.601, .602 (2010).

³ 18 C.F.R. § 292.204 (2010) (establishes a maximum size limit of 80 MW for small power production facilities and a requirement that the primary energy source of the facility be biomass, waste, renewable resources, geothermal resources, or any combination thereof).

⁴ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 114 FERC ¶ 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

⁵ The Form No. 556 self-certifications were filed in: OREG 1, Inc., Docket Nos. QF11-115-000, QF11-116-000, QF11-117-000, and QF11-118-000; OREG 2, Inc.,

service between July 22, 2006 (i.e., subsequent to the changes adopted in Order No. 671) and August 5, 2010, and thus prior to their QF self-certification filings.⁶ Petitioners state that, since beginning service, the QFs have satisfied the size and fuel use criteria for small power production QF status under PURPA, although the QFs did not meet the filing requirement for QF status.

5. Petitioners argue that, by granting the requested waivers, the Commission will be encouraging its policy objective of energy efficiency, specifically with respect to the type of waste heat recovery technology used by the Petitioners.⁷ Moreover, Petitioners state that the waivers are substantially similar to those granted in *WM Renewable Energy* and *Ashland Windfarm*,⁸ where the owners of small power production facilities failed to submit certification filings until some period of time after their facilities were constructed and placed into operation. Petitioners claim the factors supporting waiver in those cases

Docket Nos. QF11-119-000, QF11-120-000, QF11-121-000, and QF11-122-000; OREG 4, Inc., Docket No. QF11-123-000; and OREG 3, Inc., Docket No. QF11-124-000.

⁶ The in-service dates reflected in the QF self-certifications are: July 22, 2006 in Docket No. QF11-115-000; August 6, 2006 in Docket No. QF11-116-000; October 5, 2006 in Docket No. QF11-117-000; August 28, 2006 in Docket No. QF11-118-000; December 17, 2009 in Docket No. QF11-119-000; February 3, 2009 in Docket No. QF11-120-000; December 31, 2008 in QF11-121-000; August 5, 2010 in Docket No. QF11-124-000; and March 9, 2009 in Docket No. QF11-123-000.

⁷ The ORMAT® Recovered Energy REG® system installed adjacent to the gas turbine exhaust extracts the turbine's waste heat to generate electrical power using an ORMAT® Energy Converter unit, which is a pre-packaged power unit based on the principle of the thermodynamic Organic Rankine Cycle technology (Petition at 3).

⁸ *WM Renewable Energy, L.L.C. (WM Renewable)*, 130 FERC ¶ 61,268 (2010) (granting waiver of the filing requirement under section 292.203(a)(3) of the Commission's regulations with respect to small power production facilities which began operations between September 24, 2007 and June 30, 2008); *Ashland Windfarm, LLC, et al. (Ashland Wind Farm)*, 124 FERC ¶ 61,068 (2008) (granting waiver of section 292.203(a)(3)'s filing requirement for petitioners' wind project companies owned by individuals, trusts and charities inexperienced in Commission regulatory matters and the power industry).

are also present here. Petitioners also assert that they contacted the purchasers of the electric output of the QFs and none has expressed any objection to the waivers that are being sought.

II. Notice of Filing

6. Notice of Petitioners' filing was published in the *Federal Register*, 76 Fed. Reg. 10,359 (2011), with protests or interventions due on or before March 16, 2011. None was filed.

III. Determination

7. For many years, in order to be considered a QF, a generator merely needed to meet the criteria established in section 292.203 of our regulations.⁹ That is, there was no express requirement in section 292.203 that a facility make a filing in order to be considered a QF. In Order No. 671, the Commission changed its regulations, stating that the Commission did not believe "that a facility should be able to claim QF status without having made any filing with this Commission."¹⁰ QFs were required to file self-certifications or applications for Commission certification by the March 17, 2006 effective date of Order No. 671, or by a later date when the QFs would first become operational.

8. Petitioners late-filed their QF self-certifications on January 25, 2011, claiming they inadvertently failed to file their QF self-certifications timely. Among other things, Petitioners argue that they have complied with all "substantive" requirements for small power production QF status since the date each plant went into service. Petitioners also claim that they promptly remedied the failure to file for QF status, once discovered, and that they have instituted internal procedures "to ensure compliance with *all* applicable requirements in the future."¹¹ We find that Petitioners have not justified their failure to timely file – up to four and a half years late. The filing requirement is a substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and

⁹ *E.g.*, 18 C.F.R. § 292.203 (2004).

¹⁰ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

¹¹ Petition at 6 (emphasis added).

must be followed.¹² Finally, we cannot find that the particular technology used by Petitioners justifies their failure to timely file.

9. Petitioners cite two cases—*Ashland Windfarm* and *WM Renewable*—asserting that, in those cases, the Commission granted waiver of the QF filing requirements, without ordering refunds, when the QFs did not realize they had to self-certify before acting in the market as a QF.¹³ Neither *Ashland Windfarm* nor *WM Renewable*, however, support a grant of waiver, without consequences to the QF, as requested by Petitioners.

10. In *Ashland Windfarm*, the QFs were owned by individuals, trusts or charitable organizations, none of which had previous experience in the power sector, and they lacked knowledge of Commission regulations.¹⁴ That is not the case here; the Petitioners' QFs are wholly-owned subsidiaries of Ormat Nevada, Inc, which is a direct wholly-owned subsidiary of Ormat, a publicly-traded company. Petitioners state in their petition that: Ormat is the only vertically-integrated company primarily engaged in the geothermal and recovered energy power business; and Ormat designs, develops, manufactures, constructs, owns, and operates geothermal and recovered energy-based power plants around the world; and Ormat has over four decades of experience in energy development, primarily geothermal and recovered energy generation. Ormat should have reasonably known of the Commission's regulations, including the requirement that in order to be a QF a generator must make a filing either of a notice of self-certification or of an application for Commission certification.

11. In *WM Renewable*, the 3 MW net capacity QF was out of compliance for slightly more than eight months, and the purchaser of the output did not protest the waiver request. The Commission granted the waiver, without ordering refunds.¹⁵ Similarly, Petitioners' 4.3 MW, OREG 4, Inc. QF became operational on March 9, 2009, and did not comply for approximately ten months. For Petitioners' other nine QFs, the first 7.43 MW, OREG 1, Inc. QF started operation on July 22, 2006, but was not in compliance during the longest period until it self-certified about four and a half years late. The other

¹² See 18 C.F.R. §§ 292.203(a)(3), (b)(2) (2010).

¹³ Citing *WM Renewable*, 130 FERC ¶ 61,268 at P 5; *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

¹⁴ *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 3.

¹⁵ *WM Renewable*, 130 FERC ¶ 61,268 at P 2.

7.43 MW, OREG 1, 2 and 3, Inc. QFs commenced operations on various dates including: August 8, 2006, August 28, 2006, October 5, 2006, December 31, 2008, February 3, 2009, October 20, 2009, and December 17, 2009, with the last QF operational on August 5, 2010. The purchasers of the electrical output of Petitioners QFs also did not object to the waivers.

12. In fact, *WM Renewable* was not consistent with the Commission's previously announced policy on dealing with late-filed QFs;¹⁶ and we choose here not to follow a decision inconsistent with our policy. There, the Commission chose to exercise its discretion and waive its regulatory requirements. Here, the Commission does not find it appropriate to exercise similar discretion. Petitioners, which are owned by a company whose principal business is the energy business, and which owns multiple facilities that are QFs, cannot credibly claim that they had no reason to know that a filing was needed for QF status. We also find unpersuasive the claim that the facilities met all other requirements for QF status, except the filing requirement, as an excuse for not fully complying with the requirements for QF status. The argument minimizes the importance of the filing requirement, which the Commission consciously chose to adopt in Order No. 671, and believes is an important and necessary requirement for QF status (except for the very smallest of QFs).¹⁷

13. Nevertheless, here, even given Petitioners' failure to comply with regulations which they reasonably should have known about, the Commission will grant partial waiver so that the facilities will remain QFs, and will qualify for most exemptions contained in sections 292.601 and 292.602 of the Commission's regulations, excepting exemption from sections 205 and 206 of the FPA for past periods. Granting most of the exemptions from the FPA, PUHCA and state laws contained in sections 292.601 and 292.602 of the regulations, which go to lightening the regulatory burden on QFs, but denying exemption from sections 205 and 206 of the FPA for past periods, is consistent with the Commission's action in *Southampton*.¹⁸

¹⁶ See *LG&E-Westmoreland Southampton (Southampton)*, 76 FERC ¶ 61,116, at 61,603-05 (1996), *order granting clarification and denying reh'g*, 83 FERC ¶ 61,182, at 61,752-53 (1998).

¹⁷ 18 C.F.R. § 292.203(d) (2010) (exempting facilities with a net power production capacity of 1 MW or less from the filing requirements for QF status).

¹⁸ *Southampton*, 76 FERC at 61,603, 61,605.

14. In that case, Southampton argued that section 205 refunds represented an appropriate remedy for its non-compliance and that there was no compelling reason to compound its “punishment” by also withholding other, broader regulatory exemptions – from other sections of the FPA, from PUHCA, and from certain state laws and regulations (pertaining to electric utility rates and financial and organization regulation) – otherwise available to QFs under sections 292.601 and 292.602.¹⁹ Southampton expressed particular concern with the possible loss of its PUHCA exemption.²⁰ And, while the Commission did require section 205 refunds, the Commission otherwise granted Southampton the other, broader regulatory exemptions, and we will do so here.²¹

15. Thus, following our *Southampton* precedent, the Commission will grant Petitioners a similar limited waiver. Petitioners, however, are required to refund to their customers the time value of the revenues collected during the periods of non-compliance with the QF filing requirements, calculated pursuant to 18 C.F.R. § 35.19a (2010). We see no need to make a section 205 rate filing to put in place tariff language for those past periods. Instead, refunds are to be calculated by each QF, made to the purchasing utility, and reported in the QF dockets of each individual QF. We will direct Petitioners to make refunds within 30 days of the date of this order and to file a refund report with the Commission within 30 days thereafter.

The Commission orders:

(A) The Petitioners’ request for waiver is hereby granted in part, and denied in part, and time-value refunds are hereby directed, as discussed in the body of this order.

(B) Within 30 days of the date of this order, Petitioners are hereby directed to make refunds of the time value of the revenues collected using as the basis of the calculations the rates collected during the periods of non-compliance with the Commission’s requirements for QF status.

¹⁹*Id.*, 76 FERC at 61,602.

²⁰ *Id.*

²¹ *Id.* at 61,603.

(C) Within 30 days of the refunds made pursuant to Ordering Paragraph (B), Petitioners shall file refund reports with the Commission, in the QF dockets in which each Petitioner was subsequently certified.

By the Commission. Chairman Wellinghoff is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.