

148 FERC ¶ 61,074
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Badger Creek Limited

Docket Nos. EL14-42-000
QF87-120-014

ORDER DENYING REQUEST FOR LIMITED WAIVER

(Issued July 30, 2014)

1. This order addresses a request by Badger Creek Limited (Badger Creek) for a temporary waiver of the qualifying facility (QF) operating and efficiency standards contained in section 292.205(a) of the Commission's regulations¹ for calendar years 2014 and 2015 with respect to Badger Creek's 49 MW natural gas-fired topping-cycle cogeneration QF located in Bakersfield, California (Bakersfield QF). As discussed below, we will deny Badger Creek's waiver request.

I. Background

2. Badger Creek owns a 49 MW natural gas-fired topping-cycle cogeneration facility located in Bakersfield, California.² The facility was initially certified as a QF on March 23, 1987.³ The facility was recertified on December 15, 1999.⁴ Badger Creek states that it has operated the Bakersfield QF in compliance with the Commission's QF requirements since commercial operation of the facility commenced in 1991, except

¹ 18 C.F.R. § 292.205(a) (2013).

² Badger Creek states in its waiver request that the Bakersfield QF is 46 MW (nameplate capacity), but the Commission order granting recertification, *Badger Creek Limited*, 89 FERC ¶ 62,216 (1999), and subsequent Badger Creek self-recertifications indicate the net capacity of the QF is 49 MW.

³ *Badger Creek Cogeneration Inc.*, 38 FERC ¶ 62,291 (1987).

⁴ *Badger Creek Limited*, 89 FERC ¶ 62,216 (1999). Badger Creek also filed numerous notices of self-recertification, with the most recent self-recertification filed on August 30, 2013.

during calendar year 2012 when the facility was granted a temporary waiver of the efficiency standard.⁵

3. Badger Creek sells the electric energy produced by the Bakersfield QF to Pacific Gas and Electric Company (PG&E) pursuant to a transition power purchase agreement (Transition PPA) under California's new QF and Combined Heat and Power Program. The Transition PPA is a contract executed pursuant to the California Public Utility Commission's implementation of section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA);⁶ the Transition PPA requires the Bakersfield QF to maintain its QF status.⁷

4. The thermal host of the Bakersfield QF is Vintage Production California LLC (Vintage), which is owned by OXY USA Inc., a subsidiary of Occidental Petroleum Corporation. Vintage uses the steam from the Bakersfield QF in its enhanced oil recovery (EOR) operations. In 2011, upon the expiration of Badger Creek's original long-term steam sales agreement with Vintage, Vintage elected to install its own steam generators and temporarily self-supplied its thermal energy on-site. As a result of Vintage's extended suspension of steam takes, the Bakersfield QF was unable to satisfy the QF efficiency standard for calendar year 2012. Badger Creek's requested waiver of the efficiency standard for 2012 was granted on March 8, 2013.⁸

II. Instant Waiver Request

5. On April 29, 2014, Badger Creek submitted a request for temporary waiver of the QF operating and efficiency standards for calendar years 2014 and 2015. Badger Creek states that, as of May 1, 2015, the Bakersfield QF will no longer operate as a QF and will

⁵ See *Badger Creek Limited*, 142 FERC ¶ 62,195 (2013).

⁶ 16 U.S.C. § 824a-3 (2012).

⁷ Badger Creek states that the Transition PPA specifically provides that Badger Creek shall take all necessary steps, including making filings with the Commission, to maintain or obtain a waiver of QF status throughout the term of the agreement.

⁸ *Badger Creek Limited*, 142 FERC ¶ 62,195.

begin operating as an exempt wholesale generator (EWG).⁹ Badger Creek states that, as a result of Vintage's permanent discontinuation of steam takes and a lack of alternative steam hosts, the Bakersfield QF will be unable to satisfy the QF operating and efficiency standards for calendar years 2014 and 2015.

6. Badger Creek explains that Vintage resumed steam takes from the Bakersfield QF in August 2012 pursuant to a replacement steam sales agreement. However, Vintage terminated the replacement steam sales agreement in May 2013. During 2013, Badger Creek and Vintage engaged in negotiations regarding a continuation of the replacement steam sales agreement, and Vintage briefly resumed steam deliveries from the Bakersfield QF during the month of November. However, for economic reasons and in light of an internal corporate restructuring at Vintage, Vintage ultimately elected to self-supply its thermal energy on-site on a permanent basis. Nonetheless, Vintage's steam takes were sufficient for the Bakersfield QF to satisfy the operating and efficiency standards for calendar year 2013.

7. Badger Creek states that Vintage has not taken any steam from the Bakersfield QF since November 2013, and has indicated to Badger Creek that it does not plan to take any steam in the future. Badger Creek states that there are no feasible steam host alternatives within proximity to the Bakersfield QF. Badger Creek states that, although the Transition PPA runs through June 2015, Badger Creek and PG&E have entered into a replacement power purchase agreement (Replacement PPA), effective as of May 1, 2015, which is not contingent on the QF status of the facility. Badger Creek states that it will relinquish QF status for the Bakersfield QF, and will begin to operate as an EWG under its existing market-based rate tariff upon commencement of the Replacement PPA on May 1, 2015. Accordingly, Badger Creek requests that the Commission waive the QF operating and efficiency standards for calendar years 2014 and 2015, thus allowing the Bakersfield QF to continue to operate as if it were a QF until May 1, 2015, when the Replacement PPA

⁹ Although Badger Creek sells the electrical output from the facility under a state-prescribed PURPA contract and is therefore currently exempt from rate regulation under sections 205 and 206 of the Federal Power Act (FPA) (18 C.F.R. § 292.601(b) (2013)), Badger Creek has obtained market-based rate authorization from the Commission. *Badger Creek Limited*, Docket No. ER13-445-000 (Dec. 18, 2012) (unpublished letter order). Concurrently with the filing of this waiver request, Badger Creek also filed a notice of self-certification of EWG status under the Public Utility Holding Company Act of 2005 (PUHCA) in Docket No. EG14-46-000.

(which is not contingent on the Bakersfield QF maintaining QF status) becomes effective.¹⁰

8. In support of the requested waiver, Badger Creek asserts that Vintage's decision to terminate the replacement steam sales agreement in May 2013 and to self-supply steam on a permanent basis as of November 2013 were events outside of Badger Creek's control. Badger Creek contends that the waiver request is limited in duration to two calendar years, that it submitted the waiver request in a timely manner, that waiver is consistent with PURPA's goals as it would encourage continued investment in cogeneration projects, and that the facility brings economic and environmental benefits to the local region. Finally, Badger Creek asserts that the waiver being sought would allow Badger Creek to produce significant energy savings by selling power pursuant to the Transition PPA (which, as noted above, is contingent on the Bakersfield QF maintaining QF status) until the Replacement PPA (which does not have such a requirement) takes effect.

III. Notice of Filing, Interventions, and Protests

9. Notice of Badger Creek's filing was published in the *Federal Register*, 79 Fed. Reg. 26,246 (2014), with interventions and protests due on or before May 20, 2014. No interventions or protests were filed.

IV. Discussion

10. The Commission's regulations define a "qualifying cogeneration facility" as equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam) used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy.¹¹ The regulations provide that a cogeneration QF must satisfy applicable operating and efficiency requirements during the 12-month period beginning with the date the facility first produces electric energy and any calendar year subsequent to the year in which the facility first produces electric energy.¹² The regulations also provide that the Commission may waive any of its operating and efficiency standards

¹⁰ Because the Replacement PPA is not contingent on the QF status of the facility, Badger Creek states that it will not need a waiver of the QF standards from May 1, 2015 (the effective date of the Replacement PPA), but understands that, with an exception not relevant here, the Commission waives its operating and efficiency standards on a full calendar year basis only. Therefore, this request for waiver encompasses all of calendar years 2014 and 2015.

¹¹ 18 C.F.R. § 292.202(c) (2013).

¹² 18 C.F.R. § 292.205(a) (2013).

“upon a showing that the facility will produce significant energy savings.”¹³ The Commission has exercised its waiver authority based on a balancing of factors such as the limited duration of the requested waiver; whether non-compliance was confined to the start-up and testing stage and whether further waivers would therefore be unnecessary; the timeliness of the submission of the waiver request; whether non-compliance was the result of an unexpected and one-time operations event outside the applicant’s control; whether the request was intended to remedy specific problems associated with an innovative technology; the amount of opposition, if any; and whether granting waiver would fulfill PURPA’s goal of encouraging cogeneration and the development of alternative generation technologies.¹⁴

11. Here, we will deny Badger Creek’s request for waiver. The Bakersfield QF no longer meets the statutory definition of a qualifying cogeneration facility because it does not have a steam host (and will not have a steam host in the future), and therefore (1) no longer produces both electrical energy and useful thermal energy through the sequential use of energy; and (2) will not meet the QF operating and efficiency standards on a going-forward basis. Badger Creek’s non-compliance is also not of a limited duration but rather, given the absence of any steam host, will continue indefinitely.¹⁵ Therefore, in 2014 and 2015, the Bakersfield QF is and will be purely a generating facility and not a cogeneration facility, and thus will not be producing significant energy savings as a cogeneration facility as envisioned in PURPA.

12. In addition, there may be wholesale rate consequences to granting the waiver request by allowing Badger Creek to continue selling at avoided cost under the Transition PPA. While Badger Creek relies on the Commission’s decision in *Pedricktown Cogeneration Company, LP*¹⁶ to support its waiver request, the instant case is distinguishable from that precedent. In *Pedricktown*, the Commission stated that granting waiver would not have an adverse effect on ratepayers because Pedricktown did not sell its output at an avoided-cost rate to any buyer pursuant to the PURPA mandatory

¹³ 18 C.F.R. § 292.205(c) (2013).

¹⁴ See, e.g., *Ripon Cogeneration LLC*, 120 FERC ¶ 61,167 (2007); *PowerSmith Cogeneration Project Limited Partnership*, 118 FERC ¶ 61,021 (2007); *Oildale Energy LLC*, 103 FERC ¶ 61,060 (2003); *Kamine/Besicorp Allegany L.P.*, 73 FERC ¶ 61,290 (1995), *reh’g denied*, 74 FERC ¶ 61,094 (1996); *Gordonsville Energy, L.P.*, 72 FERC ¶ 61,160 (1995).

¹⁵ Indeed, even if the requested waiver were granted, beginning May 1, 2015, Badger Creek intends to relinquish the QF status for its Bakersfield QF and will begin operating as an EWG under its existing market-based rate authorization.

¹⁶ 117 FERC ¶ 61,246 (2006) (*Pedricktown*).

purchase requirement. Rather, Pedricktown sold its output into the PJM market pursuant to its market-based rate authority. Thus, there were no wholesale rate consequences to granting the waiver request.¹⁷ In contrast, Badger Creek sells all of its output to PG&E pursuant to a Transition PPA under California's implementation of PURPA, and therefore there could be wholesale rate consequences to granting waiver.

13. Because the non-compliance is due to events outside of Badger Creek's control, however, we will not revoke the full benefits of QF status. Specifically, we will revoke only the exemption from rate regulation under sections 205 and 206 of the FPA.¹⁸ In prior cases, the Commission did not revoke the full benefits of QF status when the failure to comply with the requirements for QF status was not willful. In those cases, the Commission revoked only the exemption from sections 205 and 206 of the FPA and determined that a QF was not entitled to charge QF avoided-cost rates during the period it failed to comply with the requirements for QF status, unless the PPA contained provisions providing for a continuation of the avoided-cost rates during such periods.¹⁹ The Commission found that the rate remedies alone were sufficient to provide ample incentive for QFs to operate in a manner sufficient to retain QF status, including compliance with the operating and efficiency standards, and to the extent uncertain as to their continuing compliance, to take the initiative to seek Commission guidance as soon as possible.²⁰ Thus, Badger Creek is no longer entitled to charge QF avoided-cost rates,

¹⁷ *Id.* PP 10-11.

¹⁸ 16 U.S.C. §§ 824d, 824e (2012). Section 210 of PURPA provides that the Commission has the authority to grant such exemptions "in whole or part" and that the Commission may grant exemptions from "any combination of" FPA, PUHCA, and state regulation "if the Commission determines such exemption is necessary to encourage cogeneration and small power production." 16 U.S.C. § 824a-3(e) (2012) (emphasis added).

¹⁹ *See Pittsfield Generating Co.*, 101 FERC ¶ 61,229, at P 18 (2002), *reh'g denied* 103 FERC ¶ 61,045 (2003) (citing *LG&E-Westmoreland Southampton*, 76 FERC ¶ 61,116 (1996), *order granting clarification and denying reh'g*, 83 FERC ¶ 61,132 (1998) and *New Charleston Power I, L.P.*, 76 FERC ¶ 61,282 (1996), *order denying reh'g and ordering settlement judge proceedings*, 83 FERC ¶ 61,281, *order denying reh'g in part and granting reh'g in part*, 84 FERC ¶ 61,286 (1998)). Those orders left open the possibility of a greater revocation of QF benefits as well as a permanent revocation of QF benefits in more serious cases, or upon a continuing failure to satisfy the technical criteria for QF status.

²⁰ *LG&E-Westmoreland Southampton*, 76 FERC ¶ 61,116, at 61,605 (1996), *order granting clarification and denying reh'g*, 83 FERC ¶ 61,132 (1998).

unless Badger Creek's contract with PG&E provides otherwise.²¹ However, we will allow Badger Creek to continue to enjoy the other benefits of QF status, including exemptions from PUHCA and state laws as provided in sections 292.601 and 292.602 of the regulations.²²

The Commission orders:

Badger Creek's request for limited waiver of the operating and efficiency standards, 18 C.F.R. § 292.205(a) (2013), is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹ Badger Creek states that the contract requires it to maintain QF status; therefore, the contractual rate will not be collectible. Badger Creek may, however, make sales under its pre-existing market-based rate authority.

²² 18 C.F.R. §§ 292.601, 292.602 (2013).