

149 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Minwind I, LLC	Docket No. EL15-5-000
Minwind II, LLC	
Minwind III, LLC	
Minwind IV, LLC	
Minwind V, LLC	
Minwind VI, LLC	
Minwind VII, LLC	
Minwind VIII, LLC	
Minwind IX, LLC	

Minwind I, LLC	Docket No. QF14-658-001
Minwind II, LLC	Docket No. QF14-659-001
Minwind III, LLC	Docket No. QF14-660-001
Minwind IV, LLC	Docket No. QF14-661-001
Minwind V, LLC	Docket No. QF14-662-001
Minwind VI, LLC	Docket No. QF14-663-001
Minwind VII, LLC	Docket No. QF14-664-001
Minwind VIII, LLC	Docket No. QF14-665-001
Minwind IX, LLC	Docket No. QF14-666-001

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR LIMITED
WAIVER AND DIRECTING REFUNDS

(Issued November 7, 2014)

1. On October 8, 2014, Minwind I, LLC, Minwind II, LLC, Minwind III, LLC, Minwind IV, LLC, Minwind V, LLC, Minwind VI, LLC, Minwind VII, LLC, Minwind VIII, LLC, Minwind IX, LLC (collectively, Petitioners) filed a petition for declaratory order requesting a limited waiver from the filing requirements of section 292.203(a)(3) of

the Commission's regulations¹ applicable to small power production qualifying facilities (QFs), for the period from April 15, 2006² until July 14, 2014 —the date Petitioners' facilities self-certified as QFs.³ In the alternative, Petitioners request, for the same period, a waiver of (i) the rate filing requirement under section 205 of the Federal Power Act (FPA)⁴, and (ii) the requirements of the Public Utility Holding Company Act of 2005 (PUHCA)⁵ to the extent applicable. The requests for waiver are granted in part and denied in part as discussed below.

I. Background

2. Each of the Petitioners' Facilities consists of one or two wind turbines, each with a net generating capacity of 1.862 or 1.602 MW (individually, Facility, and collectively, Facilities).⁶ Petitioners state that Minwind I and Minwind II became operational October 8, 2002 and October 11, 2002 respectively, when they began selling power to their interconnecting utility, Interstate Power and Light Company, at negotiated market rates (not avoided cost rates). Petitioners state that Minwind III through Minwind IX interconnect to Northern States Power Company, d/b/a Xcel Energy, and began selling power on December 29, 2004, also at negotiated rates.⁷

3. According to the Petitioners, the Facilities at issue have satisfied all of the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA)⁸ during their entire operation, except for compliance with the filing requirement of section

¹ 18 C.F.R. § 292.203(a)(3) (2014).

² Petitioners use an April 15, 2006 date, but as discussed below, the QF filing requirement did not go into effect until April 16, 2006.

³ On July 14, 2014, Petitioners each filed a Form 556 self-certification in Docket Nos. QF14-658-000, QF14-659-000, QF14-660-000, QF14-661-000, QF14-662-000, QF14-663-000, QF14-664-000, QF14-665-000, and QF14-666-000.

⁴ 16 U.S.C. § 824d (2012).

⁵ 42 U.S.C. §§ 16451-63 (2012).

⁶ Petition at 2.

⁷ *Id.*; see also *supra* note 3 (Petitioners' Form 556 self-certifications).

⁸ 16 U.S.C. §§ 796(17), 824a-3 (2012).

292.203(a)(3), which became effective on April 16, 2006.⁹ Petitioners state, however, that the wind turbines have experienced main bearing failures and ice damage over the past two years, requiring major equipment repairs. Petitioners explain that the repairs have become so costly that Petitioners began soliciting buyers for their wind turbines. Petitioners state that in May and June a third-party turbine repair company offered to buy the wind turbines for the cost of the debt remaining. Petitioners state that they became aware of the section 292.203(a)(3) filing requirement through sales discussions with the potential buyer, who during the course of due diligence discovered that the Petitioners had failed to make the required self-certification filings.¹⁰

4. In support of their waiver request, Petitioners argue that they are comprised of local landowners who are “unsophisticated in FERC regulatory matters,”¹¹ and do not have any experience in the power sector, except through ownership and operation of the small power production facilities at issue.¹² Further, Petitioners contend that the Facilities were fully compliant with the Commission’s QF requirements when they were placed in service and that Petitioners did not engage counsel other than corporate business counsel until they initiated the sales process with the potential buyer. Petitioners state that they retained counsel soon after learning of the self-certification filing requirement in section 292.203(a)(3) and filed notices of self-certifications of QF status for each Facility on July 14, 2014.¹³

5. According to Petitioners, the sale of their Facilities is contingent upon the Commission’s granting Petitioners’ request for waiver. Petitioners also state that, for tax and business purposes, the sale must close no later than the middle of November 2014.¹⁴ Further, Petitioners assert that failure to close on the sale or the Commission’s denial of

⁹ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7,852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203, *order on reh’g*, Order No. 671-A, 71 Fed. Reg. 30,585 (May 30, 2006), FERC Stats. & Regs. ¶ 31,219 (2006).

¹⁰ Petition at 12.

¹¹ *Id.* at 11.

¹² *Id.* at 4.

¹³ *Id.* at 2.

¹⁴ *Id.* at 2-3.

the requested relief will likely result in bankruptcy proceedings and the shut-down of the Facilities.¹⁵

II. Request for Declaratory Order

6. Petitioners maintain that, due to the span of time of their non-compliance with the QF self-certification filing requirement (eight years and 89 days) the cumulative refund remedy would be approximately \$1.91 million. Petitioners claim that given their existing financial condition, pointing to undertaking a distress sale of the Facilities, they are not able to pay the \$1.91 million refund, and thus, have no recourse other than to request the relief set forth in their Petition.¹⁶ According to the Petitioners, the granting of the waivers will also benefit existing privately-owned small wind farms in Minnesota and will signal the Commission's continuing commitment to small renewable project development.

7. Petitioners contend that granting a waiver of section 292.203(a)(3) is justified because their Facilities have satisfied all of the requirements for QF status (other than the filing requirement) since their first production of power, and the delay in making the filing was the result of inadvertent error and lack of power sector business acumen.¹⁷ Petitioners also observe that their Facilities' capacities are well below 30 MW, the maximum size allowed with respect to the Commission's exemptions from the FPA, PUHCA, and financial regulations pursuant to the Commission's PURPA rules, and in fact, the net power production of each Facility is only 1.605 or 1.862 MW, which places them well below the 20 MW threshold applicable under the Commission's rules for exemptions from sections 205 and 206 of the FPA.¹⁸

8. Petitioners argue that waiver of the filing requirement in section 292.203(a)(3) for their Facilities would be consistent with Commission precedent. Petitioners point to *Ashland Windfarm*¹⁹ and *WM Renewable Energy, L.L.C.*²⁰ as support for their request for

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 11.

¹⁹ *Ashland Windfarm, LLC, et al.*, 124 FERC ¶ 61,068 (2008) (*Ashland Windfarm*).

²⁰ *WM Renewable Energy, L.L.C.*, 130 FERC ¶ 61,268 (2010) (*WM Renewable*).

waiver of the filing requirement in section 292.203(a)(3) of the Commission's regulations.²¹

9. Petitioners request that, if the Commission denies their request for waiver of the QF filing requirement, the Commission grant waiver from the rate filing requirement of section 205 of the FPA and from PUHCA, to the extent necessary, for the period from April 15, 2006 to July 14, 2014.²²

10. Specifically, Petitioners assert that given the small scale of the Facilities, had they filed for QF status, they would have qualified for the exemption from the rate filing requirements of section 205 of FPA that is granted to both QFs smaller than 20 MW and to QFs selling pursuant to pre-March 17, 2006 contracts by the Commission's regulations.²³

11. Additionally, Petitioners contend that the Commission's waiver in *Lyondale Biomass, LLC*, 116 FERC ¶ 61,133 (2006) (*Lyondale*) supports their request.²⁴ There, a waiver was granted to a biomass facility of the size criterion for regulatory exemption available to QFs from section 205 of the FPA, Petitioners argue that, similar to *Lyondale*, Petitioners' failure to satisfy any otherwise-applicable rate filing requirements was inadvertent, and Petitioners remedied the inadvertent noncompliance on a permanent basis as soon as it was discovered.²⁵

12. With regard to the requested PUHCA waiver, Petitioners assert that they satisfy the substantive criteria of either QF status or exempt wholesale generator status and therefore should be exempt from PUHCA.²⁶ Although noting that Petitioners are owned by individuals, they maintain that the individuals would not be holding companies in any case absent a specific determination by the Commission and that no policy purpose would be served by deeming Petitioners to be subject to PUHCA regulation for the limited period in which they failed to file the notices of self-certification.²⁷ Finally,

²¹ 18 C.F.R. § 292.203(a)(3) (2014).

²² Petition at 14-15 (citing to 18 C.F.R. § 292.601(c)(1) (2014)).

²³ *Id.* at 15.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Petitioners seek waiver of the filing fee applicable to petitions for issuance of a declaratory order.²⁸

III. Notice and Interventions

13. Notice of Petitioners' filing was published in the *Federal Register*, 79 Fed. Reg. 62,134-62,135 (2014), with interventions or protests due on or before October 20, 2014. On October 20, 2014, Xcel Energy Services, Inc. on behalf of its affiliates, Northern States Power Company, a Minnesota corporation, and Northern States Power Company, a Wisconsin corporation, filed a motion to intervene, taking no position on Petitioners' request for waiver. Also, Alliant Energy Corporate Services, Inc., a service company affiliate of Interstate Power and Light Company, filed a motion to intervene, taking no position on Petitioners' request for waiver.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely unopposed motions to intervene serve to make Xcel Energy Services, Inc. and Alliant Energy Corporate Services, Inc., parties to this proceeding.

B. Commission Determination

15. For many years, there was no express requirement in section 292.203 that a facility make a filing in order to establish QF status. However, in Order No. 671, the Commission changed its regulations by adding the filing requirements for QF status contained in sections 292.203(a)(3) (for small power production facilities) and 292.203(b)(2) (for cogeneration facilities) of the Commission's regulations.²⁹ The Commission explained that it did not believe "that a facility should be able to claim QF status without having made any filing with this Commission."³⁰ Our regulations thus have required that an owner or operator of a facility, whether existing or new, must, in addition to meeting other specified requirements, file either a notice of self-certification,

²⁸ 18 C.F.R. § 381.302 (2014).

²⁹ 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2014). As with other changes in Commission regulations, this change was published in the *Federal Register*, 71 Fed. Reg. 7852 (2006).

³⁰ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

or an application for Commission certification that has been granted, in order to establish QF status for a generating facility larger than 1 MW.³¹ For facilities that were operating at the time Order No. 671 was issued, the filing requirement became effective on April 16, 2006.

16. As noted above, each of Petitioners' Facilities began selling electric energy prior to April 16, 2006 and Petitioners self-certified their Facilities on July 14, 2014. Accordingly, absent our granting the requested waiver, Petitioners' Facilities would not be considered QFs from April 16, 2006, the date the filing requirement became effective for already-operating QFs, until July 14, 2014, when Petitioners filed their notices of self-certification. The issue in this case is thus the intervening period and whether Petitioners' excuse for their failure to timely certify their Facilities warrants waiver of the filing requirement for that period. We find that it does not, and we will deny Petitioners' requested waiver. Petitioners have not justified their failure to comply with a filing requirement that has been present in the Commission's regulations for more than eight years. Petitioners, in fact, acknowledge that their Facilities were operating in 2006, when the change in the Commission's regulations and the resulting filing requirement became effective, and that they did not file notices of self-certification until July 14, 2014 – more than eight years late.³²

17. Petitioners nonetheless argue that they deserve a waiver of the filing requirement. Among other things, Petitioners argue that they have complied with all “substantive” requirements for small power production QF status since the date the Facilities went into service. Petitioners also claim that they promptly remedied the failure to file for QF status, once discovered.

18. The factors that Petitioners cite for failing to timely file are not persuasive. As the Commission recently stated, “[t]he filing requirement is a substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and must be

³¹ 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2014). Although the revised regulations were published in the Federal Register on February 15, 2006, and were made effective generally 30 days thereafter (i.e., on March 17, 2006), the requirement to file for existing QFs that had never filed was made effective 60 days after the date of publication (i.e., on April 16, 2006). Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 82.

³² In light of the financial evidence provided by Petitioners, we will grant Petitioners' request for waiver of the filing fee for a petition for declaratory order pursuant to 18 C.F.R. § 292.106 (2014).

followed.”³³ Although Petitioners argue that the failure to make the filing was inadvertent, the fact remains that for more than eight years the Facilities were out of compliance with the express requirements for QF status. In similar situations, the Commission has not been persuaded by claims that the facility met all other requirements for QF status because that argument improperly minimizes the importance of the filing requirement.³⁴

19. Petitioners cite two cases—*WM Renewable* and *Ashland Windfarm*—in support of the requested waiver.³⁵ Neither *WM Renewable* nor *Ashland Windfarm*, however, support a grant of waiver in this instance.

20. *Ashland Windfarm* involved atypical ownership of the wind project by companies that included charities.³⁶ This case does not present a similar situation. Petitioners also claim inexperience in the power industry; the Commission finds that not to be the case. Petitioners have been selling electric energy subject to the jurisdiction of the Commission beginning in 2002 and have during this period apparently relied on their presumed status as a QF exempt from section 205 of the FPA, and thus from the obligation to file with this Commission pursuant to section 205 rates for sales of electric energy. Moreover, they have taken advantage of state tax credits contingent upon their compliance with state regulations regarding their participation in the renewable energy industry, obtained grants and loan guarantees from a federal agency (the United States Department of Agriculture) contingent upon their compliance with a variety of regulations and requirements, and have been quoted in the press regarding the scope of their operations and their decision to enter the energy industry rather than simply lease land to those already involved in wind farming. Petitioners acknowledge that they retained “expert legal counsel” prior to beginning commercial operation (the first Facility began operation in 2002 and the last in 2004), and thereafter they only retained “corporate business counsel” until early this year when Petitioners once again hired regulatory counsel.³⁷ In this regard, as noted earlier,

³³ *OREG 1, Inc.*, 135 FERC ¶ 61,150, at P 8 (2011), *reh’g denied*, 138 FERC ¶ 61,110 (2012) (*OREG 1*).

³⁴ *Beaver Falls Municipal Authority*, 149 FERC ¶ 61,108 (2014); *OREG 1*, 135 FERC ¶ 61,150, at PP 8, 12 & n.16.

³⁵ *Citing WM Renewable*, 130 FERC ¶ 61,268 at P 5; *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

³⁶ *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 3.

³⁷ Petition at 6.

the change in the Commission's regulations was published in the *Federal Register*. And the regulation as revised, with the filing requirement, has been published in each year's Code of Federal Regulations since that time.³⁸ It is not unreasonable to expect entities such as Petitioners that claim benefits because they meet criteria laid out in the Code of Federal Regulations, i.e., what Petitioners view as the "substantive" requirements necessary to meet QF status, to read those regulations from time to time (or to retain counsel to regularly advise them with regard to the regulations) to see how they may have changed and to ensure their continued compliance. Indeed, Petitioners' argument that they are unsophisticated and that their error was inadvertent, if accepted, which they are not, would equally justify granting waiver of even what they view as the "substantive" requirements of QF status had those requirements changed in the intervening years. More than eight years' failure to comply with the filing requirement for QF status is simply too long.

21. Petitioners' reliance on *WM Renewable* is equally misplaced. In *OREG 1*, the Commission stated that "*WM Renewable* was not consistent with the Commission's previously announced policy on dealing with late-filed QFs," and that the Commission has chosen "not to follow a decision inconsistent with its policy."³⁹

22. Finally, we will deny Petitioners' alternate requests, that if we deny waiver of the QF filing requirements, we grant waiver of section 205 of the FPA. Here, given Petitioners' failure to comply with the regulations – not only not timely filing a notice of self-certification of QF status, but also not alternatively timely filing rates under section 205 of the FPA – for over eight years, we are not persuaded to waive section 205 of the FPA; rather we will vindicate the longstanding requirement for timely filing of rates.⁴⁰ Nonetheless, the Commission will otherwise grant Petitioners partial waiver so that the Facilities will be treated as QFs for the period that Petitioners' Facilities operated out of compliance with the Commission's requirement that an owner of a small

³⁸ See, e.g., 18 C.F.R. § 292.203(a)(3) (2007).

³⁹ *OREG 1*, 135 FERC ¶ 61,150 at P 12 (citing *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)).

⁴⁰ 16 U.S.C. § 824d(c) (2012); 18 C.F.R. §§ 35.1, 35.3 (2014); cf. *Central Hudson Gas & Electric Corp.*, 60 FERC ¶ 61,106, at 61,338 n.9 (finding that, even in situation where Commission would be willing to grant waiver of 60-day prior notice requirement, utilities do not have "an unlimited time period for making the required filings," and that such filings should be made "within a reasonable time"), *order on reh'g*, 61 FERC 61,089 (1992).

power production facility make a filing in order to certify as a QF, i.e., from April 16, 2006, when the Facilities became subject to the filing requirement, until July 14, 2014, when the Facilities self-certified as QFs, and as a consequence the Facilities will qualify for most of the exemptions contained in sections 292.601 and 292.602 of the Commission's regulations,⁴¹ excepting exemption from sections 205 and 206 of the FPA. Granting Petitioners most of the exemptions from the FPA, the Public Utility Holding Company Act of 2005 and state laws, as provided 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, is consistent with the Commission's action in other cases.⁴²

23. In *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, *order on reh'g*, 65 FERC ¶ 61,081 (1993) (*Prior Notice*), the Commission clarified its refund remedy (for both cost-based and market-based rates) for the late filing of jurisdictional rates and agreements under section 205 of the FPA when waiver of the 60-day prior notice requirement is denied. With respect to market-based rates, the Commission stated that, in the case where a utility transacted without authorization, the Commission would require the utility to refund to its customers: (1) the time value of the revenues collected, calculated pursuant to section 35.19a of our regulations,⁴³ for the entire period that the rate was collected without Commission authorization; and (2) all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate.⁴⁴ The second component of the two-part refund methodology does not typically apply to QFs because the Commission has previously indicated that a QF can use a substitute for the cost-justified rate, which may include the market-based rate or the avoided cost rate.⁴⁵ To the extent that there is no

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

⁴² See *Iowa Hydro, LLC*, 146 FERC ¶ 61,207 (2014); *accord CII Methane Management IV, LLC*, 148 FERC ¶ 61,229 (2014); *OREG I, Inc., et al.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110, at P 16 (2012); *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).

⁴³ 18 C.F.R. § 35.19a (2014).

⁴⁴ *Prior Notice*, 64 FERC ¶ 61,139 at 61,980.

⁴⁵ See *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 32 (2007); see also *OREG I, Inc.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110 (2012); *CII Methane Management IV, LLC*, 148 FERC ¶ 61,229, at P 4 (2014).

difference between the QF's rate collected and the market-based rate or the QF's rate collected and the avoided cost rate, the QF would not have a refund obligation under that part of the refund methodology. Here, the Facilities have been selling pursuant to negotiated rates, satisfying the second component of the two-part refund methodology, but Petitioners remain subject to the first component.

24. For any monies collected before the effective date, the Petitioners must refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization,⁴⁶ with the refunds limited so as not to cause the Petitioners to suffer a loss.⁴⁷ Accordingly, the Petitioners must make time value refunds within 30 days of the date of this order and file a refund report with the Commission within 30 days of making those refunds.

The Commission orders:

(A) The requests for waiver are hereby granted in part and denied in part, 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 during the periods of noncompliance with the Commission's requirements for QF status.

(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 certified.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁶ *El Paso Electric Company*, 101 FERC ¶ 61,276 (2002), *reh'g denied*, 105 FERC ¶ 61,131 (2003).

⁴⁷ *See Carolina Power & Light Co.*, 87 FERC ¶ 61,083 (1999); *see also Southern California Edison Co.*, 98 FERC ¶ 61,304, at 62,302 n.10 (2002); *Florida Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002).