

149 FERC ¶ 61,108
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Beaver Falls Municipal Authority

Docket Nos. EL14-78-000
QF14-91-001

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

(Issued November 7, 2014)

1. On June 26, 2014, as amended on August 11, 2014, Beaver Falls Municipal Authority (Beaver Falls) filed a petition for declaratory order (Petition) requesting a limited waiver of the small power production qualifying facility (QF) filing requirements set forth in section 292.203(a)(3) of the Commission's regulations¹ during a period of non-compliance from March 17, 2006 to November 22, 2013 with respect to Beaver Fall's Townsend Dam Facility, a 4.995 MW net capacity municipality-owned "run of the river" hydroelectric generating plant located in New Brighton, Pennsylvania (Facility). As discussed below, we will grant in part and deny in part Beaver Falls' waiver request.

I. Background

2. Beaver Falls is a municipal water authority created by the City of Beaver Falls, Pennsylvania, to supply water to 25,000 customers in Beaver County, Pennsylvania. Beaver Falls has sold electric energy produced by the Facility to Duquesne Light Company (Duquesne Light) or its assignee since 1987 pursuant to a 1985 power purchase agreement (1985 Agreement) and Rider No. 18 of Duquesne Light's Pennsylvania Public Utility Commission (Pennsylvania Commission) approved retail tariff.

3. In September 1999, Orion Power Midwest, LP, which, through various mergers and acquisitions, is now NRG Power Midwest LP (NRG), entered into a QF Agency

¹ 18 C.F.R. § 292.203(a)(3) (2014).

Agreement with Duquesne Light under which NRG assumed the obligations of Duquesne Light in the 1985 Agreement.²

4. On October 28, 2013, NRG sent a letter to Duquesne Light requesting a copy of Beaver Falls' QF self-certification, and announced its intention to cease purchases from Beaver Falls under the 1985 Agreement, effective December 1, 2013, unless NRG received a copy of the self-certification from Beaver Falls by November 29, 2013.

5. On November 22, 2013, Beaver Falls filed a notice of self-certification of QF status with the Commission in Docket No. QF14-91-000, which became effective on the date of filing.

II. Instant Petition

6. On June 26, 2014, as amended on August 11, 2014, Beaver Falls filed its Petition, seeking a limited waiver of the filing requirements for its QF under section 292.203 of the Commission's regulations for the period from March 17, 2006 to November 22, 2013.³ Beaver Falls also claims an exemption from the filing fee otherwise required in Part 381 of the Commission's regulations with respect to its request for declaratory relief.

7. Aside from temporary outages, Beaver Falls states that the Facility has been operating and producing renewable electric energy without interruption since the commencement of commercial operation on October 12, 1987⁴ and has sold the electrical output to Duquesne Light pursuant to the 1985 Agreement at an agreed upon avoided cost rate at \$.06 per kWh. The 1985 Agreement has no expiration date but becomes void if Beaver Falls loses its QF status and cannot be re-executed; Duquesne Light's Rider No. 18 has been closed and unavailable to new QFs since 1987.⁵

8. Beaver Falls argues that, at the time of the Facility's initial operation, no filing for QF status certification was required for a facility to claim QF status, and that it was not

² Beaver Falls August 11, 2014 Answer at 5.

³ Beaver Falls amended its Petition to request waiver until November 22, 2013, instead of until November 15, 2013 as initially proposed in its June 26, 2014 Petition.

⁴ Beaver Falls' Form 556, Box 11 states that the Facility was expected to be installed and begin operation on October 12, 1987, but Beaver Falls confusingly also states on page 19 of its Form 556 that the Facility began operations on January 1, 1987.

⁵ Beaver Falls August 11, 2014 Answer at 4. Currently the only other facility selling pursuant to the 1985 Agreement is Beaver Valley Power Company, which received its QF certification in Docket No. QF01-23-000.

until the Commission issued Order No. 671,⁶ where the Commission implemented provisions of the Energy Policy Act of 2005 relating to QFs,⁷ that the Commission established a filing requirement for QF status, which was codified in section 292.203(a)(3) of the Commission's regulations⁸ for small power production facilities and in section 291.203(b)(2) of the Commission's regulations⁹ for cogeneration facilities. Sections 292.203(a)(3) and 292.203(b)(2), which became effective on April 16, 2006, require a generating facility seeking QF status (in addition to meeting the other requirements for QF status) to file either a notice of self-certification, or an application for Commission certification, that has been granted, to establish QF status.

9. Beaver Falls argues that, outside of operating the Facility, Beaver Falls has no experience in the energy production market and as a municipality/municipal authority it is exempt from the Federal Power Act (FPA) pursuant to section 201(f) of the FPA.¹⁰ Beaver Falls states that it does not routinely have the need to employ counsel practicing before the Commission.¹¹

10. Beaver Falls states that it was only made aware of the need to file for self-certification of QF status for the Facility during the course of its participation in a base rate proceeding initiated by Duquesne Light before the Pennsylvania Commission, and when NRG challenged the continuation of Rider No. 18's minimum floor pricing applicable to the 1985 Agreement. Beaver Falls claims that it has otherwise satisfied all of the requirements for QF status under section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA);¹² it has been in substantive compliance with the QF requirements from the date the Facility commenced operation until its recent certification but it could not find records indicating that the Facility had ever previously been certified

⁶ *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).

⁷ Pub. L. No. 109-58, 119 Stat. 594, 967-70 (2005).

⁸ 18 C.F.R. § 292.203(a)(3) (2014).

⁹ 18 C.F.R. § 292.203(b)(2) (2014).

¹⁰ 16 U.S.C. § 824(f) (2012).

¹¹ June 26, 2014 Petition at 3.

¹² Section 201 of PURPA amended section 3 of the FPA by adding new paragraphs (17)-(22). 16 U.S.C §§ 796(3)(17)-(22) (2012).

as a QF.¹³ Beaver Falls states that it did, however, file for and receive hydroelectric licensing authority from the Commission in connection with the Facility, and that those filings provided notice to the Commission that Beaver Falls was operating as a hydroelectric generating plant under 80 MW that would qualify as a QF under PURPA.¹⁴

11. Beaver Falls states that the waiver that it is requesting is substantially similar to those granted in *WM Renewable Energy, L.L.C* and *Ashland Windfarm, LLC*¹⁵ where the owners of small power production facilities failed to submit QF certification filings until some period of time after their facilities were constructed and placed into operation.

12. Beaver Falls states that, under the 1985 Agreement, Duquesne Light agreed to buy all of the net electric energy generated at the Facility as long as it would maintain its QF status under PURPA at a minimum or “floor” pricing of \$0.06 per kWh for electric energy purchases.

III. Notice of Filing, Interventions, and Protests

13. Notice of Beaver Falls’ amended filing was published in the *Federal Register*, 79 Fed. Reg. 49,304 (2014), with interventions and protests due on or before September 2, 2014. A timely motion to intervene was filed by Duquesne Light. A timely intervention and protest was filed by NRG.

A. NRG’s Protest

14. NRG argues that Beaver Falls: (1) should not be able to claim the significant benefits of QF status when it failed to take action to obtain or maintain QF status; (2) has not justified its seven and a half-year delay in complying with the Commission’s filing requirements; and (3) has not identified any Commission precedent or policies supporting its Petition. NRG asks that the Commission deny Beaver Falls’ request for waiver of the filing requirement and thus deny QF status for the period after April 16, 2006 and prior to November 22, 2013 when Beaver Falls first self-certified its QF status.

15. NRG argues the Commission should deny Beaver Falls’ requested waiver because: (1) Beaver Falls, as an active participant in Commission proceedings in which it filed several hundred documents in the hydroelectric licensing context since 1984, cannot claim ignorance of Commission law and procedures, and should have been aware of

¹³ June 26, 2014 Petition at 4- 5.

¹⁴ See *Beaver Falls Municipal Authority*, 28 FERC ¶ 62,227 (1984).

¹⁵ *WM Renewable Energy, L.L.C.*, 130 FERC ¶ 61,268 (2010) (*WM Renewable*); *Ashland Windfarm, LLC*, 124 FERC ¶ 61,068 (2008) (*Ashland Windfarm*).

Order No. 671 which was not an obscure decision on case-specific facts;¹⁶ (2) the precedent that Beaver Falls cites – *Ashland Windfarm* and *WM Renewable* – does not support a waiver in these circumstances; and (3) granting Beaver Falls a waiver would not lead to equitable results that are consistent with current policy. NRG adds that, if the Commission denies waiver, Beaver Falls will still be a QF from the date of its self-certification.

16. NRG points out that the 1985 Agreement has no expiration date but becomes void if Beaver Falls loses its QF status certification and cannot be re-executed, and that Rider No. 18 has been closed and unavailable to new QFs since 1987.¹⁷ NRG also points out that, in contrast to the minimum floor pricing of \$0.06 per kWh, the average annual marginal price between 2009 and 2013 in PJM Interconnection, L.L.C. (PJM) ranged from \$0.03153 per kWh to \$0.03889 per kWh.¹⁸

17. NRG asks that the Commission, if it decides to grant Beaver Falls waiver of the filing requirement, grant any such waiver conditioned upon Beaver Falls' accepting the obligation to refund the revenues received under the 1985 Agreement, plus interest, for power sold between March 17, 2006 and November 22, 2013.

B. Beaver Falls' Answer

18. On August 11, 2014, Beaver Falls filed an answer to its request for waiver which, among other things, opposed NRG's intervention. Beaver Falls argued that NRG, as an indirect purchaser of the output of the facilities (NRG purchases from Duquesne Light), does not meet the standard for intervention in Rule 214 of the Commission's Rules of Practice and Procedure,¹⁹ and that NRG's motion to intervene is not in the public interest.

¹⁶ NRG cites to Docket No. P-3451, where, during February 2006, nearly thirty documents were filed on behalf of Beaver Falls.

¹⁷ NRG's July 28, 2014 Protest at 2 (citing to Section 7 of the 1985 Agreement, which states "Beaver Falls must obtain and maintain a "qualified facility" status under PURPA Section 210 from the Federal Energy Regulatory Commission for this Agreement to be in force. Beaver Falls will notify Duquesne Light in writing if the facilities should lose its 'qualified facility' status. Beaver Falls will provide Duquesne Light a copy of its application to FERC on or before the entered date of this Agreement.").

¹⁸ *Pennsylvania Public Utility Comm'n v. Duquesne Light Co.*, Prepared Direct Testimony of Judith A. Lagano, at 5 (filed Jan. 24, 2014, Pa. PUC Docket No. R-2013-2372129, *et al.*).

¹⁹ 18 C.F.R. § 385.214(b) (2014).

Beaver Falls also argues that NRG seeks to intervene in the Petition to not only urge denial of the Petition, but to obtain an order from the Commission directing refunds from the Beaver Falls going back to 2006, six years before it had any connection with Duquesne Light, which connection only first existed in 2012.²⁰

C. NRG's Answer to Beaver Falls' Answer

19. On August 25, 2014, NRG filed an answer to Beaver Falls' answer. NRG argues that its request to intervene should be granted because its pass-through relationship with Duquesne Light with respect to the Beaver Falls 1985 Agreement creates an interest in the outcome of this proceeding, which will determine whether Beaver Falls maintained its QF status, and which will directly affect whether the 1985 Agreement and the accompanying Rider No. 18 rates remain in effect.

IV. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), Duquesne Light's timely, unopposed motion to intervene serves to make it a party to this proceeding. Notwithstanding Beaver Falls' opposition to NRG's intervention, we find that NRG has demonstrated an interest in this proceeding that warrants our granting its intervention.²¹

21. Section 381.108 of the Commission's regulations²² provides that municipalities are exempt from the filing fees required in Part 381. Beaver Falls explains that it is a municipality. Beaver Falls is therefore exempt from the filing fee otherwise required for a petition for declaratory order.

B. Commission Determination

22. 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

²⁰ Beaver Falls August 11, 2014 Answer at 5.

²¹ See 18 C.F.R. § 385.214(b)(2) (2014).

²² 18 C.F.R. § 381.108 (2014).

292.203(b)(2) (for cogeneration facilities) of the Commission's regulations.²³ 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."²⁴ 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, or an application for Commission certification that has been granted, in order to establish QF status for a generating facility larger than 1 MW.²⁵ For facilities that were operating at the time Order No. 671 was issued, the filing requirement became effective on April 16, 2006.

23. As noted above, Beaver Falls self-certified its facility on November 22, 2013. Accordingly, absent our granting the requested waiver, Beaver Falls would not be considered a QF from April 16, 2006, the date the filing requirement became effective for already-operating QFs, until November 22, 2013, when Beaver Falls filed its notice of self-certification. The issue in this case is thus the intervening period and whether Beaver Falls' excuse for its failure to timely certify its facility warrants waiver of the filing requirement for that period. We find that it does not, and we will deny Beaver Falls' requested waiver. Beaver Falls has not justified its failure to comply with a filing requirement that has been present in the Commission's regulations for seven and a half years. Beaver Falls acknowledges that it was operating in 2006 when the change in the Commission's regulations and the resulting filing requirement became effective, and that it did not file a notice of self-certification until November 22, 2013 – seven and a half years late.

24. Beaver Falls nonetheless argues that it deserves a waiver of the filing requirement. Among other things, Beaver Falls argues that it has complied with all "substantive" requirements for small power production QF status since the date the Facility went into service. Beaver Falls also claims that it promptly remedied the failure to file for QF status, once discovered.

²³ 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).

²⁴ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

²⁵ 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2014). While 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.

25. The factors that Beaver Falls cites 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 followed.”²⁶ Although Beaver Falls argues that its failure to make the filing was inadvertent, the fact remains that for seven and a half years it was 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.²⁷

26. Beaver Falls cites two cases—*WM Renewable* and *Ashland Windfarm*—in support of its requested waiver.²⁸ Neither *WM Renewable* nor *Ashland Windfarm*, however, supports a grant of waiver in this instance.

27. *Ashland Windfarm* involved atypical ownership of the petitioners’ wind project companies that included charities.²⁹ This case does not present a similar situation.

28. To the extent that Beaver Falls argues that it was inexperienced in the power industry, the Commission finds that not to be the case; since 1984, Beaver Falls’ QF has filed several hundred documents in hydroelectric licensing proceedings before the Commission. And, as pointed out by Beaver Falls, it learned of its failure to comply with the Commission regulations through its participation in a state regulatory proceeding. As an entity experienced in electric utility matters both at the Federal and state levels, Beaver Falls should have reasonably known of the requirements of the Commission’s regulations, including the requirement that, in order to be a QF, a generator larger than 1 MW must file either a notice of self-certification or of an application for Commission certification that has been granted.³⁰ In this regard, as noted earlier, 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.³¹ It is not unreasonable to expect a regulated

²⁶ *OREG 1, Inc.*, 135 FERC ¶ 61,150, at P 8 (2011), *reh’g denied*, 138 FERC ¶ 61,110 (2012) (*OREG 1*).

²⁷ *OREG 1*, 135 FERC ¶ 61,150, at PP 8, 12 & n.16.

²⁸ Citing *WM Renewable*, 130 FERC ¶ 61,268 at P 5; *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

²⁹ *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 3.

³⁰ *See supra* note 23.

³¹ *See, e.g.*, 18 C.F.R. § 292.203(a)(3) (2007).

entity such as Beaver Falls that claims benefits because it meets criteria laid out in the Code of Federal Regulations, i.e., what Beaver Falls views as the “substantive” requirements necessary to meet QF status, to read those regulations from time to time to see how they may have changed and to ensure its continued compliance. Indeed, Beaver Falls’ argument that it is unsophisticated and that its error was inadvertent, if accepted, would equally justify granting waiver of even what it views as the “substantive” requirements of QF status had those requirements changed in the intervening years. Seven and a half years’ failure to comply with the filing requirement for QF status is simply too long.

29. Finally, Beaver Falls’ reliance on *WM Renewable* is 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.”³²

30. In sum, we are not persuaded that we should grant Beaver Falls waiver of the filing requirement for QF status. Nonetheless, the Commission will grant Beaver Falls partial waiver so that the Beaver Falls’ generating facility will be treated as a QF for the period that Beaver Falls’ generating facility operated out of compliance with the Commission’s requirement that an owner of a small power production facility make a filing in order to certify as a QF, i.e., from April 16, 2006, when the Facility became subject to the filing requirement, until November 22, 2103, when the Facility self-certified as a QF, and will qualify for most exemptions contained in sections 292.601 and 292.602 of the Commission’s regulations.³³ Treating Beaver Falls as a QF for the period it was out of compliance and granting Beaver Falls 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, is consistent with the Commission’s action in other cases.³⁴

³² *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)).

³³ 18 C.F.R. §§ 292.601, 292.602 (2014).

³⁴ See *Iowa Hydro, LLC*, 146 FERC ¶ 61,207 (2014); *accord CII Methane Management IV, LLC*, 148 FERC ¶ 61,229 (2014); *OREG 1, Inc.*, 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).

31. Typically, when the Commission denies a QF waiver of the filing requirement for QF status, it nevertheless otherwise grants partial waiver of the exemptions provided to QFs so that the QF is granted all of the exemptions contained in sections 292.601 and 292.602 of the Commission's regulations, except the exemptions from sections 205 and 206 of the FPA.³⁵ Here, consistent with that precedent, we are not granting an exemption from sections 205 and 206 of the FPA. However, as NRG has recognized, because Beaver Falls is a municipal utility, it is largely exempt from the FPA, and accordingly any refunds which the Commission might otherwise order pursuant to section 205 of the FPA, in a situation where a generating plant makes sales without the exemption from section 205 of the FPA that is available to some QFs, are beyond the Commission's authority. As to NRG's request that we condition any waiver granted to Beaver Falls on its agreeing to make refunds pursuant to section 205 of the FPA as if section 205 of the FPA were applicable, we deny; we do not believe that Beaver Falls' failure to timely self-certify its Facility as a QF warrants compelling Beaver Falls to submit to Commission jurisdiction under the FPA when it is otherwise exempt (even assuming that we had the authority to do so³⁶).

The Commission orders:

Beaver Falls' Petition requesting waiver of the filing requirement in section 292.203(a)(3), is hereby granted in part, and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁵ Id.

³⁶ Cf., e.g., *Pacer Power LLC*, 104 FERC ¶ 61,131, at P 37 n.5 (2003) ("an entity that is not subject to regulation as a public utility under Part II of the FPA cannot voluntarily submit to regulation as a public utility under the Commission's jurisdiction").