

156 FERC ¶ 61,247  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, and Colette D. Honorable.

Saguaro Power Company, A Limited Partnership

Docket Nos. EL16-78-000  
QF90-203-007

ORDER GRANTING, IN PART, AND DENYING, IN PART,  
PETITION FOR WAIVER

(Issued September 30, 2016)

1. On June 6, 2016, as amended on June 23, 2016, Saguaro Power Company, A Limited Partnership (Saguaro) filed a petition requesting a temporary waiver of the cogeneration qualifying facility (QF) operating and efficiency standards of the Commission's regulations<sup>1</sup> for calendar years 2016 and 2017. As discussed below, we grant, in part, and deny, in part, Saguaro's waiver request.

**I. Background**

2. Saguaro owns and operates a 105 MW topping-cycle cogeneration facility near Henderson, Nevada. Saguaro states that it has operated as a QF since 1990. Saguaro also has authority to sell electric energy, capacity and ancillary services at market-based rates.<sup>2</sup>

3. Saguaro states that it recently became aware that, as the result of losing its primary steam host (the chlor alkali processing operations of Saguaro's unaffiliated thermal host, Pioneer Americas LLC d/b/a Olin Chlor Alkali Products (Olin)), it is unable to meet the Commission's operating and efficiency standards for cogeneration QFs. Saguaro further states that, prior to 2016, the amount of steam that Olin purchased had been sufficient for Saguaro to continuously meet the Commission's operating and efficiency standards for

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<sup>1</sup> 18 C.F.R. § 292.205(a) (2016).

<sup>2</sup> *Saguaro Power Co., A Ltd. P'ship*, Docket Nos. ER07-486-000 and ER07-486-001 (Mar. 30, 2007) (delegated letter order).

25 years.<sup>3</sup> According to Saguaro, Olin permanently shut down its chlor alkali facility on March 31, 2016, and Olin stopped taking steam from Saguaro on April 22, 2016. Saguaro notes that it also sells steam to Ocean Spray Cranberries, Inc. (Ocean Spray). However, the amount of steam purchased by Ocean Spray is insufficient for Saguaro to meet the Commission's operating and efficiency standards. According to the contractual provisions agreed to in the power purchase agreement (PPA) between Saguaro and Nevada Power Company (Nevada Power), if Saguaro loses its QF status, its energy and capacity rates will be reduced to 80 percent of the otherwise applicable contract rate.<sup>4</sup>

## II. Waiver Request

4. Saguaro requests the waiver of the Commission's operating and efficiency standard requirements because the closing of Olin's chlor alkali processing operations was an event outside of Saguaro's control.<sup>5</sup> Saguaro states that its QF is located near several other manufacturing and industrial facilities, all of which also have a demand for steam, and that Saguaro is currently in discussions with other potential customers. Saguaro also asserts that it is working on designing a distilled water facility that would use off take steam to produce distilled water and may be operable by 2017.

5. Saguaro asserts that the waiver should be granted because the waiver request is limited to calendar years 2016 and 2017. Saguaro also states that it expects to secure other customers and/or construct facilities that would allow Saguaro to meet the

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<sup>3</sup> Saguaro Petition at 4.

<sup>4</sup> Section 1.8.4 of the PPA states:

[i]f Seller obtained [QF] status prior to Firm Operation and subsequently lost such status for reasons beyond Seller's reasonable control, Seller shall be paid for Capacity delivered to [Nevada Power], during the periods that Seller did not have [QF] status, at Capacity rates equal to eighty (80) percent of the Capacity rates otherwise agreed upon by the Parties.

Section 1.9.4 of the PPA states:

[i]f Seller obtained [QF] status prior to Firm Operation and subsequently lost such status for reasons beyond Seller's reasonable control, Seller shall be paid for Capacity delivered to [Nevada Power], during the periods that Seller did not have [QF] status, at Capacity rates equal to eighty (80) percent of the Capacity rates otherwise agreed upon by the Parties.

<sup>5</sup> Saguaro Petition at 5.

Commission's operating and efficiency standards by the end of 2017. Saguaro maintains that its waiver request was submitted in a timely manner after it was notified of the closing of Olin's chlor alkali processing operations.

6. Furthermore, Saguaro states that the waiver request is consistent with the goals of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>6</sup> and that a strict adherence to the Commission's operating and efficiency standards would frustrate cogeneration development.<sup>7</sup> Saguaro notes that it continues to provide useful steam output to Ocean Spray, and asserts that it provides economic incentives, environmental benefits, and energy savings to the region because its cogeneration facility is efficient, reliable and a relatively low-cost source of electric power and steam.<sup>8</sup> Saguaro also states that it produces significant energy savings as a cogeneration QF because it is more energy efficient for its single facility to jointly produce electric power and steam than for electric power and steam to be produced separately by two different facilities.<sup>9</sup>

### **III. Notice and Responsive Pleadings**

7. Notice of Saguaro's petition was published in the *Federal Register*, 81 Fed. Reg. 38,167 (2016), with interventions and protests due on or before June 28, 2016. Saguaro's amended petition was published in the *Federal Register*, 81 Fed. Reg. 42,697 (2016) with interventions and protests due on or before July 5, 2016. The Public Utilities Commission of Nevada filed a notice of intervention. Nevada Bureau of Consumer Protection (Nevada Bureau) and Nevada Power filed interventions and protests. Saguaro, Nevada Power, and Nevada Bureau filed answers.

8. Nevada Power argues that Saguaro's petition should be denied because Saguaro failed to disclose that the PPA specifically addressed the temporary inability to meet the Commission's operating and efficiency standards for cogeneration QFs. Nevada Power asserts that the parties contemplated that Saguaro could lose its QF status over the 30-year duration of the PPA, and, when considering this possibility, the parties agreed to provisions that would reduce the capacity rates and energy rates by 20 percent for the period of non-compliance.<sup>10</sup> Nevada Power notes that, if the Commission were to grant

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<sup>6</sup> 16 U.S.C. § 824a-3 (2012).

<sup>7</sup> *Id.* at 8-11.

<sup>8</sup> *Id.* at 11-12.

<sup>9</sup> *Id.* at 12.

<sup>10</sup> Nevada Power Protest at 5-7 (citing PPA §§ 1.8.4 and 1.9.4).

Saguaro's requested waiver, the Commission would alter the agreed-upon terms in the PPA and would increase the rate received by Saguaro by 20 percent over the contract rate, or almost one million dollars per month. Nevada Power also states that, in *Badger Creek*,<sup>11</sup> the Commission recognized the economic harm to utility customers and denied the waiver request as to the rate regulation under sections 205 and 206 of the Federal Power Act (FPA).<sup>12</sup> Nevada Bureau asks the Commission to deny the petition for similar reasons.

9. Nevada Power and Nevada Bureau assert that Saguaro's petition should be denied because it has not met the Commission's waiver requirements. Nevada Power contends that Saguaro failed to act in good faith when it did not notify Nevada Power of this change in circumstances. Nevada Power also argues that Saguaro's requested waiver is for a substantial and speculative duration, would harm third parties through rate increases, and is opposed, contrary to the Commission's regulations.<sup>13</sup> Nevada Power also asserts that denying the waiver request would encourage PURPA's goals by encouraging parties to enter into negotiated contract terms that address the loss of QF status without terminating the agreement.<sup>14</sup> Finally, Nevada Power requests that the Commission require Saguaro to make monthly informational filings on its compliance with the Commission's QF operating and efficiency standards.<sup>15</sup>

10. In its answer, Saguaro argues that the arguments by Nevada Power and Nevada Bureau (together, Protesters) amount to an improper challenge to the PPA and Saguaro's legal right to petition the Commission for a waiver. Saguaro reasserts its arguments that it has met all of the conditions for a QF waiver and contends that Commission precedent supports Saguaro's petition. Saguaro disputes Nevada Power's reliance on *Badger Creek*, arguing that the Commission denied Badger Creek's requested waiver because Badger Creek did not have a replacement for its lost thermal host and intended to end its QF status. Saguaro argues that, unlike Badger Creek, it is seeking contracts for the sale of steam with other potential thermal customers in the area.<sup>16</sup>

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<sup>11</sup> *Badger Creek Limited*, 148 FERC ¶ 61,074, at PP 12-13 (2014) (*Badger Creek*).

<sup>12</sup> 16 U.S.C. § 824d (2012).

<sup>13</sup> Nevada Power Protest at 8-11.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> Saguaro Answer at 7, 12-13; *accord* Saguaro Petition at 6.

11. Saguario also argues that *Las Vegas Cogen* is applicable here.<sup>17</sup> The Commission granted Las Vegas Cogen's requested waiver, finding that the waiver request was timely, for a limited time period, arose from circumstances beyond its control, provides substantial public benefits converting waste heat to useful thermal energy, and would encourage cogeneration. Saguario argues that similarly its requested waiver is timely, for a limited time, arose from circumstances beyond its control, and would encourage cogeneration.

12. Nevada Bureau responded in an answer, arguing that waiver of the Commission's operating and efficiency standards is permissive and can be granted on a case-specific basis, and further can be granted in part (i.e., certain reporting requirements) and denied in part (i.e., rate purposes).<sup>18</sup> Nevada Bureau argues that Saguario has not justified why it should be granted a waiver for rate purposes.

13. Finally, Saguario filed a further answer largely reiterating earlier statements.

#### **IV. Discussion**

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2016), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept Nevada Power, Nevada Bureau, and Saguario's answers because they have provided information that assisted us in our decision-making process.

15. The Commission's regulations are permissive providing that the Commission may waive the operating and efficiency standards "upon a showing that the facility will produce significant energy savings."<sup>19</sup> The Commission has considered a number of factors in deciding whether to grant waiver of its operating and efficiency standards; including: 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

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<sup>17</sup> Saguario Answer at 8-11 (citing *Las Vegas Cogeneration Ltd. P'ship*, 117 FERC ¶ 61,309 (2006) (*Las Vegas Cogen*)).

<sup>18</sup> Nevada Bureau Answer at 2-3.

<sup>19</sup> 18 C.F.R. § 292.205(c) (2016).

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.<sup>20</sup>

16. Saguario is currently providing steam to Ocean Spray. However, those sales of thermal output to Ocean Spray are insufficient for Saguario to satisfy the Commission's operating and efficiency standards. We recognize that Saguario's non-compliance is due to the closure of Olin's facility, which was an event outside of Saguario's control. Saguario's petition was filed timely and is limited to two years while Saguario attempts to locate a replacement host.

17. However, the filed PPA explicitly considers the possibility that Saguario could be out of compliance with the requirements for QF status and provided for a lower rate during the periods of noncompliance with those requirements. Granting Saguario its requested waiver in its entirety, which is opposed by both Nevada Bureau and Nevada Power, would allow Saguario to continue collecting an avoided cost rate instead of the lower out-of-compliance rate contained in the PPA. Under the PPA, once Saguario locates a replacement host and is again in compliance with the operating and efficiency standards, Saguario would again be entitled to the higher avoided cost rate. Notwithstanding its request for waiver, we note that Saguario has not argued that the PPA is unclear on this point. Furthermore, we believe denying the waiver will encourage parties to PPAs to enter into negotiated contract terms that address noncompliance with the technical standards for QF status, thereby providing rate certainty and, thus, encouraging co-generation.

18. In *Las Vegas Cogen*, the Commission granted a waiver under similar circumstances, i.e., failure to satisfy the efficiency standard as a result of a one-time unanticipated event outside of the control of the operator of the cogeneration facility, even though the parties had a similar provision reducing the avoided cost rate by 20 percent if Las Vegas Cogen lost its QF status.<sup>21</sup> However, the Commission did not

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<sup>20</sup> See, e.g., *Ripon Cogeneration LLC*, 120 FERC ¶ 61,167 (2007); *PowerSmith Cogeneration Project Ltd. P'ship*, 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).

<sup>21</sup> *Las Vegas Cogen*, 117 FERC ¶ 61,309.

specifically address the Las Vegas contract provision in its determination, and the Commission has previously stated that silence on an issue is not a ruling on the issue.<sup>22</sup>

19. In balancing the relevant factors in the record in this proceeding, we agree with the Protesters that the approach taken in *Badger Creek* is more appropriate here. Accordingly, consistent with *Badger Creek*, the Commission partially denies Saguario's petition as it relates to the exemption from the operating and efficiency standards of the Commission's QF regulations.<sup>23</sup> Specifically, our waiver denial only extends to the exemption from rate regulation under sections 205 and 206 of the FPA as provided for in section 292.601 of the Commission's regulations.<sup>24</sup> As a result, the PPA continues to control the rates and terms of service. However, because Saguario's non-compliance is due to events outside of its control, we grant waiver as to the other benefits of QF status, including exemptions from the Public Utility Holding Company Act and state laws, as provided in sections 292.601 and 602 of the regulations.<sup>25</sup>

20. Finally, we will not require Saguario to file monthly informational filings on Saguario's compliance with the Commission's QF operating and efficiency standards. Such informational filings are not required under our regulations, nor have we required them in prior orders,<sup>26</sup> and we are not persuaded that such reports are necessary here.

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<sup>22</sup> *PJM Interconnection and Potomac-Appalachian Transmission Highline*, 153 FERC ¶ 61,308 at P 13 (2015); *Gas Transmission NW. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (citing *Alabama Power v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir 1993)); see also *SFPP*, Opinion No. 522-A, 150 FERC ¶ 61,097 at P 54 (2015) (citing, *inter alia Nevada Power Co.*, 113 FERC ¶ 61,007 at 61,013-14 (2005); see also *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record... are not to be considered as having been so decided as to constitute precedents").

<sup>23</sup> 18 C.F.R. § 292.205 (2016).

<sup>24</sup> 18 C.F.R. § 292.601 (2016).

<sup>25</sup> 18 C.F.R. § 292.601-02 (2016).

<sup>26</sup> *E.g.*, *Ripon Cogeneration LLC*, 120 FERC ¶ 61,167, at PP 19-21 (2007); *PowerSmith Cogeneration Project Ltd. P'ship*, 118 FERC ¶ 61,021, at PP 13-16 (2007); *Brush Cogeneration Partners*, 117 FERC ¶ 61,043, at PP 10-11 (2006).

The Commission orders:

Saguaro's request for limited waiver of the operating and efficiency standards is hereby granted, in part, and denied, in part, as discussed in the body of this order.

By the Commission. Commissioner Clark is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.