

172 FERC ¶ 61,238  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;  
Richard Glick and James P. Danly.

Clean Fuel Dane, LLC

Docket Nos. EL19-84-000  
QF19-1331-001

ORDER GRANTING REQUEST FOR PARTIAL WAIVER  
AND ACCEPTING REFUND REPORT

(Issued September 17, 2020)

1. On July 11, 2019, Clean Fuel Dane, LLC (Petitioner) filed a petition for declaratory order requesting partial waiver from the filing requirements of section 292.203(a)(3) of the Commission's regulations<sup>1</sup> applicable to small power production qualifying facilities (QFs) for the time period beginning December 8, 2015, when Petitioner purchased Clean Fuel Dane QF (CF Dane QF), and ending June 28, 2019, when Petitioner filed for self-certification of QF status (Petition). On June 30, 2020, Petitioner filed an amended refund report (Amended Refund Report). As discussed below, we grant the request for partial waiver and accept the Amended Refund Report.

**I. Background**

2. Petitioner states that it operates CF Dane QF, which is a biomass anaerobic digester facility that extracts methane gas from processing cow manure. Petitioner explains that the gas fuels two 1.067 MW generating units to produce electricity and the excess combustion heat is used to further process the manure for use as bedding for cows. Petitioner states that the generating units are connected to Wisconsin Power and Light Company's (Wisconsin Power) distribution system pursuant to a Distributed Generation Interconnection Agreement as prescribed by the Wisconsin Public Service Commission (Wisconsin Commission).<sup>2</sup>

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<sup>1</sup> 18 C.F.R. § 292.203(a)(3) (2020).

<sup>2</sup> Petition at 2.

3. Petitioner states that it takes service from Wisconsin Power under an experimental service authorized by the Wisconsin Commission, pursuant to which Petitioner purchases power from Wisconsin Power and Wisconsin Power purchases CF Dane QF's output.<sup>3</sup> Petitioner states that it purchased CF Dane QF in December 2015 and relied upon Wisconsin Power's advice that it did not need to obtain any further regulatory approvals.<sup>4</sup>

4. Petitioner states that, during discussions with a prospective buyer to transfer ownership of CF Dane QF, it discovered that CF Dane QF had not been certified with the Commission as a QF.

## II. Petition

5. Petitioner requests partial waiver of the QF filing requirements for the time period beginning December 8, 2015, when Petitioner purchased CF Dane QF, and ending June 28, 2019, when Petitioner filed a Form No. 556 to self-certify the facility as a QF with the Commission. Petitioner requests waiver of most of the provisions of sections 292.203(a)(3), 292.601, and 292.602 of the Commission's regulations,<sup>5</sup> the Public Utility Holding Company Act of 2005 (PUHCA),<sup>6</sup> and certain state laws and regulations regarding rates and financial and organizational regulation.<sup>7</sup> Petitioner states that it is not in the energy business because it relies on a state-run program with energy sales ancillary to its actual business, which is operating a biomass anaerobic digester facility.<sup>8</sup>

6. Petitioner states that, when it became aware that it had not timely complied with the Commission's QF certification requirements, it promptly filed a Form No. 556.<sup>9</sup> Petitioner further states that it has met all the other requirements for QF status and is

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

requesting waiver for a limited period. Petitioner argues that this partial waiver request is consistent with Commission precedent granting waivers to similarly-situated QFs.<sup>10</sup>

7. With respect to refunds, with the Petition, Petitioner submitted a refund report, which would provide Wisconsin Power with the time value refunds for the period that CF Dane QF was making wholesale sales without Commission authorization.<sup>11</sup> Petitioner also requests waiver of the Commission's prior notice requirement so that refunds would not be required. Petitioner asserts that the Commission's refund policy does not require refunds when refunds would prevent a QF from recovering its costs.<sup>12</sup> Petitioner states that it purchased the facility from the prior owner, Clear Horizons Dane, LLC, effective December 8, 2015. Petitioner states that CF Dane QF's annual return on investment has been low to negative because its fixed and variable costs are significant, adding that a significant refund liability here would likely force Petitioner to incur a significant loss with respect to its power sales to Wisconsin Power that could require Petitioner to declare bankruptcy.<sup>13</sup> Petitioner states that it recognizes the importance of the Commission's QF regulations and, if the Commission declines to grant waiver, it is prepared to refund Wisconsin Power the time value of revenues it collected from the date Petitioner acquired the facility, December 8, 2015, until Petitioner filed a Form No. 556 on June 28, 2019.

8. On June 30, 2020, Petitioner filed the Amended Refund Report, requesting that the Commission consider five categories of O&M expenses as deductible variable costs because, according to Petitioner, the costs vary with the generation output of CF Dane QF.<sup>14</sup> The five categories are (1) labor – the hourly labor necessary to operate the facility is based on the amount of manure processed; (2) parts and fluids – the 24 hour operation schedule requires replacement of worn parts and lubricating, hydraulic and other fluids; (3) outside contractors – maintenance personal trained in major generator

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<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 8 n.24.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> Amended Refund Report, Attachment A (citing *Int'l Transmission Co.*, 140 FERC ¶ 61,151 (2012), *order on reh'g*, 152 FERC ¶ 61,043, at P 33 (2015) (“[v]ariable costs are those costs that vary primarily with the MWh of energy produced or transmitted. The Commission classifies certain production [operation and maintenance] accounts as variable (e.g., fuel) and other production [operation and maintenance] accounts as fixed.”)).

maintenance with necessary equipment; (4) other materials and services – hauling charges, testing and equipment rentals; and (5) fuel and other variable O&M costs.<sup>15</sup>

### III. Notice

9. Notice of the Petition was published in the *Federal Register*, 84 Fed. Reg. 34,887 (July 19, 2019), with interventions and protests due on or before August 12, 2019. None was filed.

### IV. Discussion

10. In Order No. 671,<sup>16</sup> the Commission added the filing requirements for QF status contained in sections 292.203(a)(3) (for small power production QFs) and 292.203(b)(2) (for cogeneration QFs) of the Commission's regulations.<sup>17</sup> Thus, since 2006, the regulations require that an owner or operator of a facility must, in addition to meeting other specified requirements, either file a notice of self-certification (i.e., Form No. 556) or apply for and receive Commission certification in order to establish QF status for a generating facility larger than 1 MW.<sup>18</sup>

11. As the Commission has 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.”<sup>19</sup> In recent orders, the Commission has denied waiver of the filing requirements but granted partial waiver to treat the facilities as QFs for the time period

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<sup>15</sup> *Id.* (citing *Zeeland Farm Servs., Inc.*, Docket Nos. QF17-935-001 and QF17-936-001, at 7 (filed Feb. 14, 2018) (variable costs include “‘Repair, Maintenance and Variable Operating Expenses’ which reflect Zeeland’s costs of operating and maintaining Zeeland Biomass 1 and Zeeland Biomass 2 (i.e., parts, fluids, and contract labor to repair and to maintain Zeeland Biomass 1 and Zeeland Biomass 2)”); *Zeeland Farm Services, Inc.*, Docket Nos. QF17-935- 001 and QF17-936-001 (May 17, 2018) (delegated letter order)).

<sup>16</sup> *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 114 FERC ¶ 61,102, *order on reh’g*, Order No. 671-A, 115 FERC ¶ 61,225 (2006).

<sup>17</sup> 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2).

<sup>18</sup> *Id.*

<sup>19</sup> *OREG I, Inc.*, 135 FERC ¶ 61,150, at P 8 (2011) (*OREG I*), *order on reh’g*, 138 FERC ¶ 61,110 (2012).

during which those QFs were out of compliance.<sup>20</sup> Therefore, consistent with those prior orders, we grant Petitioner partial waiver so that its facility will be treated as a QF for the time period during which it operated out of compliance with the Commission's QF certification filing requirements, that is, for the time period beginning December 8, 2015, when Petitioner purchased CF Dane QF, and ending June 28, 2019, when Petitioner filed for self-certification of QF status. Accordingly, Petitioner qualifies for most of the exemptions contained in sections 292.601 and 292.602 of the Commission's regulations,<sup>21</sup> excepting exemption from FPA sections 205 and 206.<sup>22</sup> Granting Petitioner most of the exemptions from the FPA, PUHCA, and state laws, as provided in sections 292.601 and 292.602 of the Commission's regulations, but denying exemption from sections 205 and 206 of the FPA, is consistent with the Commission's action in other, similar cases.<sup>23</sup>

12. Regarding the Amended Refund Report, in *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*,<sup>24</sup> the Commission clarified its refund remedy (for both cost-based and market-based rates) for the late filing of jurisdictional rates and agreements under FPA section 205 when the entity has not received a waiver of the 60-day prior notice requirement. With respect to sales for resale made without Commission authorization under FPA section 205, the Commission stated that it would require the utility to refund to its customers: (1) the time value of the revenues collected,

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<sup>20</sup> See *Branch Street Solar Partners, LLC*, 169 FERC ¶ 61,269 (2019); *Zeeland Farm Servs., Inc.*, 163 FERC ¶ 61,115 (2018) (*Zeeland*); *Minwind I, LLC*, 149 FERC ¶ 61,109 (2014) (*Minwind I*); *Beaver Falls Mun. Auth.*, 149 FERC ¶ 61,108 (2014) (*Beaver Falls*); see also *OREG I*, 135 FERC ¶ 61,150.

<sup>21</sup> 18 C.F.R. §§ 292.601, 292.602 (2020).

<sup>22</sup> We remind Petitioner that it must submit required filings on a timely basis or face possible sanctions by the Commission.

<sup>23</sup> See *Zeeland*, 163 FERC ¶ 61,115 at P 15; *SunE B9 Holdings, LLC*, 157 FERC ¶ 61,044, at P 19 (2016); *SunE M5B Holdings, LLC*, 157 FERC ¶ 61,045, at P 18 (2016); *Minwind I*, 149 FERC ¶ 61,109 at P 22; *Beaver Falls*, 149 FERC ¶ 61,108 at P 31; *OREG I*, 135 FERC ¶ 61,150 at P 16; see also *Iowa Hydro, LLC*, 146 FERC ¶ 61,207, at PP 14-15 (2014); *accord CII Methane Management IV, LLC*, 148 FERC ¶ 61,229, at P 5 (2014) (*CII Methane*); *LG&E-Westmoreland 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).

<sup>24</sup> *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (*Prior Notice*), *order on reh'g*, 65 FERC ¶ 61,081 (1993).

calculated pursuant to section 35.19a of the Commission's regulations,<sup>25</sup> 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.<sup>26</sup> 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 a market-based rate or an avoided cost rate.<sup>27</sup> To the extent that there is no difference between the QF's rate collected and the market-based rate or between 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, Petitioner has been selling pursuant to a negotiated rate, satisfying the second component of the two-part refund methodology, but Petitioner remains subject to the first component (i.e., the time value refund obligation). Petitioner filed the Amended Refund Report consistent with this obligation. We accept the Amended Refund Report.

The Commission orders:

(A) Petitioner's request for partial waiver is hereby granted, as discussed in the body of this order.

(B) Petitioner's Amended Refund Report is hereby accepted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>25</sup> 18 C.F.R. § 35.19a (2020).

<sup>26</sup> *Prior Notice*, 64 FERC at 61,980.

<sup>27</sup> *Minwind I*, 149 FERC ¶ 61,109 at P 23; *see Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 32 (2007); *see also CII Methane*, 148 FERC ¶ 61,229 at P 4.