

138 FERC ¶ 61,110  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Philip D. Moeller, John R. Norris,  
and Cheryl A. LaFleur.

OREG 1, Inc., OREG 2, Inc., OREG 3, Inc., and  
OREG 4, Inc.

Docket Nos. EL11-22-001  
QF11-115-002  
QF11-116-002  
QF11-117-002  
QF11-118-002  
QF11-119-002  
QF11-120-002  
QF11-121-002  
QF11-122-002  
QF11-123-002  
QF11-124-002

ORDER DENYING REHEARING

(Issued February 16, 2012)

1. On June 17, 2011, OREG 1, Inc., OREG 2, Inc., OREG 3, Inc., and OREG 4, Inc. (collectively, Petitioners) requested rehearing of the Commission's May 19, 2011 order granting in part and denying in part their request for waivers of the small power production qualifying facility (QF) filing requirements set forth in section 292.203(a)(3) of the Commission's regulations<sup>1</sup> during the periods of non-compliance prior to Petitioners filing QF self-certifications and directing refunds.<sup>2</sup> The Commission denies rehearing.

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<sup>1</sup> 18 C.F.R. § 292.203(a)(3) (2011) (requiring a small power production QF either to file a notice of self-certification with the Commission pursuant to section 292.207(a) of the Commission's regulations, or to file an application for Commission certification under section 292.207(b)(1)).

<sup>2</sup> *OREG 1, Inc., et al.*, 135 FERC ¶ 61,150 (2011) (May 19 Order).

## **I. Background**

2. The Petitioners are direct, wholly-owned subsidiaries of Ormat Nevada, Inc., which is a direct, wholly-owned subsidiary of Ormat Technologies, Inc., a publicly-traded company in the geothermal and recovered energy power business and together own and operate ten waste heat recovery generation QFs in North Dakota, South Dakota, Montana, Minnesota, and Colorado. Petitioners have acknowledged failing to comply with the section 292.203(a)(3) filing requirement, adopted in Order No. 671,<sup>3</sup> and ultimately filed their QF self-certifications on January 25, 2011.<sup>4</sup> However, all ten QFs had commenced service before their QF self-certification filings.<sup>5</sup>

3. Petitioners stated that, since beginning service, the QFs satisfied all criteria for small power production QF status under the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>6</sup> other than the filing requirement. The Petitioners, in seeking waiver of the filing requirement, relied on the Commission's orders in *WM Renewable Energy and Ashland Windfarm*.<sup>7</sup>

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<sup>3</sup> *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).

<sup>4</sup> The Form No. 556 self-certifications were filed in: OREG 1, Inc., Docket Nos. QF11-115-000, QF11-116-000, QF11-117-000, and QF11-118-000; OREG 2, Inc., Docket Nos. QF11-119-000, QF11-120-000, QF11-121-000, and QF11-122-000; OREG 4, Inc., Docket No. QF11-123-000; and OREG 3, Inc., Docket No. QF11-124-000.

<sup>5</sup> The in-service dates reflected in the QF self-certifications are: July 22, 2006 in Docket No. QF11-115-000; August 6, 2006 in Docket No. QF11-116-000; October 5, 2006 in Docket No. QF11-117-000; August 28, 2006 in Docket No. QF11-118-000; December 17, 2009 in Docket No. QF11-119-000; February 3, 2009 in Docket No. QF11-120-000; December 31, 2008 in QF11-121-000; August 5, 2010 in Docket No. QF11-124-000; and March 9, 2009 in Docket No. QF11-123-000.

<sup>6</sup> 16 U.S.C. § 824a-3 (2006).

<sup>7</sup> *WM Renewable Energy, L.L.C. (WM Renewable)*, 130 FERC ¶ 61,268 (2010) (granting waiver of the filing requirement under section 292.203(a)(3) of the Commission's regulations with respect to a 3 MW small power production facility which

(continued...)

4. The Commission, however, found the facts presented by the two cases cited, *WM Renewable* and *Ashland Windfarm*, were distinguishable from the Petitioners' situation.<sup>8</sup> The Commission also stressed that the filing requirement is an important and necessary requirement for QF status.<sup>9</sup>

5. The Commission, nevertheless, granted partial waiver of the filing requirement to permit the noncompliant generating facilities to retain QF status during the period of noncompliance for all purposes other than for exemption from sections 205 and 206 of the Federal Power Act (FPA).<sup>10</sup> The Commission stated that this partial waiver was consistent with the Commission's prior actions with respect to generating units that claimed QF status but were not compliant with the Commission criteria for QF status;<sup>11</sup> the Commission, in *Southampton*, granted waiver of the requirements for QF status to permit the noncompliant QFs to claim most regulatory exemptions, other than exemptions from sections 205 and 206.<sup>12</sup>

## II. Rehearing Request

6. Petitioners request rehearing of the Commission's decision in the May 19 Order to impose a refund obligation. While they concede the Commission has discretion when deciding when to require refunds, Petitioners argue the Commission has not applied that

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began operation on September 24, 2007, but did not self-certify until June 30, 2008); *Ashland Windfarm, LLC, et al. (Ashland Windfarm)*, 124 FERC ¶ 61,068 (2008) (granting waiver of the section 292.203(a)(3) filing requirement for Petitioners' wind project companies owned by individuals, trusts and charities inexperienced in Commission regulatory matters and the power industry).

<sup>8</sup> May 19 Order, 135 FERC ¶ 61,150 at P 10-12.

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

<sup>10</sup> 16 U.S.C. §§ 824d, 824e (2006).

<sup>11</sup> See *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).

<sup>12</sup> *Id.* at 61,603.

discretion consistently in its departure from *Ashland Windfarm* and *WM Renewable*. Petitioners argue that the Commission erred in distinguishing the instant case from *Ashland Windfarm* and *WM Renewable*.

7. Petitioners argue that *Ashland Windfarm* is not sufficiently distinguishable on factual grounds to justify not applying it. Petitioners argue that the *Ashland Windfarm* QFs, which the Commission described as individuals, trusts or charitable organizations lacking previous experience in the power sector,<sup>13</sup> are not sufficiently distinguishable from Petitioners' QFs to justify a different treatment, including a refund obligation, in this proceeding.

8. Petitioners characterize the Commission's discussion of *WM Renewable* in the May 19 Order as finding that *WM Renewable* is an "outlier" and "bad precedent." Petitioners argue that *WM Renewable* should not be considered an outlier or bad precedent but should be considered, along with *Ashland Windfarm*, as controlling precedent. Petitioners argue that, while not a long line of cases, *WM Renewable* and *Ashland Windfarm* nevertheless represent the full universe of precedent applicable to waivers involving the QF certification requirement at issue in this proceeding and, hence, the most relevant precedent for the Commission's consideration.

9. Additionally, Petitioners argue that *Southampton*, cited in the May 19 Order in support of the Commission's decision to impose a refund obligation in this proceeding,<sup>14</sup> is inapposite. Petitioners argue that *Southampton* does not apply because it is precedent from 1996, and addresses refunds where a generator fails to maintain compliance with certain technical requirements for QF status, rather than the specific post-2006 QF certification requirement at issue here. Petitioners argue that the Commission should not have "automatically" extended the remedy for failure to meet technical criteria for QF status to the newer requirement that a QF must make a filing to claim QF status.

10. Petitioners also argue that, if *Southampton* does apply, the Commission still should not require refunds here because *Southampton* only requires them when there is a difference between any higher "avoided cost" prices the seller was able to charge for sales made during periods of noncompliance and the incremental cost prices the buyer would otherwise have been willing to pay if not subject to an avoided cost purchase obligation under PURPA. Petitioners argue the prices they charged their customers were

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<sup>13</sup> *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

<sup>14</sup> May 19 Order at P 11.

not PURPA avoided cost prices, but were freely negotiated between the different generators and their customers. In this regard, the Petitioners say they have been in contact with those customers throughout this proceeding and none has requested refunds or opposed Petitioners' efforts to have the May 19 Order's refund obligation rescinded.

11. In the alternative, Petitioners request that the Commission reconsider the obligation "to refund to their customers the time value of the revenues collected during the periods of non-compliance with the QF filing requirements, calculated pursuant to 18 C.F.R. § 35.19a (2010)."<sup>15</sup> Petitioners argue that the refund obligation imposed by the May 19 Order is punitive in effect and amounts to a substantial penalty. To illustrate, Petitioners allege that refunds would approximate \$1.6 million; that most of the Petitioners were not profitable and operated at a loss; and, on an aggregated basis, Petitioners experienced a net loss of about \$3 million during the periods of non-compliance.<sup>16</sup>

12. Finally, Petitioners argue that the QF certification requirement at issue in this proceeding was adopted in 2006 and that, they, like the smaller QFs in *Ashland Windfarm* and *WM Renewable* were not able to monitor Commission proceedings. If they are to be penalized now, then others like them would be discouraged from compliance.

### **III. Commission Determination**

13. We deny Petitioners' request for rehearing.

14. With regard to Petitioners' arguments that we should have followed *Ashland Windfarm* and *WM Renewable*, and not distinguished them from the instant case, as we found in the May 19 Order neither *Ashland Windfarm* nor *WM Renewable* support a grant of waiver (without consequences to the QF), under the facts presented.<sup>17</sup> Unlike the QFs in *Ashland Windfarm*<sup>18</sup>, Petitioners are the wholly-owned subsidiaries of an international energy company and reasonably should have been aware of the Commission's

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<sup>15</sup> May 19 Order at P 15.

<sup>16</sup> Petitioners' June 17, 2011 Request for Rehearing at 9.

<sup>17</sup> May 19 Order at P 11.

<sup>18</sup> We note in particular that our letter order did accept the unique circumstances presented. *See Ashland Windfarm*, 124 FERC ¶ 61,068 at P 6.

regulations. In addition, the QFs in *WM Renewable* spent months out of compliance, as opposed to years in the case of some of the QFs at issue here. To the extent that Petitioners argue that the Commission in the May 19 Order was wrong in stating that the grant of waiver in *WM Renewable* was inconsistent with previous Commission policy for QFs out of compliance with the requirements for QF status, the Commission properly found that *WM Renewable* is inconsistent with the Commission's previously-announced policy in *Southampton* on dealing with such QFs. The Commission properly chose not to follow a decision inconsistent with its policy.<sup>19</sup>

15. We also disagree with Petitioners' assertions questioning the relevance of *Southampton* to the instant proceeding.<sup>20</sup> Both cases present issues of noncompliance. The fact that the requirement for QF status that was not complied with in *Southampton* (compliance with the operating standard applicable to a topping-cycle cogeneration facility) differs from the requirement at issue here (that a facility make a filing in order to claim QF status) is irrelevant to our analysis. The fact remains that, like the *Southampton* QF, the Petitioners' QFs were out of compliance with the requirements for QF status, and the Commission has granted waiver in both cases from the requirements for QF status, but has also in both cases chosen not to extend the exemption from sections 205 and 206 of the FPA during the periods of non-compliance. Petitioners have not convinced us that because the particular criteria for QF status ignored by Petitioners are different than the criteria which the *Southampton* QF failed to satisfy makes a difference.

16. Petitioners, in fact, failed to comply with the requirements of section 292.203(a)(3) of the Commission's regulations and made jurisdictional power sales without Commission authorization under section 205 of the FPA. In 1993, the Commission articulated its policy with respect to violations of section 205 of the FPA and addressed the refund remedy for the late filing of jurisdictional rates and agreements.<sup>21</sup> Petitioners ask that the Commission exercise its discretion and waive the

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<sup>19</sup> May 19 Order at P 10-12.

<sup>20</sup> Petitioners' June 17, 2010 Request for Rehearing at 6.

<sup>21</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); *El Paso Electric Co.*, 105 FERC ¶ 61,131 (2003).

remedies that the Commission has established for such violations. As discussed in the May 19 Order and reaffirmed herein, Commission declines to exercise its discretion to waive the prescribed remedy; the Commission's discretion is at its zenith when fashioning policies, procedures and sanctions.<sup>22</sup>

17. With respect to Petitioners' claim that the refunds requested are excessive and not necessary, we note that statutory obligations do not depend on, as suggested by Petitioners, whether customers complain regarding their rates. The obligations are there and must be followed. The Commission has explained, in the context of section 205 of the FPA, that following the statute and the Commission's regulations and policies does not depend on customers complaining of non-compliance.<sup>23</sup> The injury being remedied by refunds for late filing is not redress for that customer, but particularly "the Commission's ability to enforce FPA section 205's requirement that there be prior notice."<sup>24</sup> We find that the same principle should apply equally here in the QF context. Moreover, we do not agree that our remedy constitutes a penalty; rather, the Commission imposed a remedy to enforce the statutory requirement of prior notice and filing, the magnitude of which remedy was commensurate with the nature of Petitioner's violation.<sup>25</sup>

18. Here, where the QFs failed to timely seek QF status, and thus sold electric energy without the benefit of the QF exemption from section 205 of the FPA, and then without section 205 authority, our policy as to the need to file under section 205 of the FPA, and the remedy for the failure to file, is and should be applicable. As relevant here,

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<sup>22</sup> See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at its zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions . . . in order to arrive at maximum effectuation of Congressional objectives").

<sup>23</sup> *El Paso Electric Company (El Paso Electric)*, 101 FERC ¶ 61,276, at P 5 (2002), *order denying reh'g*, 105 FERC ¶ 61,131, at P 32, 35 (2003); *see also Xcel Energy Services, Inc.*, 114 FERC ¶ 61,295, at P 11 (2006) ("Lack of harm to the Customers from XES's non-compliance...does not warrant waiver.").

<sup>24</sup> See *El Paso Electric*, 105 FERC ¶ 61,131 at P 21.

<sup>25</sup> *PacifiCorp*, 60 FERC ¶ 61,292, at 62,038-39 (1992), *reh'g granted on other grounds*, 64 FERC ¶ 61,325 (1993); *accord, El Paso Electric*, 105 FERC ¶ 61,131 at P 32, 35.

Petitioners must refund to customers the time value of revenues collected for the entire period that the rate was collected without Commission authorization.<sup>26</sup>

19. The Commission has also held in *Carolina Power & Light*, that a utility is permitted to recover its variable costs (e.g., fuel and variable operation and maintenance expenses).<sup>27</sup> Thus, a time-value refund is not open-ended, and is limited in that a utility may recover its variable costs.<sup>28</sup> This should prevent the individual Petitioners from not recovering their fuel costs and their variable operation and maintenance costs.

20. When Petitioners make their refunds and subsequently file a refund report to comply with the May 19 Order,<sup>29</sup> Petitioners should calculate the time-value refunds, as previously ordered, on a QF-by-QF basis. If there are instances where paying the time-value refunds would prevent Petitioners from recovering their variable costs, Petitioners must also provide specifics identifying the types and amounts of variable costs claimed for each of Petitioners' QFs, and sufficiently demonstrate that losses would be incurred.

21. Finally, to answer Petitioners' suggestion that our ordering refunds will discourage others from self-certification, we disagree. Instead, we expect that other QFs will be encouraged to act according to the statute and regulations,<sup>30</sup> and to timely file for QF certification or timely file under FPA section 205, if they wish to avoid incurring avoidable refunds.

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<sup>26</sup> A utility is also usually required to refund all revenues resulting from the difference, if any, between the rate collected and a cost-justified rate. *Prior Notice*, 64 FERC ¶ 61,139 at 61,980. That further refund is not at issue here, however.

<sup>27</sup> *Carolina Power & Light Co.*, 84 FERC ¶ 61,103 (1998), *order on reh'g*, 87 FERC ¶ 61,083 (1999); *accord El Paso Electric*, 105 FERC ¶ 61,131 at P 21-23.

<sup>28</sup> *Carolina Power & Light*, 87 FERC ¶ 61,083 at 61,357.

<sup>29</sup> A notice extending the date to make refunds was issued on June 15, 2011 (extending the date to make refunds until 30 days after the Commission issues an order on rehearing of the May 19 Order).

<sup>30</sup> Every person or entity appearing before the Commission "is held responsible for being familiar with the agency's regulations." *San Diego Gas & Elec. Co.*, 112 FERC ¶ 61,330, at P 8 (2005); *accord United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971) ("The principle that ignorance of the law is no defense applies whether the law be a statute or a duly promulgated and published regulation.").

The Commission orders:

Petitioners' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Chairman Wellinghoff is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.