

146 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Iowa Hydro, LLC

Docket No. QF12-135-000

ORDER ON REFUND REPORT

(Issued March 20, 2014)

1. On September 6, 2013, Iowa Hydro, LLC (Iowa Hydro) submitted a proposed refund report reflecting the time value of revenues received from the sales of energy made by Iowa Hydro to Interstate Power & Light Company (Interstate Power) for the five year and five month period when Iowa Hydro failed to comply with the Commission's requirement that an owner of a small power production facility make a filing in order to certify as a qualifying facility (QF)¹ under the Public Utility Regulatory Policies Act of 1978 (PURPA).² Iowa Hydro submitted a refund report consistent with the Commission's methodology under section 35.19a of the Commission's regulations,³ but also submitted an alternative refund report should the Commission act favorably on its requests for various waivers also included in its filing. Specifically, Iowa Hydro requests (1) a waiver of the Commission's filing requirement under section 292.303(a)(3) of the Commission's regulations for the period of non-compliance; (2) a waiver of the Federal Power Act's (FPA) section 205 prior notice and filing requirement;⁴ and (3) the refund obligation contained in section 35.19a of the Commission's regulations.⁵

¹ 18 C.F.R. § 292.203(a)(3) (2013) (requiring that a facility claiming QF status must either file a notice of self-certification pursuant to section 292.207(a) of the Commission's regulations or an application for Commission certification under section 292.207(b)(1)); 18 C.F.R. § 292.203(d) (2013) (facilities with a net power production capacity of 1 MW or less are not required to make a filing to be certified as a QF).

² 16 U.S.C. § 824a-3 (2012).

³ 18 C.F.R. § 35.19a (2013).

⁴ 16 U.S.C. 824d (2012).

⁵ 18 C.F.R. § 35.3(a)(1) (2013) (notice requirements for rate schedules or tariffs).

2. In this order, the Commission grants a limited waiver of the QF filing requirements, denies the requested waiver of the Commission's prior notice requirements, and directs Iowa Hydro to make refunds in accordance with this order.

I. Background

3. Iowa Hydro owns Maquoketa Hydroelectric Project (Maquoketa), a 1.2 MW net capacity hydroelectric QF located in Jackson County, Iowa, which it self-certified on December 27, 2011 in Docket No. QF12-135-000 by filing a Form 556. On March 28, 2012, Renewable World Energies, LLC acquired Iowa Hydro and on March 13, 2013, Iowa Hydro submitted a revised Form 556 in Docket No. QF12-135-001 to reflect the March 28, 2012 change in upstream ownership of the facility.⁶ Iowa Hydro states that it was not in compliance with the Commission's QF filing requirement for the period from August 1, 2006, when it acquired and began selling energy to Interstate Power, through December 27, 2011, when it filed its first Form 556 self-certification (non-compliance period). Iowa Hydro claims that it did not discover its omission until the Fall of 2011, when preparing to sell the facility, and it filed the Form 556 after discovering the oversight. Iowa Hydro claims that its failure to file the Form 556 certification for Maquoketa was inadvertent and identifies the 23 other Form 556 filings it made in June of 2006 on behalf of its other subsidiaries to support its claim that it was committed to complying with Order No. 671.⁷

4. On March 2, 2012, Iowa Hydro's previous owner, North American Hydro Holdings, Inc., submitted a self-report regarding its violation to the Commission's Office of Enforcement (Enforcement).⁸ After Renewable World Energies, LLC acquired Iowa Hydro it engaged in a series of discussions with Enforcement staff regarding the self-report and to obtain guidance on calculating the refund under section 35.19a of the Commission's regulations.

5. Iowa Hydro acknowledges that refunds include two components: (1) the difference, if any, between the applicable market rate and the seller's avoided cost rate, or

⁶ When implementing changes to Form 556 in Order No. 732, the Commission determined that a change in upstream ownership triggers a recertification requirement. *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, 130 FERC ¶ 61,214, at P 58 (2010).

⁷ Iowa Hydro Refund Report at 6-7.

⁸ Iowa Hydro included a copy of its Self-Report as Appendix C to its filing.

in certain instances, a reasonable proxy for such rate; and (2) the time value of the revenues collected by the seller during the period of non-compliance.⁹

6. Iowa Hydro states that it sold power to Interstate Power pursuant to a bilateral 10-year contract based on Interstate Power's anticipated avoided costs over the term of the contract. Iowa Hydro further states that the contract was entered into pursuant to and consistent with Iowa Utilities Board's (Board) regulations implementing section 210 of PURPA, and the contract is on file with the Board. Iowa Hydro claims that during the period of non-compliance, sales from Maquoketa at the fixed contract price produced gross revenues that were less than the same volume of sales would have been at the "melded" avoided cost rates.¹⁰ Iowa Hydro therefore argues that no additional refund amount is owed for sales in excess of avoided cost rates. With respect to the second component, Iowa Hydro states that the total refund based on the time value of the revenues collected during the non-compliance period is \$159,652.45 when calculated pursuant to section 35.19a of the Commission's regulations.¹¹

7. In addition, Iowa Hydro argues that the Commission should waive the filing requirements of section 292.203(a)(3) of the Commission's regulations because: (1) Iowa Hydro's power was sold pursuant to a state regulatory authority's implementation of PURPA; (2) Iowa Hydro's failure to file the QF certification at the appropriate time was an unintentional and isolated incident; (3) the total refund would be disproportionate to the action committed; (4) the total refund would cause significant hardship to Iowa Hydro; (5) Iowa Hydro's QF is a mere 200 kW (0.2 MW) above the 1 MW threshold for being subject to the filing requirement; and (6) Iowa Hydro's facility would, but for the

⁹ Iowa Hydro Refund Report at 1. *See also 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), *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at PP 31-32 (2007); *Mendota Hills, LLC*, 110 FERC ¶ 61,222 (2005).

¹⁰ Iowa Hydro Refund Report at 9 ("A melded avoided cost energy cost is derived from the reported peak and non-peak avoided energy costs, with the peak cost being weighted by a factor of 13/24 and the non-peak value being weighted by 11/24 to reach the melded rate.").

¹¹ For simplicity, Iowa Hydro included revenues received through the entire month of December 2011, even though the facility came into compliance on December 27, 2011. Iowa Hydro Refund Report at 8, n.14.

fact that it failed to timely submit a Form 556,¹² meet the criteria to qualify for QF status and, thus, an exemption from regulation under section 205 of the FPA.

8. In the alternative, Iowa Hydro requests that the Commission consider allowing Iowa Hydro to use a different method to calculate the time value refund to lessen the financial remedy imposed on it. For the calendar years 2007 through 2011, Iowa Hydro indicates that it received an average of \$289,094 in annual revenues from sales of power produced by Maquoketa.¹³ Iowa Hydro states that the time value refund of \$159,652.45 is more than 55 percent of the company's average annual gross revenues from sales of power generated by the Maquoketa QF.¹⁴ Iowa Hydro proposes a time-value refund remedy of \$20,002.89 using an alternate methodology that it claims is commensurate with the actual harm imposed. Using its alternate methodology, Iowa Hydro proposes to compound only the interest and does not cumulate the principle (i.e. sales revenues) over the period of non-compliance.¹⁵

II. Notice of Filing

9. Notice of the filing was published in the *Federal Register*, 78 Fed. Reg. 56,686 (2013), with protests or interventions due on or before October 9, 2013. None was filed.

III. Determination

10. To implement changes in the Energy Policy Act of 2005, the Commission issued Order No. 671¹⁶ and revised its regulations to require a generator to make a filing to certify as a QF. Order No. 671 required that any owner or operator of a facility, existing or new, seeking to claim continued QF status for that facility was required to have filed a notice of self-certification or application for Commission certification on Form 556 by March 17, 2006, or when a QF becomes operational.

¹² 18 C.F.R. § 131.80 (2013) (*FERC Form No. 556 - Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility*).

¹³ Iowa Hydro Refund Report at 12, n.24.

¹⁴ *Id.*

¹⁵ *Id.* & n.25.

¹⁶ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *clarified*, 14 FERC ¶ 61,128 (2006), *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

11. Iowa Hydro acknowledges that it was late in complying with the filing requirement¹⁷ and argues that it deserves a waiver of the filing requirements because its failure to timely file the Form 556 was inadvertent. In an effort to persuade the Commission to grant a waiver, Iowa Hydro urges the Commission to consider that it otherwise complied with all the requirements for QF status since the facility went into service; that the sales were made pursuant to a state's implementation of section 210 of PURPA, and that the project is only 200 kW above the 1 MW threshold requiring certification.

12. These factors are not persuasive. As the Commission recently stated, “[t]he filing requirement is substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and must be followed.”¹⁸ Although Iowa Hydro argues that its failure to make the filing was inadvertent, it did not identify the omission for more than five years undermining its claim that it was committed to fully complying with Order No. 671.¹⁹ Likewise, in similar situations, the Commission has not been persuaded by claims that the facility met all other requirements for QF status because that argument minimizes the importance of the filing requirement.²⁰ Iowa Hydro also ignores Order No. 732, where the Commission concluded that a 1 MW threshold is consistent with PURPA's mandate by eliminating the burden of filing. And a 1 MW threshold appropriately balances the competing claims of those seeking a lower threshold and those seeking a higher threshold.²¹ Finally, the fact that sales were made pursuant to a state's implementation of PURPA is also not a basis for a waiver as that also undermines the importance of the filing requirement. Iowa Hydro did not comply with section 292.203(a)(3) of the Commission's regulations for more than five years and, therefore, made jurisdictional power sales without Commission authorization under section 205 of the FPA for that same time period. Iowa Hydro has not justified its failure to timely file – more than five years late. Where a QF failed to timely seek QF status, as Iowa Hydro did here, and where the Commission has denied waiver of the filing requirement for QF status, as the Commission is doing in this order, and where the QF has sold electric energy without the benefit of the QF exemption from FPA section 205, the Commission

¹⁷ Iowa Hydro is reminded that it must submit required filings on a timely basis, or face possible sanctions by the Commission.

¹⁸ *OREG 1, Inc., et al.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110, at P 16 (2012) (*OREG 1*).

¹⁹ Iowa Hydro Refund Report at 7.

²⁰ *OREG 1*, 135 FERC ¶ 61,150, at P 12.

²¹ Order No. 732 at P 35.

routinely applies a FPA section 205 remedy for the late filing of jurisdictional rates and agreements.²²

13. In *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (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 Federal Power Act when waiver of notice 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, 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.²³ 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.²⁴ To the extent that there is no 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, Iowa Hydro has been selling pursuant to a negotiated rate, which satisfies the Commission's avoided cost rate requirements.²⁵ Iowa Hydro is, accordingly, subject to only the first component of the two-part refund methodology.

14. Nevertheless, here, even given Iowa Hydro's failure to comply with the regulations, the Commission will grant partial waiver so that the facility will be treated as a QF for the period that Iowa Hydro's 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 August 1, 2006, when the facility began operation, until December 27, 2011, 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,²⁶ excepting exemption from sections 205 and 206 of the FPA.

²² See e.g., *OREG 1*, 135 FERC ¶ 61,150, at PP 13-15, *order denying rehearing*, 138 FERC ¶ 61,110, at PP 16-19 ; *J.D. Wind 4, LLC*, 120 FERC ¶ 61,274, at PP 23-24 (2007); *Mendota Hills LLC*, 110 FERC ¶61,222 (2005).

²³ *Prior Notice*, 64 FERC at 61,980.

²⁴ See *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 32 (2007).

²⁵ 18 C.F.R. § 292.301(b) (2013).

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

Granting most of the exemptions from the FPA, the Public Utility Holding Company Act of 2005 and state laws contained 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 *Southampton*.²⁷

15. Thus following our *Southampton* precedent, the Commission will grant Iowa Hydro a similar limited waiver. As a result, we find that Iowa Hydro must make refunds calculated pursuant to section 35.19a of the Commission's regulations. As discussed above, Iowa Hydro must refund only the time value of its revenues collected for the period that the rate was collected without Commission authorization, i.e., from August 1, 2006 until December 27, 2011. Iowa Hydro's request to utilize an alternative time value calculation is denied. Iowa Hydro claims that the currently proposed refund is disproportionate to the scale of the violation as it is more than 55 percent of Iowa Hydro's average annual gross revenues from sales of power from Maquoketa and because the realized actual revenues under the contract during the non-compliance period were \$120,421.38 less than the same volume of sales that would have been realized at monthly avoided cost rates during that period.²⁸ Neither of these factors justifies waiving or deviation from section 35.19a of the Commission's regulations. In this regard, Iowa Hydro also represented that it collected more than \$1.5 million over the five-year period of non-compliance.²⁹ Moreover, its agreement to receive payments that were less than the avoided cost is not relevant to the Commission's long-standing refund methodology. We find that Iowa Hydro's alternative approach is not consistent with refunds calculated under section 35.19a of the Commission's regulations and therefore deny its request.³⁰

The Commission orders:

(A) A limited waiver of the filing requirements in section 292.203(a) of the Commission's regulations is granted, as discussed in the body of this order.

²⁷ 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). See also *OREG 1*, 135 FERC ¶ 61,150, at PP 13-15, *reh'g denied*, 138 FERC ¶ 61,110, at PP 14-21.

²⁸ Iowa Hydro Refund Report at 12.

²⁹ Iowa Hydro Refund Report, Appendix A at 3.

³⁰ *OREG 1*, 135 FERC ¶ 61,150, at P 15 (calculated pursuant to 18 C.F.R. § 35.19(a)).

(B) Waiver of the prior notice requirements in section 35.3(a)(3) of the Commission's regulations is denied.

(C) Iowa Hydro is directed to make the refunds required by this order within 30 days of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.