

157 FERC ¶ 61,045  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

SunE M5B Holdings, LLC

Docket Nos. EL16-111-000  
QF15-792-001

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

(Issued October 20, 2016)

1. On September 7, 2016, SunE M5B Holdings, LLC (SunE M5B) 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 regulations<sup>1</sup> for a period of non-compliance from December 2010 until May 27, 2015.<sup>2</sup> The request for waiver is granted in part and denied in part, as discussed below.

**I. Background**

2. SunE M5B owns six 500 kW inverters, and all began operation in December 2010. On May 27, 2015, SunE M5B filed a Form 556 self-certification, describing each

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<sup>1</sup> 18 C.F.R. § 292.203(a)(3) (2016).

<sup>2</sup> On May 27, 2015, SunE M5B filed a Form 556 ("Certification of Qualifying Facility (QF) Status for a Small Power Production or Cogeneration Facility") self-certification in Docket No. QF15-792-000. The Form 556 self-certification states that the facilities were installed and began operation on December 14, 2010.

respective QF as a solar electric generating facility. SunE M5B acknowledged that the inverters are located within one mile of other solar electric generating facilities.

## II. Request for Declaratory Order

3. SunE M5B explains that it has six 500 kW inverters,<sup>3</sup> and further states that each inverter is physically separate and sells its output to Duke Energy Carolinas, LLC (Duke) under a separate power purchase agreement.<sup>4</sup> SunE M5B adds that it is a wholly-owned subsidiary of SunEdison, Inc.

4. According to SunE M5B, the inverters at issue have satisfied all of the requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA)<sup>5</sup> during their entire operation, except for compliance with the filing requirement of section 292.203(a)(3).<sup>6</sup> SunE M5B argues that each inverter is exempt from the filing requirements of section 292.203(a)(3) because each inverter has a net power production capacity of less than 1 MW, and, pursuant to section 292.203(d),<sup>7</sup> facilities with a net power production capacity of 1 MW or less are exempt from the filing requirement of section 292.203(a)(3).<sup>8</sup>

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<sup>3</sup> SunE M5B characterizes each inverter as a “Facility,” such that it states that it has six 500 kW “Facilities.”

<sup>4</sup> Petition at 2.

<sup>5</sup> 16 U.S.C. §§ 796(17), 824a-3 (2012).

<sup>6</sup> 18 C.F.R. § 292.203(a)(3) (2016).

<sup>7</sup> *Id.* § 292.203(d) (2016).

<sup>8</sup> Petition at 3.

5. However, SunE M5B is concerned that the Commission may apply the one-mile rule of section 292.204(a)(2)<sup>9</sup> and find that, because each inverter is within one mile of the others, none of the inverters are eligible for the filing exemption for QFs with a net capacity of 1 MW or less. SunE M5B therefore requests that, to the extent necessary, the Commission grant a limited waiver of the filing requirement of section 292.203(a)(3) such that each inverter will be treated as a QF from the date each inverter commenced operations until May 27, 2015.

6. SunE M5B characterizes the failure to timely submit notices of self-certification for the inverters as the result of a good faith error in interpreting an ambiguous regulation, asserting that the instructions for Form 556 and its Frequently Asked Questions for QFs do not adjust the facility size for affiliated facilities located within one mile in determining whether the less-than-1-MW filing exemption of section 292.203(d) is available to a QF.<sup>10</sup> SunE M5B states that the requested waiver is consistent with the

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<sup>9</sup> Section 18 C.F.R. § 292.204(a) (2016), states:

(a) *Size of the facility*—

(1) *Maximum size.* Except as provided in paragraph (a)(4) of this section, the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

(2) *Method of calculation.*

(i) For purposes of this paragraph, facilities are considered to be located at the same site as the facility for which qualification is sought if they are located within one mile of the facility for which qualification is sought. . . .

(ii) For purposes of making the determination in clause (i), the distance between facilities shall be measured from the electrical generating equipment of a facility.

<sup>10</sup> Petition at 3 n.4.

Commission's precedent granting similar relief to other QFs.<sup>11</sup> SunE M5B asserts that the requested waiver will lighten the regulatory burden on QFs by providing most exemptions from the Federal Power Act (FPA), the Public Utility Holding Company Act of 2005,<sup>12</sup> and state laws provided to QFs under the Commission's regulations.<sup>13</sup>

7. SunE M5B states that it is not seeking waiver of FPA sections 205 and 206.<sup>14</sup> On September 6, 2016, SunE M5B made refunds to Duke and filed a refund report in Docket No. QF15-792-000 in the amount of \$230,824.42.<sup>15</sup>

### **III. Notice, Interventions, and Comments**

8. Notice of SunE M5B's filing was published in the *Federal Register*, 81 Fed. Reg. 63,478 (2016), with interventions or protests due on or before September 28, 2016. On September 8, 2016, Duke filed a motion to intervene and comments.

9. Duke states that, in May 2008, Duke entered into power purchase agreements with SunE DEC1, LLC, a subsidiary of Sun Edison, Inc., to purchase power from 31 facilities that are interconnected to Duke's transmission/distribution system. Duke states that the facilities are comprised of thirteen inverters that are owned by SunE M5B and eighteen inverters owned by SunE B9 Holdings, LLC.<sup>16</sup>

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<sup>11</sup> *Id.* at 4 (citing *Beaver Falls Mun. Auth.*, 149 FERC ¶ 61,108 (2014) (*Beaver Falls*); *OREG 1, Inc.*, 135 FERC ¶ 61,150 (2011), *reh'g denied*, 138 FERC ¶ 61,110 (2012) (*OREG 1*); *WM Renewable Energy, L.L.C.*, 130 FERC ¶ 61,268 (2010) (*WM Renewable*); *Ashland Windfarm, LLC*, 124 FERC ¶ 61,068 (2008) (*Ashland Windfarm*)).

<sup>12</sup> 42 U.S.C. § 16452 (2012).

<sup>13</sup> *Id.* at 4-5.

<sup>14</sup> *Id.* at 5 n.8.

<sup>15</sup> SunE M5B states that after wiring the refund to Duke, SunE M5B identified an error in the calculation that resulted in an overpayment of \$48.20, but that SunE M5B does not intend to request that Duke return this amount. Refund Report at 1.

<sup>16</sup> Duke Comments at 1-2.

10. Duke notes that, on September 7, 2016, the same day that SunE M5B filed the Petition in this docket, SunE M5B also filed a refund report with the Commission for refunds based on the time value of amounts received for QF sales to Duke for service provided between the date service commenced and May 27, 2015, the date that SunE M5B submitted its QF self-certification notices. Duke states that on September 6, 2016, refund payments were made to and received by Duke that were consistent with the refund report.<sup>17</sup> Duke states that it has now received the refunds which were the subject of its Motion to Intervene and Comments filed on April 29, 2016, in Docket No. EL16-58-000, et al., and informs the Commission that all of the issues it previously raised in those dockets concerning refunds from the six SunE M5B inverters have been resolved.<sup>18</sup>

#### **IV. Discussion**

##### **A. Procedural Matters**

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), Duke's timely unopposed motion to intervene serves to make Duke a party to this proceeding.

##### **B. Commission Determination**

12. 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,<sup>19</sup> 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 292.203(b)(2) (for cogeneration facilities) of the Commission's regulations.<sup>20</sup> The

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<sup>17</sup> *Id.* at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).

<sup>20</sup> 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2016). As with other changes in Commission regulations, this change was published in the *Federal Register*, 71 Fed. Reg. 7852 (2006).

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.”<sup>21</sup> Thus, our regulations require an owner or operator of a facility, whether existing or new, must, in addition to meeting other specified requirements, to 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.<sup>22</sup>

13. As noted above, the inverters began operation on December 14, 2010 and SunE M5B filed a Form 556 self-certification on May 27, 2015. The issue in this case is thus the intervening period and whether SunE M5B’s excuse for its failure to timely certify its inverters warrants waiver of the filing requirement for that period. We find that it does not, and we will deny SunE M5B’s requested waiver. SunE M5B has not justified its failure to comply with a filing requirement that has been present in the Commission’s regulations since 2006.

14. SunE M5B argues that each inverter is exempt from the filing requirements of section 292.203(a)(3) because each inverter has a net power production capacity of less than 1 MW, and, pursuant to section 292.203(d), facilities with a net power production capacity of 1 MW or less are exempt from the filing requirement of section 292.203(a)(3). However, SunE M5B states that it understands that the Commission may apply the one-mile rule of section 292.204(a)(2), thus viewing each inverter as having a 17.36 MW capacity and thus not eligible for the filing exemption for QFs with a net capacity of 1 MW or less.<sup>23</sup> SunE M5B requests that, if the Commission applies the one-mile rule of section 292.204(a)(2) here, and finds that because each inverter is within one mile of the others none of the inverters are eligible for the less-than-1-MW filing exemption of 292.203(d), the Commission grant a waiver of the filing requirement. SunE M5B states that it has complied with all “substantive” requirements for small power production QF status since the date the inverters went into service, and has operated under the assumption that they qualified as QFs since each commenced operations.<sup>24</sup>

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<sup>21</sup> Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

<sup>22</sup> 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2016).

<sup>23</sup> Petition at 2, 4.

<sup>24</sup> *Id.* at 2-3.

15. The explanation that SunE M5B cites for failing to timely file is not persuasive. The one-mile rule of section 292.204(a)(2) is a size determination which the Commission has consistently applied generally to the regulations pursuant to PURPA,<sup>25</sup> and which applies here to determining the applicability of the less-than-1-MW exemption of section 292.203(d). As SunE M5B acknowledges, each of the six inverters are within one-mile of the others, and therefore their combined net capacity is in excess of 1 MW. Therefore, the filing exemption for QFs with a net capacity of 1 MW or less does not apply here, and absent our granting the requested waiver, SunE M5B's inverters would not be considered QFs from the time they became operational until May 27, 2015, when SunE M5B filed the notice of self-certification.

16. 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>26</sup> Although SunE M5B argues that the failure to make the filing was due to an ambiguous regulation, the fact remains that, since the inverters began operation, they were 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.<sup>27</sup>

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<sup>25</sup> *Windfarms, Ltd.*, 13 FERC ¶ 61,017, at 61,031 (1980) (finding that the Commission intended the one-mile rule to apply to the regulations implementing section 210(e) of PURPA, despite the fact that they do not expressly refer to the one-mile rule.)

<sup>26</sup> *OREG 1, Inc.*, 135 FERC ¶ 61,150 at P 8.

<sup>27</sup> See, e.g., *Minwind I, LLC*, 149 FERC ¶ 61,109, at P 18 (2014) (*Minwind I*); *Beaver Falls*, 149 FERC ¶ 61,108 at P 25; *OREG 1, Inc.*, 135 FERC ¶ 61,150 at PP 8, 12.

17. SunE M5B cites several cases in support of the requested waiver.<sup>28</sup> We find that *Minwind I*, *Beaver Falls*, and *OREG 1* are particularly instructive. In each of those cases, the Commission denied waiver of the filing requirement, but nevertheless granted partial waiver to treat the facilities as QFs for the period that they were out of compliance.

18. Therefore, the Commission will grant SunE M5B the same partial waiver so that the inverters will be treated as QFs for the period that SunE M5B's inverters 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 December 2010, when the inverters began operation, until May 27, 2015, when the inverters self-certified as QFs, and as a consequence the inverters will qualify for most of the exemptions contained in sections 292.601 and 292.602 of the Commission's regulations,<sup>29</sup> excepting exemption from sections 205 and 206 of the FPA. Granting SunE M5B 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 lighten the regulatory burden on QFs, but denying exemption from sections 205 and 206 of the FPA, is consistent with the Commission's action in other cases.<sup>30</sup>

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

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<sup>28</sup> Petition at 4 n.7 (citing *Beaver Falls*, 149 FERC ¶ 61,108; *OREG 1, Inc.*, 135 FERC ¶ 61,150; *WM Renewable*, 130 FERC ¶ 61,268; *Ashland Windfarm*, 124 FERC ¶ 61,068). *Ashland Windfarm* involved atypical ownership of the petitioners' wind project companies. *Ashland Windfarm*, 124 FERC ¶ 61,068 at P 3. This case does not present a similar situation. SunE M5B's reliance on *WM Renewable* is also 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." *OREG 1, Inc.*, 135 FERC ¶ 61,150 at P 12.

<sup>29</sup> 18 C.F.R. §§ 292.601, 292.602 (2016).

<sup>30</sup> See *Minwind I*, 149 FERC ¶ 61,109 at P 22; *Beaver Falls*, 149 FERC ¶ 61,108 at P 31; *OREG 1, Inc.*, 138 FERC ¶ 61,110 at P 16; see also *Iowa Hydro, LLC*, 146 FERC ¶ 61,207, at P 14 (2014); accord *CII Methane Management IV, LLC*, 148 FERC ¶ 61,229, at P 5 (2014); *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).

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 FPA when waiver of the 60-day prior notice requirement is denied. With respect to sales for resale made without Commission authorization under FPA section 205, the Commission stated it would require the utility to refund to its customers: (1) the time value of the revenues collected, calculated pursuant to section 35.19a of the regulations,<sup>31</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>32</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 the market-based rate or the avoided cost rate.<sup>33</sup> 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, the inverters have been selling pursuant to negotiated rates, satisfying the second component of the two-part refund methodology, but SunE M5B remains subject to the first component, e.g., the time-value refund obligation.

20. For any monies collected before the effective date, SunE M5B must refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization.<sup>34</sup> SunE M5B states that it is not seeking waiver of FPA sections 205 and 206.<sup>35</sup> As a result, on September 6, 2016,

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<sup>31</sup> 18 C.F.R. § 35.19a (2016).

<sup>32</sup> *Prior Notice*, 64 FERC ¶ 61,139 at 61,980.

<sup>33</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 Management IV, LLC*, 148 FERC ¶ 61,229 at P 4.

<sup>34</sup> *Minwind I*, 149 FERC ¶ 61,109 at P 24; *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,150-51, *reh'g denied*, 99 FERC ¶ 61,320 (2002).

<sup>35</sup> Petition at 5 n.8.

SunE M5B made refunds to Duke in the amount of \$230,824.42<sup>36</sup> in Docket No. QF15-792-000.

The Commission orders:

The request for waiver is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner Honorable is concurring with a separate statement attached.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>36</sup> SunE M5B states that after wiring the refund to Duke, SunE M5B identified an error in the calculation that resulted in an overpayment of \$48.20, but that SunE M5B does not intend to request the Duke return this amount. Refund Report at 1.

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QF15-792-001

(Issued October 20, 2016)

HONORABLE, Commissioner, *concurring*:

In today's order, the Commission directed SunE M5B to refund the time value of the revenues collected during periods of SunE M5B's noncompliance with the Commission's QF requirements, consistent with the Commission's long-standing policy. I support that policy because it encourages timely compliance, but write separately to express concern with how time value refunds are calculated for generation resources.

Although I agree with the Commission's decision today, I believe it is appropriate to revisit how we establish a refund floor for time value refunds. The Commission establishes a refund floor for time value refunds to protect entities by ensuring that they will not be forced to operate at a loss. For generation resources, the Commission determines this floor by considering only variable operation and maintenance (O&M) costs. Thus, a generation resource is responsible to make time value refunds only to the extent such refunds would not recoup the resource's variable O&M costs. The Commission has taken a different approach in establishing refund floors for non-generation resources. In Opinion No. 540, the Commission explained the reason for the different approaches:<sup>1</sup>

The Commission distinguished between the time value refund methodology that applies in cases involving power sales . . . in which the utility typically incurs substantial fuel and other O&M costs that vary with the amount of energy produced or transmitted, and the time value refund methodology that has been used and accepted in numerous generator interconnection and transmission line ownership cases, where the costs incurred are sunk investment in the transmission system or fixed O&M costs that do not vary depending on the amount of energy produced or transmitted . . .

As a result, the Commission's time value refund methodology does not distinguish

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<sup>1</sup> *Opinion No. 540*, 153 FERC ¶ 61,185, at P57 (2015).

between thermal and non-thermal generation resources (e.g., renewable resources), even though, as discussed below, non-thermal generation resources have levels of variable and fixed O&M costs more akin to that of interconnection customers and transmission owners.

The levels of variable and fixed O&M costs for renewable resources, including the solar resources at issue here, are more similar to that of interconnection customers and transmission owners than thermal generation resources. For example, according to a 2013 EIA report, a photovoltaic resource generally has \$0.00/MWh variable O&M costs and \$27.75/kW-year fixed O&M costs.<sup>2</sup> In contrast, a conventional natural gas combined-cycle generator generally has \$3.60/MWh variable O&M costs (excluding fuel) and \$13.17/kW-year fixed O&M costs. Adding fuel to the natural gas-fired generator's variable O&M costs, which the Commission uses to determine a refund floor, would further increase the variable O&M figure.<sup>3</sup>

Although not specifically at issue today, I remain sensitive to concerns that our policies with respect to generation resources might result in entities with higher fixed costs having to pay larger refunds because of the nature of their cost structure and not their conduct. Our industry has seen tremendous evolution and renewable generation resources have been reliably supplying electricity for many years. We must continually evaluate our policies to ensure they keep pace with changes in the markets we regulate. The Commission has properly considered fixed costs in the transmission context. I believe we should stand ready to apply those principles to similarly situated entities.

Accordingly, I respectfully concur.

  
Colette D. Honorable  
Commissioner

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<sup>2</sup> See [https://www.eia.gov/forecasts/capitalcost/pdf/updated\\_capcost.pdf](https://www.eia.gov/forecasts/capitalcost/pdf/updated_capcost.pdf) at Table 1.

<sup>3</sup> See [https://www.eia.gov/forecasts/aeo/pdf/electricity\\_generation.pdf](https://www.eia.gov/forecasts/aeo/pdf/electricity_generation.pdf) at Table 1b.