

157 FERC ¶ 61,046
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Bright Light Capital, LLC

Docket Nos. EL16-43-000
QF16-259-001

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR WAIVER

(Issued October 20, 2016)

1. On March 3, 2016, as amended on May 18, 2016, Bright Light Capital, LLC (Bright Light) filed a request for a declaratory order requesting a limited waiver from the filing requirements of section 292.203(a)(3) of the Commission's regulations¹ applicable to small power production qualifying facilities (QFs), for the period from April 15, 2006 until December 21, 2015, the date Bright Light self-certified its facilities as QFs. The request for waiver is granted in part and denied in part as discussed below.

I. Petition

2. Bright Light states that, on July 7, 2006, it purchased a 1.5 MW wind QF in Wilmington, Minnesota. Bright Light states that the previous owners had not filed the required QF certification, and that Bright Light itself was unaware of the filing requirement. Bright Light states that it learned of its noncompliance in 2015 when it tried to sell the facility.² Bright Light requests that the Commission grant waiver of the QF filing requirement and not require Bright Light to pay time value refunds. Bright Light claims it is likely unable to pay the refunds and likely will file for bankruptcy if it must pay them.³

¹ 18 C.F.R. § 292.203(a)(3) (2016).

² Bright Light March 3 Petition at 3.

³ *Id.* at 5, 8, 10; *see also* May 18 Amended Petition at 3, 4.

3. According to Bright Light's calculation, the time value revenues amount to \$499,847.43 based on revenues of \$2,238,308 earned between July 2006 and December 2015.⁴ Bright Light states that, as of December 31, 2015, its balance sheet shows total assets valued at \$574,957.82.⁵ Bright Light claims that \$475,000 of that is an intangible asset (goodwill). According to Bright Light, the only liquid asset it has is \$183,730.83 in cash. Bright Light further explains that the highest sale price offer it received in 2015 was \$500,000, but that Bright Light would have to spend approximately \$100,000 as an investment banking fee to complete such a sale.⁶ Bright Light provides its non-audited income statement for 2015, which shows net income for the year of \$60,518.07.⁷ According to Bright Light, "[if] this income level continues, the time value refund calculated by Bright Light would account for all of the company's net income for approximately the next eight years."⁸ Moreover, Bright Light claims that that projection is optimistic, as its sales are made pursuant to a power purchase agreement that expires in five years and it is unclear whether Bright Light will be able to secure a new agreement at the same price after that date. Finally, Bright Light explains that it has incurred a net loss of approximately \$1.1 million over the period of noncompliance.⁹

4. Bright Light recognizes that its late filing is similar to the late filing presented in *Minwind*,¹⁰ and emphasizes that, like *Minwind*, it likely will file for bankruptcy if it must pay the time value refund.¹¹ Bright Light argues that requiring a time value refund would be unduly burdensome and not commensurate with the harm caused. Bright Light requests that the Commission reevaluate the reasonableness of a time value refund in this instance.

⁴ *Id.* at 2.

⁵ *Id.* at 3.

⁶ *Id.* at 4.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ Bright Light, however, counts fixed costs as well as its variable costs in making this assessment. *Id.* at 2.

¹⁰ *Minwind I, LLC*, 149 FERC ¶ 61,109 (2014) (*Minwind*).

¹¹ Bright Light March 3 Petition at 8.

5. Bright Light acknowledges that time value refunds could protect utilities that purchase output from resources based on the assumption that they qualify as QFs. However, Bright Light contends that, in the majority of cases, the purchasing utility waives its right to receive refunds. Furthermore, Bright Light asserts that a utility could easily verify whether a QF was actually certified.

6. Bright Light suggests that “[a]n alternative to time value refunds and to the extent the Commission deems it necessary, the Commission could treat Bright Light’s failure to file a certification for what it is, an inadvertent violation of the Commission’s regulations.” On that basis, Bright Light suggests that the Commission could refer the matter to the Office of Enforcement for determination of an appropriate penalty, which penalty can then be refunded to the utility purchaser of Bright Light’s output if deemed appropriate. In that context, Bright Light states that the Commission’s penalty guidelines expressly permit Bright Light’s financial condition to be taken into consideration.¹²

II. Notice and Interventions

7. Notice of Bright Light’s filing was published in the *Federal Register*, 81 Fed. Reg. 14,436 (2016), with interventions or protests due on or before April 11, 2016. Notice of Bright Light’s amended filing was published in the *Federal Register*, 81 Fed. Reg. 33,522 (2016), with interventions or protests due on or before June 15, 2016. None was filed.

III. Discussion

8. 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. 671,¹³ 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.¹⁴ The

¹² *Id.* at 10 (Bright Light cites *Revised Policy Statement on Penalty Guidelines*, 132 FERC ¶ 61,216, at P 192 (2010); *Penalty Guidelines* § 1C3.2(b); *Richard Silkman*, 144 FERC ¶ 61,164, at P 94 (2013)).

¹³ *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).

¹⁴ 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.”¹⁵ Thus, our regulations require that an owner or operator of a facility, whether existing or new, must, in addition to meeting other specified requirements, 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.¹⁶

9. 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.”¹⁷ Although Bright Light characterizes its violation of the certification requirement as inadvertent and argues that it purchased the facility unaware that it had not been certified, Bright Light had its own obligation to ensure the facility was in compliance after the acquisition. The fact remains that for more than eight years the facility was 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.¹⁸

10. Bright Light avers that its factual background is similar to *Minwind*, and we agree. Accordingly, we find *Minwind*, along with *Beaver Falls* and *OREG 1*, to be instructive. In those instances the Commission denied waiver of the filing requirements, nevertheless granting partial waiver to treat the facilities as QFs for the period that they were out of compliance.

11. Therefore, consistent with our precedent, the Commission will grant Bright Light partial waiver so that Bright Light’s facility will be treated as a QF for the period that it operated out of compliance with the Commission’s QF certification filing requirement, i.e., from July 7, 2006 when Bright Light purchased the facility, until December 21, 2015, when Bright Light self-certified the facility as a QF. As a consequence, Bright Light will qualify for most of the exemptions contained in sections 292.601 and 292.602

¹⁵ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 81.

¹⁶ 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2) (2016).

¹⁷ *OREG 1, Inc.*, 135 FERC ¶ 61,150, at P 8 (2011), *reh’g denied*, 138 FERC ¶ 61,110 (2012) (*OREG 1*).

¹⁸ *See, e.g., Minwind*, 149 FERC ¶ 61,109 at P 18; *Beaver Falls Mun. Auth.*, 149 FERC ¶ 61,108, at P 25 (2014) (*Beaver Falls*); *OREG 1*, 135 FERC ¶ 61,150 at PP 8, 12.

of the Commission's regulations,¹⁹ excepting exemption from sections 205 and 206 of the Federal Power Act (FPA). Granting Bright Light 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.²⁰

12. 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 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 our regulations,²¹ 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.²² 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.²³ 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, Bright Light has been selling pursuant to a negotiated rate, i.e., avoided cost rate,

¹⁹ 18 C.F.R. §§ 292.601, 292.602 (2016).

²⁰ See *Minwind*, 149 FERC ¶ 61,109 at P 22; *Beaver Falls*, 149 FERC ¶ 61,108 at P 31; *OREG 1*, 135 FERC ¶ 61,150 at P 13; see also *Iowa Hydro, LLC*, 146 FERC ¶ 61,207, at P 14-15 (2014); *accord CII Methane Management IV, LLC*, 148 FERC ¶ 61,229, at P 5 (2014); *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).

²¹ 18 C.F.R. § 35.19a (2016).

²² *Prior Notice*, 64 FERC ¶ 61,139 at 61,980.

²³ *Minwind*, 149 FERC ¶ 61,109 at P 23; see *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 32 (2007); see also *OREG 1, Inc.*, 135 FERC ¶ 61,150; *CII Methane Management IV, LLC*, 148 FERC ¶ 61,229, at P 4 (2014).

satisfying the second component of the two-part refund methodology, but Bright Light remains subject to the first component, e.g., the time value refund obligation.

13. We, therefore, require Bright Light to refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization, from July 7, 2006 when it purchased the facility, to December 21, 2015, the date it filed its self-certification, calculating interest through the date Bright Light actually pays the time-value refund.²⁴ We are mindful of Bright Light's concerns regarding its financial condition, and note that Bright Light may file a request to pay the time-value refund obligation through an installment plan over a specified period of time, calculating interest through the date Bright Light makes its first refund payment.

The Commission orders:

(A) The requests for waiver are hereby granted in part and denied in part, as discussed in the body of this order.

(B) Within 30 days of the date of this order, Bright Light is hereby directed to make refunds of the time value of the revenues collected during the periods of noncompliance with the Commission's requirements for QF status.

(C) Within 30 days of the refunds made pursuant to Ordering Paragraph (B), Bright Light shall file a refund report with the Commission.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁴ *Minwind*, 149 FERC ¶ 61,109 at P 24; *El Paso Electric Co.*, 101 FERC ¶ 61,276 (2002), *reh'g denied*, 105 FERC ¶ 61,131 (2003).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Bright Light Capital, LLC

Docket No. EL16-43-000
QF16-259-001

(Issued October 20, 2016)

HONORABLE, Commissioner, *concurring*:

In today's order, the Commission directed Bright Light to refund the time value of the revenues collected during periods of Bright Light'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:¹

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 . . .

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

As a result, the Commission's time value refund methodology does not distinguish 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 wind 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, an onshore wind resource generally has \$0.00/MWh variable O&M costs and \$39.55/kW-year fixed O&M costs.² 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.³

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

² See https://www.eia.gov/forecasts/capitalcost/pdf/updated_capcost.pdf at Table 1.

³ See https://www.eia.gov/forecasts/aeo/pdf/electricity_generation.pdf at Table 1b.