

157 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Saguaro Power Company, A Limited Partnership

Docket Nos. EL16-78-001
QF90-203-008

ORDER DENYING REHEARING

(Issued December 15, 2016)

1. In a September 30, 2016 order¹ the Commission partially denied Saguaro Power Company, A Limited Partnership's (Saguaro) request for waiver of the cogeneration qualifying facility (QF) operating and efficiency standards of the Commission's regulations² for calendar years 2016 and 2017. The September Order denied Saguaro the waiver insofar as it would have provided an exemption from rate regulation under sections 205 and 206 of the Federal Power Act (FPA),³ pursuant to section 292.601 of the Commission's regulations⁴ and thus required Saguaro to abide by the reduced rate provision it had agreed to in the power purchase agreement (PPA) between Saguaro and Nevada Power Company (Nevada Power).

2. Saguaro seeks rehearing of the September Order, arguing that the Commission erred in partially denying its requested waiver of the Commission's cogeneration operating and efficiency standards. As explained below, we disagree and deny Saguaro's request for rehearing.

I. Background

3. Saguaro owns and operates a 105 MW topping-cycle cogeneration facility near Henderson, Nevada. Saguaro states that it has operated as a QF since 1990. Saguaro also

¹ *Saguaro Power Co., A Ltd P'ship*, 156 FERC ¶ 61,247 (2016) (September Order).

² 18 C.F.R. § 292.205(a) (2016).

³ 16 U.S.C. §§ 824d, 824e (2012).

⁴ 18 C.F.R. § 292.601 (2016).

has authority to sell electric energy, capacity and ancillary services at market-based rates.⁵

4. In its original petition Saguaro stated that, as the result of losing its primary steam host (the chlor alkali processing operations of Saguaro's unaffiliated thermal host, Pioneer Americas LLC d/b/a Olin Chlor Alkali Products (Olin)), it would be unable to meet the Commission's operating and efficiency standards for cogeneration QFs. Saguaro further stated that, prior to 2016, the amount of steam that Olin purchased had been sufficient for Saguaro to continuously meet the operating and efficiency standards for 25 years.⁶ According to Saguaro, Olin permanently shut down its chlor alkali facility on March 31, 2016, and Olin stopped taking steam from Saguaro on April 22, 2016. Saguaro noted that it also sells steam to Ocean Spray Cranberries, Inc. (Ocean Spray). However, Saguaro stated that the amount of steam purchased by Ocean Spray is insufficient for Saguaro to meet the Commission's operating and efficiency standards. Under the PPA between Saguaro and Nevada Power, if Saguaro loses its QF status, its energy and capacity rates are to be reduced to 80 percent of the otherwise applicable contract rate.⁷

5. In June 2016, Saguaro requested waiver of the operating and efficiency standard requirements for 2016 and 2017. In the September Order, the Commission partially denied waiver of the operating and efficiency standards of the Commission's QF

⁵ *Saguaro Power Co., A Ltd. P'ship*, Docket Nos. ER07-486-000 and ER07-486-001 (Mar. 30, 2007) (delegated letter order).

⁶ Saguaro June 2016 Petition at 4.

⁷ Section 1.8.4 of the Saguaro PPA states:

[i]f Seller obtained [QF] status prior to Firm Operation and subsequently lost such status for reasons beyond Seller's reasonable control, Seller shall be paid for Capacity delivered to [Nevada Power], during the periods that Seller did not have [QF] status, at Capacity rates equal to eighty (80) percent of the Capacity rates otherwise agreed upon by the Parties.

Section 1.9.4 of the Saguaro PPA states:

[i]f Seller obtained [QF] status prior to Firm Operation and subsequently lost such status for reasons beyond Seller's reasonable control, Seller shall be paid for Energy delivered to [Nevada Power], during the periods that Seller did not have [QF] status, at Energy rates equal to eighty (80) percent of the Energy rates otherwise agreed upon by the Parties.

regulations.⁸ Specifically, the Commission did not allow exemption from rate regulation under sections 205 and 206 of the FPA.⁹ As a result, the Commission found that the PPA, with its reduced rates, controls the rates. The September Order explained that the PPA explicitly considered the possibility that Saguaro could be out of compliance with the requirements for QF status and provided for a lower rate during the periods of noncompliance.¹⁰ Under the PPA, once Saguaro locates a replacement host and is again in compliance with the operating and efficiency standards, Saguaro would then be entitled to the full avoided cost rate.

II. Request for Rehearing

6. Saguaro argues that the September Order was a material departure from precedent without prior notice or an opportunity to comment. Saguaro reiterates the argument made in its June 2016 filing that, in *Las Vegas Cogen*, the Commission granted a waiver under similar circumstances, i.e., failure to satisfy the efficiency standard as a result of a one-time unanticipated event outside of the control of the operator of the cogeneration facility, even though the parties had a similar provision reducing the avoided cost rate by twenty percent if Las Vegas Cogen lost its QF status.¹¹ Saguaro argues that the similar contract issue was raised in *Las Vegas Cogen* and was not merely “lurking in the record,” as the September Order maintains. Saguaro contends that Nevada Power protested the requested waiver in *Las Vegas Cogen*, arguing that the contractual provision provided for the reduced rate. According to Saguaro, the Commission’s order was not silent on the issue but, instead, summarized and rejected that argument, and the Commission should have followed that precedent here.¹²

⁸ 18 C.F.R. § 292.205 (2016).

⁹ 18 C.F.R. § 292.601 (2016).

¹⁰ September Order, 156 FERC ¶ 61,247 at P 17.

¹¹ *Las Vegas Cogeneration Ltd. P’ship*, 117 FERC ¶ 61,309, at PP 13-14 (2006) (*Las Vegas Cogen*).

¹² Saguaro Rehearing Request at 8 (citing September Order, 156 FERC ¶ 61,247 at P 18 (citing *PJM Interconnection and Potomac-Appalachian Transmission Highline*, 153 FERC ¶ 61,308, at P 13 (2015); *Gas Transmission NW. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (citing *Alabama Power v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993)); see also *SFPP*, Opinion No. 522-A, 150 FERC ¶ 61,097, at P 54 (2015) (citing, *inter alia Nevada Power Co.*, 113 FERC ¶ 61,007, at 61,013-14 (2005); see also *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“[q]uestions which merely lurk in the record... are not to be considered as having been so decided as to constitute precedents”)).

7. Saguario also argues that the Commission improperly relied upon *Badger Creek* in partially denying Saguario's waiver request.¹³ Saguario asserts that, in *Badger Creek*, the Commission found that the generator no longer had a steam host such that it was no longer producing both electrical and useful thermal energy and that the generator was not seeking a replacement host so its non-compliance was not for a limited duration.¹⁴ Saguario argues that, unlike the circumstances in *Badger Creek*, it still has a current steam host and it is still producing useful thermal energy. Furthermore, Saguario states that it is seeking a replacement host and intends to continue to operate as a cogeneration facility.¹⁵

8. Saguario argues that the September Order applies the non-QF rate to a QF that has been granted waiver of Commission's regulations. Saguario contends that the September Order alters the PPA by expanding the non-QF rate provision to include those time periods that Saguario has a waiver of QF standards.¹⁶

9. Saguario also asserts that, until the September Order, it was not subjected to sections 205 and 206 of the FPA and to apply the rate earlier than the date of that order would impose retroactive refunds.¹⁷ Saguario adds that it will not know whether it will be in compliance with the Commission's operating and efficiency standards until after the end of the calendar year. Saguario argues that, if the year-end year calculations indicate that it met the Commission's standards, then the waiver is not necessary and the reduced rate in the PPA would not apply. Furthermore Saguario argues that, if the facility was only out of compliance for a few months, then the reduced rate in the PPA should only apply to those time periods during which it was out of compliance.

10. Saguario argues that the Commission has previously granted waivers on a monthly basis for the time period that the QF was out of compliance and not for the entire calendar year.¹⁸ Saguario states that, until it can first determine when in 2016 it ceased to comply with the Commission's operating and efficiency standards, it cannot determine the periods during which either the full avoided cost rate or the reduced rate would apply.

¹³ *Badger Creek Ltd.*, 148 FERC ¶ 61,074, at PP 12-13 (2014) (*Badger Creek*).

¹⁴ Saguario Rehearing at 12-14 (citing *Badger Creek*, 148 FERC ¶ 61,074).

¹⁵ *Id.*

¹⁶ *Id.* at 14-15.

¹⁷ *Id.* at 18.

¹⁸ Saguario Rehearing at 19 (citing *Brush Cogeneration Partners*, 117 FERC ¶ 61,043, at P 11 (2006) (*Brush Cogen*)).

11. The Nevada Bureau of Consumer Protection (Nevada Bureau) and Nevada Power filed answers to Saguario's rehearing request. Saguario responded, arguing that Nevada Bureau and Nevada Power's answers should be rejected as improper, and in the event that they are not rejected, answering Nevada Bureau and Nevada Power's answers.

III. Discussion

12. Rule 713(d) of the Commission's Rules of Practice and Procedure provides that the Commission will not permit answers to requests for rehearing,¹⁹ and accordingly the Commission will reject the Nevada Bureau and Nevada Power answers, and correspondingly reject Saguario's response to the answers.

13. The Commission's regulations provide that, to be a qualifying facility, a topping-cycle facility must meet certain specified operating and efficiency standards; failure to meet those standards means that a facility does not qualify.²⁰ The Commission's regulations are permissive, however, expressly providing that the Commission *may* waive the operating and efficiency standards.²¹ The Commission has considered a number of factors in deciding whether to grant waiver of its operating and efficiency standards, including: the limited duration of the requested waiver; whether non-compliance was confined to the start-up and testing stage and whether further waivers would therefore be unnecessary; the timeliness of the submission of the waiver request; whether non-compliance was the result of an unexpected and one-time operations event outside the applicant's control; whether the request was intended to remedy specific problems associated with an innovative technology; the amount of opposition, if any; and, whether granting waiver would fulfill PURPA's goal of encouraging cogeneration and the development of alternative generation technologies.

14. Saguario's petition explained that it expected that its facility would be unable to meet the Commission's operating and efficiency standards for all or part of 2016 and 2017. Thus, Saguario sought a waiver of those standards so that, essentially, it could continue to receive the benefits of QF status during periods when it did not qualify as a QF.

15. In *Las Vegas Cogen*, as Saguario argues, the Commission did grant waiver under similar circumstances. But, while also identifying in the summary of the parties' arguments a similar argument concerning the rate, i.e., the existence of a PPA with a provision calling for a reduced rate if the facility fell out of compliance, the Commission's discussion -- as distinct from the summary of the parties'

¹⁹ 18 C.F.R. § 385.713(d) (2016).

²⁰ 18 C.F.R. § 292.205(a) (2016).

²¹ 18 C.F.R. § 292.205(c) (2016).

arguments -- neither mentioned nor relied upon this particular argument. Thus, the holding was silent as to whether or not the Commission found the argument persuasive or even relevant.

16. As the courts have recognized in an analogous circumstance, “FERC’s acceptance of a pipeline’s tariff sheets does not turn every provision of the tariff into ‘policy’ or ‘precedent,’” especially when the Commission later takes the opportunity to clarify its policy.²² When the Commission granted waiver in the earlier *Las Vegas Cogen* order without referencing in its analysis the parties’ PPA, the Commission cannot be held to have adopted the *Las Vegas Cogen* order’s approach to that argument as precedent or policy.

17. In contrast, in the September Order, the Commission relied upon the approach taken in the later *Badger Creek* order that partially denied waiver. And so, here, consistent with that later *Badger Creek* order, the Commission partially denied waiver. The Commission found that the PPA explicitly considered the possibility that Saguaro could be out of compliance with the requirements for QF status and thus not be exempt from FPA sections 205 and 206, and the PPA provided for a lower rate during the periods of noncompliance. Granting Saguaro its requested waiver in its entirety, which was opposed by both Nevada Bureau and Nevada Power, would allow Saguaro to continue collecting the full avoided cost rate instead of the lower out-of-compliance rate contained in the PPA. Saguaro recognized the risk that it might not be able to maintain QF status, and when negotiating the PPA, Saguaro limited its risk by ensuring that it would at least receive eighty percent of the avoided cost rate for those time periods when it was noncompliant. By partially denying waiver and making Saguaro subject to FPA sections 205 and 206, the September Order not only follows the later *Badger Creek* order, but honors the contract negotiations between the parties.

18. In sum, the Commission denies Saguaro’s request for rehearing.

19. The Commission agrees, however, that Saguaro will need the yearly data available after the end of 2016 in order to accurately assess whether Saguaro met the operating and efficiency standards for 2016. If, after the end of the calendar year, Saguaro finds that it met the operating and efficiency standards for calendar year 2016, then Saguaro did not need the waiver, and remained a QF entitled to an avoided cost rate for the entire year.

²² *Gas Transmission Nw. Corp. v. FERC*, 504 F.3d 1318, 1320 (D.C. Cir. 2007) (citing *Alabama Power v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993)). See also *SFPP, L.P.*, Opinion No. 522-A, 150 FERC ¶ 61,097, at P 54 (2015) (citing, *inter alia*, *Nevada Power Co.*, 113 FERC ¶ 61,007, at 61,013-14 (2005); *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”)).

20. However, if, in reviewing the data, Saguaro determines that it only met the operating and efficiency standards for part of the year, then it would be entitled to the full avoided cost rate for those months that it met the operating and efficiency standards. For example, if in January 2017, Saguaro determines that it met the operating and efficiency standards through July 2016, the lower 80 percent rate found in the PPA would apply only for those months that Saguaro was out of compliance. The Commission's regulations provide for QF status to be evaluated, in the first instance, on a yearly basis, however, the regulations do not require the imposition of a loss of QF status for the entire year. In *Brush Cogen*, the Commission granted a waiver of the operating and efficiency standards for a partial year, September through December 2006, since the facility met the operating and efficiency standards for January through August 2006.²³ We will follow that same approach here and, consequently, the effect of the loss of QF status will be determined on a monthly basis.²⁴

The Commission orders:

Saguaro's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²³ *Brush Cogen*, 117 FERC ¶ 61,043 at PP 10-11 (Brush Cogen filed a waiver request when it received notice that its thermal host was ending its lease as of August 31, 2006, and it would be unable to comply with Commission's operating and efficiency standards for the remainder of calendar year 2006. The Commission granted the waiver for the remainder of 2006, September through December).

²⁴Even if Saguaro finds it was out of compliance prior to the September Order, the refunds would not violate prohibition against retroactive ratemaking since the PPA containing the reduced rate provision is on file with the Commission. *NV Energy, Inc.*, Docket No. ER13-725-000 (Feb. 15, 2013) (delegated letter order).