

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D C 20426

OFFICE OF THE GENERAL COUNSEL

March 5, 2014

Julia E. Sullivan, Esquire
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, N.W.
Washington, DC 20036

Re: General Counsel Opinion Letter -- NRG Power Midwest, LP

Dear Ms. Sullivan:

By later dated January 27, 2014, you requested, on behalf of NRG Power Midwest, LP (NRG), an opinion from the General Counsel of the Federal Energy Regulatory Commission. You asked that I conclude that:

1. Under Section 292.203 of the Commission's regulations, as amended by Order No. 671, as of April 16, 2006, the owner or operator of a facility could not claim [qualifying facility (QF)] status for a facility unless and until it filed a notice of self-certification or the Commission granted an application for Commission certification of the QF status of the facility.
2. Any actual or constructive notice on the Commission's part of the characteristics of a facility provided through separate filings in other proceedings, including, for example, a hydroelectric licensing proceeding, is insufficient to confer QF status.
3. A properly completed, filed, and served notice of self-certification on Form No. 556 is effective prospectively from the date of filing. If the owner or operator of a facility desires to claim QF status for the facility for a period that precedes the date of the self-certification filing, it must request waiver of the filing requirement in a petition for declaratory order.

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Including a retroactive “expected effective date” in a self-certification on Form No. 556 is not sufficient to cure a failure to timely file the self-certification.¹

My analysis of the Commission’s regulations and precedent leads me to the following conclusions on the issues that you presented. First, the owner, operator, or representative of a small power production facility with a net power production capacity over 1 MW may not claim QF status after April 16, 2006, unless and until it files a notice of self-certification, the Commission grants an application for Commission certification of the QF status of the facility, or the Commission grants waiver of the requirement that the QF make a filing with the Commission. Second, actual or constructive notice of the characteristics of a facility outside of certification proceedings, such as in a hydroelectric licensing proceeding, is insufficient to confer QF status upon that facility. Third, after April 16, 2006, a complete, filed, and served notice of self-certification on Form 556 is effective prospectively from the date of filing, not retroactively prior to the date of filing, unless the Commission grants waiver in a declaratory order proceeding. The listing of an “expected effective date” in a self-certification on Form 556, absent the Commission’s granting waiver of the filing requirement, does not trigger retroactive QF self-certification.

Applicable Law

When the Commission first implemented section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 796(17)-(22) (2012), it provided prospective QF facilities the option of either self-certifying QF status or seeking Commission certification of QF status. Self-certifying entailed filing a notice with the Commission that the facility met the requirements for QF status. This self-certification notice “was purely for informational” and “record keeping” purposes, and the question of whether a facility met the requirements for QF status was not dependent on that filing.²

In Order No. 671, however, the Commission stated that it did “not believe that a facility should be able to claim QF status without having made a filing with this

¹ Request for Opinion at 6-7.

² *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, FERC Stats. & Regs. ¶ 31,306, at PP 7-8 (2010); *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 81, *clarified*, 114 FERC ¶ 61,128, *order on reh’g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219, at P 19 (2006).

Commission.”³ The Commission therefore instituted an express requirement that a facility claiming QF status must either self-certify or seek Commission certification. The Commission did not limit this requirement to new QFs: it mandated that, in order to continue claiming QF status, even existing facilities that had never filed notices of self-certification or sought Commission certification must self-certify or seek Commission certification within sixty days of Order No. 671’s publication in the *Federal Register* (i.e., April 16, 2006).⁴ Subsequently, in Order No. 732, the Commission explicitly declared its authority to exempt a facility from the self-certification or Commission certification filing requirement upon a showing of good cause.⁵

As a result of Order Nos. 671, 671-A, and 732, the Commission’s regulations implementing PURPA now define a small power production QF as a facility that (1) meets maximum size criteria specified in 18 C.F.R. § 292.204(a), (2) meets the fuel use criteria specified in 18 C.F.R. § 292.204(b), and (3) has either filed a notice of self-certification with the Commission pursuant to 18 C.F.R. § 292.207(a) or has filed with the Commission an application for Commission certification pursuant to 18 C.F.R. § 292.207(b)(1).⁶ Both notices of self-certification under 18 C.F.R. § 292.207(a) and applications for Commission certification under 18 C.F.R. § 292.207(b)(1) require that the owner, operator, or representative of the facility file a properly completed Form 556 with the Commission.⁷ A facility claiming QF status must also serve a copy of its notice of self-certification or its application for Commission certification “upon each electric utility with which the facility expects to interconnect, transmit, or sell electric energy to, or purchase supplementary, standby, back-up, or maintenance power from, and the State

³ Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 82.

⁴ *Id.* Order No. 671 was published in the *Federal Register* on February 15, 2006. See 71 Fed. Reg. 7852 (Feb. 15, 2006). Sixty days after February 15, 2006 was April 16, 2006.

⁵ Order No. 732, FERC Stats. & Regs. ¶ 31,306, at P 33. The Commission also separately exempted facilities with a net power production capacity of 1 MW and below from the certification requirement. *Id.* P 34.

⁶ 18 C.F.R. § 292.203(a)(1)-(3) (2013).

⁷ See *id.* § 292.207(a)(1) (“The qualifying facility status of an existing or a proposed facility that meets the requirements of § 292.203 may be self-certified by the owner or operator of the facility or its representative *by properly completing a Form No. 556 and filing that form with the Commission . . .*” (emphasis added)); *id.* § 292.207(b)(2) (an application for Commission certification under section 292.207(b)(1) “must include a properly completed FERC No. 556”).

regulatory authority of each state where the facility and each affected electric utility is located.”⁸

A facility with a net power production capacity over 1 MW that desires to be certified as a QF is only exempt from the necessity of self-certification or Commission certification if the Commission waives the certification requirement upon a showing of good cause.⁹ To obtain a waiver of the certification requirement for good cause, an applicant “must file a petition for declaratory order describing in detail the reasons waiver is being sought.”¹⁰

Opinion

Effective April 16, 2006, Order No. 671 (as endorsed in Order No. 732), along with section 292.203 of the Commission’s regulations, require that the owner, operator, or representative of a small power production facility with a net power production capacity over 1 MW that desires to be certified as a QF must file a notice of self-certification or an application for Commission certification, using Form 556, as a prerequisite to claiming QF status.¹¹ The owner, operator, or representative of an existing small power production facility with a net power production capacity over 1 MW that desires to be certified as a QF but that has failed to file a complete Form 556 with the Commission and to properly serve it upon the relevant electric utility and state regulatory authority by April 16, 2006, may not claim QF status as of that date, unless it otherwise successfully obtains waiver of the filing requirements from the Commission through a petition for declaratory order.¹²

A notice of self-certification must include a properly completed Form 556;¹³ the Commission’s precedent and regulations do not provide for the Commission instead to take actual or constructive notice of a facility’s characteristics as described in other proceedings, such as hydroelectric licensing proceedings. Information provided in other

⁸ *Id.* § 292.207(c)(1).

⁹ *Id.* § 292.203(d)(2).

¹⁰ *Id.*

¹¹ *See id.* § 292.203(a)(3), (d)(1); Order No. 732, FERC Stats. & Regs. ¶ 31,306 at P 34 (exempting QFs with net power production capacity under 1 MW); Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 82.

¹² 18 C.F.R. § 292.203(d)(2) (2013).

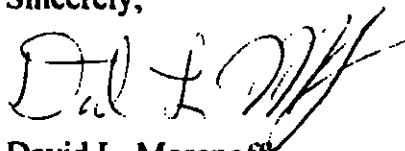
¹³ *Id.* § 292.207(a)(1).

proceedings is not a substitute for filing Form 556. Similarly, should an owner, operator, or representative of an existing facility fail to file a notice of self-certification or apply for Commission certification by April 16, 2006, any Form 556 filed by that applicant in a self-certification after that date would only be valid prospectively.

A facility that desires to be certified as a QF may, however, seek waiver of the filing requirement for good cause shown by filing a petition for declaratory order that describes the reasons why waiver is being sought, including why certification should apply retroactively.¹⁴ Listing an "expected effective date" in a notice of self-certification, absent a grant of waiver, does not establish retroactive certification.

As provided by section 384.104(a) of the Commission's regulations, the opinions expressed herein are mine as the Acting General Counsel, and they neither bind, nor necessarily reflect the views of, the Commission.

Sincerely,



David L. Morenoff
Acting General Counsel

¹⁴ See *id.* § 292.203(d)(2).

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