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# Renewable Projects Must Keep Up With FERC Filings

By **Seth Lucia and Catherine McCarthy** (August 12, 2019, 2:05 PM EDT)

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Recent Federal Energy Regulatory Commission orders remind industry participants that even small renewable energy projects create the potential for regulatory challenges, particularly if required notices and/or rate schedules are not submitted to FERC on a timely basis.

For example, the owners of solar and wind generation facilities that qualify as small power production qualifying facilities, or QFs, pursuant to the Public Utility Regulatory Policies Act of 1978, or PURPA, can be subject to refund obligations and possible civil penalties if they do not confirm the applicability or continued applicability of regulatory exemptions — or, if required, file a market-based rate schedule with FERC.

Additionally, the owners of older QFs should remember that rolling off a power purchase agreement, or PPA, may trigger rate schedule filing requirements. It is important to note that the triggers for certain FERC requirements are frequently considered on an aggregate basis for QFs under common ownership and control — so even a very small facility could be subject to notice and/or rate schedule requirements if it is under common ownership with other QFs located proximate to it.

This article also highlights some FERC refund precedent that may be of interest to renewable generation owners — FERC may consider its refund authority to be broader than may be expected. Renewable energy resource owners should focus on FERC notice and rate filing requirements not only as projects are being developed, but also once the projects are operational. In certain circumstances, the size of projects will be considered on an aggregate basis for rate and notice filing requirements. Further, the termination of older PPAs may trigger the need for FERC approvals.

**QF Notice Filing Requirements**

FERC's regulations implementing PURPA exempt certain categories of QFs from FERC's rate regulation, including QFs that are 20 megawatts or smaller. However, FERC considers these exemptions ineffective until the QF has submitted a FERC Form 556 seeking to certify or self-certify the facility as a QF, even if the generation facility satisfies the substantive statutory provisions of PURPA (with the carveout that

FERC does not require a Form 556 submittal for QFs that are one MW and smaller).

In many cases, neglecting to file a timely FERC Form 556 may result in refund liability for power sales made before the FERC Form 556 is filed. Arguments that a QF's owners acted in good faith, but simply made an administrative oversight, or were unaware of the filing requirement, do not resonate with FERC. In 2018, FERC emphasized: "[A]n applicant's lack of awareness does not constitute extraordinary circumstances" to justify waiver of FERC's QF filing requirements.[1]

FERC's July 18, 2019, order, North American Natural Resources Inc., or NANI, is a reminder of the FERC Form 556 requirements and what could occur if a QF owner neglects to notify FERC of its project's QF status and proceeds to operate the facility. NANI concerns a 4.8 MW biomass small power production QF that sold its output beginning in 2010 pursuant to a PPA.

The facility's owner did not submit FERC Form 556 to self-certify the facility's status as a QF before the facility became operational, and instead submitted the form in 2017. The owner also submitted a self-report to FERC's Office of Enforcement, and submitted a refund report to FERC that reported refunds to the purchaser corresponding to the interest on certain revenues collected during the period the QF began making sales until the owner submitted the FERC Form 556.

FERC's order rejected the refund report because FERC required additional refunds (i.e., it disagreed with the methodology the QF owner used to calculate refunds). FERC disregarded the company's arguments seeking to mitigate the late filing, and emphasized: "[t]he [Form 556] filing requirement is a substantive and important criterion for QF status, which was expressly adopted in Order No. 671 and must be followed."[2]

FERC also found it unpersuasive that the refund report it rejected resulted from NANI's "back and forth" with the FERC Office of Enforcement in the context of NANI's self-report related to its failure to timely submit the FERC Form 556:

> Enforcement staff assistance was limited to providing informal advice and assistance on relevant precedent and the mechanics of the calculation of time value refunds. Enforcement staff does not possess the authority to approve refunds or, as relevant here, to make a final determination on ... [the methodology for] calculating refunds. Rather, Enforcement staff can provide only informal advice and assistance. ...[3]

FERC ordered NANI to recalculate the refunds in a way expected to require additional amounts to be refunded to the customer.

**QFs Rolling Off Long-Term PPAs May Need to Make a FERC Rate Filing**

FERC's regulations at Section 292.601(c)(1) also provide for another category of QFs that are exempt from FERC's rate regulation — certain QFs making sales pursuant to PPAs executed on or before March 17, 2006. However, owners of such QFs are sometimes tripped up when these legacy PPAs expire, and the QFs must then make a FERC rate filing to obtain FERC rate authorization, unless another exemption applies. A recent FERC order concerns this scenario.

In Rio Bravo Fresno et al.,[4] an owner of two QFs (24 MW and 25 MW biomass units) sold the output of the facilities pursuant to PPAs executed before March 17, 2006, thereby avoiding the need for FERC rate authorization for sales pursuant to those contracts. When the original PPAs terminated on Sept. 8, 2017, the owner replaced them with new PPAs, in conjunction with emergency state legislation to reduce fire hazard conditions.

However, the owner's exemption from FERC rate regulation expired along with the original PPAs, and the QF owner did not file a rate schedule with FERC for authorization to make sales pursuant to the new PPAs until June 23, 2018. FERC did not view the emergency legislation that led to the new PPAs as "extraordinary circumstances warranting waiver" of its regulations, because the QFs knew more than a year in advance of the Sept. 8, 2017, termination date of the original PPAs and commencement of the new PPAs, and thus had time to seek market-based rate authorization for sales under the new PPAs. FERC required the QFs to make refunds for the period of time without market-based rate authorization.

**FERC's One-Mile Rule May Require Unexpected FERC Notice Filings**

Additional regulatory pitfalls exist for companies that develop or acquire QFs within one mile of each other and trigger rate filings or FERC Form 556 notice submittals as a result of FERC's one-mile rule. This rule provides that, for purposes of FERC's PURPA regulations, FERC will aggregate the capacity of small power production QFs that: (1) are located within one mile of each other, (2) use the same energy resource, e.g., solar or wind, and (3) are owned by the same persons or affiliates.[5]

In many cases, two commonly owned separate solar QFs that are each smaller than 20 MWs (but larger than one MW) need to provide notice to FERC of their QF status by filing a FERC Form 556, but do not need FERC rate authorization. However, in a scenario where the two QFs are within a mile of each other and covered by the one-mile rule, the capacity figures are combined, which could trigger a need for a FERC rate filing based on the combined capacity.

Similarly, a small power production QF that is one MW or smaller ordinarily is not required to file Form 556 to notify FERC of its QF status, but in a scenario where two or more such QFs are covered by the one-mile rule and they have a combined capacity above one MW, the requirement to file FERC Form 556 applies. Recent FERC orders discuss such scenarios.

In Energy Unlimited Inc.,[6] an owner of two QFs (9.4 MW and 16.1 MW wind units) sold their output pursuant to PPAs executed before March 17, 2006, thereby not needing FERC rate authorization for the PPA sales. Upon expiration of the PPAs, the QF owner considered each QF to be exempt from FERC rate regulation as a separate QF 20 MW or smaller, consistent with requirements at Section 292.601(c)(1) of FERC's regulations.

However, FERC applied its one-mile rule to the QFs, and the aggregate capacity of the facilities exceeded 20 MW. Thus, the facilities' owner could not enjoy the benefit of the 20 MW or smaller size rate filing exemption, and FERC ordered refunds for the post-PPA sales from these units.

SunE M5B Holdings LLC[7] also highlights the potential for refund liability for small QFs affected by the one-mile rule. In this case, the owner of several small power production facilities made sales from each of the facilities, reasoning that each facility was one MW or smaller, and therefore could benefit from QF status without the need for a Form 556 filing. As noted above, facilities one MW or smaller are not required to file FERC Form 556 to enjoy the benefits of QF status.

However, FERC applied the one-mile rule to the facilities on an aggregate basis. Because the facilities on an aggregate basis exceeded one MW, FERC concluded the owner could not rely on QF status without providing notice to FERC of the self-certification of the QFs by submitting the FERC Form 556. As a result, FERC determined that the owner could not rely on exemptions from FERC rate regulation applicable to QFs one MW and smaller, and treated the sales as unauthorized, ordering refunds for the sales made without a rate schedule.

**FERC Refunds and Renewable Energy Projects**

When refunds are required for unauthorized sales — sales of power at wholesale without FERC rate authority or QF exemption from the same — FERC's recent orders provide guidance on the scope and calculation of such refunds. FERC refund authorization may extend to the sales of renewable energy credits, or RECs, in some cases.

In NANI, FERC reiterated that unbundled REC transactions independent of the wholesale sale of energy fall outside of FERC jurisdiction, and need not be included in refund calculations. However, FERC also concluded that when a PPA bundles the REC sales with wholesale energy sales in a transaction, the revenues from the sales of the REC portion of that PPA should be included in the revenues used to calculate FERC's refunds.

In the NANI case, the underlying PPA treated the sale of renewable energy, capacity and RECs as a single product. Consistently, the PPA's monthly charge did not break out the REC component from the energy and capacity components, and instead consisted of a single bundled rate.[8] This resulted in higher refund obligations. Determining whether projects must include revenues from REC sales in the calculation of refunds will depend on the fact-specific circumstances of the transaction arrangements.

As renewable projects, including QFs, comprise a growing part of the energy generation mix, FERC's recent orders remind project owners to ensure that any wholesale sales are first authorized by FERC or validly exempted from rate regulation, because the potential refund obligations for unauthorized sales by renewable projects can wipe out past profits.

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[1] Rio Bravo, 164 FERC ¶ 61,115 at P 26 (2018).

[2] NANI, 168 FERC ¶ 61,041 at P 34 (quoting 43 OREG 1, Inc., 135 FERC ¶ 61,150 at P 8 (2011)).

[3] Id. at P 45.

[4] 164 FERC ¶ 61,115 (2018).

[5] See 18 C.F.R 292.204(a).

[6] 161 FERC ¶ 61,152 (2017).

[7] 157 FERC ¶ 61,045 (2016). See also, SunE B9 Holdings LLC, 157 FERC ¶ 61,044 (2016).

[8] Id. at P 40.