

168 FERC ¶ 61,041
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

North American Natural Resources, Inc.

Docket No. QF18-452-000

ORDER REJECTING REFUND REPORT AND
DIRECTING A REVISED REFUND REPORT

(Issued July 18, 2019)

1. On December 21, 2018, North American Natural Resources, Inc. (NANR) filed a refund report (Refund Report),¹ requesting Commission approval of its refund to the City of Holland Board of Public Works (Holland) for jurisdictional sales made prior to obtaining qualifying facility (QF) status.² In this order, we reject the Refund Report and

¹ NANR filed an earlier refund report with the Commission on November 20, 2018 and subsequently filed two supplements. Notice of the original November 20 refund report was published in the *Federal Register*, 83 Fed. Reg. 61,154 (2018), with interventions and protests to the refund report as supplemented ultimately due on or before December 17, 2018.

On December 12, 2018, Holland filed a timely motion to intervene (December 12 Motion to Intervene). On December 27, 2018, NANR filed an answer opposing Holland's motion to intervene.

On December 14, 2018, NANR filed a notice to withdraw its November 20 refund report. On December 17, 2018, Holland filed a protest to NANR's November 20 refund report. On January 3, 2019, NANR filed a comment regarding its notice of withdrawal. Because NANR's earlier November 20 refund report was withdrawn, we do not address that refund report or Holland's responsive protest to that refund report in this order.

² Section 205 of the Federal Power Act (FPA) requires Commission authorization for a public utility to make sales for resale of electricity in interstate commerce. 16 U.S.C. § 824d (2012). However, after certification, certain QFs are exempt from the

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direct NANR to recalculate the refund amounts, make time value refunds, and file a revised refund report with the Commission within 30 days of the date of this order.

I. Refund Report

2. In its Refund Report, NANR states that, pursuant to a power purchase agreement between NANR and Holland (PPA),³ it began delivering energy, capacity, and renewable energy credits (RECs) from its Southeast Berrien Generating Facility, a 4.8 MW landfill gas-fueled biomass generating facility located at the Southeast Berrien Landfill in Buchanan, Michigan (Southeast Berrien Facility), to Holland on January 1, 2010.⁴ NANR asserts that the Southeast Berrien Facility meets the requirements of a QF under the Public Utility Regulatory Policies Act of 1978 (PURPA).⁵ However, NANR failed to file a Form No. 556 self-certification until December 29, 2017.⁶ NANR also notes that, on February 22, 2018, it filed a self-report and a supplement to the self-report with the Commission's Office of Enforcement (Enforcement).⁷

3. NANR asserts that it worked closely with Enforcement staff to determine the remedy, including the refunds due, for making sales to Holland without Commission authorization prior to its certification as a QF. In its Refund Report, NANR lists its variable costs as \$8,275,189.33.⁸ NANR states that Enforcement staff "ultimately determined," and NANR agreed, that the correct amount of refunds would be \$563,483.64 and that NANR would pay that refund amount to Holland.⁹ NANR states that, on December 20, 2018, it sent a refund check for \$563,483.64 to Holland by overnight mail.

otherwise-applicable filing requirements of section 205. *See* 18 C.F.R. § 292.601 (2018); *see also* 16 U.S.C. § 824a-3(e) (2012).

³ Holland Protest, Att. D (Holland Bd. of Pub. Works and N. Am. Nat. Res.-SBL, LLC Renewable Power Purchase Agreement).

⁴ Refund Report at 1.

⁵ 16 U.S.C. § 824a-3 (2012).

⁶ Refund Report at 1; *see* NANR, Form No. 556, Docket No. QF18-452-000 (filed Dec. 29, 2017).

⁷ Refund Report at 1-2.

⁸ *Id.* at Att. A.

⁹ *Id.* at 2.

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NANR attaches to the Refund Report the cover letter sent to Holland with the refund check, in which NANR contends that Enforcement staff approved the refund amount.¹⁰

II. Notices and Responsive Pleadings

4. Notice of the Refund Report was published in the *Federal Register*, 83 Fed. Reg. 67,720 (2018). On January 14, 2019, Holland filed a protest (Holland Protest). On January 30, 2019, NANR filed an answer to the Holland Protest (NANR Answer). On February 14, 2019, Holland filed an answer (Holland Answer). On February 25, 2019, NANR filed a second answer (NANR Second Answer).

A. Holland Protest

5. Holland argues that, because NANR was required to notify the Commission prior to commencing service and collecting rates,¹¹ NANR was engaged in unauthorized sales from the Southeast Berrien Facility for over eight years.¹² Holland also notes that NANR has acknowledged its non-compliance.¹³

6. Holland states that the Commission should treat NANR consistently with other QFs that have violated the Commission's requirements, i.e., require NANR to refund: (1) the time value of revenues actually collected for the entire period the rate was collected without authorization (characterized as "Part One"); and (2) the amounts NANR collected in excess of a cost-justified rate for the entire period the rates were collected without Commission authorization (characterized as "Part Two").¹⁴

¹⁰ *Id.* at Att. A.

¹¹ Holland Protest at 3 (citing *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 and Filing Requirements*)).

¹² *Id.*

¹³ *Id.* (citing Refund Report at 1).

¹⁴ *Id.* at 10 (citing *Prior Notice and Filing Requirements*, 64 FERC ¶ 61,139 at 61,980).

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7. According to Holland, NANR's Part One refund equals roughly \$3.7 million, of which only \$563,483.64 was paid to Holland on December 21, 2018, and NANR's Part Two refund could equal up to \$8.7 million.¹⁵

8. Holland makes several requests in its Protest. Holland asks the Commission to: (1) reject NANR's method for calculating the Part One refund and direct NANR to provide support for its variable costs of \$8,275,189.33 in a compliance filing; (2) find that NANR's Part One refund is \$3,707,648.23 through January 11, 2019, with \$563,483.64 paid to Holland as of December 21, 2018; (3) determine the appropriate method for calculating NANR's Part Two refund (which may result in additional refunds owed by NANR up to \$8,708,901.46); (4) determine that NANR's variable cost floor produces a refund limit of \$10,594,737.97; and (5) direct NANR to remit any amount of unpaid refunds to Holland within thirty days consistent with these calculations, with interest through the date on which payment is made.¹⁶

9. Holland contends that the refund amount in NANR's Refund Report is "based on grossly understated revenues and is wholly at odds with the Commission's established refund remedy methodology."¹⁷ Holland is not persuaded by NANR's argument that the refund amount should be reduced simply because NANR self-reported its violation to the Commission and engaged in conversations with Enforcement staff.¹⁸ Holland explains that, in the past, the Commission has noted the importance of filing requirements and denied requests for a reduced refund obligation for violations that have been shorter in duration than NANR's violations.¹⁹

10. Holland argues that NANR's Refund Report understates the revenues that it collected from Holland. Holland contends that, although the Refund Report identifies only about \$8 million in revenues, NANR actually received \$18.8 million from Holland during the period of unauthorized sales.²⁰ Holland asserts that the Refund Report does

¹⁵ *Id.* at 4-5.

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 8-9 (citing *OREG 1, Inc.*, 135 FERC ¶ 61,150, at PP 7-8 (2011) (*OREG 1*); *SunE B9 Holdings, LLC*, 157 FERC ¶ 61,044, at P 17 (2016) (*SunE B9*)).

²⁰ *Id.* at 11. Holland states that Attachment C of its Protest specifies the amount of revenues Holland paid to NANR each month from January 2010 through December 2017, the period over which NANR was making unauthorized sales. Holland also notes that
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not explain how NANR calculated the \$8 million amount.²¹ For the Part One refund, Holland claims that NANR is obligated to calculate its time value refund based on the total revenues that NANR actually received from Holland under the PPA for the entirety of the period of unauthorized sales,²² which would result in a Part One refund, with interest, totaling \$3,707,648.23.²³

11. Holland further argues that, for a QF, the Part Two refund is the difference between the contract rate and the market rate or avoided cost rate, or a reasonable proxy for such rate.²⁴ Holland notes that the Commission can decide whether or not the PPA between NANR and Holland is a reasonable proxy for the market rate or the avoided cost rate.²⁵ Holland explains that NANR's Part Two refund could total zero to \$8.7 million, depending on how the Commission decides to calculate the amount of refund owed.²⁶

12. Holland asserts that the sum total of NANR's Part One refund and Part Two refund may be as high as \$12,416,549.69.²⁷ Holland explains that the Commission can limit the amount of refunds owed by applying a variable cost floor, which ensures that the refunds owed do not exceed the generator's variable costs.²⁸ Holland states that the Refund Report shows that NANR's variable costs were \$8,275,189.33 when it was making unauthorized sales.²⁹ Therefore, Holland asserts that the total amount of refunds

Attachment C includes interest on the refund amount, as NANR has not paid the full refunds owed. *See id.* at Att. C.

²¹ *Id.* at 14.

²² *Id.* at 15.

²³ *Id.* at 11.

²⁴ *Id.* at 12 (citing *Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044, at P 32 (2017); *Niagara Wind Power, LLC*, 141 FERC ¶ 61,179, at P 27 (2012)).

²⁵ *Id.* at 12-13.

²⁶ *Id.* at 13.

²⁷ *Id.*

²⁸ *Id.* at 10, 13.

²⁹ *Id.* at 13 (citing Refund Report, Att. C). Holland notes, however, that NANR does not provide an explanation or support for this amount.

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owed by NANR, when applying the variable cost floor (i.e., subtracting the variable costs from the total revenues), would be \$10,594,737.97.³⁰

13. Holland also contends that NANR continues to improperly subtract its variable costs from the total revenues that NANR claims it received from Holland to reduce its refund obligation,³¹ leading NANR to claim that it should not be required to owe any refunds from 2012 to 2017.³² Holland states that this calculation is a departure from the Commission's established method of calculating the time value of revenues for the Part One refund.³³ Holland notes that, "under the Commission's methodology, variable costs are not subtracted from the revenues to determine the refund obligation. Rather, variable costs are considered in determining the Variable Cost Floor."³⁴

14. Holland adds that NANR did not adequately identify or provide sufficient support for its alleged variable expenses, stating that it is not possible to confirm whether NANR's calculations improperly include other costs or expenses.³⁵ Holland asks the Commission to require NANR to submit a compliance filing with sufficient detail to support its variable costs of approximately \$8.2 million, including audited financial statements.³⁶

15. Holland also argues that the Commission should allow it to intervene in this proceeding because the Commission has consistently recognized the right to intervene and protest the filing of a refund report and has routinely accepted interventions and protests in cases where refunds for unauthorized rates are at issue, including in cases involving QFs that self-report their unauthorized collection of rates.³⁷

³⁰ *Id.* at 13-14.

³¹ *Id.* at 15.

³² *Id.* at 15-16 (citing Refund Report at 2).

³³ *Id.* at 16.

³⁴ *Id.* (citing *Tucson Elec. Power Co.*, 155 FERC ¶ 61,070, at P 24 (2016); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999)).

³⁵ *Id.* at 16-17.

³⁶ *Id.* at 17.

³⁷ *Id.* at 18 (citing *Zeeland Farm Servs., Inc.*, 163 FERC ¶ 61,115 (2018) Letter Order, Docket Nos. QF17-935-001 and QF17-936-001 (May 17, 2018) (*Zeeland*); *SunE M5B Holdings, LLC*, 157 FERC ¶ 61,045, at P 11 (2016) (*SunE M5B Holdings*); (continued ...)

B. NANR Answer

16. NANR does not dispute that it is subject to Part One refunds. NANR asserts, however, that the refund amount of \$563,483.64, which was paid to Holland on December 20, 2018, is correct.³⁸ NANR asserts that its refund calculation was actually quite favorable to Holland, and that it paid Holland the refund amount of \$563,483.64, despite the fact that the variable cost floor used to calculate the refund amount did not reflect either NANR's transmission fixed operation and maintenance expenses or NANR's financing costs for both the generating plant and the transmission substation. Had the refund calculation taken these amounts into account, NANR claims, the refund amount owed to Holland would have been reduced to zero.³⁹

17. NANR states that three aspects of its Refund Report are at issue: (1) whether Part Two refunds are applicable; (2) whether NANR correctly calculated and applied its variable costs; and (3) whether NANR correctly calculated the revenues.⁴⁰

18. First, NANR states that the Part Two refund obligation is not applicable here because its PPA with Holland contains a negotiated rate.⁴¹ NANR asserts that, in suggesting that the PPA is not a reasonable proxy for the market or avoided cost rate, Holland ignores that Holland (1) approached NANR seeking to purchase RECs; (2) proposed the rates in the PPA and the rates were approved by its City Council and Board of Public Works; (3) was the only governmental agency that approves QF rates; and (4) has purchased (and continues to purchase) power and RECs under other contracts at higher prices than the prices in the PPA with NANR.⁴² NANR notes that, in *SunE B9*,

SunE B9, 157 FERC ¶ 61,044, at P 12; *Beaver Falls Muni. Auth.*, 149 FERC ¶ 61,108, at P 13 (2014) (*Beaver Falls*); *Minwind I, LLC*, 149 FERC ¶ 61,109 at P 14 (2014) (*Minwind I*); *Tucson Electric Power Co.*, 157 FERC ¶ 61,027, at P 12 (2016); *Iowa Hydro, LLC*, 146 FERC ¶ 61,207, at P 9 (2014) (same); *OREG I, Inc.*, Letter Order, Docket Nos. QF11-115-001, et al., at 2 (Nov. 28, 2012) (delegated letter order).

³⁸ NANR Answer at 3.

³⁹ *Id.* at 4.

⁴⁰ *Id.* at 3.

⁴¹ *Id.*

⁴² *Id.* at 6-7.

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the Commission found that Part Two was satisfied because the inverters were selling pursuant to negotiated rates and thus only Part One refunds were necessary.⁴³

19. Second, NANR argues that its variable costs are fully transparent and legitimate and that the information included in Attachment C of its Refund Report was prepared based on discussions with Enforcement staff.⁴⁴ NANR states that it provided Enforcement staff with the total costs specific to the Southeast Berrien Facility that were developed using annual financial statements that have been reviewed by a Certified Public Accounting firm.⁴⁵ NANR asserts that maintenance costs (e.g., for parts for the engine generators) vary on an annual basis, depending on the number of hours those parts were used, the quality of landfill gas, and the number of unexpected shutdowns.⁴⁶ NANR notes that the maintenance expenses do not include property or insurance taxes.⁴⁷

20. Third, NANR insists that its revenues appropriately exclude RECs because RECs do not fall within the Commission's jurisdiction.⁴⁸ NANR argues that the question is whether the sales of RECs included in the PPA are, in fact, independent and unbundled, and, if so, whether the revenues of the REC sales are therefore appropriately excluded from the refund calculation.⁴⁹ NANR contends that its REC sales and its revenues from its REC sales are independent and separable.⁵⁰ NANR claims that RECs and power are treated independently and separately under the FPA and under Michigan's Clean and Renewable Energy and Energy Waste Reduction Act (Michigan Act), adding that the

⁴³ *Id.* at 7 (citing *SunE B9*, 157 FERC ¶ 61,044 at P 20).

⁴⁴ *Id.* at 8.

⁴⁵ *Id.*

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* NANR also notes that fuel costs include invoices paid to a company for lubricants and antifreeze, operator costs include the salary costs of the individuals that worked either full- or part-time at the plant, and landfill gas costs include the cost paid to the landfill operator for the gas obtained from the landfill. *Id.*

⁴⁸ *Id.* at 3; *see id.* at 14.

⁴⁹ *Id.* at 10.

⁵⁰ *Id.*

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Commission has recognized that RECs are state-created.⁵¹ NANR argues that the Michigan Act, which focuses on the fuel used to generate power, the methods of reducing the need for power, and the use of conventional fuels in Michigan, required Holland to obtain increasing quantities of RECs.⁵² NANR adds that the Michigan Act required Holland to report its compliance, including the obligation to satisfy the REC requirement, to the Michigan Public Service Commission.

21. NANR further asserts that the PPA treats power and RECs differently. NANR explains that, in the third quarter of 2009, Holland contacted NANR regarding a potential purchase of RECs, so Holland could fulfill its statutory obligations under the Michigan Act.⁵³ NANR contends that, because Holland's full power requirements were already being satisfied, Holland had no need for power and only needed RECs.⁵⁴ NANR argues that the fact that Holland needed RECs, but did not need power, resulted in the separate valuation of the RECs and the power both in the PPA and in practice.⁵⁵ NANR states that the power that Holland did not need was injected into the PJM Interconnection, LLC (PJM) market and the necessary RECs were placed into Holland's REC account. NANR contends that Holland's receipt of the power and RECs and its placement of the energy into the PJM market, while retaining the RECs, provides confirmation of the contractual differentiation of their separate values.⁵⁶

22. NANR compares the instant proceeding to *Zeeland*, in which Zeeland Farm Services, Inc. was selling energy, capacity, and RECs under a long-term PPA pursuant to the Michigan Act.⁵⁷ NANR claims that the refund calculation used in the instant proceeding is the same refund calculation used in *Zeeland* and that the refund reports submitted to the Commission both here and in *Zeeland* included capacity and energy

⁵¹ *Id.* at 11 & n.22 (citing *WSPP Inc.*, 139 FERC ¶ 61,061, at P 21 (2012) (*WSPP*)).

⁵² *Id.* at 11. NANR states that RECs are created as a result of the fuel and only measured by megawatt hours.

⁵³ *Id.* at 12.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 13.

⁵⁷ *Id.* at 14 (citing *Zeeland*, 163 FERC ¶ 61,115).

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revenues that are under the Commission's jurisdiction and excluded non-jurisdictional REC revenue.⁵⁸

23. NANR states that the Commission's refund floor for time value refunds is designed to protect entities from operating at a loss. NANR adds that the refund floor is set by considering only operation and maintenance costs so that a generation resource is only responsible for time value refunds if such refunds would not recoup the resource's variable operation and maintenance costs.⁵⁹ NANR argues that its Refund Report does not include transmission costs or financing costs, even though it should have been allowed to recover its transmission costs as part of the variable cost floor.⁶⁰ NANR asserts that including its transmission cost in its variable floor results in a refund amount of zero.⁶¹

24. NANR further states that, although it did not timely file a Form No. 556, it gave the Commission notice of the Southeast Berrien Facility, along with all of the project's operational characteristics that would otherwise make it a QF, 57 days before making sales to Holland.⁶²

25. NANR argues that Holland cannot intervene because only NANR and Enforcement staff can resolve a self-report.⁶³ NANR differentiates the instant proceeding from the precedent cited by Holland because, in those proceedings, the Commission acted on a waiver request first, which was then followed by the filing of a refund report.⁶⁴

⁵⁸ *Id.* NANR argues that the REC values in *Zeeland* are virtually identical to the REC values in this proceeding. *Id.* at 14-15 & n.27.

⁵⁹ *Id.* at 15-16 (citing *SunE M5B Holdings*, 157 FERC ¶ 61,045, at 61,160 (Honorable, Comm'r, concurring); *Consumers Energy Co.*, 153 FERC ¶ 61,185, at P 57 (2015)).

⁶⁰ *Id.* at 19-21.

⁶¹ *Id.* at 24.

⁶² *Id.* at 21-22. NANR states that it gave notice to the Commission in the context of a dispute with American Electric Power Company (AEP) wherein the Commission's jurisdiction was invoked with respect to transmission substation expenses. *Id.*

⁶³ *Id.* at 4.

⁶⁴ *Id.* (citing *Holland Protest* at 18 n.45); *see supra* note 37.

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26. NANR also asserts that the Commission's notice regarding a QF's obligation to file a Form No. 556 and the consequences of a failure to do so, including what NANR refers to as "burdensome penalties," were not properly noticed in the Notice of Proposed Rulemaking that ultimately led to Order No. 671.⁶⁵

C. Holland Answer

27. Holland argues that NANR's contention that the REC portion of the PPA is not within the Commission's jurisdiction is incorrect.⁶⁶ Holland asserts that Commission precedent states that "bundled REC transactions fall within the Commission's jurisdiction under sections 201, 205 and 206 of the FPA."⁶⁷ Holland argues that the PPA is a bundled transaction that provides for energy, capacity, and RECs for a single price and as part of the same transaction.⁶⁸

28. Holland points to sections of the PPA that reference both renewable energy and RECs to support its assertion that the Commission has jurisdiction over the wholesale energy portion, and REC portion, of the PPA. Holland refers to (1) PPA section 2, which states that the buyer "shall purchase all Renewable Energy generated from the first 4.8 MW of installed capacity...NANR shall also transfer, deliver, and assign all RECs associated with this initial purchase to [Holland],"⁶⁹ and (2) PPA section 8, which states that the contract price "applies to all Energy, RECs, and capacity sold under Section 2."⁷⁰ Holland adds that the Commission has jurisdiction, regardless of whether the contract price is allocated separately between the energy and RECs.⁷¹

⁶⁵ *Id.* at 15.

⁶⁶ *Id.* at 1-2.

⁶⁷ *Id.* at 2 (citing *WSPP*, 139 FERC ¶ 61,061 at P 18).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2-3 (quoting PPA, § 2 (Purchase and Sale)).

⁷⁰ *Id.* at 3-4 (quoting PPA, § 8 (Contract Price)).

⁷¹ *Id.* at 4 (citing *WSPP*, 139 FERC ¶ 61,061 at P 24).

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29. Holland also asserts that NANR's claim that it can now establish a separate value for the RECs portion of the PPA is irrelevant because the sale of energy and RECs from NANR to Holland is part of the same transaction.⁷²

D. NANR Second Answer

30. NANR notes that Holland established the price for the RECs that it needed, and NANR agreed and delivered the RECs accordingly. NANR states that "Holland promptly unbundled the RECs from the energy and then used the RECs" in order to meet the requirements under the Michigan Act.⁷³

III. Discussion

A. Procedural Matters

31. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2018), Holland's December 12 Motion to Intervene is granted given its interest in this proceeding as the buyer of the electric energy and thus the recipient of the refunds, the early stage of this proceeding, and the absence of undue prejudice to the parties or delay to the proceeding by our granting the intervention.⁷⁴

32. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We accept the NANR Answer, the Holland Answer, and the NANR Second Answer because they have provided information that assisted us in our decision-making process.

⁷² *Id.*

⁷³ NANR Second Answer at 3, 5.

⁷⁴ The Commission rejects NANR's argument that Holland cannot intervene because this matter is an Enforcement action. *See* NANR Answer at 4-5; NANR December 27, 2018 Answer at 4-14 (incorporated by reference in the NANR Answer). While 18 C.F.R. § 385.214(a)(4) prohibits intervention as a matter of right in a proceeding "arising from an investigation" pursuant to Part 1b of our regulations, 18 C.F.R. §§ 1b.1-.22, this matter is not one "arising from an investigation" pursuant to Part 1b of our regulations. Rather, NANR late filed its Form No. 556 for QF status, and this proceeding began with its *sua sponte* filing of its original November 20 refund report. NANR separately non-publicly self-reported to Enforcement staff that it made jurisdictional sales without Commission authorization.

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B. Substantive Matters

33. In Order No. 671,⁷⁵ the Commission adopted 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.⁷⁶ Thus, in order for a generating facility larger than 1 MW to qualify as a QF, our regulations require that an owner or operator of a facility must, in addition to meeting other specified requirements, either file a notice of self-certification pursuant to section 292.207(a) or file for and receive Commission certification pursuant to section 292.207(b).⁷⁷ In either case, whether a facility is seeking to self-certify or is seeking Commission certification, a formal certification filing is required. Contrary to NANR's argument, presenting information about a facility in some other Commission proceeding does not confer QF status.

34. As noted above, NANR's Southeast Berrien Facility began making sales on January 1, 2010. However, NANR first filed a Form No. 556, and thus only first self-certified its facility as a QF, on December 29, 2017 under section 292.207(a) of the Commission's regulations.⁷⁸ Accordingly, NANR's Southeast Berrien Facility was not a QF until NANR filed its notice of self-certification. NANR has not justified its failure to comply with a filing requirement that has been in effect since 2006. 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."⁷⁹

35. In *Prior Notice and Filing Requirements*, the Commission clarified its refund remedy (for both cost-based and market-based rates) for the late filing of jurisdictional rates and agreements under FPA section 205 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

⁷⁵ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 114 FERC ¶61,102, *order on reh'g*, Order No. 671-A, 115 FERC ¶ 61,221 (2006).

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

⁷⁷ *Id.*; 18 C.F.R. §§ 292.207(a)-(b). Sections 292.207(a) and (b) of the Commission's regulations both require that such filings include a Form No. 556. *Accord* 18 C.F.R. § 131.80(a).

⁷⁸ 18 C.F.R. § 292.207(a).

⁷⁹ *OREG I*, 135 FERC ¶ 61,150 at P 8.

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to refund to its customers: (1) the time value of the revenues collected, calculated pursuant to section 35.19a of the regulations,⁸⁰ for the entire period that the rate was collected without Commission authorization (Part One); and (2) all revenues resulting from the difference, if any, between the market-based rate and a cost-justified rate (Part Two).⁸¹

36. Holland argues that NANR's Part Two refund obligation may be up to \$8.7 million.⁸² We disagree. The second component of the two-part refund methodology does not typically apply to QFs because the Commission has previously determined that a QF can use a substitute for the cost-justified rate, which may include the market-based rate or the avoided cost rate.⁸³ To the extent that, as is the case here, there is no difference between the QF's rate collected and either (i) the market-based rate or (ii) the avoided cost rate, the QF would not have a refund obligation under that part of the refund methodology.⁸⁴ Accordingly, and consistent with Commission precedent, NANR has no Part Two refund obligation.

37. For any monies collected prior to filing its self-certification, a QF must refund the Part One refund, i.e., the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization,⁸⁵ with the refunds limited so as not to prevent recovery of variable costs.⁸⁶ We reject NANR's

⁸⁰ 18 C.F.R. § 35.19a; *see also Zeeland*, 163 FERC ¶ 61,115 at P 16.

⁸¹ *Prior Notice and Filing Requirements*, 64 FERC ¶ 61,139 at 61,980; *see also Zeeland*, 163 FERC ¶ 61,115 at P 16.

⁸² Holland Protest at 12.

⁸³ *Zeeland*, 163 FERC ¶ 61,115 at P 16 (citing *Minwind I*, 149 FERC ¶ 61,109 at P 23; *see Trigen-St. Louis Energy Corp.*, 120 FERC ¶ 61,044 at P 32 (2007); *CII Methane Management IV, LLC*, 148 FERC ¶ 61,229 at P 4 (2014)).

⁸⁴ *Id.*

⁸⁵ *Id.* P 17 (citing *Minwind I*, 149 FERC ¶ 61,109 at P 24; *Florida Power & Light Co.*, 98 FERC ¶ 61,276 at 62,150-51 (*Florida Power & Light*), *reh'g denied*, 99 FERC ¶ 61,320 (2002)).

⁸⁶ *Id.* (citing *Minwind I*, 149 FERC ¶ 61,109 at P 24; *Carolina Power & Light*, 87 FERC ¶ 61,083; *Southern California Edison Co.*, 98 FERC ¶ 61,304 at 62,302 n.10 (2002); *Florida Power & Light*, 98 FERC ¶ 61,276; *Int'l Transmission Co.*, 140 FERC ¶ 61,151 (2012), *order on reh'g*, 152 FERC ¶ 61,043 at PP 33-34 (2015)). “[F]or those situations in which we impose the time value remedy pursuant to *Prior Notice* [*and (continued ...)*”

Refund Report and direct NANR to recalculate the time value refund amounts. We find that, after review of the PPA between NANR and Holland, the RECs are part of a bundled transaction and subject to the Commission's jurisdiction.

38. In *WSPP*,⁸⁷ the Commission explained its jurisdiction regarding RECs. The Commission noted that RECs do not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce, and, therefore, RECs and contracts for the sale of RECs are not *themselves* subject to the Commission's jurisdiction under FPA section 201.⁸⁸ The Commission found, however, that, although a transaction may not directly involve the transmission or sale of electric energy, the transaction could still fall under the Commission's jurisdiction because it is "in connection with" or "affects" jurisdictional rates or charges.⁸⁹ The Commission further noted that the Commission's jurisdiction is limited to "those methods or ways of doing things on the part of the utility that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so."⁹⁰

39. The Commission found that, when an unbundled REC transaction is independent of a wholesale electric energy transaction, the unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity.⁹¹ Thus, an unbundled REC transaction that is independent of a wholesale electric energy transaction does not fall within the Commission's jurisdiction under FPA sections 201, 205 and 206.⁹² However, in a bundled REC transaction, where a wholesale energy sale and a REC sale take place as part of the same transaction, RECs are charges in connection with a jurisdictional service

Filing Requirements], we will limit the application of the time value formula to an amount that permits a public utility to recover its variable costs." *Carolina Power & Light*, 87 FERC ¶ 61,083 at 61,356.

⁸⁷ *WSPP*, 139 FERC ¶ 61,061.

⁸⁸ *Id.* P 21 (emphasis added).

⁸⁹ *Id.* P 22 (citing 16 U.S.C. § 824d).

⁹⁰ *Id.* (quoting *Cal. Indep. Sys. Operator Corp.*, 372 F.3d 395, 403 (D.C. Cir. 2004)).

⁹¹ *Id.* P 24.

⁹² *Id.*

(continued ...)

that affect the rates for wholesale energy.⁹³ The Commission has concluded, therefore, that it has jurisdiction over the wholesale energy portion of the bundled transaction as well as the REC portion of the bundled transaction under FPA sections 205 and 206.⁹⁴

40. Based on our review of the PPA, we find that, consistent with *WSPP*, the RECs here are part of a bundled transaction and thus jurisdictional to this Commission because the “wholesale energy sale and [the] REC sale took place as part of the same transaction.”⁹⁵ Here, the PPA contemplates the purchase of renewable energy, capacity, and RECs as a single transaction. PPA section 2 provides that Holland shall purchase renewable energy and capacity from NANR, and that, on a monthly basis, NANR shall also transfer all RECs to Holland.⁹⁶ Also, PPA section 8 states that the section applies to “all Energy, RECs and capacity sold under Section 2.” Section 8 also states that Holland agrees to pay \$82 per megawatt-hour to NANR on a monthly basis for all renewable energy, RECs, and capacity delivered.⁹⁷ Accordingly, we find that, because the energy and RECs are sold according to the same sections of the same PPA and for a single lump-sum price, these RECs are part of a bundled transaction.

41. Moreover, although NANR argues that the sale of RECs was independent and separable,⁹⁸ NANR’s Answer describes Holland receiving the energy and power together and then Holland’s “splitting” them.⁹⁹ Likewise, NANR’s Second Answer similarly states that it delivered the RECs to Holland, and then Holland promptly “unbundled” the

⁹³ *Id.*

⁹⁴ The Commission noted that it would have jurisdiction over the wholesale energy portion of the transaction, as well as the RECs portion, regardless of whether the contract price is allocated separately between the energy and RECs. *Id.*

⁹⁵ *Id.*

⁹⁶ PPA, § 2 (Purchase and Sale).

⁹⁷ *Id.* at § 8 (Contract Price).

⁹⁸ NANR Answer at 10.

⁹⁹ “Holland’s receipt of the power and RECs and instantaneous splitting of those into (i) a sale of the energy into the market while (ii) retaining the RECs provides a clear confirmation of the contractual differentiation of their separate values.” *Id.* at 14.

(continued ...)

RECs from the energy.¹⁰⁰ NANR's own phrasing depicts the sale of energy and RECs by NANR to Holland as a bundled transaction that only Holland later "unbundled."

42. Regarding NANR's argument that the refund calculation used in the instant proceeding was the same refund calculation accepted in *Zeeland*,¹⁰¹ we note that the issue of whether RECs were appropriately excluded was neither brought to the Commission's attention in, nor addressed in, *Zeeland*. As such, silence on the treatment of RECs in the *Zeeland* refund report cannot be "considered as having been so decided as to constitute precedent" on that subject here.¹⁰² Moreover, the order accepting the refund report in *Zeeland* was issued by Commission staff pursuant to delegated authority,¹⁰³ and on that basis also would not be precedent binding the Commission.¹⁰⁴ We further expressly disavow any implication that the treatment of RECs in *Zeeland*, which was silent on the issue, trumps the treatment of RECs in *WSPP*, where the Commission explicitly explained its jurisdiction over RECs.

43. For the eight years before NANR filed its Form No. 556, NANR made sales for resale and, therefore, was a public utility subject to the FPA. Our findings here are consistent with those made with respect to other QFs that have similarly failed to timely file a self-certification.¹⁰⁵

¹⁰⁰ "Holland established the favorable price for RECs that it needed and offered that price to [NANR], [NANR] agreed and delivered the RECs promised, Holland promptly unbundled the RECs from the energy and then used the RECs to meet state requirements." NANR Second Answer at 3 n.5.

¹⁰¹ NANR Answer at 14 (citing *Zeeland*, 163 FERC ¶ 61,115).

¹⁰² *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions 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."); *see, e.g., PJM Interconnection, LLC*, 153 FERC ¶ 61,308, at P 13 & n.28 (2015).

¹⁰³ *Zeeland Farm Servs., Inc.*, Letter Order, Docket No. QF17-935-001, et al., (May 17, 2018) (delegated letter order).

¹⁰⁴ *E.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,223 at P 15 n.14 (2011) ("Actions taken by the Commission staff by delegated authority do not constitute precedent binding the Commission in future cases.").

¹⁰⁵ *See, e.g., Zeeland*, 163 FERC ¶ 61,115; *SunE B9*, 157 FERC ¶ 61,044; *Minwind I*, 149 FERC ¶ 61,109; *Beaver Falls*, 149 FERC ¶ 61,108; *OREG I*, 135 FERC ¶ 61,150.

(continued ...)

44. Furthermore, even accepting for the sake of argument that the Notice of Proposed Rulemaking that preceded Order No. 671 did not provide sufficient notice that it was required to make a filing with the Commission to be certified as a QF (a proposition with which we disagree), we find that, nearly four years before it began its jurisdictional power sales, NANR had notice of Order No. 671 through its publication in the Federal Register¹⁰⁶ and the resulting regulations set forth in the Code of Federal Regulations that require a filing with the Commission for a facility to be certified as a QF.¹⁰⁷ Thus, when NANR began making jurisdictional power sales, NANR was on notice that the Commission required a filing in order for a facility to be certified as a QF and entitled to an exemption from FPA section 205. The Commission further rejects any contention by NANR that the refund is a penalty, because NANR admits that it made jurisdictional power sales without Commission authorization and is making time value refunds.¹⁰⁸

45. Finally, in the cover letter NANR sent to Holland with the refund check, NANR asserts that Enforcement staff approved the refund amount.¹⁰⁹ In the context of working with NANR on the self-report related to NANR's failure to timely file its Form No. 556, however, 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 whether and how RECs should or should not be considered in calculating refunds. Rather, Enforcement staff can provide only informal advice and assistance pursuant to section 388.104(a) of the Commission's regulations,¹¹⁰ which provides that "[o]pinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions."¹¹¹

¹⁰⁶ Specifically, Order No. 671 was issued on February 2, 2006 and published in the Federal Register on February 15, 2006, *see* 71 Fed. Reg. 7852 (2006), and NANR began jurisdictional power sales on January 1, 2010.

¹⁰⁷ *See* 18 C.F.R. §§ 292.203(a)(3), 292.203(b)(2).

¹⁰⁸ NANR Answer at 2-3. NANR states that it self-reported its failure to comply with section 292.203(a)(3) of the Commission's regulations for the Southeast Berrien Facility and is thus making time value refunds for its non-compliance. *Id.* at 2.

¹⁰⁹ Refund Report, Att. A.

¹¹⁰ 18 C.F.R. § 388.104.

¹¹¹ *Id.*

(continued ...)

46. Because we find that the RECs at issue here are part of a bundled transaction and therefore jurisdictional, we accordingly find that the revenues from the RECs should be included in the gross revenues used to calculate the time value refund obligation. We therefore direct NANR to recalculate the time value refunds owed. Because we have directed NANR to recalculate the refund amounts to include revenues from RECs in gross revenues, the Commission cannot presently determine whether a further refund is due.¹¹² In addition, to the extent NANR believes that the time value refund obligation would prevent it from recovering its variable costs, NANR must provide detailed information with its refund report to provide the Commission with sufficient information to determine if the claimed variable costs are appropriate.¹¹³ We reject, at this time, Holland's request that NANR submit audited financial statements. Accordingly, the Commission directs NANR to make time value refunds and file a revised refund report with the Commission within 30 days of the date of this order.

The Commission orders:

(A) NANR's Refund Report is hereby rejected, as discussed in the body of this order.

(B) NANR is hereby directed to make time value refunds and file a revised refund report with the Commission within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹² Refund Report at 2. NANR refunded to Holland the amount NANR asserts was due as the time value refund in the check sent to Holland on December 20, 2018, in the amount of \$563,483.64. For the purposes of a recalculation as required by this order, interest will not continue on the amounts paid by NANR on December 20, 2018, but continues to otherwise accrue on the remaining balance owed (if any).

¹¹³ See 18 C.F.R. § 385.203(a)(7) (party submitting a filing or pleading must provide the basis in fact and law for its position).