SUTHERLAND

LEGAL ALERT

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FERC Clarifies QF Recertification Requirement

In an order issued on March 30, 2010,[1] the Federal Energy Regulatory Commission (FERC) clarified one ambiguity in its qualifying facility (QF) regulations, while leaving another in its wake. Resolved is the issue of whether a recertification filing is required when there has been a material change in the facts presented by a QF in its prior notice of self-certification or application for FERC certification. In sum, FERC clarified that a recertification filing is generally not required for a QF to maintain its QF status so long as the QF (1) continues to meet the QF criteria (*e.g.*, the operating and efficiency criteria), and (2) has previously filed a notice of self-certification or application for FERC certification. FERC advised that obtaining recertification may nonetheless be beneficial to the QF in certain circumstances even if it is not strictly required by the regulations – for example, to meet lender or utility requirements or to obtain the certainty that recertification would provide. Unresolved is how much a cogeneration QF may expand its generating capacity before FERC treats it as a "new" cogeneration facility, thereby requiring a new self-certification or application for FERC certification.

Background

FERC's order was issued on an application filed by Medical Area Total Energy Plant, Inc. and New MATEP, Inc. (collectively, MATEP) for FERC recertification of the QF status of the MATEP cogeneration facility.[2] The facility had previously been self-certified as a QF.[3] As part of an expansion and restructuring of the ownership of the facility, MATEP sought FERC recertification.

In its application, MATEP reported that the total electric capacity was 87.8 MW, which is an increase over the facility's original 62 MW capacity. According to the MATEP application, the facility continued to meet FERC's operating and efficiency criteria for cogeneration QFs.

In response to the application, Harvard Medical Collaborative, Inc. (HMC) filed adverse comments on the filing, arguing that MATEP had failed to demonstrate that the facility satisfied FERC's "productive and beneficial" requirement and "fundamental use" test applicable to "new" cogeneration facilities. Under those requirements, "new" cogeneration facilities must demonstrate that "(1) The thermal energy output of the cogeneration facility is used in a productive and beneficial manner; and (2) The electrical, thermal, chemical and mechanical output of the cogeneration facility is used fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility, taking into account technological, efficiency, economic, and variable thermal energy requirements, as well as state laws applicable to sales of electric energy from a qualifying facility to its host facility."[4]

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[1] *Medical Area Total Energy Plant, Inc.*, 130 FERC ¶ 61,254 (2010) (*MATEP*).

[2] *Applications of NSTAR, et al. for Federal Power Act § 203 Authorization and for Certification of Qualifying Facility Status*, Docket Nos. EC10-32-000, ER98-1922-006, and EL10-34-000 (filed Dec. 29, 2009).

[3] *Self-Certification of Harvard College & Medical Area Total Energy Plant as Qualifying Cogeneration Facility*, Docket No. QF83-334-000 (filed June 30, 1983).

[4] 18 C.F.R. § 292.205(d) (2009). FERC recently revised its regulations to clarify that "new" cogeneration facilities are those that had not self-certified or applied for FERC certification prior to February 2, 2006. *See Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, Order No. 732, 130 FERC ¶ 61,214, at P 50 (2010).

These requirements apply only to "new" cogeneration facilities, *i.e.*, those not previously certified as QFs on or before August 8, 2005, or that had not filed a notice of self-certification, self-recertification or an application for FERC certification or recertification prior to February 2, 2006.[5]

FERC's Order

In the March 30 order, FERC concluded that MATEP's cogeneration facility satisfied the QF criteria and therefore recertified the facility as a QF. Specifically, FERC concluded that the cogeneration facility satisfied the operating and efficiency standards required of cogeneration facilities for QF status. FERC also held that the facility was not a "new" facility as a result of the expansion of the facility's capacity. Accordingly, the facility did not need to demonstrate that it satisfied the "productive and beneficial" requirement and "fundamental use" test required of new cogeneration facilities. However, FERC noted that, even if those requirements applied, the facility – which supplies steam and chilled water to hospital and medical customers – would have passed the tests because all of the thermal energy output of the facility was used in a "productive and beneficial" manner and was used "fundamentally for industrial, commercial, residential or institutional purposes and is not intended fundamentally for sale to an electric utility."

Concerning the recertification requirements, FERC explained that the failure of a QF to file a notice of self-recertification or seek FERC recertification in connection with a change in facts relating to the QF facility does not "in and of itself" affect the continuing status of the facility as a QF. Instead, if the facility meets the applicable technical criteria for QF status (*e.g.*, the operating and efficiency criteria) and has previously filed a notice of self-certification or application for FERC certification, then the facility is a QF. If circumstances change, the QF may seek recertification, but is not required to do so. "Recertification provides the added benefit of assurance, but is not a prerequisite for QF status in the circumstances presented here."[6]

Clarification of Ambiguity

FERC's order clarifies an ambiguity in the QF regulations as to when a recertification filing is required. As noted by FERC, FERC's QF regulations do not state that a recertification filing is required for material changes in facts from those presented in a QF notice of self-certification or application for FERC certification. Under long-standing FERC precedent and the QF regulations initially adopted by FERC, a QF was a QF as long as it satisfied the applicable criteria, regardless of whether it formalized its status by filing with FERC. However, the QF regulations were revised after enactment of the Energy Policy Act of 2005 (EPAct 2005) to require an initial self-certification or FERC certification application in order to obtain QF status. Because of the adoption of that new initial QF filing requirement, it became unclear whether subsequent recertification filings were then required to maintain QF status if material changes in facts occurred, but the entity nonetheless continued to satisfy the substantive criteria for QF status. FERC's *MATEP* order has now clarified that a recertification filing is not required to maintain QF status, even in the post-EPAct 2005 world (though recertification filings may well be beneficial).

[5] 18 C.F.R. § 292.205(d) (2009).

[6] *MATEP*, at P 10.

Remaining Ambiguity

FERC's clarification of the recertification requirement is helpful, but one ambiguity in the QF recertification regime remains after *MATEP*: When does an expansion of an existing QF's capacity render the QF a "new" facility? In the order promulgating the revised QF regulations after the enactment of EPAct 2005, FERC explained that the "productive and beneficial" requirement and "fundamental use" test would apply to "new" cogeneration facilities. Existing cogeneration facilities would be exempt from having to demonstrate that they satisfy these requirements. FERC cautioned, however, that changes in an existing QF could be so great as to render the QF a "new" facility subject to the requirements. FERC provided an example of the expansion of a QF's capacity from 50 MW to 350 MW.[7] Here, MATEP's QF capacity was expanded from 62 MW to 87.8 MW. This expansion was not enough to render MATEP's QF a "new" facility. It remains unclear, therefore, where the demarcation point is for triggering "new" status when existing QFs are expanded.

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If you have any questions about this Legal Alert, please feel free to contact the attorneys listed below or the Sutherland attorney with whom you regularly work.

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[7] *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 115, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 (2006).