

## FERC Reinforces Importance of Qualifying Facility Recertification

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On March 24, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued an order in *Irradiant Partners, LP*, 178 FERC ¶ 61,215 (2022) (the “[Irradiant Order](#)”) in which it declined to waive qualifying facility (“QF”) recertification requirements under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). FERC explained that recertification is essential to maintaining the benefits of QF status and acknowledged an absence of regulatory guidance with respect to recertification timing. FERC declined, however, to establish a bright-line test for timeliness, other than to state that recertifying prior to a change is permissible. The Irradiant Order has significant implications for sponsors, owners and investors with portfolios of projects that rely on the exemptions conferred by such QF status.

### Background

Under PURPA, QFs receive certain rate and regulatory benefits, including exemptions from specified laws and regulations, such as certain provisions of the Federal Power Act (“FPA”), the Public Utility Holding Company Act of 2005 and certain state utility-regulatory laws. Some of the key benefits, which are subject to limitations based on size and other factors, include exemptions from:

- FPA section 203 (obviating the need for prior FERC approval for the disposition of such QFs under FPA section 203(a)(1); similarly, certain holding companies with QFs qualify for blanket authorization under FPA Section 203(a)(2));
- FPA sections 205 and 206 (meaning such facilities often do not need to seek rate authorization from FERC); and
- State laws and regulations related to rates and financial and organizational

regulation of electric utilities.

In light of these and other benefits, QF status has lately been subject to increased scrutiny by FERC.<sup>1</sup>

A threshold requirement for QF status is that an owner or operator of the facility must file a notice of self-certification (a FERC Form No. 556) or receive an order from FERC certifying QF status. As affirmed in the Irradiant Order, the Commission views this filing requirement, which applies to initial QF status, as well as in response to a change in any material facts or representations, to be “a substantive and important criterion.”

In the application that prompted the recent order, Irradiant asked the Commission to waive the recertification requirement for 185 not-yet-operational QFs in the context of a transaction in which Irradiant had acquired upstream ownership interests in excess of the 10% threshold for reporting on Form No. 556. Irradiant argued that FERC should waive the recertification requirement because: (1) the QFs were not yet operational, so recertifying would be unduly burdensome; (2) requiring a burdensome recertification process for QFs that will be exempt from most FERC regulation once they are operational is a perverse result; and (3) FERC regulations do not provide a deadline by which recertifications should be filed (although Commission staff had informally advised Irradiant that a filing more than 30 days after a material change would be considered late).

## Waiver Denied

The Commission denied Irradiant’s requested waiver, reiterating that recertification is necessary whenever a QF fails to conform to material facts and representations previously made to FERC. The Commission expressed particular concern with respect to ownership information, which, the Commission noted, “assists the Commission in monitoring potential discrimination in the provision of service and in reviewing the extent to which QFs should continue to be exempt from various provisions of the FPA and state laws.” Irradiant Order at P 10. According to the Commission, “[i]f as in this case, there is a material change in facility ownership, an updated Form No. 556 needs to be filed *for a facility to continue to be a QF.*”<sup>2</sup>

The Commission also rejected the notion that new Form No. 556 filings would be unduly burdensome in light of the resulting benefits, even for Irradiant’s 185 not-

yet-operational QFs, and, in particular, found that exemption from selected sections of the FPA rests on validly holding QF status in the first place, which requires recertification when there is a material change. The Commission agreed with Irradiant that the regulations do not provide a deadline by which a QF must file recertification but declined to provide a specific deadline for recertification, stating only that “recertification is required when the material change is made.”<sup>3</sup> The Commission further offered that QFs are free to prepare and submit recertifications in advance of a material change. However, the Commission clarified that it will “not require such filings prior to the date of the material change.”<sup>4</sup>

## Recertify Early, Recertify Often

The Irradiant Order is likely to prompt QF owners and operators to recertify in advance of, or promptly after, any material change, including changes in upstream ownership, despite the absence of specific timing guidelines. Moreover, the order highlights the importance of recertification in retaining the benefits of QF status, including valuable exemptions from provisions of the FPA, like Section 203 (pertaining to transaction authorizations) and Sections 205 and 206 (pertaining to electric rates), as well as other regulatory laws.

The effects of this decision are likely to include a heightened focus on existing self-certifications by transaction counterparties and may cause existing and prospective QF owners and investors to take a closer look at the currency and completeness of such filings for their facilities. It is too early to tell, however, whether the Irradiant Order presages an increase in FERC enforcement actions in response to untimely or missed recertifications, and the order, moreover, may yet be challenged on rehearing.

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1. See, e.g., *Qualifying Facility Rates and Requirements, Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (2020); *addressing arguments raised on rehearing and clarifying in part*, Order No. 872-A, 172 FERC ¶ 61,158 (2020); “[FERC PURPA Reform Effort Proposes Modified Opportunities for Renewable Electric Generation](#),” and “[FERC’s Broadview Reversal Restores and Expands Opportunities for Qualifying Facilities under PURPA](#).”↩

2. *Id.* at P 16.↩

3. *Id.* at P 17.↩

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