

129 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Sun Edison LLC

Docket No. EL09-31-000

DECLARATORY ORDER

(Issued November 19, 2009)

1. In this order we address the petition of Sun Edison, LLC (SunEdison) for a declaratory order confirming that certain of its subsidiaries' sales to end-use customers do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce for purposes of the Federal Power Act (FPA),¹ nor involve jurisdictional rates for purposes of the Public Utility Holding Company Act of 2005 (PUHCA 2005).² SunEdison also requests certain waivers from the Commission's regulations implementing PUHCA 2005.

2. As discussed below, we find that such sales do not constitute the sale of electric energy at wholesale in interstate commerce or the transmission of electric energy in interstate commerce under the FPA, nor do they involve jurisdictional rates under PUHCA 2005. However, because qualifying facilities (QFs) are already exempt from those provisions of our regulations for which SunEdison seeks waiver, and because QF status for facilities like those at issue here is easy to establish, we see no need to grant the waiver requested.

¹ 16 U.S.C. § 791a, *et seq.* (2006); 16 U.S.C. § 824(d) (2006) (defining the "sale of electric energy at wholesale").

² 42 U.S.C. §§ 16451-63 (2006).

Background

3. SunEdison constructs, finances, installs, operates and maintains solar-powered electric generation facilities. The majority of these installations are located in the United States.³

4. SunEdison describes its primary businesses within the United States as: (1) the delivery and sale of solar-generated electricity directly to end-use consumers for their immediate consumption, which SunEdison calls its “Retail Operations;” and (2) the sale at wholesale of solar-generated electricity to load-serving entities, which SunEdison calls its “Wholesale Operations.” SunEdison states that it neither owns nor controls transmission or distribution facilities beyond its project-specific interconnection facilities.

5. SunEdison’s Wholesale Operations are not the subject of this petition. Rather, SunEdison states that its Retail Operations are the focus of the instant petition. SunEdison’s Retail Operations involve the installation of photovoltaic panels, inverters and associated equipment on property controlled by an electric energy customer, such as a large retail store, hospital, school or a manufacturing plant. SunEdison, through subsidiaries, finances (with debt or through financial leases), installs, owns or controls, operates and maintains these facilities. SunEdison sells the electric energy output to the on-site end-use customer. Contractual arrangements with the customer govern how and when the solar facilities are installed and maintained, the interconnection of the solar facilities to the customer’s electric system, and the sale of electric energy generated by the solar facilities to the customer for direct use by that customer on those same premises.

6. SunEdison states that its Retail Operations currently comprise more than 38 MW of generating capacity, installed in more than 150 locations in nine states, with an average capacity of approximately 250 kW. SunEdison continues that these solar photovoltaic facilities sell their output directly to on-site commercial, industrial and governmental end-use customers. According to SunEdison, these projects typically supply less than 30 percent of the end-use customer’s average electrical consumption.

7. SunEdison states that it is bringing this petition because its Retail Operations “are drowning in Commission-related paperwork.” SunEdison explains that it has filed a QF self-certification not only for each operational Wholesale Operations installation (totaling 2 filings to date), but also for every Retail Operations installation (totaling 250 self-

³ SunEdison states that it also has a growing business in solar power installations outside the United States. SunEdison explains that these foreign activities are undertaken by “foreign utility companies” for purposes of the FPA and PUHCA 2005, are the subject of a Notification of Self-Certification of Foreign Utility Company Status in Docket No. FC08-6-000, and are not the subject of the instant petition.

certifications and self-recertifications to date). SunEdison states that it has filed the self-certifications and self-recertifications for its Retail Operations facilities, even though the sales of electric energy from those facilities are not subject to regulation under the FPA, for two reasons: (1) to assure SunEdison's investors and lenders that SunEdison's Retail Operations will not be subject to utility-type regulation under Part II of the FPA; and (2) to obtain the automatic exemption from the PUHCA 2005 regulations provided pursuant to section 366.3(a) of the Commission's regulations.⁴ SunEdison states that, with the expected expansion of its Retail Operations, SunEdison and the Commission will be dealing with thousands of QF filings for facilities that, SunEdison asserts, do not sell electric energy at jurisdictional rates, because the electric energy is sold directly from the solar facilities to the on-site end-use customers that immediately consume the electricity, reducing, but not eliminating, purchases from local load-serving utilities.

8. SunEdison explains that its power sales agreements require that each of SunEdison's on-site end-use customers purchase one hundred percent of the electrical output of a SunEdison Retail Operations facility. SunEdison states that, during periods of normal production and demand, these electric purchases never approach the customer's total demand for electricity, so that all of the solar photovoltaic facility's electrical output is consumed onsite by the end-use customer. Under these circumstances, SunEdison asserts, there is no sale of electric energy at wholesale in interstate commerce for purposes of section 201 of the FPA, and the SunEdison power sale agreements are thus outside the Commission's FPA jurisdiction.

9. SunEdison states that, at a small number of locations, during certain temporary periods of peak electrical production and low demand for electricity, the solar photovoltaic facility's production electrical output may temporarily exceed SunEdison's customer's retail load. SunEdison states that in each of the states where it operates, however, the state has authorized "net metering" programs. SunEdison states that each of the programs address circumstances in which electric energy generated within an end-use customer's premises temporarily exceeds that customer's electric demand; in that circumstance, electric energy is allowed to flow back through the interconnection to the grid, with these deliveries netted against the customer's electrical purchases from the local utility. SunEdison also states that these state net metering programs uniformly prescribe either size limitations on the on-site generation capacity, or require that the generation be sized for the primary purpose of supplying the end-use customer.

10. SunEdison expresses concern that, in the circumstances of net metering, it might be argued that some of the electric energy generated by SunEdison's facility and then unused by the on-site end-use customer is, in a sense, sold by that customer to the local load-serving utility, and therefore at least a portion of the electric energy sold by

⁴ 18 C.F.R. § 366.3(a) (2009).

SunEdison to the on-site end-use customer is actually a sale for resale in interstate commerce for purposes of both the FPA and PUHCA 2005. SunEdison states that, while the Commission has stated that it does not assert jurisdiction over flows of power to the grid occurring under the auspices of a state net metering program provided there is no net sale over the course of the relevant billing period,⁵ SunEdison expresses concern that the Commission's pronouncements in this area have been limited and have not directly addressed sales of power from a generation facility to an on-site end-use customer.

11. SunEdison asks the Commission, based on the Commission's analysis in *MidAmerican*, to make the following determinations:

1. Where SunEdison and/or its subsidiaries or financing/lessor entities own, lease, control and/or operate solar-powered electric generation facilities directly interconnected to the premises of an end-use customer (Host Customer) and sell all of the electric output of the solar generation facilities to the same Host Customer for the Host Customer's direct consumption, the sale of electricity from the solar facility to the Host Customer will not constitute the sale or transmission of electricity in interstate commerce for purposes of the FPA provided that the customer does not engage in any resale of such electricity, and the rates for such electricity sales will not constitute "jurisdictional rates" for purposes of PUHCA 2005 and the Commission's regulations;
2. Provided that no "net sale" occurs under the applicable state net metering program, and the Host Customer otherwise complies with the requirements of the state net metering program, then neither the Host Customer nor the owner, financial lessee or operator of the solar facilities will be deemed to have engaged in a sale for resale of any electric energy produced by the solar facilities and purchased by the Host Customer; and
3. SunEdison and its affiliates and subsidiaries are not required to make any filings pursuant to the FPA and the Commission's implementing regulations in order to undertake sales from the solar facilities to the

⁵ SunEdison cites *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001) (*MidAmerican*), *PJM Interconnection, LLC*, 94 FERC ¶ 61,251 (2001), and *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160.

4. Host Customer so long as the Host Customer does not engage in any resale of such electric energy.

12. SunEdison also states that it seeks a waiver, or an exemption pursuant to section 366(b)(1)(i) of the Commission's regulations,⁶ from certain record keeping requirements and from making certain filings applicable to holding companies and holding companies' associated service companies.

13. SunEdison states that granting its requests will substantially reduce the administrative burden by making clear that it need only to make QF self-certification filings for its Wholesale Operations projects, but not its Retail Operations, and that it will not need to make filings pursuant to the Commission's regulations implementing PUHCA 2005.

14. Notice of SunEdison's filing was published in the *Federal Register*, 74 Fed. Reg. 6621 (2009), with interventions and protests due on or before March 4, 2009.

15. Solar Power Partners, Inc. (Solar Power Partners) filed a timely motion to intervene and comments. Solar Power Partners states that it is the third largest solar energy developer in the United States, with over 37 completed projects equaling 12.8 MW of commercial solar systems in operation. Solar Power Partners supports SunEdison's petition and suggests that the Commission consider initiating a rulemaking to codify a broader exemption from the Commission's PUHCA 2005 regulations.

Discussion

Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motion to intervene serves to make Solar Power Partners a party to this proceeding.

Commission Determination

17. In Order No. 2003-A, the Commission described net metering as follows:

Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commission's jurisdiction. A participant in a net metering program must be a net consumer of electricity -- but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This

⁶ 18 C.F.R. § 366(b)(1)(i) (2009).

electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power that it needs, and runs normally when the load takes electricity off the system.[⁷]

18. The Commission has explained that net metering is a method of measuring sales of electric energy.⁸ Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated; that is, the Commission does not assert jurisdiction when the end-use customer that is also the owner of the generator receives a credit against its retail power purchases from the selling utility.⁹ Only if the end-use customer participating in the net metering program produces more energy than it needs over the applicable billing period, and thus is considered to have made a net sale of energy to a utility over the applicable billing period, has the Commission asserted jurisdiction.¹⁰ If the entity making a net sale is a QF that has been exempted from section 205 of the FPA by section 292.601 of our regulations,¹¹ no filing under the FPA is necessary to permit the net sale; however, if the entity is either not a QF or is a QF that is not exempted from section 205 of the FPA by section 292.601 of our regulations, a filing under the FPA is necessary to permit the sale.

19. SunEdison presents a case where the entities that own the generating facilities will not be the participants in the net metering program, but will sell their output to the net metering program participants. Sun Edison asks the Commission to declare that in these circumstances there is no sale for resale. We agree that, where the net metering

⁷ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 at P 744, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir 2007).

⁸ *MidAmerican*, 94 FERC ¶ 61,340, at 62,262-63 (2001).

⁹ *Id.*

¹⁰ The Commission, in *MidAmerican*, found that a one-month billing period was reasonable, but indicated that other billing periods could also be reasonable. *Id.* at 62,262-64.

¹¹ 18 C.F.R. § 292.601 (2009).

participant (i.e., the end-use customer that is the purchaser of the solar-generated electric energy from SunEdison) does not, in turn, make a net sale to a utility, the sale of electric energy by SunEdison to the end-use customer is not a sale for resale, and our jurisdiction under the FPA is not implicated.¹² That is, under the holding of *MidAmerican*, where there is no net sale over the applicable billing period to the local load-serving utility, there is no sale; accordingly, where there is no net sale over the applicable billing period to the local load-serving utility by the end-use customer that is the purchaser of SunEdison's solar-generated electric energy, SunEdison is likewise not making a sale "at wholesale," i.e., a "sale for resale." In these circumstances, SunEdison's sales of electric energy to end-use customers are not subject to the Commission's jurisdiction under Part II of the FPA.¹³

20. SunEdison also asks the Commission to declare that the rates for its sale of electric energy to end-use customers do not constitute "jurisdictional rates." "Jurisdictional rates," for purposes of PUHCA 2005 and our regulations implementing PUHCA 2005, means "rates accepted, established or permitted by the Commission for the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use."¹⁴ Because we have found that, where the end-use customer makes no net sale to the local load-serving utility with which it has a net metering arrangement, the sale of electric energy by SunEdison to the end-use customer in such circumstances does not constitute a sale for resale (and also would not involve transmission in interstate commerce), and in such circumstances the sales are not subject to the Commission's jurisdiction under Part II of the FPA, we find that the rates for these sales would not be "jurisdictional rates" for purposes of PUHCA 2005 and our regulations implementing PUHCA 2005.

21. We next turn to SunEdison's request that we waive certain requirements of our PUHCA 2005 implementing regulations, without the requirement that SunEdison first

¹² The Commission has jurisdiction over "the sale of electric energy at wholesale." 16 U.S.C. § 824(b)(1) (2006). The term "sale of electric energy at wholesale," when used in Part II of the FPA, means "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d) (2006).

¹³ Likewise, we do not view SunEdison's sales of electric energy to on-site end-use customers as involving the "transmission of electric energy in interstate commerce." 16 U.S.C. § 824 (2006).

¹⁴ 18 C.F.R. § 366.1 (2009); *see* 42 U.S.C. § 16451(10) (2006).

claim QF status for its Retail Operations facilities.¹⁵ Should SunEdison obtain QF status for its facilities, they would be exempt from the regulations that it requests we waive.¹⁶ SunEdison states, however, that its request for waiver is motivated by the desire to be relieved of the burden of making filings to claim QF status (and, in turn, of the burden of making filings to comply with our regulations implementing PUHCA 2005). SunEdison states that, with its expected growth, the requirement to make filings claiming QF status, that is, filing a Form 556 for each facility that seeks QF status, will be burdensome. We deny SunEdison's request.

22. It is true that, under the Commission's current regulations, every generating facility claiming QF status must file with the Commission either a self-certification of QF status, or an application for Commission certification of QF status.¹⁷ Our self-certification process, in particular, has been designed to be relatively quick and easy.¹⁸ In addition, SunEdison may contact Commission staff to discuss possible methods of self-certification that may not require a separate filing for each rooftop solar facility.

¹⁵ Any person that is a holding company solely by virtue of QFs, EWGs, or FUCOs is exempt from the requirements of sections 366.2 and 366.21 of our regulations and any associated service company is exempt from the requirements of sections 366.2, 366.22 and 366.23, and such persons need not make the filings provided in sections 366.(4)(a) and 366(4)(b). *See* 18 C.F.R. § 366.3 (2009).

¹⁶ *See* 18 C.F.R. § 292.602 (2009). From the description of its facilities, under our current regulations SunEdison's facilities would appear to be QFs if SunEdison makes the requisite self-certification filings.

¹⁷ 18 C.F.R. § 292.203 (2009).

¹⁸ The Commission has recently proposed amendments to its regulations so that generating facilities 1 MW or smaller claiming QF status will be exempt from the requirement that they make a filing (either a self-certification or application for Commission certification) to be a QF. *Revisions to Form, Procedures, and Criteria for Certification of Qualifying Facility Status for a Small Power Production or Cogeneration Facility*, 74 Fed. Reg. 54,503 at P 16, 20 (October 22, 2009), FERC Stats. & Regs. ¶ 32,648 (2009). If the Commission adopts this proposal, or a similar size-based exemption from the filing requirements for QF status, SunEdison's facilities will likely be QFs without making any filing and SunEdison's concern about the burden of making any filings will no longer be relevant. In this regard, we note that both SunEdison and Solar Power Partners describe their retail facilities as, on average, being much smaller than 1 MW.

23. Given that we believe that SunEdison's assessment of the burden of self-certification is misplaced, we deny SunEdison's requested waiver.

The Commission orders:

(A) SunEdison's request for a declaratory order is hereby granted, as discussed in the body of this order.

(B) SunEdison's request for waiver is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.