

107 FERC ¶ 61,203
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Gaylord Container Corporation

Docket Nos. EL04-86-000
QF83-168-009

ORDER GRANTING LIMITED WAIVER OF OPERATING AND EFFICIENCY
STANDARDS

(Issued May 27, 2004)

1. This order addresses a request by Gaylord Container Corporation (Gaylord) for a limited waiver of the Commission's qualifying facility (QF) operating and efficiency standards¹ for calendar year 2004. Gaylord's request is due to the shutdown of Gaylord's thermal host, a paper production plant. Gaylord states that it expects to be unable to achieve compliance with the operating and efficiency standards during calendar year 2004. Gaylord also states that it intends to sell its facility to a purchaser who will continue to operate the facility as a QF and productively use the facility's thermal energy. As discussed below, we will grant Gaylord's request.

¹ The operating and efficiency standards are contained in section 292.205 of the Commission's regulations. See 18 C.F.R. § 292.205 (2003). For any qualifying topping-cycle cogeneration facility, the operating standard requires that the useful thermal energy output of the facility (i.e., the thermal energy made available to the host) must, during the applicable period, be no less than five percent of the total energy output. The Commission's operating standard ensures that the facility's thermal host meets a certain threshold level of heat utilization. See Everett Energy Corp., 45 FERC ¶ 61,314 (1988).

Section 292.205(a)(2) of the Commission's regulations establishes an efficiency standard for topping-cycle cogeneration facilities for which any of the energy input is natural gas or oil. The useful power output of the facility plus one-half the useful thermal energy output during the applicable period must be no less than 42.5 percent of the total energy input of natural gas or oil. If the useful thermal energy output is less than 15 percent of the total energy output of the facility, the useful power output of the facility plus one-half of the useful energy output must be no less than 45 percent of the total energy input, rather than 42.5 percent. 18 C.F.R. § 292.205(a)(2) (2003). The Commission's efficiency standard ensures that the facility operates at or above a certain level of performance when it uses natural gas or oil.

Background

2. Gaylord's 49.7 MW combined cycle cogeneration facility is located in Antioch, California. The facility consists of a combustion turbine generator, a waste heat recovery steam generator, an extraction and condensing steam turbine generating unit, an auxiliary boiler and appurtenant facilities.
3. The facility was originally certified as a qualifying cogeneration facility in 1983 by its owner at that time. Crown Zellerbach Corporation, 23 FERC ¶ 62,135(1983). The facility was operated as a component of a paper production plant and sold its excess electric output to Pacific Gas & Electric Company (PG&E). In May 1986, the facility was recertified as a qualifying facility to reflect new ownership. Gaylord Container, Ltd., 36 FERCF ¶ 62,148 (1986). In October 2002 Gaylord's paper production plant ceased operations. Gaylord then stopped running the facility. Prior to its closure, the facility delivered electric energy to PG&E.
4. After shutting down, Gaylord entered into a contract to sell the facility to a new owner, Wilbur Power LLC (Wilbur). Wilbur planned to build a new thermal host for the facility, a water distillation unit. Wilbur applied to the Commission for recertification of the facility reflecting both the new ownership and new thermal host. In addition, Wilbur asked for a waiver of the operating and efficiency standards for calendar year 2003. The Commission granted Wilbur's application for recertification as a QF, and granted waiver of the operating and efficiency standards for calendar year 2003. Wilbur Power LLC, 103 FERC ¶ 61,183 (2003), order on clarification, 104 FERC ¶ 61,055 (2003).
5. Wilbur did not complete its acquisition of the facility as expected. The facility did not operate during calendar year 2003 and thus the facility did not take advantage of the waiver granted in 2003. On February 25, 2004, Wilbur filed a request for waiver of the operating and efficiency standards for calendar year 2004. Wilbur stated that negotiations surrounding the sale of the distilled water from the facility to an unaffiliated third-party industrial purchaser had been time consuming and complex and involved receiving approvals from local regulatory agencies. Wilbur expected to begin start-up and testing by early spring of 2004.
6. On March 31, 2004, Gaylord filed an amended request for a waiver. Gaylord explained that the deal between Wilbur and Gaylord had broken down unexpectedly and had terminated. Gaylord also explained that PG&E had placed the facility on probation under the terms of the power purchase agreement (PPA) between Gaylord and PG&E because of the facility's failure to operate in 2003. PG&E also notified Gaylord of its plans to derate the facility's firm capacity under the PPA in the event that Gaylord fails to meet certain performance obligations this summer. Gaylord states that this would effectively terminate the PPA.

7. Gaylord argues that it was forced to shut down its paper plant by an increase in global competition. The closure of its paper plant, in turn, caused Gaylord to shut down its generating facility. Gaylord states that originally it fully expected Wilbur to be operating the facility by now. Gaylord adds that Wilbur was in charge of making arrangements for and getting the necessary permits for operation of the water distillation plant. Gaylord states that the failure to operate in 2003 was thus not its fault. Gaylord explains that it has since acted quickly to identify other purchasers of the facility and expects to sell the facility to a purchaser who will be able to satisfy the operating and efficiency standards for years following 2004. Gaylord states, however, that waiver of the operating and efficiency standards is necessary to ensure that the facility can operate prior to its sale and satisfy the requirements of the PPA. Gaylord states that, if the facility is derated, the facility will not be able to reopen; this, Gaylord asserts, will cost the local economy at least a dozen jobs. Gaylord thus asks for a waiver of the operating and efficiency standards for calendar year 2004.

8. Notice of the filing was published in the Federal Register, 69 Fed. Reg. 19,412 (2004), with comments, protests, and interventions due on or before April 20, 2004. PG&E filed a timely motion to intervene and protest. PG&E states that the Commission should deny the amended request because Gaylord does not satisfy the requisites for a waiver of the operating efficiency standards. Among other things, PG&E notes that this would be the second waiver for the facility. PG&E argues that granting a waiver will require its customers to pay more for energy than if the waiver were denied. In addition, PG&E states that there will be no public benefits to the area. PG&E asserts that any loss of jobs to the area is the direct result of Gaylord's decision to shut down its paper operations. PG&E also argues that the amended request is open-ended because it is unknown when or if the facility can be sold to a purchaser who will operate it as a QF, or how long it would take a purchaser to obtain a thermal host. PG&E asserts that if Gaylord is not able to meet the minimum requirements of the PPA this summer, PG&E may derate the contract capacity, and Gaylord would be required to refund a portion of prior capacity payments.

9. On April 27, 2004, Gaylord filed an answer to PG&E's protest.

Discussion

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 285.214 (2003), PG&E's timely, unopposed motion to intervene serves to make it a party to this proceeding.

11. Rule 213(a)(2) of the Commission's Rules of practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Gaylord's answer to PG&E's protest and will, therefore, reject it.

12. The Commission's regulations (see supra note 1) provide that a QF must satisfy the applicable operating and efficiency requirements "during any calendar year period." Section 292.205(c) of the Commission's regulations provides that the Commission may waive any of its operating and efficiency standards "upon a showing that the facility will produce significant energy savings."² The Commission has exercised its waiver authority in a number of cases based on factors such as the limited duration of the requested waiver; whether non-compliance was confined to the start-up and testing stage, and whether further waivers would therefore be unnecessary; the timeliness of the request; whether the request was intended to remedy specific problems associated with an innovative technology; the amount of opposition, if any; and whether granting waiver would fulfill PURPA's goal of encouraging cogeneration and the development of alternative generation technologies.³

13. Balancing the relevant factors, we will grant Gaylord's request for waiver. The need for waiver is the result of events outside of Gaylord's control, i.e., the closure of the thermal host for economic reasons and the unforeseeable termination of the purchase of the facility by Wilbur. Gaylord's request is timely because Gaylord sought waiver promptly upon learning that Wilbur would not purchase the facility and that it would likely fail to comply with the standards for 2004. While Gaylord may fail to meet the Commission's operating and efficiency standards for a short period, it met the operating and efficiency standards from 1983 to 2002 (and because Gaylord shut down its generating facility as soon as it shut down its thermal host, it to date has not operated out of compliance with those standards) and it intends to sell the facility to an entity which will provide a thermal host and continue to utilize the facility as a QF. Thus, if Gaylord is successful in selling its facility to another entity, PG&E will be required to purchase from the facility operating subject to waiver for only one calendar year.⁴ As explained by Gaylord, denial of waiver would essentially guarantee the demise of the facility; PG&E acknowledges that, unless Gaylord operates this summer, PG&E will seek refunds of capacity payments from Gaylord. A grant of limited waiver is thus consistent with the PURPA goal of encouraging cogeneration and alternative generation technologies. Therefore, we will grant waiver for a limited period of time, for calendar year 2004, in order to give Gaylord time to recover from circumstances which have led to the facility's failure to meet the operating and efficiency standards.

² 18 C.F.R. § 292.205(c) (2003); see also City of Fremont v. FERC, 336 F.3d 910, 916-17 (9th Cir. 2003).

³ See, e.g., Oildale Energy LLC, 103 FERC ¶ 61,060 at P 11 (2003); Kamine/Besicorp Allegany L.P., 73 FERC ¶ 61,290 at 61,808-09 (1995), reh'g denied, 74 FERC ¶ 61,094 (1996); Gordonsville Energy, L.P. 72 FERC ¶ 61,160 at 61,790-91 & n.7 (1995), and the cases cited therein.

⁴ Gaylord has represented that another waiver should not be needed.

The Commission orders:

Gaylord's request for temporary waiver of the operating and efficiency standards is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.