UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Brush Cogeneration Partners — Docket Nos. EL06-98-000
QF89-7-004

ORDER GRANTING REQUEST FOR LIMITED WAIVER OF QF OPERATING AND EFFICIENCY STANDARDS

(Issued October 13, 2006)

1. This order addresses a request by Brush Cogeneration Partners (Brush) for a limited waiver of the Commission's operating and efficiency standards[1] applicable to qualifying cogeneration facilities for the remainder of calendar year 2006 (from September through December). As discussed below, the Commission will grant Brush's waiver request.

I. Background

A. Factual Background

2. Brush owns and operates a 68 megawatt natural gas fueled topping-cycle cogeneration facility (Facility) located in Brush, Colorado. The Facility was certified by the Commission on May 8, 1989 as a qualifying cogeneration facility[2] and became operational on January 17, 1994. The Facility is interconnected with Public Service Company of Colorado (PSCo) and PSCo purchases the electrical output from the Facility pursuant to a long-term power purchase agreement. The Facility was designed to produce electricity and thermal energy in the form of hot water for heating an 18-acre greenhouse that grows food products commercially.

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[1] The operating and efficiency standards are contained in section 292.205 of the Commission's regulations. *See* 18 C.F.R. § 292.205 (2006). 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.

[2] *Colorado Power Partners*, 47 FERC ¶ 62,134 (1989).

3. Since becoming operational in 1994, Brush has sold its thermal output to a variety of greenhouse operators. Sunblest Management, LLC (Sunblest), a company that grows and markets tomatoes, currently operates the greenhouse that serves as Brush's thermal host. Sunblest has been operating the greenhouse since 1998.

B. Request for Waiver

4. On August 15, 2006, Brush filed a petition for limited waiver of the Commission's operating and efficiency standards set forth in 18 CFR § 292.205(a) for calendar year 2006. Brush states that the waiver is necessary due to the imminent loss of the thermal host, Sunblest.

5. Brush states that Sunblest has been the thermal host pursuant to a lease agreement since 1998. Pursuant to the lease, which was set to expire on August 31, 2006, Sunblest has the unilateral option to renew, and on March 8, 2006, Sunblest notified Brush by letter of its intent to renew the lease, thereby extending the lease term to August 31, 2009. Brush explains that by letter dated May 26, 2006, Sunblest informed Brush that it no longer intends to renew the lease. Thus, if Sunblest ceases to honor its intent to renew the lease, Brush will lose its thermal host as of August 31, 2006, and it will be unable to comply with Commission's operating and efficiency standards for the remainder of calendar year 2006.

6. Brush argues that waiver of the operating and efficiency standards are warranted because: (1) it has never sought such a waiver prior to the instant request; (2) the waiver period is of a limited duration – four months; (3) its waiver request was filed shortly after learning of Sunblest's intent to withdraw its renewal notification; and (4) the loss of Sunblest as the thermal host is the result of unexpected events beyond its control. Brush further argues that granting the limited waiver request would fulfill PURPA's goal of encouraging cogeneration and the development of alternative generation technologies. Finally, Brush expects no opposition from PSCo to the waiver request.

II. Notice and Interventions

7. Notice of this filing was published in the *Federal Register*, 71 Fed. Reg. 51,592 (2006), with interventions, protests, or comments due on or before September 14, 2006. Xcel Energy Services Inc. (Xcel) filed a timely motion to intervene but did not object to the requested waiver and raised no issues.

III. Discussion

A. Procedural Matters

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene serves to make Xcel a party to this proceeding.

B. Request for Waiver

9. The Commission's regulations provide that a qualifying facility must satisfy 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."[3] 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 submission of the waiver request; whether non-compliance was the result of an unexpected and one-time operational event outside the applicant's control; 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.[4]

10. Taking into account all the relevant factors, we will grant Brush's request for waiver. First, Brush's need for waiver of the Commission's operating and efficiency standards is due to events outside of Brush's control – the unexpected loss of its thermal host Sunblest. Based on Sunblest's letter of intent to renew the lease submitted to Brush on March 8, 2006, it was reasonable for Brush to expect Sunblest to continue as its thermal host through August 31, 2009. However, Sunblest withdrew its renewal notification on May 26, 2006, three months before the lease was set to expire. It would be unreasonable for the Commission to expect Brush to find another thermal host in such a short period of time. Next, Brush's request for waiver is of a limited duration – from September 2006 through December 2006. This is Brush's first and only waiver request since becoming operational in 1994. Furthermore, Brush anticipates that it will not

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[3] 18 C.F.R. § 292.205(c) (2006); *see also* 16 U.S.C. § 825h (2000) (general authority to waive regulations as the Commission "may find necessary or appropriate").

[4] *See, e.g.*, *Oildale Energy LLC*, 103 FERC ¶ 61,060 (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 cased cited therein.

require any additional waivers in the future.[5] In addition, Brush filed its request for waiver shortly after Sunblest withdrew its renewal notification which will cause Brush to not meet the operating and efficiency requirement for QF status. Finally, there is no opposition to the request for waiver.

11. Accordingly, we will grant Brush's waiver for a limited period of time from September 2006 through December 2006.

The Commission orders:

Brush's request for waiver of the operating and efficiency standards, 18 C.F.R. § 292.205(a) (2006), is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[5] Application at 6. Brush states that it has renegotiated its power sales arrangements so that in the future it will sell as an exempt wholesale generator pursuant to market-based rate authority. Accordingly, the waiver is only to assure QF status for the current calendar year.