

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Birchwood Power Partners, L.P.

Docket Nos. EL05-69-000
EL05-69-001
EL05-69-002
QF93-126-004
QF93-126-006
QF93-126-007

ORDER GRANTING LIMITED WAIVER AND
APPROVING UNCONTESTED SETTLEMENT

(Issued June 1, 2005)

1. On April 18, 2005, Birchwood Power Partners, L.P. (Birchwood) and Dominion Virginia Power (Dominion), filed a settlement in Docket Nos. QF93-126-007 and EL05-69-002 related to Birchwood's request for waiver of the operating standard¹ applicable to cogeneration facilities certified as qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA).² In this order, the Commission grants waiver of the operating standard for calendar year 2001 and approves the settlement agreement.

¹ The operating and efficiency standards are contained in section 292.205 of the Commission's regulations. *See* 18 C.F.R. § 292.205 (2004). 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).

² 16 U.S.C. § 824a-3(a) (2000).

Background

2. Birchwood owns and operates the 242 MW coal-fired cogeneration facility located in King George County, Virginia. Birchwood is owned by the General Electric Corporation, Mirant Corporation, and The Goldman Sachs Group, Inc. Birchwood's facility consists of one pulverized coal-fired steam generator, one reheat steam turbine generator, and appurtenant facilities. The electric output of the facility is sold to Dominion.

3. On February 28, 2005, Birchwood filed a request for a declaratory order, or, in the alternative, a petition for limited waiver of the operating standard. In its request for a declaratory order, Birchwood requests that the Commission find that the facility at all times satisfied the requirements for QF status. This request depends on the Commission declaring that the thermal output used by Birchwood's steam host, a commercial greenhouse used to propagate, grow and dry hydroponic tomato plants, was employed in a process and not a heating application, as defined in 18 C.F.R. §292.202(h) (2004). Birchwood also requests that the Commission find that the useful thermal energy from the facility was "made available" to the greenhouse at the inlet to the steam line connecting the facility to the greenhouse. The result of such a declaration would be that Birchwood satisfied the operating standard in calendar year 2001.

4. Birchwood, in the alternative, requests a limited waiver of the operating standard. Birchwood explains that a recent review of the facility's output by Birchwood's new management revealed that in 2001 the facility appears to have fallen short of satisfying the operating standard by approximately 0.02 percent.³ Birchwood states that the facility satisfied the operating standards in all other years.⁴

5. On April 28, 2005, Birchwood and Dominion filed an offer of settlement that they state resolves all issues arising from this proceeding. Birchwood and Dominion request that the Commission approve the settlement without condition or modification. Birchwood and Dominion also request that the Commission find that the facility was a "qualified cogeneration facility" in accordance with the Federal Power Act (FPA), and is

³ The facility failed to satisfy the operating standard if the use of the thermal output is considered a heating application rather than a process application.

⁴ The facility was granted QF certification in 1993, *Birchwood Power Partners, L.P.*, 65 FERC ¶ 62,048 (1993), and recertified in 1995, *Birchwood Power Partners, L.P.*, 72 FERC ¶ 62,007 (1995). It self-certified in 1998 and 2005 in Docket Nos. QF93-126-003 and QF93-126-005 respectively.

therefore entitled to all rights and exemptions from federal and state law set forth in 18 C.F.R. §§ 292.601 and 292.602 (2004).

Notices, Interventions and Protests

6. Notices of Birchwood's initial and amended filings were published in the *Federal Register*,⁵ with comments, protests and interventions due on or before April 11, 2005. On March 9, 2005, Mirant Americas, Inc, and Mirant Birchwood, Inc. (the Mirant Parties) filed a motion to intervene. Pursuant to Rule 602, comments on the settlement were due on or before May 9, 2005. None was filed.

Discussion

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁶ the timely, unopposed motion to intervene serve to make the entities that filed it parties to this proceeding.

8. Birchwood and Dominion ask the Commission to take two actions. First, they ask the Commission to find that Birchwood satisfied the requirements for QF status for calendar year 2001. Second, they ask the Commission to approve their settlement agreement.

9. In the settlement agreement, among other things, Birchwood and Dominion agree that the Birchwood facility was a QF in calendar year 2001. Dominion, in essence, has agreed that it supports waiver for the facility and/or a finding that the facility at all times satisfied the requirements for QF status. Attached to the settlement agreement, and subject to the effectiveness of the settlement agreement, is an Excess Energy Agreement (EEA) that contains rates and terms and conditions for sales of electric power from the QF.⁷

⁵ 70 Fed. Reg. 12,674 and 17,443 (2005).

⁶ 18 C.F.R. § 385.214 (2004).

⁷ We note that, pursuant to 18 C.F.R. § 292.601 (2004), Birchwood is exempt from most sections of the FPA, including section 205 of the FPA. Thus, there is no requirement that the EEA be on file with the Commission as long as Birchwood maintains QF status.

Moreover, we note that the settlement agreement contains a provision providing that any change to the settlement shall be pursuant to the public interest standard of review established in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S.

(continued)

10. We will first address the request for waiver. As discussed below, the Commission grants waiver of the operating standard for calendar year 2001. Our action of granting waiver for calendar year 2001 means that Birchwood's facility satisfied the requirements for QF status during that year.⁸

11. The Commission's regulations provide that a QF must satisfy applicable operating 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 standards "upon a showing that the facility will produce significant energy savings."⁹ 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; whether non-compliance was caused by the temporary loss of the steam host; 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.¹⁰

12. Balancing the relevant factors, we will grant a waiver to Birchwood because: (1) the limited waiver of the operating standard for calendar year 2001 is for a discrete period of time; (2) the lack of opposition to, and the support of the purchaser for, this requested waiver; and, (3) the Facility has operated in compliance with the technical criteria for QF status for all but one of the years in which it has been in operation. Moreover, as Birchwood and Dominion point out, the facility failed to meet the PURPA operating

332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). The EEA further provides that, should the EEA ever be required to be on file with the Commission, the right of the Commission to change any provision of the EEA shall be limited to the maximum extent permissible by law, in accordance with the *Mobile-Sierra* public interest standard of review.

⁸ The facility is thus entitled to the exemptions from state and federal law, pursuant to 18 C.F.R. §§ 292.601-02 (2004), for calendar year 2001.

⁹ 18 C.F.R. § 292.205(c) (2004); *see also City of Fremont v. FERC*, 336 F.3d 910, 916-17 (9th Cir. 2003).

¹⁰ *See, e.g., Calpine King City Cogen, LLC*, 108 FERC ¶ 61,149 (2004); *Gaylord Container Corp.*, 107 FERC ¶ 61,203 (2004); *Oildale Energy LLC*, 103 FERC ¶ 61,060 (2003); *Kamine/Besicorp Alegany L.P.*, 73 FERC 61,290 at 61,808-09 (1995), *reh'g denied*, 74 FERC ¶ 61,094 (1996); *Gordonville Energy, L.P.*, 72 FERC ¶ 61,790-91 & n. 7 (1995), and the cases cited therein.

standard by a very small amount --- 0.02 percent, and for only one year. Our grant of limited waiver is thus consistent with the PURPA goal of encouraging cogeneration and alternative generation technologies.

13. We find that the offer of settlement is uncontested. We further find that the settlement agreement appears to be fair and reasonable and in the public interest and we will accordingly approve it. The Commission's approval of the settlement agreement does not constitute approval of or precedent regarding any principle or issue in this proceeding.

The Commission orders:

(A) We hereby grant waiver of the PURPA qualifying cogeneration facility operating standard for calendar year 2001, as discussed in the body of this order.

(B) We hereby approve the settlement agreement, as discussed in the body of this order.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Birchwood Power Partners, L.P.

Docket Nos. EL05-69-000
EL05-69-001
EL05-69-002
QF93-126-004
QF93-126-005
QF93-126-006
QF93-126-007

(Issued June 1, 2005)

KELLY, Commissioner, *dissenting in part*:

For the reasons I have previously set forth in *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004), I do not believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the “just and reasonable” standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate.

Therefore, I disagree with this order to the extent it accepts for filing a settlement agreement that provides, in relevant part: “It is the Parties’ intent that the Commission’s right to change any provision of this Agreement, upon its own motion or otherwise, shall be limited to the maximum extent permissible by law and that any such change, if permissible shall be in accordance with the *Mobile-Sierra* public interest standard applicable to fixed rate agreements. *United Gas Pipe Line Co v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).”

	_____ Sudeen G. Kelly
--	--------------------------