

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Wilbur Power LLC

Docket Nos. EL03-118-000  
QF83-168-005

ORDER GRANTING APPLICATION FOR RECERTIFICATION AS QUALIFYING  
COGENERATION FACILITY AND GRANTING LIMITED WAIVER OF OPERATING  
AND EFFICIENCY STANDARDS

(Issued May 16, 2003)

1. This order addresses two requests by Wilbur Power LLC (Wilbur Power or Applicant), one for recertification as a qualifying cogeneration facility (QF) and the other for a limited waiver of the Commission's operating and efficiency standards<sup>1</sup> applicable to the cogeneration facility for the calendar year 2003. Wilbur Power files recertification due to: (1) the change in upstream ownership of the facility and (2) the change in the thermal

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<sup>1</sup>The operating and efficiency standards are contained in Section 292.205 of the Commission's regulations. See 18 C.F.R. § 292.205 (2002). 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 Corporation, 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 thermal energy output must be no less than 45 percent, rather than 42.5 percent. 18 C.F.R. § 292.205(a)(2) (2002). The efficiency standard ensures that the facility operates at or above a certain level of performance when it uses natural gas or oil. Id.

host and use of thermal output of the facility. Request for a limited waiver of the QF operating and efficiency standard is triggered by the loss of current thermal host. Applicant expects to be in compliance of the Commission's regulations from year 2004 onward. As discussed below, the Commission will grant both of Wilbur Power's requests.

### **Background**

#### **Factual Background**

2. The 49 MW, topping cycle natural gas-fired cogeneration facility (Facility) at issue here is located in Antioch, California. The Facility consists of a combustion turbine generator, a heat recovery steam generator, a condensing and extraction steam turbine generator, an auxiliary boiler, and appurtenant facilities. The Facility was originally certified as a qualifying cogeneration facility in 1983.<sup>2</sup> In 1986, Gaylord Container Limited (Gaylord Container) purchased the Facility and was granted recertification.<sup>3</sup> Gaylord Container operated the Facility until October 2002, when the Facility's thermal host, an affiliated paper-mill, ceased operations. Wilbur Power is currently engaged in negotiations to purchase the Facility from Gaylord Container.

3. Wilbur Power will sell its electric power output to Pacific Gas & Electric Company (PG&E). Wilbur Power plans to build a new thermal host for the Facility, a water distillation unit. The thermal energy output of the Facility will be processed in a steam host evaporator to produce high-quality distilled water. Wilbur Power states that it plans to sell the distilled water to an affiliated small power production facility, or, if the Commission finds that sale to be inconsistent with QF status, the distilled water will be sold to an unaffiliated third party.

#### **Request for Recertification and Waiver**

4. On March 25, 2003 Wilbur Power filed an application for Commission recertification of the Facility as a QF. Wilbur Power also requests that the Commission grant it waiver of the operating and efficiency standards for calendar year 2003. The Facility is currently idle. Wilbur Power states it is implementing plans to enable it to meet the Commission's operating and efficiency standards. However, Wilbur Power does not expect that the proposed new water distillation facility will commence commercial operations before January 31, 2004. Wilbur Power states that it needs a waiver to allow it

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<sup>2</sup>Crown Zellerbach Corp., 23 FERC ¶ 62,135 (1983).

<sup>3</sup>Gaylord Container Ltd, 36 FERC ¶ 62,148 (1986). Notices of self-recertification have also been filed with the Commission in Docket No. QF83-168.

to restart the Facility and resume sales of electricity while it is in the process of replacing the Facility's now idle thermal host with the proposed new water distillation plant.

### **Notice, Interventions and Protests**

5. Notice of the Applicant's filing was published in the Federal Register, 68 Fed. Reg. 19,984 (2003), with protests and interventions due on or before April 24, 2003. PG&E filed a motion to intervene that raises no issues.

### **Discussion**

#### **Application for Recertification**

6. Under 18 C.F.R. § 292.203(b) (2002), a facility seeking certification or recertification as a qualifying cogeneration facility must meet the ownership criteria for QF status specified in 18 C.F.R. § 292.206 (2002), as well as any applicable operating and efficiency standards specified in 18 C.F.R. § 292.205(a) and (b) (2002), in order to receive QF status. By definition, a cogeneration facility also must produce "forms of useful thermal output." See 18 C.F.R. § 292.202(c) (2002).

7. The ownership requirements for QF status, set forth in 18 C.F.R. § 292.206 (2002), require that no more than 50 percent of the equity interest in a QF may be held, directly or indirectly through subsidiaries, by an electric utility or utilities or by an electric utility holding company or companies, or any combination thereof.

8. According to the application, the Facility will be wholly owned and operated by Wilbur Power, a Delaware limited liability company that is indirectly, wholly-owned by Harbinger Independent Power Fund II L.L.C., a Delaware limited liability company. Harbinger is an investment fund managed by Harbinger Power MMII, LLC. The application states that no electric utility, electric utility holding company, or entity owned by either has an ownership interest in Wilbur Power. Based on these representations, we find that the Facility satisfies the Commission's QF ownership criteria.

9. Based on the information provided by Wilbur Power, we find that, with the addition of the proposed new water distillation unit, the Facility will meet the operating and efficiency standards established in 18 C.F.R. § 292.205.

10. The Commission has found that the use of steam to produce distilled water is common and thus presumptively useful for purposes of meeting the Commission's

definition of a cogeneration facility.<sup>4</sup> However, Wilbur Power is proposing to sell the water to an affiliated power producer. In order to be useful for cogeneration purposes, the thermal output of a facility must be used in a process that is independent of the power production process; the ultimate use of the thermal output cannot be power production.<sup>5</sup> The Commission has found that processing material for use as a boiler fuel in unrelated electric generating facilities or for other heating used by entities unaffiliated with the cogeneration facility is independent of the power production cycle,<sup>6</sup> but that use of steam to process material for use in an affiliated facility is not. Therefore, Wilbur Power's proposal to sell the distilled water to an affiliated power producer is not consistent with QF status and Wilbur Power, to be a QF, must sell the distilled water it produces to an unaffiliated entity.

11. Based on these findings, we will grant the application for recertification, conditioned on Wilbur Power selling the distilled water to an unaffiliated entity.

### **Request for Waiver**

12. The Commission's regulations (see supra note 1) 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."<sup>7</sup> 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

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<sup>4</sup>See, e.g., *Brazos Electric Power Cooperative v. Tenaska IV Texas Partners, Ltd.*, 83 FERC ¶ 61,176 at 61,727, reh'g denied, 85 FERC ¶ 61,097 (1998), aff'd, *Brazos Electric Power Cooperative, Inc. v. FERC*, 205 F.3d 235 (5th Cir. 2000), reh'g denied en banc, 214 F.3d 214 (5th Cir. 2000), cert. denied, 531 U.S. 957 (2000).

<sup>5</sup>See, e.g., *EG&E, Inc.*, 16 FERC ¶ 61,060 at 61,104 (1981); *LaJet Energy Company*, 43 FERC ¶ 61,288 at 61,789, reh'g denied, 44 FERC ¶ 61,070 (1988).

<sup>6</sup>See, e.g., *Pennsylvania Power & Light Company v. Schuylkill Energy Resources, Inc.*, 83 FERC ¶ 61,188 at 61,779 (1998), reh'g rejected, 86 FERC ¶ 61,053 (1999).

<sup>7</sup>18 C.F.R. § 292.205(c) (1999); see also 16 U.S.C. § 825h (1994) (general authority to waive regulations as the Commission "may find necessary or appropriate").

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.<sup>8</sup>

13. Balancing the relevant factors, we will grant Wilbur Power's request for waiver. The non-compliance with the Commission's operating and efficiency standards will occur during the restart-up and testing phase of Wilbur Power's facility. The need for waiver is the result of events outside of Wilbur Power's control, *i.e.*, the loss of the thermal host by the current owner and operator. The Facility has satisfied the operating and efficiency standards in the past and the application indicates that, other than calendar year 2003, it will in the future. Wilbur Power's request for waiver was timely. The grant of limited waiver is consistent with the PURPA goal of encouraging cogeneration and alternative generation technologies. Finally, there is no opposition to the request for waiver. We, therefore, will grant waiver for a limited period of time (calendar year 2003) in order to give Wilbur Power the opportunity to remedy the circumstances which have led to the failure to meet the operating and efficiency standards.

The Commission orders:

(A) The application for recertification of qualifying facility status filed on March 25, 2003 by Wilbur Power, pursuant to 18 C.F.R. § 292.207(b) (2002), and Section 3(18)(B) of the Federal Power Act, 16 U.S.C. § 796(18)(B) (2000), is hereby granted, provided that the facility is owned and operated in the manner described in the application and this order.

(B) Wilbur Power's request for temporary waiver of the operating and efficiency standards, 18 C.F.R. § 292.205 (2002), is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

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<sup>8</sup>See, *e.g.*, *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.

Magalie R. Salas,  
Secretary.