

108 FERC ¶ 61,149
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Calpine King City Cogen, LLC

Docket Nos. QF85-735-005
EL04-101-000

ORDER GRANTING LIMITED WAIVER OF OPERATING STANDARD

(Issued August 5, 2004)

1. This order addresses a request by Calpine King City Cogen, LLC (King City) for a limited waiver of the Commission's operating standard¹ applicable to the cogeneration facility for calendar years 2004 and 2005. King City's request for a limited waiver of the qualifying facility (QF) operating standard is triggered by the temporary loss of its thermal host. King City states that it expects to be in compliance with the Commission's regulations by the end of 2005. As discussed below, the Commission will grant King City's request.

Background

2. The 120 MW combined cycle cogeneration facility (Facility) is located in King City, Monterey County, California.² King City is indirectly owned by Calpine Corporation and General Electric Capital Corporation and leases the Facility from BAF Energy, a California Limited Partnership. King City sells electric output from the

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 Corporation*, 45 FERC ¶ 61,314 (1988).

² The Facility was certified as a QF in 1986 (Docket No. QF85-735-000). Recertification due to change in upstream ownership was granted on October 22, 1987. Notices of self-recertification were filed on April 15, 1988, June 11, 1996 and May 30, 2003 to reflect changes in ownership.

Facility to Pacific Gas and Electric Company (PG&E) pursuant to a long term power purchase agreement. King City also sells steam to CAG 45, Inc. (CAG or Steam Host), a subsidiary of ConAgra Foods, Inc., for use in drying agricultural products.

Request for Waiver

3. On May 12, 2004, King City filed an application requesting that the Commission waive the operating standard for the period of January 1, 2004 through December 31, 2005. King City states that it has met the Commission's operating & efficiency standards since the Facility was certified as a QF on February 26, 1986³.

4. On February 23, 2004, CAG advised King City that it would curtail its food processing operations and that, as a result, CAG's steam take might not be sufficient to satisfy the Commission's operating standard for calendar year 2004. CAG also informed King City that it intends to install a water distillation system on site and purchase steam to produce distilled water in place of the steam formerly used in the food processing operations. Once CAG's distillation system is operating, King City states that it will meet the Commission's operating standard.

5. King City seeks a limited waiver of the Commission's operating standard to allow sufficient time for CAG to construct the water distillation system and to finalize contractual arrangements related to construction and operations. King City anticipates the water distillation facility will be completed by the end of 2005, which will enable King City to satisfy the operating standard for calendar year 2006.

Notice, Interventions & Protests

6. Notice of King City's filing was published in the *Federal Register*⁴ with comments, protests and interventions due on or before June 11, 2004. On June 10, 2004, PG&E filed a motion to intervene and protest.

7. PG&E states that it supports the grant of a single-year waiver, *i.e.*, for calendar year 2004, but argues that the Commission should deny King City's request for a two-year waiver for calendar years 2004-2005, because King City has failed to provide sufficient evidentiary support to justify a two-year waiver. PG&E argues that it is unclear why it would take through 2005 to contract for and install the water distillation system. PG&E argues further that King City has not shown that the project would be completed by that date.

³ Basic American Foods, 34 FERC ¶ 62,411 (1986).

⁴ 69 Fed. Reg. 29,528 (2004).

8. PG&E also states that a two-year waiver will not encourage cogeneration and the development of alternative generation technologies. PG&E maintains that granting an extended waiver under these circumstances will undermine the goals of the Public Utility Regulatory Policies Act of 1978 (PURPA). PG&E also maintains that the Commission should not allow QFs to obtain the economic benefits of QF status in the absence of proper evidentiary support for limited waivers. PG&E concludes that the Commission should grant no more than a one-year waiver, subject to extension as necessary.

9. On June 25, 2004, King City filed an answer to PG&E's protest. King City's answer clarifies several points PG&E addressed in its protest. King City states that it has already begun discussions with CAG regarding the contractual arrangements for construction and operation of the water distillation system. King City asserts that the water distillation facility will operate in compliance with the Commission's operating standards by the end of the requested two-year waiver period. In contrast to PG&E's timing concerns, King City states that it intends to expedite the contracting process and expects to finalize an agreement on construction and operation of the water distillation facility with CAG within "the next month or so."⁵ In response to PG&E's concern that granting King City's request for a two-year waiver does not support PURPA's goals, King City states that the Facility has produced "reliable energy at substantial savings over 14 years of continuous and successful operation."⁶ King City argues that once the two-year period is over and King City is back in compliance with the Commission's operating standards, the King City Facility will continue to provide further energy savings, which supports the goals of PURPA.

Discussion

Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, the timely, unopposed motion to intervene serves to make PG&E a party to this proceeding. 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 will accept King City's answer because it has provided information that assisted us in our decision-making process.

⁵ King City's Answer at 4.

⁶ *Id.* at 8.

Waiver

11. The Commission's regulations⁷ provide that a QF must satisfy applicable operating & 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."⁸ 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.⁹

12. Balancing the relevant factors, we will grant King City's request for waiver. The need for waiver is the result of events outside of King City's control, *i.e.*, the decrease in the need for steam in CAG's agricultural product drying operation. King City's petition, however, indicates that CAG will fulfill its contractual obligation to purchase sufficient steam from King City by building a water distillation plant. This will enable King City to be in compliance with the Commission's operating requirements for calendar year 2006. King City sought this limited waiver shortly after it learned that it would likely not meet the Commission's requirements.

13. While King City's Facility may fail to comply with the Commission's operating standard for a short period King City has operated in compliance with the technical standards for QF status for over 14 years producing reliable energy at substantial savings. After a short period granted by this waiver, King City will continue to meet the Commission's operating standards once CAG is able to purchase sufficient steam from King City. A grant of limited waiver is thus consistent with the PURPA goal of encouraging cogeneration and alternative generation technologies.

14. PG&E argues that King City has not demonstrated why it needs a two-year waiver and has not demonstrated that it is assured compliance with the operating standard in calendar year 2006. We disagree. King City demonstrated that it and CAG have been

⁷ See *supra* fn. 1.

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

⁹ See *e.g.*, *Oildale Energy LLC*, 103 FERC ¶ 61,060 (2003); *Kaminel Besicorp Allegany L.P.*, 73 FERC ¶ 61,160 at 61,790-91 and n. 7 (1995), and the cases cited therein.

working on the arrangements for the construction and operation of the water distillation facility. King City states that both King City and CAG are “committed to expediting this process and anticipate finalizing the agreements in the next month or two.”¹⁰ CAG has indicated that it is committed to complete the water distillation facility “no later than October 5, 2005.”¹¹ The statements provide us sufficient evidence of King City’s need for a two-year waiver and of King City’s and CAG’s commitment to complete the water distillation facility in time to satisfy the Commission’s operating standard for calendar year 2006. We, therefore, will grant King City’s request for limited waiver of the Commission’s operating standard for calendar years 2004 and 2005 in order to give King City the opportunity to remedy the circumstances which have led to its failure to satisfy the operating standard.

The Commission orders:

King City’s request for temporary waiver of the operating standard is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁰ King City’s Answer at 4.

¹¹ *Id.*