

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Decatur Energy Center, LLC

Docket Nos. EL05-31-000
QF01-103-003

ORDER GRANTING LATE INTERVENTION AND LIMITED WAIVER OF
OPERATING AND EFFICIENCY STANDARDS

(Issued January 24, 2005)

1. This order addresses a request by Decatur Energy Center, LLC (Decatur) for a limited waiver of the Commission's qualifying facility (QF) operating and efficiency standards¹ for its 780 MW cogeneration facility in Decatur, Alabama. This request is being made for calendar years 2004 and 2005. In addition, Decatur is requesting that 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 (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).

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 of 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) (2004). The efficiency standard ensures that the facility operates at or above a certain level of performance when it uses natural gas or oil. *Id.*

Commission grant it the opportunity to seek a one-year extension of the waiver through December 31, 2006, based upon a showing of substantial progress in obtaining a replacement steam host. Decatur's request results from the temporary loss of its steam host, Solutia, Inc. (Solutia), an acrylic fibers and chemical manufacturing plant (Solutia Plant). The steam host has been in bankruptcy since December 17, 2003. Decatur has not delivered steam to Solutia since June 11, 2004. Decatur is prepared to negotiate with either Solutia, following its reorganization, or the new owner of the Solutia Plant upon termination of the bankruptcy proceeding. Further, Decatur is conducting discussions with several local businesses for the sale of its steam, and anticipates that these efforts will result in Decatur satisfying the Commission's QF standards by 2006 or 2007. As discussed below, the Commission will grant Decatur's request for calendar years 2004 and 2005.

Background

Factual Background

2. Decatur's cogeneration facility, located in Decatur, Alabama, consists of three combustion turbine generators, three separately-fired heat recovery boilers and an extraction/condensing steam turbine generator.
3. Decatur began operations in 2002 and thereafter operated as a QF, meeting the Commission's operating and efficiency standards through calendar year 2003.² During this time, Decatur provided steam to Solutia for the manufacturing of acrylic and nylon fibers.

Request for Waiver

4. On November 29, 2004, Decatur filed an application requesting that the Commission waive the operating and efficiency standards for calendar years 2004 and 2005. Decatur states that in December, 2003 Solutia filed petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. In the course of the bankruptcy proceeding, Solutia rejected several executory contracts, including Decatur's contracts, and the bankruptcy court approved those rejections. As a result, Decatur has not delivered steam to Solutia since June 11, 2004, and Decatur does not expect the facility to satisfy the Commission's operating and efficiency standards for calendar year 2004, and

² The facility was self-certified on June 4, 2001 as a qualifying facility, and Commission certified on February 28, 2002. *Decatur Energy Center*, 98 FERC ¶ 62,141 (2002).

possibly for 2005. Accordingly, Decatur requests a waiver of operating and efficiency standards for calendar year 2004 and 2005 to enable it to obtain a replacement thermal host.

5. Decatur states that it is prepared to negotiate a new steam sales agreement with either Solutia, following its reorganization, or a new owner of the Solutia Plant upon termination of the bankruptcy proceeding. Decatur also has had discussions with several local businesses, and will approach other potential replacement hosts to explore other opportunities for the sale of steam from the facility in order to avoid the need for a future waiver of the Commission's operating and efficiency standards. Decatur further states that it is considering installing a water distillation facility that would enable it to satisfy the Commission's operating and efficiency standards. However, due to uncertainty surrounding these options, Decatur also requests the opportunity to seek a one-year extension of the waiver period upon a showing that it has made substantial progress in obtaining a replacement steam host, or otherwise remedying its failure to meet the Commission's operating and efficiency standards.

6. Decatur states that it promptly filed this request after it determined that it would not be able to satisfy the Commission's operating and efficiency standards for 2004.

Notice, Interventions and Protests

7. Notice of Decatur's filing was published in the *Federal Register*, 69 Fed. Reg. 75,945 (2004), with comments, protests and interventions due on or before December 29, 2004.

8. On January 14, 2005, the Tennessee Valley Authority (TVA), the utility-purchaser of the electric output of Decatur's facility, filed an untimely intervention and protest to Decatur's request for waiver. TVA argues that Decatur's application does not satisfy the Commission's criteria for waiver of the operating and efficiency standards. TVA questions the timeliness of Decatur's waiver request, and whether the cause of Decatur's inability to satisfy the operating and efficiency standards was truly outside of Decatur's control. TVA further argues that Decatur's request that it be permitted to file for a one-year extension constitutes a request for an open-ended waiver.

Discussion

9. Given the early stage of this proceeding, its interest in this proceeding, and the absence of undue prejudice or delay, we will grant TVA's unopposed motion to intervene out of time.

10. The Commission's regulations³ 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."⁴ 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 the goals of the Public Utility Regulatory Policies Act of 1978 (PURPA) of encouraging cogeneration and the development of alternative generation technologies.⁵

11. Balancing the relevant factors, we will grant Decatur's request for waiver for calendar years 2004 and 2005. While TVA is correct that Decatur might have responded differently to Solutia's bankruptcy, nothing changes the fact that, the need for waiver is the result of events outside of Decatur's control, *i.e.*, an unforeseeable cessation of the steam host's business and, secondarily, the inability of Decatur to immediately secure a substitute steam host. Contrary to TVA's claims, we find that Decatur's request was timely because Decatur sought waiver as soon as it became reasonable to conclude that Decatur would fail to comply with the efficiency standard for 2004. Decatur promptly applied for a waiver when it learned of its steam host's bankruptcy and its attempt to arrange for temporary steam sales to Solutia failed. Decatur was not able to find other steam hosts within sufficient time to continue meeting the Commission's standards for calendar year 2004. Decatur is currently seeking a substitute thermal host, and is considering installing a water distillation facility to allow it to meet the operating and efficiency standards in the future.

³ See n.1 *supra*.

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

⁵ *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); *Gordonsville Energy, L.P.*, 72 FERC ¶ 61,790-91 & n.7 (1995), and the cases cited therein.

12. While Decatur's facility may fail to comply with the Commission's operating and efficiency standards for a relatively short period, Decatur has operated in compliance with the technical criteria for QF status for over 2 years producing reliable energy at substantial savings. After a short waiver, Decatur will continue to meet the Commission's operating and efficiency standards once the new steam host or hosts are able to purchase sufficient steam from Decatur. A grant of limited waiver is thus consistent with PURPA's goal of encouraging cogeneration and alternative generation technologies.

13. As to Decatur's request for permission in the future to file for a one year extension of this waiver, we will address the merits of any subsequent waiver request when it is filed. We note, however, that in the past, when faced with a request for an extended waiver, the Commission denied waiver beyond two years, and expressed reluctance to grant waiver beyond the initial two-year waiver period, absent a showing of substantial progress in obtaining replacement steam hosts. *Pittsfield Generator Company, L.P.*, 91 FERC ¶ 61,064 at 61,222 (2000). The Commission later denied Pittsfield's request for waiver beyond the initial waiver period. The Commission concluded that even though Pittsfield had used its best efforts to increase steam usage and meet the technical criteria for QF status, the waiver of two years was adequate time for Pittsfield to make alternative arrangements for use of its steam. *Pittsfield Generator Company, L.P.*, 101 FERC ¶ 61,229 at P 16 (2002) *reh'g denied* 103 FERC ¶ 61,045 at P 7 (2003).

The Commission orders:

(A) TVA's untimely motion to intervene is hereby granted.

(B) Decatur'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)

Magalie R. Salas,
Secretary.