

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Las Vegas Cogeneration Limited Partnership

Docket Nos. EL07-7-000
QF89-251-009

ORDER GRANTING LIMITED WAIVER OF EFFICIENCY STANDARD AND
APPLICATION FOR RECERTIFICATION AS QUALIFYING FACILITY

(Issued December 21, 2006)

1. This order addresses a request by Las Vegas Cogeneration Limited Partnership (Las Vegas Cogen) for a limited waiver of the Commission's efficiency standard¹ applicable to qualifying cogeneration facilities and an application for recertification of its cogeneration facility as a qualifying facility (QF). As discussed below, the Commission will grant the waiver request and will recertify Las Vegas Cogen as a QF.

I. Background

A. Factual Background

2. Las Vegas Cogen owns and operates a gas-fired 54 MW (net) topping-cycle cogeneration facility (Facility). The Facility was certified as a qualifying cogeneration facility by the Commission on October 17, 1991.² The Facility supplies its thermal host, a 12 acre greenhouse, with thermal energy in the form of hot water for use in space

¹ The efficiency standard is contained in section 292.205 of the Commission's regulations. *See* 18 C.F.R. 292.205(2)(i) (2006). For any qualifying topping-cycle cogeneration facility, the efficiency standard requires that the useful power output of the facility plus one-half the useful thermal energy output must, during the applicable period, be no less than 42.5 percent of the total energy input of natural gas and oil to the facility or no less than 45 percent if the useful thermal energy output is less than 15 percent of the facility's total energy output.

² *Las Vegas Cogeneration Limited Partnership*, 57 FERC ¶ 62,035 (1991). The Commission recertified the Facility as a qualifying facility on August 10, 1992. *Las Vegas Cogeneration Limited Partnership*, 60 FERC ¶ 62,094 (1992). The Facility has also self-recertified as a qualifying facility on several occasions.

heating and temperature regulation for agricultural production. The greenhouse is owned by Las Vegas Cogen affiliate, Sunco, which in turn has rented the greenhouse to unaffiliated tenants who grow crops. The Facility supplies 45 MW of electric power to Nevada Power Company (Nevada Power) during on-peak hours under a long-term power purchase agreement.

B. Request for Waiver

3. On October 13, 2006, Las Vegas Cogen filed a petition for limited waiver of the Commission's QF efficiency standard for the 2006 calendar year. Las Vegas Cogen states that the Sunco greenhouse has historically been used by tenants to grow tomatoes for sale in U.S. markets, but in mid-2005, the tomato crops in the greenhouse became infested with a virus, requiring the greenhouse to be shut down in August 2005 for cleanout and decontamination.

4. Las Vegas Cogen further states that subsequent to the greenhouse contamination, the Facility experienced a significant technical problem with its generator resulting in a long-term maintenance outage that began in October 2005 and continued until mid-April 2006. Las Vegas Cogen adds that it was necessary to ship the generator rotor to Wisconsin for redesign, repair, and rewinding work which was completed in early 2006. After testing, the Facility returned to service.

5. Las Vegas Cogen states that because of the maintenance outage it was unable to cost-effectively provide the greenhouse with hot water for growing purposes, and therefore Sunco had difficulty attracting a replacement grower starting early in 2006. Las Vegas Cogen states that Sunco has now found a grower to occupy the greenhouse and has entered into a thermal energy purchase contract with that grower to buy and utilize Facility thermal energy for agricultural production purposes.

6. Las Vegas Cogen argues that waiver of the efficiency standard is warranted because: (1) its request is limited and temporary – applicable only to 2006; (2) its need for a waiver arises from circumstances beyond its control; (3) further waivers will not be necessary; (4) its request for a waiver is timely; (5) the Facility provides substantial public benefits, converting waste heat to useful thermal energy; (6) waiver will help fulfill the goal of PURPA to encourage cogeneration.

C. Application for Recertification as Qualifying Facility

7. In its instant petition, Las Vegas Cogen also requests Commission recertification of its facility as a qualifying cogeneration facility. Las Vegas Cogen states that, other than with respect to the facts that give rise to its request for a temporary limited waiver of the QF efficiency standard for 2006, the facts upon which the Commission relied to originally certify the Facility as a QF have not changed in any material way.

II. Notice of Filing and Responsive Pleadings

8. Notice of this filing was published in the *Federal Register*, 71 Fed. Reg. 63,293 (2006), with interventions, protests, or comments due on or before November 3, 2006. Nevada Power filed a timely motion to intervene and protest. Las Vegas Cogen filed an answer and Nevada Power responded with a subsequent answer.

A. Protest

9. On November 3, 2006, Nevada Power filed a motion to intervene and protest, arguing that neither available evidence, equity, nor sound policy support granting Las Vegas Cogen the requested waiver and that the Commission should find Las Vegas Cogen has failed to maintain QF status for calendar year 2006.

10. More specifically, Nevada Power asserts that Las Vegas Cogen cancelled a 30-year fuel supply contract and entered into an index-priced gas purchase contract through April 2010, thus exposing itself to the risk of rising gas prices. Nevada Power further contends that rising natural gas prices coincide with Las Vegas Cogen's maintenance outage and Nevada Power suggests that economic incentives, as opposed to technical requirements, may have been the actual impetus for the outage.³

11. Nevada Power also argues that under its contract with Sunco, Las Vegas Cogen could have enforced a provision requiring Sunco to take a sufficient quantity of thermal energy to permit the Facility to meet Commission operating and efficiency standards, regardless of whether Sunco could use the thermal energy delivered. Nevada Power states that the Fifth Circuit has confirmed that once the Commission determines that the use of the thermal output is common, it is no longer relevant for the Commission's purposes what use the host actually makes of its thermal purchase.⁴

12. Nevada Power further contends that Las Vegas Cogen could have substantially reduced the duration of its maintenance outage and thereby met the QF efficiency standard for calendar year 2006. In support of this contention, Nevada Power attaches an affidavit from the Nevada Power electrical engineer responsible for monitoring the maintenance outage, views from other user groups about the time required to make similar repairs, and evidence from entities experienced in performing the types of repairs

³ Nevada Power attaches a press release from Las Vegas Cogen's parent company stating that due to significant increases in long-term forecasts for natural gas prices during the third quarter of 2005, its operation of the Las Vegas I plant became uneconomic.

⁴ Nevada Power cites *Brazos Elec. Power Coop. Inc. v. FERC*, 205 F.3d 235, 244 (5th Cir. 2000)(*Brazos*).

required by Las Vegas Cogen. Based on this evidence, Nevada Power concludes that the prolonged duration of the outage was not beyond the reasonable control of Las Vegas Cogen, and thus granting the requested waiver is not justified.

13. Additionally, Nevada Power argues that Las Vegas Cogen has offered no showing that it has provided substantial benefits of cogeneration during 2006; in fact, to date, it has provided *no* benefit of cogeneration. Further, Nevada contends that Las Vegas Cogen has made no showing that a denial of waiver will cause it to be economically unviable or to cease operations. Nevada Power points out that its contract with Las Vegas Cogen clearly provides for a QF and a non-QF rate, and argues that the Commission should not insulate Las Vegas Cogen from the risk it voluntarily assumed when it elected to change its fuel supply arrangements or from the obligation to honor contract terms that are the product of good faith, arm's-length negotiation.

14. Finally, Nevada Power challenges Las Vegas Cogen's contention that a waiver would help fulfill the goal of PURPA to encourage cogeneration, and maintains instead that to grant the waiver might well signal to the marketplace that the negotiation of non-QF rates in a QF power sales agreement is a meaningless exercise. Power purchasers may decide that, rather than provide QFs with certainty regarding rates during periods of non-compliance, there is greater value in relying on the Commission's policy of generally applicable rates for periods of non-compliance. Such a result would increase the economic risk to QFs and discourage their development.

B. Las Vegas Cogen's Answer

15. On November 20, 2006, Las Vegas Cogen submitted an answer to Nevada Power's protest asserting that Nevada Power does not contradict the showings originally made by Las Vegas Cogen and that Nevada Power's argument that generator repairs should have been performed more quickly amounts to speculation, not evidence. Las Vegas Cogen contends that the rotor redesign and rewinding required in the instant proceeding appears more complex than the repairs Nevada Power's engineer discusses in his affidavit. Further, according to Las Vegas Cogen, even if the Commission were to conclude that the Facility could have been repaired more quickly, the Commission should not substitute its judgment for Las Vegas Cogen's business judgment where the facts show that Las Vegas Cogen acted on an informed basis, in good faith, and in the honest belief that the actions it was taking were in the best interest of the company.

16. Las Vegas Cogen further responds that compelling Sunco to take thermal energy it could not use would not have preserved the Facility's QF status, because the thermal energy would not have been "made available to an industrial or commercial process," as required by 18 C.F.R. § 292.292(h)(1).

17. Las Vegas Cogen states that, contrary to the assertion by Nevada Power, the Facility has provided significant benefits during 2006. It adds that the Facility returned to service in April 2006 and has performed strongly since then. Further, Las Vegas Cogen states that the Facility is starting to resume its provision of thermal energy to the Sunco greenhouse now that a tenant is present and preparing a crop for the winter growing season.

C. Nevada Power's Subsequent Answer

18. On December 5, 2006 Nevada Power filed a subsequent answer, arguing that Las Vegas Cogen's answer is an incorrect interpretation of Commission precedent and an inappropriate use of what Nevada Power calls the "Business Judgment Rule." Nevada Power argues that the Facility's thermal output, supplied to the greenhouse for space heating, constitutes a useful purpose and, under Commission precedent, one that could have continued regardless of greenhouse operability. Nevada Power contends that "if circumstances forced Sunco to waste its purchases that should have been of no concern to Las Vegas Cogen."

19. Nevada Power further argues that once Las Vegas Cogen has claimed that the outage was due to circumstances beyond its control, it cannot seek to foreclose scrutiny of management decisions through reliance on the "Business Judgment Rule."

III. Discussion

A. Procedural Matters

20. 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 Nevada Power a party to this proceeding. Further, while Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(2) (2006), prohibits answers to a protest unless otherwise ordered, the Commission will accept Las Vegas Cogen's answer and Nevada Power's subsequent answer because they will lead to a more accurate and complete record in this proceeding.

B. Request for Waiver

21. 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.”⁵ 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.⁶

22. Taking into account all the relevant factors, we will grant Las Vegas Cogen’s request for waiver. First, Las Vegas Cogen’s need for waiver of the Commission’s efficiency standard is due to unexpected events outside of Las Vegas Cogen’s control. It is a result of the combination of a tomato virus infestation followed by an unanticipated maintenance outage.

23. We reject Nevada Power’s argument that the real reason for the outage was Las Vegas Cogen’s desire to avoid paying high fuel costs and its argument that the outage was unnecessarily prolonged. Nevada Power does not allege that Las Vegas Cogen contrived the virus infestation that originally led to the Facility’s shutdown, and Nevada Power has made no showing that Las Vegas Cogen contrived the equipment failure that subsequently contributed to that shutdown. Moreover, Las Vegas Cogen has provided a reasonable justification for the steps they took and the time that elapsed. Further, even if the maintenance outage had been shorter, it is likely that Las Vegas Cogen would still have required a waiver, because the Facility would still have been out of commission during much of the winter growing season thus frustrating the effort to find a new greenhouse tenant.

24. We disagree with Nevada Power’s contention that the thermal host should have been required to take the thermal energy regardless of its ability to make use of it. Nevada Power is mistaken in its interpretation of Commission policy under both the Commission’s regulations and the decision in *Brazos*. Under 18 C.F.R. 292.205 (a)(2) (2006), the efficiency standard for QF facilities is measured using the “useful thermal energy output.” Our regulations, 18 C.F.R. 292.202(h), define “useful thermal energy output” as thermal energy that is made available to an industrial or commercial process,

⁵ 18 C.F.R. § 292,205(c) (2006); *see also* 16 U.S.C. § 825g (2000) (general authority to waive regulations as the Commission “may find necessary or appropriate”).

⁶ *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); *Gordonville Energy, L.P.*, 72 FERC ¶ 61,160 at 61,790–91 & n.7 (1995), and the cases cited therein.

or that is used in a heating or cooling application. Nevada Power's contention that the Facility would qualify even if Sunco simply wasted its purchases as opposed to using them is incorrect. The useful thermal output here is one that must be "used in a heating application." Delivery of energy to an inoperable greenhouse does not constitute being "used" in a heating application. In *Virginia Turbo Power Systems*, we scrutinized the actual thermal load for the greenhouse, noting that the "obligation [to purchase thermal output] by itself does not mean that the quantity purchased is a useful thermal output, *i.e.*, a use for such energy must truly exist for a valid thermal application before it can be considered 'useful.'"⁷

25. In *Brazos*, the court explains that the underlying rationale behind encouraging cogeneration facilities is to conserve oil and natural gas by making use of the thermal energy produced as a by-product of electric generation.⁸ The issue in *Brazos* was a question of when can usefulness be presumed and how far down the use chain must the Commission scrutinize to measure usefulness. In *Brazos*, the industrial process for which the thermal energy was used was the production of distilled water; it was not necessary to evaluate the profitability of the sale of the distilled water. The *Brazos* court upheld Commission policy, stating that "PURPA and its implementing regulations require only that the thermal energy be useful; they do not demand that the sale of every end-product be profitable."⁹ Here, the thermal product from the Facility, in order to be useful, must be "used" in a heating application. No such use exists in an inoperable greenhouse and thermal output delivered to an inoperable facility would not be "useful" for purposes of satisfying the criteria for status as a qualifying cogeneration facility.

26. Other factors on which we have previously based waivers are also present in this instance. Las Vegas Cogen has not received an earlier waiver since it was certified by the Commission in 1991. The requested waiver is for a limited duration and Las Vegas Cogen states that it expects to satisfy the efficiency standard in 2007 and subsequent years. The request was timely. It was submitted over two months prior to the end of the year, at a point where Las Vegas Cogen could determine it likely would not meet the efficiency requirement for 2006.

27. Finding that waiver meets the PURPA goal of encouraging cogeneration in the face of an unanticipated, one-time combination of events is consistent with past Commission treatment of requests for waiver. Indeed we see no reason that a QF should lose QF status for calendar year 2006 based on the facts of this case. We have in the past consistently granted waivers of the efficiency standard in similar circumstances, and

⁷ 51 FERC ¶ 61,079 at 61,177 (1990).

⁸ 205 F.3d 235, 237 (5th Cir. 2000).

⁹ *Id.* at 243.

nothing raised by Nevada Power convinces us that we should begin denying waiver to facilities that fail to satisfy the operating and /or efficiency standards as a result of a one-time unanticipated event outside of the control of the operator of the cogeneration facility. Nevada Power's argument that in order to merit a waiver, the Facility must show that the loss of QF status will cause a financial calamity is inconsistent with past Commission practice of granting waiver in circumstances similar to these.

28. Accordingly we will grant Las Vegas Cogen's request for waiver of the efficiency standard for the 2006 calendar year.

C. Application for Recertification as Qualifying Facility

29. Las Vegas Cogen seeks Commission recertification of the facility as a QF. The petition states that, other than with respect to the facts that give rise to Las Vegas Cogen's request for waiver, the facts upon which the Commission relied to originally certify the facility as a QF have not changed in any material way. Based on the information provided with the application, we find that Las Vegas Cogen's facility continues to satisfy the requirements for QF status.

The Commission orders:

(A) Las Vegas Cogen's request for waiver of the efficiency standard, 18 C.F.R. § 292.205(a) (2006), is hereby granted, as discussed in the body of this order.

(B) The Las Vegas Cogen facility referenced in the submittal filed on October 13, 2006 is hereby granted recertification of qualifying status pursuant to 18 C.F.R. § 292.207(b) (2006), as amended by section 201 of the Public Utility Regulatory Policies Act of 1978 (PURPA), provided that the facility is owned and operated in the manner described in the application and in this order.¹⁰ To the extent that facts or representations

¹⁰ Certification as a QF serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations. 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state or federal law, including those regarding siting, construction, operation, licensing, and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.

which form the basis of this order change, this order cannot be relied upon. While the Las Vegas Cogen Facility might continue to be eligible to be a QF under the changed circumstances, self- or Commission-recertification at that point will be necessary.¹¹

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹ *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, 71 Fed. Reg. 7,852 (Feb. 15, 2006), FERC Stats. & Regs. ¶ 31,203 at P 82 (2006), *order on reh'g*, Order No. 671-A, 71 Fed. Reg. 30,585 (May 30, 2006), FERC Stats. & Regs. ¶ 31,219 (2006).