

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Sithe Energies, Inc.	Docket Nos. EL04-26-000
Acme POSDEF Partners, L.P.	QF85-311-004
LUZ Solar Partners, Ltd., III	QF86-734-006

LUZ Solar Partners, Ltd., III	Docket No. QF86-734-007
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ORDER APPROVING PARTIAL SETTLEMENT AND GRANTING APPLICATION  
FOR RECERTIFICATION AS A SMALL POWER PRODUCTION FACILITY

(Issued October 8, 2004)

1. On July 14, 2004, LUZ Solar Partners Ltd., III (LUZ III), CNC/SEGS, Inc., Sithe Energies, Inc., Exelon SHC, Inc. (Exelon), and Southern California Edison Company (SoCal Edison) (collectively, the Parties) filed a partial settlement resolving all issues set for hearing in the Commission's November 20, 2003 Order<sup>1</sup> in Docket Nos. EL04-26-000, QF85-311-004 and QF86-734-006 insofar as the SEGS III facility is concerned. On a related matter, LUZ III has filed an application for recertification (Application) as a small power production facility in Docket No. QF86-734-007. We approve the partial settlement and grant the application.

**Background**

2. On October 27, 2003, representatives of Sithe contacted Commission staff to alert staff that Sithe had recently discovered that two qualifying facilities (QF)<sup>2</sup> in which Sithe

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<sup>1</sup> *Sithe Energies, Inc., et al.*, 105 FERC ¶ 61,240 (2003).

<sup>2</sup> The two QFs are the Stockton facility that is owned by Acme POSDEF Partners, L.P. and initially certified in Docket No. QF85-311-000, *Cogeneration National Corporation*, 38 FERC ¶ 62,259 (1987), and the San Bernardino facility (SEGS III) that is owned by LUZ III and was initially certified in Docket No. QF86-734-000, *LUZ Solar Partners III, Ltd.*, 37 FERC ¶ 62,244 (1986). The Hearing Order refers to the SEGS III generating facility as the San Bernardino facility. Issues relating to the Stockton facility are the subject of a separate settlement agreement and will be addressed by a separate order.

affiliates possessed ownership interests may have had their QF status affected by Exelon's acquisition of a 49.9 percent indirect ownership interest in Sithe (Exelon Transaction).<sup>3</sup>

3. One of the criteria for being a QF relates to ownership of the QF. Sections 3(17)(C)(ii) and (18)(B)(ii) of the Federal Power Act (FPA), 16 U.S.C. § 796(17)(C)(ii) and (18)(B)(ii) (2000), provide that a QF must be:

Owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

The Commission's regulations implementing this statutory requirement states that:

(a) General Rule. A cogeneration facility or small power production facility may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).

(b) Ownership test. For purposes of this section, a cogeneration or small power production facility shall be considered to be owned by a person primarily engaged in the generation or sale of electric power, if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company, or companies, or any combination thereof. If a wholly or partial owned subsidiary of an electric utility or electric utility holding company has an ownership interest of a facility, the subsidiary's ownership interest shall be considered as ownership by an electric utility or electric utility holding company.

18 C.F.R. § 292.206 (a) and (b) (2004).

4. Exelon acquired an indirect ownership interest in Sithe and thus an indirect ownership interest in SEGS III, and Exelon was and is an electric utility holding company as defined by the Commission's PURPA regulations. Although Exelon's acquisition of an interest in Sithe was reported to and approved by the Commission, the potential impact on SEGS III's QF status was not examined at that time.

5. Sithe has identified its affiliates which had interests in the two facilities at issue as "inactive." This "inactive" designation was interpreted by Sithe's personnel responsible for legal and regulatory compliance to mean that they were shell companies that owned

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<sup>3</sup> The acquisition occurred on December 18, 2000.

no currently operating facilities. Because of this designation, in conjunction with the Exelon Transaction there were no QF regulatory efforts undertaken with respect to those entities or with respect to the Stockton or SEGS III facilities.

6. In October 2003, Sithe management, preparing for the sale of certain assets, discovered its ownership interest in the Stockton facility. An audit by Sithe followed which uncovered its ownership interest in the SEGS III facility. After contacting Commission staff as described above, Sithe submitted to staff of the Commission's Division of Enforcement, Office of Market Oversight and Investigations (Enforcement) materials to support its claim of inadvertence with respect to the potential noncompliance with the Commission's ownership criteria for QF status.

7. On November 20, 2003, the Commission issued an order finding that it appeared that the Stockton and SEGS III facilities may not have satisfied the Commission's ownership criteria for QF status following the Exelon Transaction. The Commission instituted a proceeding to determine whether Sithe's ownership interest in the two generation facilities affected their status as QFs under the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>4</sup>

8. On July 14, 2004, the Parties filed an offer of partial settlement to resolve all the issues set for hearing insofar as the SEGS III facility is concerned.

9. In addition, as part of the settlement, LUZ III filed its Application for recertification of the SEGS III facility. The purpose of the Application is to update information to reflect: (1) changes in ownership of the SEGS III facility since the 1999 Recertification Order, including the acquisition by Exelon of an indirect interest in the SEGS III facility effective December 18, 2000 and a subsequent change in Exelon's upstream ownership interest in the facility effective November 25, 2003; (2) the Commission proceedings in *Sithe Energies, Inc.*, Docket Nos. EL04-26-000 and QF86-734-006 investigating the SEGS III facility's compliance with the Commission's QF ownership requirements in light of the ownership changes; and (3) a settlement of issues in the foregoing dockets that provides, among other things, for a planned future change in ownership of the SEGS III facility. LUZ III requests a finding that as a result of, and effective upon the effective date of the settlement, SEGS III shall be deemed to have met the Commission's ownership requirements as a QF for the period beginning December 18, 2000 through the date of filing the Application (July 14, 2004).

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<sup>4</sup> *Sithe Energies, Inc., et al.*, 105 FERC ¶ 61,240 (2003).

## **Discussion**

### **Offer of Partial Settlement**

10. The partial settlement agreement resolves all issues the parties have raised in Docket Nos. EL04-26-000, QF85-311-004 and QF86-734-006 relating to the SEGS III facility. No comments were filed. On August 17, 2004, the Settlement Judge certified the settlement to the Commission as uncontested.

11. The partial settlement agreement is in the public interest and hereby approved. The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

12. This order terminates Docket No. QF86-734-006.

### **Application for Recertification**

13. As noted above, in connection with the settlement agreement, LUZ III filed an application for recertification of a small power production facility as a qualifying facility (QF). LUZ III seeks a declaration that the SEGS III facility be deemed to have met the ownership requirements<sup>5</sup> for QF status for the period December 18, 2000 through July 14, 2004. LUZ III states that the technical requirements (as opposed to the ownership requirements) for QF status have not changed since the facility was last certified as a QF and that LUZ III is therefore only asking for a declaration that LUZ III has met the ownership requirements for QF status for the relevant time period.

14. Notice of the application for recertification was published in the *Federal Register*, 69 Fed. Reg. 48,489 (2004), with protests or motions to intervene due on or before August 16, 2004. On August 13, 2004, SoCal Edison filed a motion to intervene. SoCal Edison states that, for the purposes of effectuating the settlement agreement, and subject to the proviso that approval of the Application be made contingent upon, and effective no earlier than, the effective date of the settlement agreement, Edison does not protest the Application.

15. Based on our review of LUZ III's application and in recognition of the fact that the application was submitted in the context of the settlement agreement, we find that LUZ III satisfies our ownership requirements for QF status during the relevant time period. This determination becomes effective on the effective date of the settlement agreement. Within 10 days of the effective date of the settlement agreement, LUZ III shall inform the Commission of that date.

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<sup>5</sup> 18 C.F.R. § 292.206 (2004).

The Commission orders:

(A) The partial settlement agreement is hereby approved, as discussed in the body of this order.

(B) The application for recertification is hereby granted, to become effective on the effective date of the partial settlement agreement, as discussed in the body of this order.

(C) Within 10 days of the effective date of the partial settlement agreement, LUZ III shall inform the Commission of that date.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.