UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sithe Energies, Inc. Acme POSDEF Partners, L.P.	Docket Nos. EL04-26-000 QF85-311-004

ORDER APPROVING PARTIAL SETTLEMENT

(Issued October 27, 2004)

1. On June 14, 2004, POSDEF Power Company, L.P. (POSDEF), on behalf of itself, Pacific Gas & Electric Company (PG&E), Acme POSDEF Partners, L.P., Sithe Energies, Inc. (Sithe), Cogeneration National Corporation (CNC), Exelon SHC, Inc. (Exelon) and Commission Trial Staff filed a "Definitive Agreement, a Consent Agreement, and a Release Agreement" (collectively, the "Offer of Partial Settlement") resolving all issues set for hearing in the Commission's November 20, 2003 Order[1] in Docket Nos. EL04-26-000, QF85-311-004 and QF86-734-006 insofar as the POSDEF generating facility (POSDEF facility) is concerned. We approve the Offer of Partial Settlement.

Background

2. POSDEF and PG&E are parties to a power purchase agreement (PPA). Pursuant to the PPA, POSDEF agreed to sell to PG&E electric energy from the POSDEF facility, which is a coal and petroleum coke fueled electric generating facility located in Stockton, California.

3. The original sole owner of the POSDEF facility, CNC, first filed for qualifying facility (QF) certification for the POSDEF facility on December 17, 1986. The Commission granted QF certification by letter order dated March 17, 1987.

4. In 1988, CNC became an indirect, wholly-owned subsidiary of Sithe, which – like CNC – was a non-utility for QF certification purposes. The Commission subsequently recertified the POSDEF facility on May 5, 1993, to reflect the transfer of ownership from CNC to Acme POSDEF.[2] POSDEF asserts that CNC held a limited partnership interest in POSDEF ranging from one to 36 percent, and Acme POSDEF acquired a general

[1] *Sithe Energies, Inc., et al.*, 105 FERC ¶ 61,240 (2003) (Hearing Order).

[2] *Acme POSDEF Partners, L.P.*, 63 FERC ¶ 62,127 (1993).

partnership interest ranging from 64 to 99 percent. Acme POSDEF was at the time indirectly owned by FPL Group, Inc. and National Power Company (NPC), as well as individuals affiliated with NPC. The Commission determined that, under this ownership structure, utility interests would not have an equity interest in the POSDEF facility of greater than 50 percent.[3]

5. In 1995, FPL Group, Inc. indirectly acquired all of the interest in Acme POSDEF held by NPC and the individuals affiliated with it, and Acme POSDEF thereby became an indirect, wholly-owned subsidiary of FPL Group, Inc. The Commission determined that this ownership structure also complied with the Commission's ownership rules.[4]

6. On December 18, 2000, Exelon Holdings, Inc. (Exelon Holdings) acquired 49.9 percent of Sithe Energies (Exelon Transaction). Exelon Holdings was and is an electric utility holding company as defined by the Commission's Public Utility Regulatory Policies Act of 1978 (PURPA) regulations.

7. In October 2003, representatives of Sithe alerted Commission staff that Sithe had recently discovered that the QF status of two QFs[5] in which Sithe affiliates possessed ownership interests may have been affected by the Exelon Transaction. After contacting Commission staff, Sithe submitted to the Commission's Division of Enforcement, Office of Market Oversight and Investigations materials to support its claim of inadvertence with respect to the potential noncompliance with the Commission's ownership criteria for QF status.

8. On November 20, 2003, the Commission issued an order finding that it appeared that the POSDEF 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 facilities affected their status as QFs under PURPA.[6]

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[3] *Id.*

[4] *Acme POSDEF Partners, L.P.*, 72 FERC ¶ 62,264 (1995).

[5] The two QFs are the POSDEF facility 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 SEGS III facility were the subject of a separate partial settlement agreement and were addressed in a previous order, *Sithe Energies, Inc.*, 109 FERC ¶ 61,035 (2004).

[6] *Sithe Energies, Inc., et al.*, 105 FERC ¶ 61,240 (2003).

9. On June 14, 2004, POSDEF filed the Offer of Partial Settlement to resolve all issues set for hearing insofar as the POSDEF facility is concerned.[7] The Offer of Partial Settlement: (1) reduces the PPA's term by six years; (2) discharges PG&E from any obligation to purchase power from POSDEF, except under the amended PPA's terms; (3) releases POSDEF from its duty to maintain QF status under the PPA; and (4) bases energy charges on the California Public Utilities Commission (California Commission) formula for short-run avoided operating costs.[8] The Offer of Partial Settlement resolves all issues raised in Docket Nos. EL04-26-000 and QF85-311-004 relating to the POSDEF facility.[9] No comments were filed. On August 6, 2004, the presiding judge certified the Offer of Partial Settlement to the Commission as uncontested.

10. In addition to the Offer of Partial Settlement, POSDEF filed a separate application for market-based rate authority. POSDEF represented that the application would help to ensure continuity of service if the POSDEF generating facility ceased to satisfy the Commission's QF requirements. POSDEF emphasized that Commission acceptance of the market-based rate application was a prerequisite to the effectiveness of the Definitive Agreement. POSDEF therefore requested that the Commission approve the application no later than it approved the Offer of Partial Settlement. The Commission granted POSDEF's application for market-based rate authority in a letter order dated September 16, 2004, in Docket Nos. ER04-947-000 and ER04-947-001.

Discussion

11. The Offer of Partial Settlement is in the public interest and is 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. QF85-311-004 and EL04-26-000.

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[7] As noted in P 1 above, the Offer of Partial Settlement was filed by POSDEF on behalf of itself and others and consists of several documents. The Definitive Agreement applies between POSDEF and PG&E, and contains the substantive terms of the Offer of Partial Settlement. The Release Agreement applies among PG&E, Sithe, CNC, and Exelon. It consists of miscellaneous provisions regarding the parties' liabilities/rights and precedential effect. The Consent Agreement applies among all participants; it reflects their general factual and legal stipulations.

[8] The amended PPA will track any changes in the California Commission's regulations regarding the short-run avoided operating costs formula and other contractual terms generally applicable to QFs that have executed a contract with PG&E as specified in the Offer of Partial Settlement.

[9] All other issues in these proceedings were previously resolved. *See* n.5 *supra*.

<u>The Commission orders</u>:

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

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

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Sithe Energies, Inc. — Docket Nos. EL04-26-000
Acme POSDEF Partners, L.P. — QF85-311-004

(Issued October 27, 2004)

KELLY, Commissioner, *dissenting in part*:

For the reasons I have previously set forth in *Wisconsin Power & Light Co*., 106 FERC ¶ 61,112 (2004), I do not believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the "just and reasonable" standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate.

Therefore, I disagree with this order to the extent it approves a settlement that provides, in relevant part, that "[t]he standard of review for changes by the FERC to the rates and other terms of the Amended PPA, shall be the 'public interest' standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)."

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Suedeen G. Kelly