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August 4, 2004

**Advice 2537-E
(Pacific Gas and Electric Company ID U 39 E)**

Public Utilities Commission of the State of California

SUBJECT: POSDEF Restructuring Advice Letter Filing¹

Pursuant to the Restructuring Advice Letter filing ("RALF") procedure the California Public Utilities Commission ("CPUC" or "Commission") adopted in Decision (D.) 98-12-066, Pacific Gas and Electric Company ("PG&E") submits the attached Settlement Agreements (Appendix A) that amend the power purchase agreement ("PPA") based on Interim Standard Offer #4 ("ISO4") between PG&E and POSDEF Power Company, LP ("POSDEF") together with its prior amendments and agreements (all such prior amendments and agreements are included in Confidential Appendix B and hereinafter collectively referred to as the "Current PPA").

Included among these Settlement Agreements is the Definitive Agreement Between Pacific Gas and Electric Company and POSDEF Power Company, L.P. and Acme POSDEF Partners, L.P. ("Definitive Agreement") and its attachment, the Third Amendment to The Long-Term Energy and Capacity Power Purchase Agreement Between Pacific Gas and Electric Company and POSDEF Power Company, L.P. ("Third Amendment"). The effectiveness of the Settlement Agreements including the Definitive Agreement and the Third Amendment are contingent on receipt of a CPUC resolution acceptable to PG&E. If the CPUC approves the Definitive Agreement and the Current PPA as amended by the Third Amendment (the "Amended PPA") as proposed herein, ratepayers may expect to receive significant benefits.

PURPOSE

PG&E makes this filing to seek a Commission resolution approving as reasonable the Settlement Agreements, and specifically the Definitive Agreement and the Amended PPA. PG&E has submitted a draft of this advice letter, the Settlement Agreements

¹ POSDEF is an acronym for Port of Stockton District Energy Facility

(Appendix A), the Current PPA (Confidential Appendix B), and the supporting data to the Office of Ratepayer Advocates ("ORA"). After review, the ORA issued the attached letter dated July 29, 2004 (Confidential Appendix C), which states ORA's support for Commission approval of PG&E's requests.

Accordingly, PG&E asks that the Commission adopt a resolution that:

1. Approves the Settlement Agreements, and in particular the Definitive Agreement and the Amended PPA as reasonable;
2. Authorizes recovery of all payments under the Amended PPA in PG&E's Energy Resource Recovery Account ("ERRA") including an above-market portion in the Ongoing Competition Transition Charge ("Ongoing CTC"), or any other cost recovery mechanism subsequently authorized by the Commission, subject only to PG&E's prudent administration of the Amended PPA; and
3. Authorizes the recovery of [REDACTED] as the shareholder incentive associated with this PPA restructuring, as authorized by the Commission in D.95-12-063 as modified by D.96-01-009.

BACKGROUND

POSDEF PPA (PG&E Log No. 08C002)

On October 18, 1984, Cogeneration National Corporation (CNC), POSDEF's predecessor in interest, and PG&E entered into a 30-year PPA for the Port of Stockton cogeneration project (See Confidential Appendix B). Under the PPA, PG&E agreed to purchase energy and capacity generated by a 44,000 kW generation facility fueled by coal, petroleum coke, refuse derived fuel and biomass located at the Port of Stockton (the "Project"). On December 7, 1987, the Project began deliveries of energy and capacity to PG&E's 60 kV transmission system in the Stockton area. Following some difficulty in establishing its commercial operation date that required extensive redesign and refurbishment of its fuel handling equipment and boiler, the Project successfully demonstrated its ability to reliably deliver firm capacity to PG&E on October 26, 1989. The terms of the Current PPA extend to October 25, 2019, 30 years after that demonstration date.

The Current PPA provides for energy payments that originally included fixed forecasted prices for a ten-year fixed price period and exclusively at short-run avoided cost (SRAC) thereafter. POSDEF was originally paid at [REDACTED] percent Option 1 (forecasted energy prices, Table B-1, as modified by paragraph 8 of the First Amendment to the PPA effective August 29, 1986) during its fixed price period that began with initial energy deliveries on December 7, 1987 and ended 10 years later. From the end of the fixed price period through the end of the Current PPA term (December 1997 through

October 2019), PG&E has made and is scheduled to make energy payments at SRAC as determined by the Commission.

Pursuant to an agreement executed in 1991, the parties clarified that power purchase terms and pricing for deliveries that exceed [REDACTED] kW, but do not exceed the physical limitation of the Project's interconnection facilities of [REDACTED] kW, are not covered under the PPA and would be paid an interruptible energy price (See Agreement letter dated April 1, 1991, Confidential Appendix B).

The Current PPA provides for firm capacity payments at non-standard rates due to the First Amendment to the PPA executed by CNC and PG&E in 1986 (see First Amendment, Confidential Appendix B). The First Amendment provided for firm capacity payments based on [REDACTED] kW to [REDACTED] kW in lieu of the original amount of [REDACTED] kW and increased the fixed energy payment percentage from [REDACTED] to [REDACTED]. In exchange for increasing the amount of firm capacity and the percentage of fixed energy prices, PG&E was granted expended curtailment rights and firm capacity prices paid under the PPA were reduced from [REDACTED] price that would have otherwise applied. For the first 10 years of firm capacity deliveries, firm capacity was paid at a price of [REDACTED]. For the remaining years of the PPA following the first ten years of firm capacity deliveries, firm capacity has been paid and is scheduled to be paid at [REDACTED]. Firm capacity payments are subject to minimum performance requirements and obligations defined in the PPA. The Project is also eligible for firm capacity bonus payments of up to a theoretical maximum of 17.6 percent if its generation meets specified performance requirements, and is currently receiving firm capacity bonus payments of [REDACTED].

The unamended PPA language provided for payment for as-delivered capacity to be paid for capacity delivered in excess of firm capacity in accordance with as-delivered capacity payment option 2 at fixed forecasted prices set forth in Table D-2 of Appendix E of the original PPA. However, on April 1, 1991, the parties executed a letter agreement clarifying that PPA pricing only covered deliveries up to the Project's generator nameplate of [REDACTED] kW for which it requested and received a transmission allocation in October 1984 (See Agreement letter dated April 1, 1991, Confidential Appendix B). Therefore, POSDEF does not receive as-delivered capacity payments under the Current PPA (although some minor amounts were paid in error during 1989 and 1990).

A copy of the Current PPA, including all prior amendments and related agreements between POSDEF (or its predecessor) and PG&E are attached in Confidential Appendix B.

The Generating Facility

The Project is a nominally rated 44,000 kW coal-fired (supplemented by petroleum coke) topping-cycle cogeneration plant supplying process steam to various customers

located at the Port of Stockton which together are the Project's thermal hosts. The Project is located at 2526 West Washington Street, Stockton, California.

The boiler is a percolating fluidized bed combustion unit primarily fueled by coal that is supplemented by other fuels primarily composed of petroleum coke. The boiler produces steam to turn a single cycle generator sized at 44,000 kW. The Project is designed to operate on a 24-hour per day, 7-day per week basis, providing baseload electrical generation to PG&E's local 60 kV transmission lines.

Project Ownership

The project has been owned by a limited partnership, POSDEF Power Company, L.P. ("POSDEF") since 1993. The general partner, Acme POSDEF Partners, L. P. ("Acme"), owns 50% of the voting interests in the project and is itself 100% indirectly owned by FPL Group, Inc. ("FPL"), an electric utility holding company under 18 C.F.R. § 292.202(n). The limited partner, Cogeneration National Corporation ("CNC") owns the remaining half of the voting interests in the project and is itself 50% indirectly owned by Exelon Corporation ("Exelon"), another utility holding company under § 292.202(n) and 50% indirectly owned by a non-utility entity.

PG&E Corporation and its affiliates, including Pacific Gas and Electric Company, are not and have never been affiliated in any way with any of the foregoing companies.

HISTORIC PERFORMANCE OPERATINGS AND COMPLIANCE WITH EFFICIENCY STANDARDS

The Project's Historical Performance

The Project's generation has ranged from 254 GWh to 362 GWh per year (excluding years including start-up and 2001 when the PPA was suspended during the energy crisis). The First Amendment to the PPA provided PG&E significant curtailment rights with respect to the Project during the first ten years following successful demonstration of firm capacity availability. These expanded curtailment rights expired October 25, 1999. Forecasted generation is based on the most recent five years of historic operating data for years that didn't include impacts for the energy crisis (2001 – 2002) or pay-for-curtailment agreements (1996 – 1998). The average generation over the years 1994, 1995, 1999, 2000 and 2003 is 321.5 GWh. Historical deliveries are provided in Confidential Appendix D. The project has consistently delivered its firm capacity to PG&E pursuant to the PPA terms and has not been placed on probation for failing to meet its minimum performance requirements even once.

Historic Performance Bonus Factors

The Project's historic firm capacity performance bonus factors are shown in the table below.

<u>Effective Date</u>	<u>Firm Capacity Performance Bonus Factors</u>
September 2003	
September 2002	
September 2001	
September 2000	
September 1999	
September 1998	
September 1997	
September 1996	
September 1995	
September 1994	
September 1993	
September 1992	

Compliance with Performance and Efficiency Standards

The Project has consistently met the operating and efficiency standards of the Federal Energy Regulatory Commission (FERC).

SUMMARY OF THE SETTLEMENT AGREEMENTS

The Settlement Agreements are a result of disputes in which PG&E intervened and actively participated concerning POSDEF's potential non-compliance with Qualifying Facility (QF) utility ownership requirements. The settlement is contingent on FERC and CPUC approval of the Settlement Agreements and FERC approval of POSDEF's market-based rate application. If final regulatory approvals are not obtained within 240 days after the date the Definitive Agreement was signed (i.e. by February 9, 2005), the Definitive Agreement terminates automatically.

The events leading to the settlement and the terms of the Settlement Agreements are explained in detail in the Explanatory Statement in Support of Uncontested Settlement filed with the Settlement Agreements at FERC (see Appendix A, Attachment A).

Events Leading to the Settlement

FERC originally certified the Project as a QF on March 17, 1987. At the time the Project was entirely owned by CNC and had no utility ownership. In 1988, CNC became an indirect, wholly-owned subsidiary of Sithe Energies, Inc. (Sithe), which like CNC, was a non-utility for QF purposes at that time. In 1993, the project ownership was restructured into its current limited partnership form. The general partner, Acme, was originally 90

percent indirectly owned by FPL. In 1995 FPL acquired the remaining interest in Acme. After both transactions in 1993 and 1995, FERC recertified the project as a QF following the changes in the ownership structure for the Project. On December 18, 2000, Exelon acquired a 49.9 percent indirect interest in ExRes SHC, Inc. (the Exelon Transaction), which in turn had a 100 percent indirect ownership interest in Sithe, and consequently CNC. POSDEF did not seek FERC recertification after the Exelon Transaction until approximately three years later. On November 25, 2003, Exelon's indirect interest in CNC increased to 50%.

On November 18, 2003, FERC's Enforcement Staff and Sithe entered into a Stipulation and Consent Agreement that "any possible non-compliance" with QF ownership requirements by POSDEF was "inadvertent." On November 20, 2003, FERC approved the Stipulation and Consent Agreement. On the same day, FERC issued a separate order initiating an investigation into Sithe and two QFs in which it held an ownership interest, including the POSEF project.

On December 5, 2003, PG&E filed a motion to intervene in that docket, EL04-26-000 and QF85-311-004. In opposition to the position of the project and its owners, PG&E took the position that effective upon the Exelon Transaction, the POSDEF project was no longer in compliance with the requirement under federal law limiting public utility ownership of QF projects to no more than 50%. PG&E thus disputed the initial positions of Sithe and FERC Staff. On April 14, 2004, after several settlement conferences held during the first quarter of 2004, PG&E, POSDEF, Acme, Sithe, CNC, and Exelon entered into a Memorandum of Understanding (MOU) which memorialized the essential terms now submitted in the Settlement Agreements. On June 14, 2004 POSDEF filed the Settlement Agreements with FERC on behalf of all the parties to the PPA and FERC Trial Staff.

Terms of the Settlement Agreements

Under the terms of the Settlement Agreements, the Project will operate and sell capacity and energy to PG&E under essentially the same terms as provided under the original PPA until October 25, 2013, when the PPA will terminate. POSDEF waives on behalf of itself and its successors in interest any right to require PG&E to purchase the electrical output of the Project other than under the Amended PPA.

In exchange for terminating the PPA six years early and waiving any further QF "put" right as to PG&E, PG&E agrees not to assert any claim that the project has violated the utility ownership requirements for QFs without any admission it was wrong, agrees to release POSDEF from all requirements related to maintaining QF status, and agrees to support POSDEF's application for market-based rate authority at FERC.

There are three agreements that comprise the Settlement Agreements: 1) the Definitive Agreement between POSDEF, Acme, and PG&E under the PPA, which includes the Third Amendment; 2) the Release Agreement between PG&E and Sithe, CNC, and

Exelon SHC; and 3) the Consent Agreement among all of the Parties, including FERC Trial Staff. As set forth herein, the Settlement Agreements resolve the complex litigation in the FERC proceedings.

The Definitive Agreement

The Definitive Agreement resolves all disputes between POSDEF and PG&E in relation to the Project's QF ownership status. It provides for a six-year reduction in the term of the PPA. It also excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. See Definitive Agreement (Attachment F to Appendix A), §§ 6-7. It also excuses POSDEF from any obligation to maintain QF status. *Id.*, § 9. Further, the Definitive Agreement provides a mechanism to ensure that the benefits under the agreement are not inadvertently changed in the future. *Id.*, § 8. The Amended PPA provides that the energy charges will be based on the CPUC's formula for calculating energy charges for QF power, as it may be revised from time-to-time. The Amended PPA thus provides that energy prices under those agreements automatically will track CPUC changes to the applicable QF energy charges.

The effective date of the Definitive Agreement is the date all regulatory approvals are obtained and no longer subject to rehearing or appeal, including the approval of FERC and the Commission. *Id.*, § 5.1. If final regulatory approvals are not obtained within 240 days after the date the Definitive Agreement is signed (or by February 9, 2005), the Definitive Agreement terminates automatically. *Id.*, § 5.2.

The Definitive Agreement also includes certain covenants and releases between POSDEF and Acme on the one hand and PG&E on the other hand. *Id.*, §§ 10-12. Among other things, POSDEF and PG&E release one another from all claims related to the Project's QF status. *Id.*, § 10.1. Neither party admits liability and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 10.2. POSDEF and PG&E also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. *Id.*, § 12.1.

The Definitive Agreement includes the Third Amendment as an attachment. The Third Amendment sets forth specific changes to the PPA to implement the settlement.

Release Agreement

In addition to the Definitive Agreement, PG&E, Sithe, CNC and Exelon SHC have entered into a Release Agreement, providing for certain covenants and releases between these parties in relation to the Definitive Agreement. Among other things, PG&E, Sithe, CNC and Exelon SHC release one another from all claims related to the Project's QF status. Release Agreement (Attachment G of Appendix A), § 6.1. None of the parties to the Release Agreement admit liability and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 6.2. PG&E,

Acme POSDEF, Sithe, CNC and Exelon also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. Id., § 7.1.

The Consent Agreement

All the parties, including FERC Trial Staff, have also entered into an uncontested Consent Agreement. See Consent Agreement (Attachment E to Appendix A). The Consent Agreement outlines the procedural history of the FERC proceeding. Id., ¶¶ 1-8. It sets forth the parties' factual stipulations. Id., ¶¶ 9-15. The Consent Agreement briefly recites the applicable law and conclusions of law applicable to this proceeding (id., ¶¶ 16-18), before outlining the terms of the settlement. Id., ¶¶ 19-23. It explains that although the parties have reached no agreement as to whether the Exelon Transaction had any effect on the Project's QF status, the parties agree that the Settlement Agreements remedy any possible violation. It concludes with a request for the issuance of a FERC order approving the settlement and terminating this proceeding. Id., ¶ 24.

Together, the Settlement Agreements resolve all past, present, and future disputes in the FERC proceeding among the specific parties that have an economic stake in the PPA and FERC Trial Staff. The settlement is uncontested.

RATEPAYER BENEFITS AND SHAREHOLDER INCENTIVE

Under the Current PPA, PG&E is to pay POSDEF above-market prices for energy and capacity for POSDEF's must-take power until October 25, 2019.

By terminating the PPA six years earlier, PG&E estimates significant savings for ratepayers (see Confidential Appendix E). PG&E calculates ratepayer benefits as the difference between the payments avoided in the final six years of the Current PPA and the cost of replacing the same amount of power that would have been provided by POSDEF at market prices. The analysis assumes that the market cost to replace the capacity and energy provided in the Current PPA is equal to SRAC and that ratepayers would save the entire projected firm capacity payments. The net present value (NPV) of these benefits amounts to [REDACTED]. As provided for in D.95-12-063, as modified by D.96-01-009, PG&E is requesting a shareholder incentive of 10% of that amount, or [REDACTED].

The NPV dollars mentioned above are based on January 1, 2005 dollars. PG&E used an annual discount rate of 8.07 percent, which is somewhat conservative considering that it is slightly higher than PG&E's interim authorized weighted average after-tax cost of capital of 7.8% authorized in D.02-11-027.

POSDEF'S PROJECTED ECONOMIC AND OPERATIONAL VIABILITY

The Project is economically viable. The *pro forma* spreadsheet prepared by PG&E projects positive income from its operation every year to the end of the PPA and a positive NPV under the Status Quo scenario as well as the five sensitivity scenarios (Confidential Appendix F). PG&E concludes that the Project is well maintained by examining its operating record over more than 14 years of operation. It has a long-established record of making reliable firm capacity deliveries under the PPA and has never been placed on probation due to not meeting its firm capacity performance requirements.

ORA LETTER

As required by the RALF procedure established in D.98-12-066, PG&E has sought and obtained a letter of support or neutrality from the ORA. In response to this request, Scott Cauchois, Senior Manager of the Electricity Rates and Pricing Branch of ORA, provided a letter dated July 29, 2004 to Frank De Rosa, PG&E's Director of Power Contracts (see Confidential Appendix C). The letter notes that PG&E seeks Commission approval of the Settlement Agreement as reasonable and requests a ten percent award based on the total expected ratepayer savings associated with the PPA restructuring. The letter states, "ORA has determined that the Settlement Agreement provides significant ratepayer benefits" and that ORA "supports approval of PG&E's requests."

LEGAL OR REGULATORY DISPUTES

Other than the FERC proceeding that the settlement agreement addresses, there are no current legal or regulatory disputes between POSDEF and PG&E. The Settlement Agreements waive all claims that PG&E may have regarding utility ownership interests in POSDEF and/or maintaining QF status in the future.

PROTESTS

Anyone wishing to protest this filing may do so by sending a letter by **August 24, 2004**, which is 20 days from the date of this filing. The protest must state the grounds upon which it is based, including such items as financial and service impact, and should be submitted expeditiously.

There are no restrictions on who may file a protest or response, but the protest or response shall set forth specifically the grounds upon which it is based and shall be submitted expeditiously. Pursuant to D.98-12-066, this RALF may be protested on one or more of the following grounds:

- a. PG&E did not properly serve or give notice of the advice letter;
- b. The relief requested in the advice letter would violate statute or Commission order;
- c. The advice letter contains material errors, or it does not follow the Commission's approved methodology, if any; or
- d. The proposed restructuring is unjust, unreasonable, or discriminatory, provided, however, that this advice letter is not subject to protest on these grounds if such protest would require re-litigating a prior order of the Commission.

Protests should be mailed to:

IMC Branch Chief – Energy Division
California Public Utilities Commission
505 Van Ness Avenue, 4th Floor
San Francisco, California 94102
Facsimile: (415) 703-2200
E-mail: jjr@cpuc.ca.gov

Copies should also be mailed to the attention of the Director, Energy Division, Room 4005 and Jerry Royer, Energy Division, at the address shown above. It is also requested that a copy of the protest be sent via postal mail and facsimile to Pacific Gas and Electric Company on the same date it is mailed or delivered to the Commission at the address shown below.

Pacific Gas and Electric Company
Attention: Brian Cherry
Director, Regulatory Relations
77 Beale Street, Mail Code B10C
P.O. Box 770000
San Francisco, California 94177
Facsimile: (415) 973-7226
E-mail: RxDd@pge.com

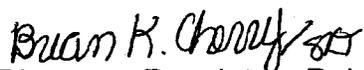
EFFECTIVE DATE

PG&E requests that this advice filing become effective on **September 13, 2004**, which is 40 days after the date of filing.

NOTICE

D.98-12-066 provides that RALFs should be served on the Consumer Services Division (CSD), the ORA, and on PG&E's restructuring advice letter service list and any other third parties as specified by the Energy Division or other Commission order or statute. PG&E has served copies on Consumer Services and Information Division (CSID, successor to CSD) and ORA. However, D.03-01-034 closed the restructuring dockets effective January 16, 2003. Therefore, in accordance with Section III, Paragraph G, of General Order No. 96-A, PG&E is sending a copy of this advice letter excluding the confidential appendices electronically or via U.S. mail to parties shown on the attached list. Non-market participants who are members of PG&E's Procurement Review Group and have signed appropriate Non-Disclosure Certificates will also receive the advice letter and accompanying confidential Appendices.

The portions of this advice letter so marked Confidential Protected Material are submitted in confidence under section 583 of the Public Utilities Code and General Order 66-C.



Director – Regulatory Relations

cc:

Pacific Gas and Electric Company's Procurement Review Group
Scott Cauchois (ORA)
Teresa Hortinela (ORA)
Linda Serizawa (CSID)

Index of Appendices

Appendix A	Settlement Agreements filed at FERC including Definitive Agreement and Third Amendment
Confidential Appendix B –	Current Power Purchase Agreement including all prior amendments and agreements
Confidential Appendix C –	ORA Letter of Support
Confidential Appendix D –	Historical Output of Project
Confidential Appendix E –	Detailed Analysis of Ratepayer Benefits
Confidential Appendix F –	Detailed Analysis of Project Economic Viability

**PG&E Electric Advice Filing List
General Order 96-A, Section III(G)**

ABAG Power Pool
Aglet Consumer Alliance
Agnews Developmental Center
Ahmed, Ali
Alcantar & Elsesser
Anderson Donovan & Poole P.C.
Applied Power Technologies
APS Energy Services Co Inc
Arter & Hadden LLP
Avista Corp
Barkovich & Yap, Inc.
BART
Bartle Wells Associates
Blue Ridge Gas
Bohannon Development Co
BP Energy Company
Braun & Associates
C & H Sugar Co.
CA Bldg Industry Association
CA Cotton Ginners & Growers Assoc.
CA League of Food Processors
CA Water Service Group
California Energy Commission
California Farm Bureau Federation
California ISO
Calpine
Calpine Corp
Calpine Gilroy Cogen
Cambridge Energy Research Assoc
Cameron McKenna
Cardinal Cogen
Cellnet Data Systems
Childress, David A.
City of Glendale
City of Healdsburg
City of Palo Alto
City of Redding
CLECA Law Office
Constellation New Energy
CPUC
Creative Technology
Crossborder Inc
CSC Energy Services
Davis, Wright Tremaine LLP
Davis, Wright, Tremaine, LLP
Defense Fuel Support Center
Department of the Army
Department of Water & Power City
Dept of the Air Force
DGS Natural Gas Services
DMM Customer Services
Downey, Brand, Seymour & Rohwer
Duke Energy
Duke Energy North America

Duncan, Virgil E.
Dutcher, John
Dynergy Inc.
Ellison Schneider
Energy Law Group LLP
Enron Energy Services
Exeter Associates
Foster, Wheeler, Martinez
Franciscan Mobilehome
Future Resources Associates, Inc
GLJ Energy Publications
Goodin, MacBride, Squeri, Schlotz &
Grueneich Resource Advocates
Hanna & Morton
Heeg, Peggy A.
Hogan Manufacturing, Inc
House, Lon
Imperial Irrigation District
Integrated Utility Consulting Group
International Power Technology
J. R. Wood, Inc
JTM, Inc
Kaiser Cement Corp
Korea Elec Power Corp
Marcus, David
Masonite Corporation
Matthew V. Brady & Associates
Maynor, Donald H.
McKenzie & Assoc
McKenzie & Associates
Meek, Daniel W.
Mirant California, LLC
Modesto Irrigation Dist
Morrison & Foerster
Morse Richard Weisenmiller & Assoc.
New United Motor Mfg, Inc
Norris & Wong Associates
North Coast Solar Resources
Northern California Power Agency
PG&E National Energy Group
Pinnacle CNG Company
PPL EnergyPlus, LLC
Price, Roy
Product Development Dept
Provost Pritchard
R. M. Hairston & Company
R. W. Beck & Associates
Recon Research
Regional Cogeneration Service
RMC Lonestar
Sacramento Municipal Utility District
SCD Energy Solutions
Seattle City Light
Sempra

Sempra Energy
Sequoia Union HS Dist
SESCO
Sierra Pacific Power Company
Silicon Valley Power
Simpson Paper Company
Smurfit Stone Container Corp
Southern California Edison
SPURR
St. Paul Assoc
Stanford University
Sutherland, Asbill & Brennan
Tabors Caramanis & Associates
Tansev and Associates
Tecogen, Inc
TFS Energy
TJ Cross Engineers
Transwestern Pipeline Co
Turlock Irrigation District
United Cogen Inc.
URM Groups
Utility Cost Management LLC
Utility Resource Network
Wellhead Electric Company
Western Hub Properties, LLC
White & Case
WMA

Appendix A

**Settlement Agreements Filed at FERC Including the
Definitive Agreement and the Third Amendment**

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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WASHINGTON, D.C. 20005-2111

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June 14, 2004

Hon. Magalie R. Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

RE: Offer of Settlement, Docket Nos. EL04-26-000 and QF85-311-004

Dear Secretary Salas:

POSDEF Power Company, LP ("POSDEF") on behalf of itself and Pacific Gas and Electric Company ("PG&E"); Acme POSDEF Partners, L.P. ("Acme POSDEF"); Sithe Energies, Inc., Cogeneration National Corporation (collectively, "Sithe"); Exelon SHC, Inc. ("Exelon"); and FERC Trial Staff (PG&E, POSDEF, Acme POSDEF, Sithe, Exelon and FERC Trial Staff collectively the "Parties" and individually a "Party") hereby file electronically pursuant to Rule 602(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(a), a signed Consent Agreement ("Consent Agreement"), Definitive Agreement ("Definitive Agreement") and a Release Agreement ("Release Agreement") (collectively, the "Settlement Agreements") submitted to resolve all issues among the Parties in Docket Nos. EL04-26-000 and QF85-311-004 (the "Affected Dockets"). The Parties request the Commission to accept the Settlement Agreements without condition or modification.

I. Offer of Settlement

The filing consists of the following documents:

1. This transmittal letter;
2. An Explanatory Statement in Support of the Offer of Settlement (Attachment A);
3. A draft Certification of the Uncontested Settlement to the Commission (Attachment B);

Magalie R. Salas
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4. A draft Commission Letter Order approving the proposed settlement (Attachment C);
5. A Form of Notice suitable for publication in the Federal Register, in both hard and electronic formats (Attachment D);
6. The Uncontested Consent Agreement (Attachment E);
7. The Definitive Agreement and Amended Power Purchase Agreement (Attachment F);
8. The Release Agreement (Attachment G); and
9. A Certificate of Service (Attachment H);

No person or entity has indicated that it will oppose the entry and certification of the Settlement Agreements.

II. Market Based Rate Authority Application

In addition to the Settlement Agreements, POSDEF will file separately pursuant to Rule 205 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.205, and Section 35.12 of the Commission's regulations, *id.* § 35.12, an application for market-based rate authority ("Market-Based Rate Application"). Filing the Market-Based Rate Application will help ensure that POSDEF, which the Commission determined to be an exempt wholesale generator in Docket No. EG04-25-000, has a rate for power sales on file with the Commission in the event its facilities no longer satisfy QF requirements. Accordingly, the request for market-based rate authority will be made as a precaution and to ensure continuity of service.

The Commission has in the past accepted similar market-based rate applications for filing in anticipation of a loss of the underlying facility's QF status. *See Sithe/Independence Power Partners, L.P.*, 101 FERC ¶ 61,210 (2002) ("*Sithe/Independence*"). Further, one prerequisite to the effectiveness of the Definitive Agreement is Commission acceptance of POSDEF's Market-Based Rate Application. In the event that POSDEF is no longer a QF, sales under the PPA will be made pursuant to market-based rate authority. The Definitive Agreement thus could not become effective without Commission acceptance of this Market Based Rate Application. For this reason, POSDEF will request that the Commission approve its Market-Based Rate Application no later than the date it approves the Settlement Agreements.

III. Calendar

All parties are hereby notified, pursuant to Rule 602(d)(2), 18 C.F.R. § 385.602(d)(2), that comments on the Settlement Agreements should be filed with the Secretary. Comments are

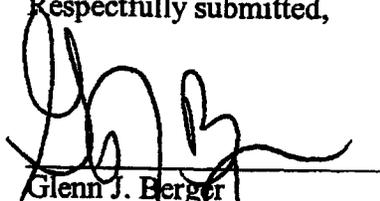
Magalie R. Salas

June 14, 2004

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due no later than July 6, 2004. Reply comments are due no later than July 14, 2004. For the Definitive Agreement to become effective, among other things, final Commission approval is required within 240 days after the date the Parties executed the Definitive Agreement, or February 9, 2005. To help ensure that final approval is obtained by that date, including the resolution of potential rehearing requests, the Parties request the Commission to approve the Settlement Agreements and Market Based Rate Application no later than November 11, 2004.

Respectfully submitted,



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202-371-7920

Counsel for POSDEF Power Company, LP

cc: The Honorable H. Peter Young, Presiding Administrative Law Judge
The Honorable Carmen A. Cintron, Settlement Judge
Service List

ATTACHMENT A

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**EXPLANATORY STATEMENT
IN SUPPORT OF UNCONTESTED SETTLEMENT**

Pursuant to Rule 602(c)(1)(ii) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(c)(1)(ii), Pacific Gas and Electric Company ("PG&E"); POSDEF Power Company, LP ("POSDEF"); Acme POSDEF Partners, L.P. ("Acme POSDEF"); Sithe Energies, Inc. ("Sithe"); Cogeneration National Corporation ("CNC"); Exelon SHC, Inc. ("Exelon"); and FERC Trial Staff (collectively the "Parties" and individually a "Party") hereby submit this Explanatory Statement in support of the concurrently filed Definitive Agreement, Release Agreement, and Consent Agreement (collectively, the "Settlement Agreements") submitted to resolve all issues among the Parties in the above captioned proceedings.

The Parties support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or modification, as in the public interest, and terminating these proceedings as they relate to POSDEF.

I. Factual and Procedural Background

This proceeding involves a power purchase agreement ("PPA") pursuant to which POSDEF agreed to sell to PG&E electric energy and capacity from a QF coal and petroleum coke fueled electric generating project located in Stockton, California (the "Project"). At issue is whether the Project was, is, and will remain a QF.

The original sole owner of the Project, CNC, first filed for QF certification of the Project on December 17, 1986 in Docket No. QF85-311-001. At the time, CNC was not affiliated with

Sithe. The Commission granted QF certification of the Project by letter order dated March 17, 1987. *Cogeneration National Corp.*, 38 FERC ¶ 62,259 (1987).

POSDEF represents that in 1988 CNC became an indirect, wholly-owned subsidiary of Sithe, which like CNC, was a non-utility for QF purposes. The Project began commercial operation on October 26, 1989. Upon commercial operation, all of the capacity and electric energy generated by the Project was sold to PG&E pursuant to the PPA, a long-term contract for the Project's full output.

The Commission subsequently recertified the Project on May 5, 1993 to reflect the transfer of Project ownership from CNC to Acme POSDEF. *Acme POSDEF Partners, L.P.*, 63 FERC ¶ 62,127 (1993). POSDEF represents that CNC held a limited partnership interest in POSDEF ranging from one to 36 percent, and Acme POSDEF acquired a general 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. FPL Group, Inc. represented the only electric utility or electric utility holding company interests in this ownership structure. The Commission determined that, under this ownership structure, utility interests would not have an equity interest in the Project of greater than 50 percent. *Id.*

POSDEF further represents that in 1995 FPL Group, Inc. indirectly acquired all of the interests 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 QF ownership rules at 18 C.F.R. § 292.206. *Acme POSDEF Partners, L.P.*, 72 FERC ¶ 62,264 (1995) ("*Acme POSDEF*").

POSDEF also represents that on December 18, 2000, Exelon (Fossil) Holdings, Inc.

("Exelon Fossil") acquired 49.9% of Sithe Energies (the "Exelon Transaction"). Exelon Fossil is an indirect, wholly-owned subsidiary of Exelon Corporation, an electric utility holding company under 18 C.F.R. § 292.206. POSDEF further represents that on November 25, 2003 Exelon Corporation's indirect interest in CNC increased from 49.9% to 50%, now held through Exelon SHC, Inc., an indirect subsidiary of Exelon Corporation.

On November 18, 2003, the Commission's Enforcement Staff entered into a Stipulation and Consent Agreement with Sithe that "any possible non-compliance" with the Commission's QF ownership requirements by POSDEF as a result of the Exelon Transaction was "inadvertent." See Stipulation and Consent Agreement at P 30; *Sithe Energies, Inc.*, 105 FERC ¶ 61,240 at P 10 (2003). On November 20, 2003, the Commission approved the Stipulation and Consent Agreement in Docket Number IN04-4-000. *Sithe Energies*. The order provided that "any remedies imposed to address any violations of the QF Ownership Requirements should not include the revocation of exemptions the QFs have received from regulation pursuant to Section 292.602," but reserved any other available remedies if the Project were ultimately found to be out of compliance with QF ownership requirements. *Id.* at P 6.

The Commission on the same day issued a separate order initiating an investigation into Sithe and two QFs in which it held an ownership interest, including Acme POSDEF Partners, L.P. See *Order Instituting Proceeding and Establishing Hearing Procedures*, 105 FERC ¶ 61,240 (2003). The Commission set for hearing the issue of whether POSDEF "actually satisfied the Commission's ownership requirements for QF status." *Id.* at P 15. The Commission also stated that if it found that either entity had in fact violated its QF status, it would "establish appropriate remedies." *Id.* It acknowledged, however, that "consistent with the Stipulation and Consent Agreement we have approved, any remedies imposed . . . shall not

include the revocation of exemptions afforded QFs under Section 292.602 of the Commission's regulations." *Id.*

On November 25, 2003, Chief Administrative Law Judge Curtis L. Wagner, Jr., appointed the Honorable H. Peter Young to preside at the hearing ordered by the Commission. On December 16, 2003, Judge Young held a prehearing conference to address the potential for settlement, a procedural schedule and other matters relevant to the Commission-initiated proceeding, and issued an order establishing a procedural schedule the following day.

On December 23, 2003, Judge Wagner issued an order appointing the Honorable Carmen A. Cintron as settlement judge. Settlement conferences were convened on January 7, February 11, March 11, and March 23, 2004, with settlement discussions continuing throughout this period.

On April 14, 2004, PG&E, POSDEF, Acme POSDEF, Sithe, CNC, and Exelon entered into a Memorandum of Understanding ("MOU"), which memorialized the essential terms the parties to the MOU agreed to include in the Settlement Agreements. The MOU also memorialized the actions those parties agreed to take prior to the execution of the Settlement Agreements.

Also on April 14, the Parties filed a joint motion to modify the procedural schedule associated with these proceedings and to hold it in abeyance for 60 days. On April 15, 2004, Judge Young issued an order granting the motion, suspending the procedural schedule until June 14, 2004.

On June 14, 2004, the Parties executed the Settlement Agreements, which included an amendment to the PPA implementing the changes agreed to as part of the settlement (the "Amended PPA").

On February 13, 2004, in an unrelated filing, the Commission granted POSDEF's application for exempt wholesale generator status. *POSDEF Power Company, LP*, 106 FERC 61,132 (2004).

II. The Settlement Agreements

There are three agreements that comprise the Settlement Agreements: the Definitive Agreement between the seller (POSDEF) and purchaser (PG&E) under the PPA, which includes the Amended PPA; the Release Agreement between PG&E, Acme POSDEF, Sithe, CNC, and Exelon; and the Consent Agreement between all of the Parties, including FERC Trial Staff. As set forth herein, the Settlement Agreements resolve the complex litigation in these proceedings.

A. The Definitive Agreement

The Definitive Agreement resolves all disputes between POSDEF and PG&E in relation to the Project's QF ownership status. It provides for a six-year reduction in the term of the PPA, providing PG&E's ratepayers with a net present value savings of \$13.7 million. It also excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. *See* Definitive Agreement (Tab F hereto), §§ 6-7. It also excuses POSDEF from any obligation to maintain QF status. *Id.*, § 9. Further, the Definitive Agreement provides a mechanism to ensure that the benefits under the agreement are not inadvertently changed in the future. *Id.*, § 8. The Amended PPA provides that the energy charges will be based on a California Public Utilities Commission ("CPUC") formula for calculating energy charges for QF power, as it may be revised from time-to-time. If the Amended PPA did not track the CPUC's energy price changes in the future, the result could be that the energy price under the PPA would be different than the energy price that would apply had the Project retained its QF status. Such a result would skew the benefits under the Definitive Agreement in a manner that is not

contemplated by the Parties' agreement. The Amended PPA thus provides that energy prices under those agreements automatically will track CPUC changes to the applicable QF energy charges.

The effective date of the Definitive Agreement is the date all regulatory approvals are obtained and no longer subject to rehearing or appeal, including the approval of FERC and the CPUC. *Id.*, § 5.1. If final regulatory approvals are not obtained within 240 days after the date the Definitive Agreement is signed (or by February 9, 2005), the Definitive Agreement terminates automatically. *Id.*, § 5.2.

The Definitive Agreement also includes certain covenants and releases between POSDEF and PG&E. *Id.*, §§ 10-12. Among other things, POSDEF and PG&E release one another from all claims related to the Project's QF status. *Id.*, § 10.1. Neither party admits liability and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 10.2. POSDEF and PG&E also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. *Id.*, § 12.1.

The Definitive Agreement includes the Amended PPA as an attachment. The Amended PPA, which is the third amendment to the original PPA, sets forth specific changes to the PPA to implement the settlement. Like the Definitive Agreement, it will be signed by POSDEF and PG&E, the current parties to the PPA.

B. Other Agreements

In addition to the Definitive Agreement, PG&E, Acme POSDEF, Sithe, CNC and Exelon have entered into a Release Agreement, providing for certain covenants and releases between these parties in relation to the Definitive Agreement. Among other things, PG&E, Acme POSDEF, Sithe, CNC and Exelon release one another from all claims related to the Project's QF

status. Release Agreement (Tab G hereto), § 6.1. None of the parties to the Release Agreement admit liability and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 6.2. PG&E, Acme POSDEF, Sithe, CNC and Exelon also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. *Id.*, § 7.1.

All the Parties, including FERC Trial Staff, have also entered into an uncontested Consent Agreement. *See* Consent Agreement (Tab E hereto). The Consent Agreement outlines the procedural history of this proceeding. *Id.*, ¶¶ 1-8. It sets forth the Parties' factual stipulations. *Id.*, ¶¶ 9-15. The Consent Agreement briefly recites the applicable law and conclusions of law applicable to this proceeding (*id.*, ¶¶ 16-18), before outlining the terms of the settlement. *Id.*, ¶¶ 19-23. It explains that although the Parties have reached no agreement as to whether the Exelon Transaction had any effect on the Project's QF status, the Parties agree that the Settlement Agreements remedy any possible violation. It concludes with a request for the issuance of a Commission order approving the settlement and terminating this proceeding. *Id.*, ¶ 24.

Together, the Settlement Agreements resolve all past, present, and future disputes in this proceeding among the specific parties that have an economic stake in the PPA and FERC Trial Staff. The settlement is uncontested.

Shortly after the filing of the Settlement Agreements, POSDEF will file for market-based rate authority pursuant to Rule 205 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.205, and Section 35.12 of the Commission's regulations, *id.* § 35.12 ("Market-Based Rate Application"). Filing the Market-Based Rate Application will help ensure that POSDEF has a rate for power sales on file with the Commission in the event its facility no longer

satisfies QF requirements. Accordingly, the request for market-based rate authority will be made as a precaution and to ensure continuity of service. Commission approval of the Market-Based Rate Application is a prerequisite to the effectiveness of the Settlement Agreements. The Parties, however, do not seek approval of the Market-Based Rate Application as part of this docket, but as part of a separate Section 205 filing.

III. Discussion

The Commission should approve the Settlement Agreements as fair, reasonable, and in the public interest. The Definitive Agreement reduces the term of the PPA by six years and excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. In exchange, POSDEF no longer has to maintain QF status. The Commission has on a number of occasions recognized the benefits to public utilities of reduced terms and other types of buy-downs of power purchase contracts. *See, e.g., Sithe/Independence Power Partners, L.P.*, 101 FERC ¶ 61,210 at P 22-23 (2002) (“*Sithe/Independence*”); *Monmouth Energy, Inc.*, 86 FERC ¶ 61,270 at 61,980 (1999). As the Commission has explained, such buy-downs are “consistent with our precedent indicating that prudence may dictate the buy-down of contracts, when this would result in savings.” *Sithe/Independence*, 101 FERC at P 24.

Further, the Definitive Agreement takes steps to ensure that the benefits under the agreement are not inadvertently changed in the future except as contemplated in the Settlement Documents. The Amended PPA provides that the energy charges will be based on the CPUC formula for calculating energy charges for QF power, as it may be revised from time-to-time. This prevents the energy price under the PPA from being different than the energy price that would apply had the Project retained its QF status. Such an approach is, under the facts here, fair, reasonable, and in the public interest.

Finally, the matters in these proceedings involve complex legal and factual issues under the FPA and the Public Utility Regulatory Policies Act of 1978. The Definitive Agreement provides PG&E with a reduced term under the PPA and assurances that it will have no obligation to purchase power from POSDEF except under the terms of the PPA. The Definitive Agreement provides POSDEF with relatively predictable revenue streams and frees it from the requirement of maintaining QF status. The settlement thus provides a fair resolution of the risks faced by sophisticated parties in complex litigation, and a fair balance of costs and benefits related to those risks. It also is consistent with the Commission's goal of promoting settlement of disputed matters. *See Arizona Pub. Serv. Co.*, 97 FERC ¶ 61,315 at 62,449 (2001).

The Settlement Agreements are uncontested by any Party and resolve all past, present, and future disputes between the Parties pertaining to the issues in the instant proceeding. All Parties support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or modification, as in the public interest, and terminating this proceeding. Among other things, for the Definitive Agreement to remain effective, final Commission approval of all of the Settlement Agreements and the Market-Based Rate Application is required 240 days from the date the Parties executed the Definitive Agreement, or by February 9, 2005. To help ensure that final approval is obtained by that date, including the resolution of potential rehearing requests, the Parties request the Commission to approve the Settlement Agreements no later than November 11, 2004.

IV. Required Information

In accordance with Chief Administrative Law Judge Curtis L. Wagner's October 15, 2003 Notice to the Public, the Parties provide the following information:

A. Issues Under the Settlement and Major Implications

The factual and procedural background of this proceeding setting forth the issues underlying the settlement is summarized in Section I above. The Settlement Agreements resolve all QF ownership issues in this proceeding. The Parties agree that the settlement is not precedential and raises no major implications for other parties or proceedings.

B. Policy Implications

The Settlement Agreements do not represent a new, novel, or modified QF policy, and are consistent with existing Commission QF policy.

C. Other Pending Proceedings

The Settlement does not control, prejudice, nor unduly influence procedural matters or potential outcomes in any other or pending Commission proceeding. The Consent Agreement is not inconsistent with the consent agreements filed and approved by the Commission to date in other QF investigation dockets, including the EL03-17 and EL03-19, and EL03-47 and EL03-117 dockets.

D. Issues of First Impression and Reversals of Prior Orders

This matter relates only to well-established statutes, regulations, and case law, and involves no reversal of or departure from existing or prior Commission or appellate precedent.

E. Applicable Standard of Review

This matter involves the question of whether POSDEF was entitled to QF status under Section 210 of PURPA. There are no issues under Sections 205 and 206 of the Federal Power Act. Accordingly, neither the "just and reasonable" nor the "*Mobile-Sierra*" standard of law is applicable. It is, however, the Parties' intention that the settlement will only be effective if it is approved by the Commission in its entirety without modification or condition.

DRAFT

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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

CERTIFICATION OF UNCONTESTED SETTLEMENT

(Issued [])

TO THE COMMISSION

On June 14, 2004, FERC Trial Staff; POSDEF Power Company, LP (“POSDEF”); Acme POSDEF Partners, L.P. (“Acme POSDEF”); Pacific Gas and Electric Company (“PG&E”); Sithe Energies, Inc. (“Sithe”); Cogeneration National Corporation (“CNC”); and Exelon SHC, Inc. (“Exelon”) (collectively the “Parties” and individually a “Party”) jointly submitted pursuant to Rule 602(a) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602(a), a signed uncontested Consent Agreement (“Consent Agreement”), Definitive Agreement (“Definitive Agreement”), and a Release Agreement (“Release Agreement”) (collectively, the “Settlement Agreements”) to resolve all issues among the Parties in Docket Nos. EL04-26-000 and QF85-311-004 (the “Affected Dockets”). The Parties requested that the Presiding Administrative Law Judge certify to the Commission the uncontested Settlement Agreements. The Parties support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or

modification, as in the public interest, and terminating these proceedings as they relate to POSDEF.

I. FACTUAL BACKGROUND

1. 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 and capacity from a qualifying facility ("QF") coal and petroleum coke fueled electric generating project located in Stockton, California (the "Project"). At issue is whether the Project was, is, and will continue to be a QF. As set forth by the Parties, the facts underlying this proceeding are as follows:

2. The original sole owner of the Project, CNC, first filed for QF certification of the Project on December 17, 1986 in Docket No. QF85-311-001. At the time, CNC was not affiliated with Sithe. The Commission granted QF certification of the Project by letter order dated March 17, 1987. *Cogeneration National Corp.*, 38 FERC ¶ 62,259 (1987).

3. POSDEF represents that in 1988 CNC became an indirect, wholly-owned subsidiary of Sithe, which like CNC, was a non-utility for QF purposes. The Project began commercial operation on October 26, 1989. Upon commercial operation, all of the capacity and electric energy generated by the Project was sold to PG&E pursuant to the PPA, a long-term contract for the Project's full output.

4. The Commission subsequently recertified the Project on May 5, 1993 to reflect the transfer of Project ownership from CNC to Acme POSDEF. *Acme POSDEF Partners, L.P.*, 63 FERC ¶ 62,127 (1993). POSDEF represents that CNC

held a limited partnership interest in POSDEF ranging from one to 36 percent, and Acme POSDEF acquired a general 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. FPL Group, Inc. represented the only electric utility or electric utility holding company interests in this ownership structure. The Commission determined that, under this ownership structure, utility interests would not have an equity interest in the Project of greater than 50 percent. *Id.*

5. POSDEF further represents that in 1995 FPL Group, Inc. indirectly acquired all of the interests 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 QF ownership rules at 18 C.F.R. § 292.206. *Acme POSDEF Partners, L.P.*, 72 FERC ¶ 62,264 (1995) ("*Acme POSDEF*").

6. POSDEF also represents that on December 18, 2000, Exelon (Fossil) Holdings, Inc. ("Exelon Fossil") acquired 49.9% of Sithe Energies (the "Exelon Transaction"). Exelon Fossil is an indirect, wholly owned subsidiary of Exelon Corporation, an electric utility holding company under 18 C.F.R. § 292.206. POSDEF further represents that on November 25, 2003 Exelon Corporation's indirect interest in CNC increased from 49.9% to 50%, now held through Exelon SHC, Inc., an indirect subsidiary of Exelon Corporation.

7. On November 18, 2003, the Commission's Enforcement Staff entered into a Stipulation and Consent Agreement with Sithe that "any possible non-compliance" with the Commission's QF ownership requirements by POSDEF as a result of the Exelon Transaction was "inadvertent." See Stipulation and Consent Agreement at P 30; *Sithe Energies, Inc.*, 105 FERC ¶ 61,240 at P 10 (2003) ("*Sithe Energies*"). On November 20, 2003, the Commission approved the Stipulation and Consent Agreement in Docket Number IN04-4-000. *Sithe Energies*. The order provided that "any remedies imposed to address any violations of the QF Ownership Requirements should not include the revocation of exemptions the QFs have received from regulation pursuant to Section 292.602," but reserved any other available remedies if the Project were ultimately found to be out of compliance with QF ownership requirements. *Id.* at P 6.

II. COMMISSION PROCEEDINGS

8. The Commission on the same day (November 20, 2003) issued a separate order initiating an investigation into Sithe and two QFs in which it held an ownership interest, including Acme POSDEF Partners, L.P. See *Order Instituting Proceeding and Establishing Hearing Procedures*, 105 FERC ¶ 61,240 (2003). The Commission set for hearing the issue of whether POSDEF "actually satisfied the Commission's ownership requirements for QF status." *Id.* at P 15. The Commission also stated that if it found that either entity had in fact violated its QF status, it would "establish appropriate remedies." *Id.* It acknowledged, however, that "consistent with the Stipulation and Consent Agreement we have approved, any remedies

imposed . . . shall not include the revocation of exemptions afforded QFs under Section 292.602 of the Commission's regulations." *Id.*

9. On November 25, 2003, Chief Administrative Law Judge Curtis L. Wagner, Jr., appointed the Honorable H. Peter Young to preside at the hearing ordered by the Commission. On December 16, 2003, Judge Young held a prehearing conference to address the potential for settlement, a procedural schedule and other matters relevant to the Commission-initiated proceeding, and issued an order establishing a procedural schedule the following day.

10. On December 23, 2003, Judge Wagner issued an order appointing the Honorable Carmen A. Cintron as settlement judge. Settlement conferences were convened on January 7, February 11, March 11, and March 23, 2004, with settlement discussions continuing throughout this period.

11. On April 14, 2004, PG&E, POSDEF,¹ Acme POSDEF, Sithe, CNC, and Exelon entered into a Memorandum of Understanding ("MOU"), which memorialized the essential terms the parties to the MOU agreed to include in the Settlement Agreements. The MOU also memorialized the actions those parties agreed to take prior to the execution of the Settlement Agreements.

12. Also on April 14, the Parties filed a joint motion to modify the procedural schedule associated with these proceedings and to hold it in abeyance for

¹ On February 13, 2004, in an unrelated filing, the Commission granted POSDEF's application for exempt wholesale generator status. *POSDEF Power Company, LP*, 106 FERC ¶ 61,132 (2004).

60 days. On April 15, 2004, Judge Young issued an order granting the motion, suspending the procedural schedule until June 14, 2004.

13. On June 14, 2004, the Parties executed the Settlement Agreements, which included an amendment to the PPA implementing the changes agreed to as part of the settlement (the "Amended PPA").

III. SETTLEMENT AGREEMENTS

14. There are three agreements that comprise the Settlement Agreements: the Definitive Agreement between the seller (POSDEF) and purchaser (PG&E) under the PPA, which includes the Amended PPA; the Release Agreement between PG&E, Acme POSDEF, Sithe, CNC, and Exelon; and the Consent Agreement between all of the Parties, including FERC Trial Staff. As set forth herein, the Settlement Agreements resolve the complex litigation in these proceedings.

A. The Definitive Agreement

15. The Definitive Agreement resolves all disputes between POSDEF and PG&E in relation to the Project's QF ownership status. It provides for a six-year reduction in the term of the PPA and excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. *See* Definitive Agreement (Tab F hereto), §§ 6-7. It also excuses POSDEF from any obligation to maintain QF status. *Id.*, § 9. Further, the Definitive Agreement provides a mechanism to ensure that the benefits under the agreement are not inadvertently changed in the future. *Id.*, § 8. The Amended PPA provides that the energy charges will be based on a California Public Utilities Commission ("CPUC") formula for

calculating energy charges for QF power, as it may be revised from time-to-time. If the Amended PPA did not track the CPUC's energy price changes in the future, the result could be that the energy price under the PPA would be different than the energy price that would apply had the Project retained its QF status. Such a result would skew the benefits under the Definitive Agreement in a manner that is not contemplated by the Parties' agreement. The Amended PPA thus provides that energy prices under those agreements automatically will track CPUC changes to the applicable QF energy charges.

16. The effective date of the Definitive Agreement is the date all regulatory approvals are obtained and are no longer subject to rehearing or appeal, including the approval of FERC and the CPUC. *Id.*, § 5.1. If final Commission approval of the Settlement Agreements, as well as the Market-Based Rate Application (as defined in ¶ 22 below), are not obtained within 240 days of the date the Definitive Agreement is signed (or by February 9, 2005), the Definitive Agreement terminates automatically. *Id.*, § 5.2.

17. The Definitive Agreement also includes certain covenants and releases between POSDEF and PG&E. *Id.*, §§ 10-12. Among other things, POSDEF and PG&E release one another from all claims related to the Project's QF status. *Id.*, § 10.1. Neither party admits liability, and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 10.2. POSDEF and PG&E also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. *Id.*, § 12.1.

18. The Definitive Agreement includes the Amended PPA as an attachment. The Amended PPA, which is the third amendment to the original PPA, sets forth specific changes to the PPA to implement the settlement. Like the Definitive Agreement, it has been signed by POSDEF and PG&E, the current parties to the PPA.

B. Other Agreements

19. In addition to the Definitive Agreement, PG&E, Acme POSDEF, Sithe, CNC, and Exelon have entered into a Release Agreement, providing for certain covenants and releases between these parties in relation to the Definitive Agreement. Among other things, PG&E, Acme POSDEF, Sithe, CNC, and Exelon release one another from all claims related to the Project's QF status. Release Agreement (Tab G hereto), § 6.1. None of the parties to the Release Agreement admit liability, and the parties agree that the settlement will have no precedential effect on other agreements. *Id.*, § 6.2. PG&E, Acme POSDEF, Sithe, CNC, and Exelon also covenant not to challenge any term of the Amended PPA pursuant to Section 205 or 206 of the Federal Power Act. *Id.*, § 7.1.

20. All the Parties, including FERC Trial Staff, have also entered into an uncontested Consent Agreement. *See* Consent Agreement (Tab E hereto). The Consent Agreement outlines the procedural history of this proceeding. *Id.*, ¶¶ 1-8. It sets forth the Parties' factual stipulations. *Id.*, ¶¶ 9-15. The Consent Agreement then recites the applicable law and conclusions of law applicable to this proceeding (*id.*, ¶¶ 16-18), before outlining the terms of the settlement. *Id.*, ¶¶ 19-23. The Parties

explain that, although they reached no agreement as to whether the Project was at all times in compliance with its QF requirements, they agreed that the Settlement Agreements remedy any possible violation. The Consent Agreement concludes with a request for the issuance of a Commission order approving the settlement and terminating this proceeding. *Id.*, ¶ 24.

21. The Parties assert that the Settlement Agreements resolve all past, present, and future disputes in this proceeding among the specific parties that have an economic stake in the PPA and FERC Trial Staff. The settlement was uncontested.

22. Shortly after the filing of the Settlement Agreements, POSDEF also filed for market-based rate authority pursuant to Rule 205 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.205, and Section 35.12 of the Commission's regulations, *id.* § 35.12 ("Market-Based Rate Application"). POSDEF asserts that filing the Market-Based Rate Application will help ensure that POSDEF has a rate for power sales on file with the Commission in the event its facility no longer satisfies QF requirements. Accordingly, POSDEF filed the request for market-based rate authority as a precaution and to ensure continuity of service. According to the Parties, Commission approval of the Market-Based Rate Application within 240 days of the date the Definitive Agreement is signed (or by February 9, 2005) is a prerequisite to the effectiveness of the Settlement Agreements. The Parties, however, do not seek approval of the Market-Based Rate Application as part of this docket, but as part of a separate Section 205 filing.

IV. COMMENTS FILED

23. [To be inserted]

V. DISCUSSION AND CONCLUSION

24. The Commission should approve the uncontested Settlement Agreements as fair, reasonable, and in the public interest. The Definitive Agreement reduces the term of the PPA by six years with a net present value to PG&E's ratepayers of \$13.7 million and excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. In exchange, POSDEF no longer has to maintain QF status. The Commission has on a number of occasions recognized the benefits to public utilities of reduced terms and other types of buy-downs of power purchase contracts. *See, e.g., Sithe/Independence Power Partners, L.P.*, 101 FERC ¶ 61,210 at P 22-23 (2002) ("*Sithe/Independence*"); *Monmouth Energy, Inc.*, 86 FERC ¶ 61,270 at 61,980 (1999). As the Commission has explained, such buy-downs are "consistent with our precedent indicating that prudence may dictate the buy-down of contracts, when this would result in savings." *Sithe/Independence*, 101 FERC at P 24.

25. Further, the Definitive Agreement takes steps to ensure that the benefits under the agreement are not inadvertently changed in the future except as contemplated in the Settlement Documents. The Amended PPA provides that the energy charges will be based on the CPUC formula for calculating energy charges for QF power, as it may be revised from time-to-time. This prevents the energy price under the PPA from being different than the energy price that would apply had the

Project retained its QF status. Such an approach is, under the facts here, fair, reasonable, and in the public interest.

26. Finally, the matters in these proceedings involve complex legal and factual issues under the FPA and the Public Utility Regulatory Policies Act of 1978. The Definitive Agreement provides PG&E with a reduced term under the PPA and assurances that it will have no obligation to purchase power from POSDEF except under the terms of the PPA. The Definitive Agreement provides POSDEF with relatively predictable revenue streams and frees it from the requirement of maintaining QF status. The settlement thus provides a fair resolution of the risks faced by sophisticated parties in complex litigation, and a fair balance of costs and benefits related to those risks. It also is consistent with the Commission's goal of promoting settlement of disputed matters. *See Arizona Pub. Serv. Co.*, 97 FERC ¶ 61,315 at 62,449 (2001).

27. In light of the foregoing, I hereby certify the Settlement Agreements and recommend them to the Commission for approval as an uncontested settlement pursuant to Rule 602(g). The Settlement Agreements are uncontested by any Party and resolve all past, present, and future disputes between the Parties pertaining to the issues in the instant proceeding. All Parties support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or modification, as in the public interest, and terminating this proceeding. Among other things, for the Definitive Agreement to remain effective, final Commission approval is required 240 days from the date the Parties executed the Definitive Agreement, or

by February 9, 2005. To help ensure that final approval is obtained by that date, including the resolution of potential rehearing requests, I recommend that the Commission approve the Settlement Agreements by no later than November 11, 2004.

28. Finally, I note that POSDEF also made a filing under Section 205 of the Federal Power Act seeking market-based rate authority. I believe that a ruling on the Section 205 filing is beyond the scope of what appropriately is addressed in this order, but instead must be addressed by the Commission. I thus offer no opinion regarding POSDEF's Section 205 filing, but note that the Parties seek Commission approval by February 9, 2005.

VI. POLICY IMPLICATIONS

A. Issues Under the Settlement and Major Implications

29. The factual and procedural background of this proceeding setting forth the issues underlying the settlement is summarized in Sections I and II above. The Settlement Agreements resolve all QF ownership issues in this proceeding. The Parties agree that the settlement is not precedential and raises no major implications for other parties or proceedings.

B. Policy Implications

30. The Settlement Agreements do not represent a new, novel, or modified QF policy, and are consistent with existing Commission QF policy.

C. Other Pending Proceedings

31. The Settlement does not control, prejudice, nor unduly influence procedural matters or potential outcomes in any other or pending Commission proceeding. The Consent Agreement is not inconsistent with the consent agreements filed and approved by the Commission to date in other QF investigation dockets, including the EL03-47 and EL03-117 dockets.

D. Issues of First Impression and Reversals of Prior Orders

32. This matter relates only to well-established statutes, regulations, and case law, and involves no reversal of or departure from existing or prior Commission or appellate precedent.

E. Applicable Standard of Review

33. This matter involves the question of whether POSDEF was entitled to QF status under Section 210 of PURPA. There are no issues under Sections 205 and 206 of the Federal Power Act. Accordingly, neither the "just and reasonable" nor the "*Mobile-Sierra*" standard of law is applicable. The settlement, however, will only be effective if it is approved by the Commission in its entirety without modification or condition.

VII. CERTIFICATION

34. Pursuant to 18 C.F.R. § 385.602(g), I hereby certify the following for consideration by the Commission:

- (1) Uncontested Consent Agreement;
- (2) Definitive Agreement and Amended Power Purchase Agreement;

- (3) Release Agreement;
- (4) Explanatory Statement in Support of Settlement Agreements;
- (5) **[Initial Comments];**
- (6) **[Reply Comments];**
- (7) All pleadings, orders, and other documents of record in this proceeding; and
- (8) Attached draft letter order.

H. Peter Young
Presiding Administrative Law Judge

June [], 2004

ATTACHMENT C

DRAFT

**FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426**

[Date]

In Reply Refer To:
Docket Nos. EL04-26-000, QF85-311-004

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Joel D. Newton
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Dear Messrs. Berger and Newton:

On June 14, 2004, you filed Settlement Agreements, consisting of a Definitive Agreement, a Release Agreement, and a Consent Agreement on behalf of FERC Trial Staff; POSDEF Power Company, LP; Acme POSDEF Partners, L.P.; Pacific Gas and Electric Company; Sithe Energies, Inc.; Cogeneration National Corporation; and Exelon SHC, Inc. On [date], [insert] submitted comments in support of the settlement. No other comments were received.

The subject 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. The Commission retains the right to investigate the rates, terms and conditions under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act, 16 U.S.C. § 824e.

By direction of the Commission.

Magalie R. Salas,
Secretary

Enclosure

cc: All Parties

ATTACHMENT D

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

NOTICE OF FILING

Take notice that on June 14, 2004, pursuant to Rule 602 of the Commission's Rules of Practice and Procedure, POSDEF Power Company, LP, on behalf of itself and Pacific Gas and Electric Company; Acme POSDEF Partners, L.P. ("Acme POSDEF"); Sithe Energies, Inc., Cogeneration National Corporation; Exelon SHC, Inc.; and the Commission Trial Staff, submitted an uncontested settlement in the form of a Consent Agreement intended to resolve all issues under investigation in the above dockets related to the qualifying facility status of the cogeneration facility owned by Acme POSDEF. A copy of the filing was served on each person on the Secretary's official service list in this proceeding.

Initial comments to the Settlement shall be filed not later than [DATE]; and any reply comments shall be filed not later than [DATE]. Copies of this filing are available for review at the Commission or may be reviewed on the Commission's web site at <http://www.ferc.gov/>, using the "elibrary" link. Enter the docket number in the search engine to access the document. For assistance, please contact FERC Online Support at ferconlinesupport@ferc.gov or toll free at (866) 208-3676, or for TTY contact (202) 502-8659.

Magalie R. Salas
Secretary

ATTACHMENT E

On June 14, 2004, POSDEF and PG&E entered into a Definitive Agreement which resolves all past, present, and future disputes between the seller (POSDEF) and purchaser (PG&E) under the PPA pertaining to these dockets. As discussed further below, the Definitive Agreement revises the PPA to, among other things, reduce the term of the PPA by six years and eliminate POSDEF's obligation to maintain QF status (the resulting agreement, the "Amended PPA").

Also on June 14, 2004, PG&E, Acme POSDEF, Sithe, CNC, and Exelon entered into a Release Agreement, providing for certain covenants and releases between these parties in relation to the Definitive Agreement. With this Consent Agreement (which includes FERC Trial Staff as a party), the Definitive Agreement and Release Agreement (all three, collectively, the "Settlement Agreements") settle the complex litigation in these proceedings among the specific parties that have an economic stake in the PPA and FERC Trial Staff.

The Settlement Agreements are submitted pursuant to Rule 602 to resolve fully the issues related to QF status of the POSDEF Project in this proceeding. Under this settlement, the Parties have reached no agreement as to whether the Project was at all times in compliance with its QF requirements. The Settlement Agreements remedy any possible violation.

All Parties to this Consent Agreement support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or modification, as in the public interest, and terminating these proceedings as they relate to POSDEF.

II. PROCEDURAL HISTORY

1. On November 20, 2003, the Commission issued an order approving a Stipulation and Consent Agreement entered into between Sithe and Commission staff. *Sithe Energies, Inc.*,

105 FERC ¶ 61,241 (2003). The Stipulation and Consent Agreement resolved the preliminary investigation into Sithe's ownership interests in POSDEF. Among other things, the Stipulation and Consent Agreement found that any violation by Sithe of QF ownership requirements was inadvertent. *Id.* at P 3. It provided that "any remedies imposed to address any violations of the QF Ownership Requirements should not include the revocation of exemptions the QFs have received from regulation pursuant to Section 292.602," but reserved any other available remedies. *Id.* at P 6.

2. As contemplated by the Stipulation and Consent Agreement, the Commission on the same day issued a separate order initiating an investigation into Sithe and its ownership of two QFs, including Acme POSDEF. *See Order Instituting Proceeding and Establishing Hearing Procedures*, 105 FERC ¶ 61,240 (2003). The Commission set for hearing the issue of whether POSDEF "actually satisfied the Commission's ownership requirements for QF status." *Id.* at P 15. The Commission also stated that, if it found that Acme POSDEF had in fact violated its QF status, it would "establish appropriate remedies." *Id.* It acknowledged, however, that "consistent with the Stipulation and Consent Agreement we have approved, any remedies imposed . . . shall not include the revocation of exemptions afforded QFs under Section 292.602 of the Commission's regulations." *Id.*

3. On November 25, 2003, Chief Administrative Law Judge Curtis L. Wagner, Jr., appointed the Honorable H. Peter Young to preside at the hearing ordered by the Commission. On December 16, 2003, Judge Young held a prehearing conference to address the potential for settlement, a procedural schedule and other matters relevant to the Commission-initiated proceeding, and issued an order establishing a procedural schedule the following day.

4. On December 23, 2003, Judge Wagner issued an order appointing the Honorable Carmen A. Cintron as settlement judge. Settlement conferences were convened on January 7, February 11, March 11 and March 23, 2004, with settlement discussions continuing throughout this period.

5. On April 14, 2004, PG&E, POSDEF, Acme POSDEF, Sithe, and Exelon entered into a Memorandum of Understanding ("MOU"), which memorialized the essential terms the parties to the MOU agreed to include in the Settlement Agreements to settle this proceeding. The MOU also memorialized the actions those parties agreed to take prior to the execution of the Definitive Agreement.

6. Also on April 14, 2004, the Parties filed a joint motion to modify the procedural schedule associated with these proceedings and to hold it in abeyance for 60 days. On April 15, 2004, Judge Young issued an order granting the motion, suspending the procedural schedule until June 14, 2004.

7. On or before June 14, 2004, the Parties executed the Definitive Agreement, Release Agreement, the Amended PPA, and this Consent Agreement.

8. The Settlement Agreements are being submitted pursuant to Rule 602 to settle fully this proceeding with respect to all of the Parties.

III. STIPULATIONS

9. CNC first filed for QF certification of the Project, a 44 MW coal and petroleum coke fuel cogeneration facility located in Stockton, California, on December 17, 1986 in Docket No. QF85-311-001. At the time, CNC was the sole owner of the Project and was not affiliated

with Sithe. The Commission granted QF certification of the Project by letter order dated March 17, 1987. *Cogeneration National Corp.*, 38 FERC ¶ 62,259 (1987).

10. POSDEF represents that in 1988 CNC became an indirect, wholly-owned subsidiary of Sithe, which like CNC, was a non-utility for QF purposes. The Project began commercial operation on October 26, 1989. Upon commercial operation, all of the capacity and electric energy generated by the Project was sold to PG&E pursuant to the PPA, a long-term contract for the Project's full output.

11. The Commission subsequently recertified the Project on May 5, 1993 to reflect the transfer of Project ownership from CNC to Acme POSDEF. *Acme POSDEF Partners, L.P.*, 63 FERC ¶ 62,127 (1993). POSDEF represents that CNC held a limited partnership interest in POSDEF ranging from one to 36 percent, and Acme POSDEF acquired a general 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. FPL Group, Inc. represented the only electric utility or electric utility holding company interests in this ownership structure. The Commission determined that, under this ownership structure, utility interests would not have an equity interest in the Project of greater than 50 percent. *Id.*

12. POSDEF further represents that in 1995 FPL Group, Inc. indirectly acquired all of the interests 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 QF ownership rules at 18 C.F.R. § 292.206. *Acme POSDEF Partners, L.P.*, 72 FERC ¶ 62,264 (1995) ("*Acme POSDEF*").

13. POSDEF also represents that on December 18, 2000, Exelon (Fossil) Holdings, Inc. ("Exelon Fossil") acquired 49.9% of Sithe Energies (the "Exelon Transaction"). Exelon Fossil is an indirect, wholly owned subsidiary of Exelon Corporation, an electric utility holding company under 18 C.F.R. § 292.206. POSDEF further represents that on November 25, 2003 Exelon Corporation's indirect interest in CNC increased from 49.9% to 50%, now held through Exelon SHC, Inc., an indirect subsidiary of Exelon Corporation.

14. On November 18, 2003, the Commission's Enforcement Staff entered into a Stipulation and Consent Agreement with Sithe that "any possible non-compliance" with the Commission's QF ownership requirements by POSDEF was "inadvertent." See Stipulation and Consent Agreement at P 30; *Sithe Energies* at P 10. The Commission approved the Stipulation and Consent Agreement in Docket Number IN04-4-000. *Sithe Energies*.

15. On February 13, 2004, in an unrelated filing, the Commission granted POSDEF's application for exempt wholesale generator status. *POSDEF Power Company, LP*, 106 FERC ¶ 61,132 (2004).

IV. RECITATIONS AND CONCLUSIONS OF LAW

16. The Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-1 *et seq.*, sets forth the ownership requirements applicable to QFs. Pursuant to Section 210(a) of PURPA, 16 U.S.C. § 824a-3(a), the Commission has prescribed regulations designed to encourage the development of cogeneration and small power production facilities. In Subpart B of the PURPA regulations, the Commission set forth the criteria and procedures for becoming a QF. See 18 C.F.R. §§ 292.201 *et seq.* (2002). A QF "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)” or exempt wholesale generators. 18 C.F.R. § 292.206(a); 16 U.S.C. § 796(17)(C), 15 U.S.C. § 79z-5a(j) (2000).

17. The Commission has determined that “a cogeneration . . . 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.” 18 C.F.R. § 292.206(b). Further, “[i]f a wholly or partially owned subsidiary of an electric utility or electric utility holding company has an ownership interest in a facility, the subsidiary’s ownership interest shall be considered as ownership by an electric utility or electric utility holding company.” *Id.*

18. Under this settlement, the Parties have reached no agreement as to whether the Exelon Transaction resulted in a violation of the Project’s QF ownership requirements, or whether it had any effect on its QF status. Commission enforcement staff, however, stipulated and the Commission has found that any possible violation of POSDEF’s QF requirements was inadvertent. The Parties agree that the Settlement Agreements remedy any possible violation.

V. THE SETTLEMENT

19. Based on the stipulations set forth herein, POSDEF and PG&E have agreed to enter into the Definitive Agreement. The Definitive Agreement provides for a six-year reduction in the term of the PPA and excuses PG&E from any obligation to purchase power from POSDEF except under the terms of the Amended PPA. In exchange, POSDEF no longer has to maintain QF status. The Commission has on a number of occasions recognized the benefits to public utilities of reduced terms and other types of buy-downs of power purchase contracts. *See, e.g.,*

Sithe/Independence Power Partners, L.P., 101 FERC ¶ 61,210 at P 22-23 (2002); *Monmouth Energy, Inc.*, 86 FERC ¶ 61,270 at 61,980 (1999).

20. Further, the Definitive Agreement provides a mechanism to ensure that the benefits under the agreement are not inadvertently changed in the future. The Amended PPA provides that the energy charges will be based on a California Public Utilities Commission (“CPUC”) formula for calculating energy charges for QF power, as it may be revised from time-to-time. If the Amended PPA did not track the CPUC’s energy price changes in the future, the result could be that the energy price under the PPA would be different than the energy price that would apply had the Project retained its QF status. Such a result would skew the benefits under the Definitive Agreement in a manner that is not contemplated by the Parties’ agreement. The Amended PPA thus provides that energy prices under those agreements automatically will track CPUC changes to the applicable QF energy charges. Such an approach is, under the facts here, fair, reasonable, and in the public interest.

21. Finally, the Definitive Agreement provides a fair resolution of the risks faced by sophisticated parties in complex litigation, and a fair balance of costs and benefits related to those risks. The Definitive Agreement provides PG&E with a reduced term under the PPA and assurances that it will have no obligation to purchase power from POSDEF except under the terms of the PPA. It provides PG&E’s ratepayers with a net present value savings of \$13.7 million. The Definitive Agreement provides POSDEF with relatively predictable revenue streams and frees it from the requirement of maintaining QF status. It resolves all disputes between the Parties within the scope of this proceeding and is consistent with the Commission’s goal of promoting settlement of disputed matters. *See Arizona Pub. Serv. Co.*, 97 FERC ¶

61,315 at 62,449 (2001). The effective date of the Definitive Agreement is the date all regulatory approvals are obtained, including that of FERC and the CPUC. If regulatory approvals are not obtained within 240 days of the date the Definitive Agreement is signed (or by February 9, 2005), the Definitive Agreement terminates automatically.

22. In addition, PG&E, Acme POSDEF, Sithe, CNC, and Exelon have entered into a separate Release Agreement, providing for certain covenants and releases between these parties in relation to the Definitive Agreement. All the Parties, including FERC Trial Staff, have also entered into this Consent Agreement. Together, the Settlement Agreements resolve all past, present, and future disputes in this proceeding among the specific parties that have an economic stake in the PPA and FERC Trial Staff. The settlement is uncontested.

23. Shortly after the filing of the Settlement Agreements, POSDEF will file for market-based rate authority pursuant to Rule 205 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.205, and Section 35.12 of the Commission's regulations, *id.* § 35.12 ("Market-Based Rate Application"). Filing the Market-Based Rate Application will help ensure that POSDEF has a rate for power sales on file with the Commission in the event its facility no longer satisfies QF requirements. Accordingly, the request for market-based rate authority will be made as a precaution and to ensure continuity of service.

24. All Parties to this Consent Agreement support the issuance of a letter order by the Commission approving the Settlement Agreements, without condition or modification, as in the public interest, and terminating this proceeding. Under the Definitive Agreement, it is necessary that all regulatory approvals of the Settlement Agreements, as well as approval of the Market-

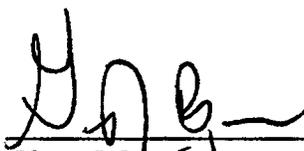
Based Rate Application, be received within 240 days of the date the Definitive Agreement is signed (or by February 9, 2005).

25. This Consent Agreement may be executed in any number of counterparts with the same effect as if all signing parties had signed the same documents. All counterparts shall be constructed together and shall constitute the same instrument.

Dated: June 14, 2004
Washington, D.C.

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Respectfully submitted,



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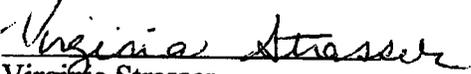
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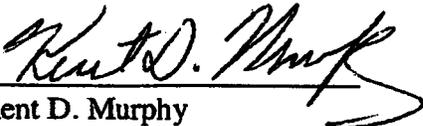
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ATTACHMENT F

**DEFINITIVE AGREEMENT
BETWEEN
PACIFIC GAS AND ELECTRIC COMPANY
AND
POSDEF POWER COMPANY, LP
AND
ACME POSDEF PARTNERS, L.P.
June 14, 2004**

1. PARTIES

- 1.1 The Parties to this Definitive Agreement ("**Definitive Agreement**") are, on the one hand, Pacific Gas and Electric Company, a California corporation ("**PG&E**"), and on the other hand, POSDEF Power Company, LP and Acme POSDEF Partners, L.P. ("**POSDEF**"), both California limited partnerships.
- 1.2 PG&E and POSDEF are referred to collectively in this Definitive Agreement as the "**Parties**" and individually as a "**Party**."

2. RECITALS

- 2.1 POSDEF and PG&E are parties to a Long-Term Energy and Capacity Power Purchase Agreement Between Cogeneration National Corporation and Pacific Gas and Electric Company, effective as of October 18, 1984, as amended ("**PPA**"), which provides for the sale to PG&E of electric energy and capacity from a QF coal and petroleum coke fueled electric generating project located in Stockton, California (the "**Project**").
- 2.2 The Parties and Cogeneration National Corporation, Sithe Energies, Inc., and Exelon SHC, Inc. (collectively, the "**Project Affiliates**") are presently engaged in certain regulatory proceedings before the Federal Energy Regulatory Commission in the matter of *Sithe Energies, Inc., et al.*, Docket Nos. EL04-26-000 and QF85-311-004, which, among other things, concerns claims arising from the relationship between PG&E, as purchaser, and POSDEF, as Seller, under the PPA.
- 2.3 It is the Parties' intentions to resolve the claims referenced in Section 2.2 through (i) this Definitive Agreement, (ii) the PPA amendments entered into by PG&E and POSDEF, an executed copy of which is attached hereto as Attachment A (the "**PPA Amendments**," the PPA as amended by the PPA Amendments, the "**Amended PPA**"), (iii) the Project Affiliates' Release Agreement (the "**Release Agreement**"), and (iv) a consent agreement entered into by and between the Parties, the Project Affiliates and FERC Trial Staff ("**Consent Agreement**"). This Definitive Agreement, the PPA Amendments, the Release Agreement, and

the Consent Agreement are collectively referred to herein as the **“Settlement Documents.”**

- 2.4 Prior to the execution of the Definitive Agreement, the Parties agreed to take certain actions in anticipation of the Definitive Agreement being executed, as set forth in a confidential Memorandum of Understanding, dated April 14, 2004 (**“MOU”**). The MOU memorialized both the essential terms that the Parties agreed to include in the Settlement Documents, as well as those actions that the Parties agreed to take prior to the execution of the Settlement Documents. The MOU also identified those provisions thereof that would be binding upon the parties to the MOU immediately upon its execution, as distinguished from obligations that would be created only upon the execution of the Settlement Documents and/or satisfaction of the conditions set forth in the Settlement Documents.

3. **AGREEMENT**

In consideration of the promises, mutual covenants and agreements hereinafter set forth, the Parties agree to the following:

4. **DEFINITIONS**

The following capitalized terms, when used in this Definitive Agreement and any attachments thereto (except insofar as the PPA Amendments may incorporate its own defined terms) shall have the meanings specified in this Section 4.

- 4.1 **“Amended Terms”** has the meaning specified in Section 8.2.1.
- 4.2 **“Amended PPA”** has the meaning specified in Section 2.3.
- 4.3 **“Attachment A”** means Attachment A to this Definitive Agreement. Attachment A contains the form of PPA Amendment that will be executed by PG&E and POSDEF as referenced in Section 2.3 above.
- 4.4 **“Attachment B”** means Attachment B to this Definitive Agreement which contains the names and addresses of individuals for notice pursuant to Section 16.11.
- 4.5 **“Business Day”** means a day on which Federal Reserve member banks are open for business (excluding Saturday or Sunday) in Pacific Prevailing Time. A Business Day for each Party shall start at 8:00 a.m. and end at 5:00 p.m. in Pacific Prevailing Time.
- 4.6 **“Claims”** has the meaning specified in Section 10.1.
- 4.7 **“Consent Agreement”** has the meaning specified in Section 2.3.

- 4.8 “CPUC” means the California Public Utilities Commission or its successor.
- 4.9 “Definitive Agreement” has the meaning specified in Section 2.3.
- 4.10 “Definitive Agreement Termination Date” has the meaning specified in Section 5.2.
- 4.11 “Effective Date” has the meaning specified in Section 5.1.
- 4.12 “FERC” means the Federal Energy Regulatory Commission or its successor.
- 4.13 “FERC Proceeding” means the matter of *Sithe Energies, Inc., et al.*, Docket Nos. EL04-26-000 and QF85-311-004; *provided, however*, that the term FERC Proceeding does not include any matter related to LUZ Solar Partners III, Ltd., which is pending in Docket Nos. EL04-26-000 and QF86-734-006.
- 4.14 “FPA” means the Federal Power Act of 1920, as amended.
- 4.15 “Market-Based Rate Application” has the meaning specified in Section 14.1.2.
- 4.16 “MOU” has the meaning specified in Section 2.4.
- 4.17 “PG&E” has the meaning specified in Section 1.1.
- 4.18 “POSDEF” has the meaning specified in Section 1.1.
- 4.19 “PPA” has the meaning specified in Section 2.1.
- 4.20 “PPA Amendments” has the meaning specified in Section 2.3.
- 4.21 “Project” has the meaning specified in Section 2.1.
- 4.22 “Project Affiliates” has the meaning specified in Section 2.2.
- 4.23 “PURPA” means the Public Utility Regulatory Policies Act of 1978.
- 4.24 “QF” means a qualifying facility as defined in PURPA and in regulations of FERC, Title 18 Code of Federal Regulations, Sections 292.201 through 292.207.
- 4.25 “Regulatory Approval” shall have the meaning specified in Section 14.
- 4.26 “Settlement Documents” has the meaning specified in Section 2.3.
- 4.27 “Release Agreement” shall have the meaning specified in Section 2.3.
- 4.28 “SRAC” means the short-run avoided cost formula for determining energy prices payable to QFs and pursuant to the PPA as established from time to time by the CPUC, including, but not limited to, applicable time-of-delivery allocation

factors and energy loss adjustment factors, consistent with the manner in which the term "full short-run avoided operating costs" is used in the PPA.

- 4.29 "**Standard Offer #4 Contract**" means PG&E's CPUC-approved version of the Standard Offer #4 Contract, also known as "Interim Standard Offer 4."
- 4.30 "**Thermal Agreements**" has the meaning specified in Section 11.1.
- 4.31 "**Waived QF Requirements**" has the meaning specified in Section 9.1.

5. **EFFECTIVE DATE; TERMINATION**

- 5.1 The settlement obligations as set out in Sections 6 through 11 and Section 13 of this Definitive Agreement, and the Amended PPA, shall become effective on the Effective Date. "**Effective Date**" means the date on which all conditions precedent to the Definitive Agreement as set out in Section 14 have either been satisfied or waived by the Parties.
- 5.2 In the event that the Effective Date has not occurred within 240 days of the date on which the Definitive Agreement is executed, then the Definitive Agreement shall terminate automatically (the date of such termination being referred to herein as the "**Definitive Agreement Termination Date**").
- 5.3 The following provisions of this Definitive Agreement shall survive such termination: Section 1 (Parties), Section 2 (Recitals), Section 3 (Agreement), Section 4 (Definitions), Section 5 (Effective Date; Termination), Section 12.2 (Necessary Approvals), Section 14 (Conditions Precedent to Effectiveness of Definitive Agreement; Regulatory and Other Approvals), Section 15 (Stay), Section 16 (General Provisions, and Section 17 (Execution).

6. **EARLY TERMINATION OF THE POSDEF PPA**

The Amended PPA will terminate six (6) years earlier than the PPA, resulting in a termination date of the Amended PPA of October 25, 2013 (the "**Amended Termination Date**").

7. **WAIVER OF RIGHTS TO SELL TO PG&E**

As memorialized in the PPA Amendments, which shall be executed by the Parties concurrently with the execution of this Definitive Agreement, the PPA will, as of the Effective Date, be amended to provide as follows:

- 7.1 POSDEF will waive, effective upon the Effective Date, on behalf of itself and any predecessors, successors or subsequent owners of the Project, (i) any and all rights, whether arising under state or federal law as a result of any past, present or future status it may have or have had as a QF, or otherwise, to require PG&E to purchase any output of the Project other than pursuant to the terms of the

Amended PPA, as it may be altered as a result of actions by the CPUC generally applicable to QFs that have executed a Standard Offer #4 Contract with PG&E, as described in Section 8 of this Definitive Agreement, and (ii) any and all rights it might have under the Definitive Agreement or otherwise to benefit from any order of the CPUC except as expressly described in this Definitive Agreement; *provided*, however, that such waiver shall not affect any rights or benefits POSDEF may have expressly under the PPA or Amended PPA, including, without limitation, as described in Section 8 of this Definitive Agreement. POSDEF shall include this waiver in any agreement(s) for the sale, lease, or transfer of the Project.

8. ENERGY RATE TO TRACK CPUC CHANGES

As memorialized in the PPA Amendments, the PPA will, upon the occurrence of the Effective Date, be amended as of the Effective Date to provide as follows:

8.1 Changes To The Short-Run Avoided Cost Formula:

8.1.1 During the term of the Amended PPA, in the event that the CPUC or California state legislature changes the SRAC formula that is generally applicable to calculate energy payments to QFs that have executed a Standard Offer #4 Contract with PG&E, then, on the date on which such change becomes effective, and continuing until such time as such rate is no longer applicable, the energy rate for power purchases made pursuant to the Amended PPA shall, without further action by the Parties or otherwise, be the revised rate adopted by the CPUC or California state legislature.

8.1.2 Nothing herein shall preclude any Party from participating in any CPUC proceeding affecting any SRAC energy payment rates, or from seeking rehearing or other appropriate review of the CPUC order(s) or decision(s) effecting such a change in SRAC energy payment rates.

8.1.3 In the event that the CPUC or California state legislature changes any SRAC energy payment rates, then POSDEF shall thereafter seek FERC acceptance of such rates as changed, effective as of the effective date of the change by the CPUC or California state legislature, to the extent such acceptance is necessary to make such rates effective. PG&E will support the acceptance by FERC of such changed rates as requested by POSDEF if reasonably requested by POSDEF, but shall have no obligation to support any justification of such request by POSDEF, whether factual, legal, or argumentative.

8.2 Changes To Other Terms Generally Applicable To QFs:

8.2.1 In the event that the CPUC modifies, revises, or restates contractual terms that are generally applicable to all QFs that have executed a Standard Offer #4 Contract with PG&E (other than as related to terms to the extent amended under Sections

6, 7 and 9 of this Definitive Agreement regarding the Amended Termination Date, the waiver of POSDEF's right to sell to PG&E, and the waiver of QF requirements) (such terms the "Amended Terms"), such changes will also apply to the Amended PPA.

8.2.2 Notwithstanding any other provision of this Definitive Agreement, any change by the CPUC to the termination dates applicable to power purchase agreements PG&E has with QFs, including without limitation any increase in the time period during which PG&E is obligated to purchase capacity or energy from such QFs beyond that contained in such agreements, however such increase might be implemented, shall not modify the Amended Termination Date.

8.2.3 In the event that the CPUC revises contractual terms that are generally applicable to all QFs that have executed a Standard Offer #4 Contract with PG&E (other than as related to the Amended Terms), then POSDEF shall thereafter seek FERC acceptance of such terms as changed, effective as of the effective date of the change by the CPUC, to the extent such acceptance is necessary to make such terms effective. PG&E will support the acceptance by FERC of such changed terms requested by POSDEF if reasonably requested by POSDEF, but shall have no obligation to support any justification of such request by POSDEF, whether factual, legal or argumentative.

8.2.4 In the event that the CPUC revises contractual terms that are generally applicable to all QFs that have executed a Standard Offer #4 Contract with PG&E (other than as related to the Amended Terms) but gives QFs the discretion or option to choose to implement the contract change or not, the Parties agree that such discretion or option shall apply similarly to POSDEF.

8.3 No Party shall oppose any filing at the FERC to implement contract changes directed by the CPUC or California state legislature as set forth in Section 8.1 or 8.2 of this Definitive Agreement.

9. WAIVER OF QF REQUIREMENTS IN PPA

9.1 Effective on the Effective Date, the PPA will be amended to eliminate the covenant (and any other contract provision) requiring that POSDEF be or remain a QF during the term of the Amended PPA or otherwise comply with the FERC's or the CPUC's QF requirements, including, without limitation, those requirements set forth in 16 U.S.C. § 796(17)(A)(ii), 16 U.S.C. § 796(17)(C)(ii), and 18 C.F.R. §§ 292.204(a)(1) and 292.206 (collectively, the "Waived QF Requirements"). Such a covenant (and any such other contract provision as appropriate) will be replaced with one that provides that the Project will, at the sole discretion of POSDEF, be either a QF, an EWG, or both during the term of the Amended PPA. Such amendment shall not affect any other rights, obligations, or liabilities of either PG&E or POSDEF arising under state and federal law and not amended by the Definitive Agreement, and neither PG&E nor POSDEF shall assert such

amendment as a basis for avoiding or modifying any terms or conditions of the Amended PPA.

- 9.2 Without limiting the foregoing, it is expressly understood that (1) although, upon the occurrence of the Effective Date, POSDEF will no longer be required to comply with the Waived QF Requirements, and therefore will no longer be required to be, or be certified as, a QF, or otherwise to comply with QF requirements under PURPA and FERC's regulations implementing PURPA or any CPUC QF requirements, POSDEF will nonetheless continue to generate power for sale to PG&E under the Amended PPA, and (2) with the exception of the Waived QF Requirements, the Amended PPA shall be treated by PG&E as if it were a QF contract, other than as set forth in this Section 9.
- 9.3 It is also expressly understood that in connection with the Definitive Agreement, POSDEF may seek approval of the rates provided in the Amended PPA or which are otherwise applicable to sales made under the Amended PPA and seek market-based rate authorization from the FERC, pursuant to Section 205 of the FPA. Neither the seeking nor the granting of such rate acceptance or approval shall constitute a basis for altering, amending or avoiding any of the terms or conditions of the Amended PPA.

10. RELEASES; WAIVER OF CIVIL CODE § 1542

- 10.1 As of the Effective Date, PG&E, on the one hand, and POSDEF, on the other hand, each acting for itself and its affiliates, mutually release and discharge one another and each of the other's respective past, present, and future, direct and indirect parent companies, partners, shareholders, subsidiaries, affiliates, directors, and officers from any and all claims, obligations, losses, causes of action, allegations, demands and liabilities, of whatsoever kind and nature, character and description, whether in law or equity, whether sounding in tort, contract or under other applicable law, whether known or unknown, whether anticipated or unanticipated, or whether asserted or unasserted, of or to a Party, in any forum (including state or federal court, the FERC or the CPUC) (collectively, "Claims") based on or arising out of: (i) lack of compliance with the Waived QF Requirements to the extent they would otherwise apply to the Project at any time prior to or following the Effective Date; (ii) any and all Claims PG&E has or could have asserted in the FERC Proceeding; and (iii) any Claims which arise from any subsequent FERC Proceeding or any other proceeding, in either case to the extent such proceeding is based on the issue of POSDEF's QF status.
- 10.2 Neither Party admits liability as to any of the matters released in this Section 10, and this Definitive Agreement shall establish no precedents with respect to other parties selling pursuant to other power purchase agreements, or disputes other than those described in Section 10.1 of this Definitive Agreement.
- 10.3 Each Party believes that it is fully familiar with the facts giving rise to this settlement, but agrees that this Definitive Agreement and Amended PPA shall

remain fully effective and binding as to each of them even if the facts turn out to be different from what they now believe them to be or there are additional future investigations of POSDEF and its affiliates as to the matters which are the subject of this Definitive Agreement and Amended PPA. Further, as to specific matters released in Section 10.1, each Party waives the benefit of California Civil Code §1542 (or any similar law from another jurisdiction). Section 1542 of the California Civil Code provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”

Such waiver is not a mere recital but a knowing and intentional waiver of a known right undertaken after consultation with counsel and with a full understanding of the risks and uncertainties inherent in such a release. Notwithstanding the waiver of Civil Code §1542, the Parties, and each of them, acknowledge that the releases in this Definitive Agreement are specific to the matters set forth in the releases and are not intended to create general releases as to all Claims, or potential Claims, between the Parties.

- 10.4 As of the Effective Date, these release provisions are deemed ratified by the Parties, confirming that these release provisions are, as of such date, in full force and effect and not subject to any further conditions, in accordance with the terms, conditions and applicable dates, as provided in these release provisions without modification.
- 10.5 As of the Effective Date, PG&E, on the one hand, and POSDEF, on the other hand, represent and warrant each to the other that, as of the date on which each Party executes this Definitive Agreement, it is, without investigation, unaware of any defenses to the validity of these release provisions other than Section 1542 of the California Civil Code, which has been expressly waived in this Definitive Agreement.

11. ADDITIONAL WARRANTIES AND COVENANTS OF POSDEF, AMENDMENT OF THE PPA

- 11.1 As of the date hereof, POSDEF (i) warrants that the contracts that are and have been in existence providing for the sale of steam generated by the Project (the “**Thermal Agreements**”) are fully effective and enforceable against POSDEF in accordance with their terms; (ii) warrants that but for the FERC Proceeding, there is no action, claim, demand, suit, proceeding, arbitration, grievance, citation, summons, subpoena, inquiry or investigation of any nature, civil, criminal, regulatory or otherwise, in law or in equity, pending or, to the knowledge of

POSDEF, threatened, against POSDEF which could reasonably be expected to (a) have a material adverse effect on the Thermal Agreements or (b) prevent the performance by POSDEF of its obligations under the Thermal Agreements; and (iii) covenants that it will, for the term of the Amended PPA, use commercially reasonable efforts to continue steam sales under the Thermal Agreements (or additional agreements, if any) at output levels equal to or exceeding historic output levels.

- 11.2 As of the Effective Date, the Parties agree to amend Section 3(b) of the PPA by adding the following: "Notwithstanding Article 3(d), Seller shall limit the Facility's actual rate of delivery into the PG&E system to 50,000 kW. Seller warrants and covenants that it will use commercially reasonable efforts to maintain the energy output of the Project commensurate with historical average levels."
- 11.3 Nothing in this Definitive Agreement or in any filing implementing the Settlement Documents, nor the loss of the Project's QF status, if any, shall in any way affect the historical course of conduct under the PPA or prejudice any Party's position regarding sales of energy in excess of the nameplate rating of the Project.

12. COVENANTS AT EXECUTION OF THE SETTLEMENT DOCUMENTS

- 12.1 Effective upon execution of the Definitive Agreement, each Party covenants (i) that neither it nor its affiliates will challenge or seek to avoid or alter in any way any provision of the Amended PPA pursuant to either Section 205 or Section 206 of the FPA or pursuant to any authority granted by the CPUC, and (ii) that neither it nor its affiliates will assert rate authority obtained pursuant to Section 205 of the FPA, as a basis, whether directly or indirectly, for avoiding or altering in any way any provision of the Amended PPA, in either case unless such changes are made as a result of an order by the CPUC of general applicability to QFs having Standard Offer #4 Contracts with PG&E as described in Section 8 except to the extent that any such order is inconsistent with the provisions of the Settlement Documents.
- 12.2 In addition to the foregoing, effective upon execution of this Definitive Agreement, each Party represents and warrants that it has obtained all necessary approvals to enter into and execute this Definitive Agreement and PPA Amendments (excluding the approvals which are conditions precedent to the effectiveness of this Definitive Agreement).

13. DISPOSITION OF FERC PROCEEDING AND OTHER MATTERS

- 13.1 Within five (5) Business Days following the Effective Date, PG&E will withdraw with prejudice, or, where required by applicable rules of procedure, seek permission from the applicable agency to withdraw with prejudice, any and all interventions, complaints, allegations, and motions in the FERC Proceeding that are based on the Claims released and/or waived in the Settlement Documents. As

of the Effective Date, all of the issues and Claims arising from the FERC Proceeding and Exelon's indirect acquisition of its interest in the POSDEF Facility shall be fully and completely resolved, and the Parties to this Definitive Agreement shall seek to have the FERC terminate the FERC Proceeding as of the date of FERC's acceptance of the Definitive Agreement.

- 13.2 Each Party covenants that, after the Effective Date, it will not bring, enter into, participate or intervene in, or otherwise pursue, directly or indirectly, any subsequent actions or proceedings to the extent arising from or related to any of the Claims released in the Definitive Agreement, except for the purpose of enforcing any of the terms of the Definitive Agreement or Amended PPA.
- 13.3 As of the Effective Date, PG&E, on the one hand, and POSDEF, on the other hand, as to each other, irrevocably waive, discharge, and agree to forego any rights they have or may have to the benefit of any ruling(s) of FERC in the FERC Proceeding (or any subsequent proceedings which concern the same general factual allegations as form the basis of the Claims released and/or waived in the Definitive Agreement or PPA Amendments) in respect of the rates PG&E must pay, refunds of prior amounts paid by PG&E, or other economic effect upon or under the PPA. To the extent any Party actually receives any funds from another Party on account of such rights or benefits the receipt of which would be inconsistent with the waiver, discharge, etc., provided for in this paragraph, such Party will promptly pay such funds over to the other Party.

14. CONDITIONS PRECEDENT TO EFFECTIVENESS OF SETTLEMENT DOCUMENTS; REGULATORY AND OTHER APPROVALS

The settlement obligations as set out in Sections 6-11 and 13 of this Definitive Agreement will not become effective until the Effective Date, the occurrence of which is subject to the conditions precedent that the Regulatory Approvals described in this Section 14 first be either obtained or waived in writing. "Regulatory Approval" means that the responsible agency has issued a final order, no longer subject to rehearing or appeal, approving the Settlement Documents without modification thereto or in a manner that is not unacceptable in its reasonable business judgment (taking into account all of its circumstances, including but not limited to circumstances not pertaining to the PPA, Amended PPA, Project, or the other Parties) to a Party whose rights or obligations under the Settlement Documents are materially adversely affected by such modification. The Parties agree to cooperate and use their reasonable best efforts to obtain such Regulatory Approvals promptly.

14.1 FERC Approval:

- 14.1.1 The Effective Date will be subject to Regulatory Approval by FERC. The Parties shall jointly file an offer of settlement pursuant to 18 C.F.R. § 385.602 within 15 days after the Definitive Agreement is executed.

14.1.2 Regulatory Approval by FERC, as contemplated herein, shall include not only the reasonableness of the terms and provisions of the Definitive Agreement, but shall expressly include acceptance of the rates provided for in the Amended PPA as implemented through POSDEF Power Company, LP's market-based rate authority application ("**Market-Based Rate Application**") under Section 205 of the FPA so that no further FERC acceptance or approval or FERC proceedings of any kind are required in connection with POSDEF Power Company, LP's authority to sell power from the Project or under the Amended PPA. PG&E agrees not to oppose the Market-Based Rate Application and will make a filing in support of the relief requested in the Market-Based Rate Application if so requested by POSDEF. Nothing in this Definitive Agreement shall prevent POSDEF or PG&E from thereafter seeking or opposing any action by the CPUC that is generally applicable to QFs that would have the effect, whether directly or indirectly, of changing a rate, term or condition of the Amended PPA. Further, nothing in the Definitive Agreement shall prevent or be construed to prevent PG&E or POSDEF from enforcing the terms of the Amended PPA.

14.1.3 With regard to the PPA and the Amended PPA, POSDEF shall waive its Section 205 rights, except as provided for in this Definitive Agreement, and the Parties shall waive on behalf of themselves and their affiliates their Section 206 rights, except as provided for in this Definitive Agreement. The 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); provided that nothing herein shall affect or modify any provision of the Amended PPA that provides for rate or administrative changes based upon determinations of the CPUC that are applicable generally to QFs having Standard Offer #4 Contracts with PG&E.

14.2 CPUC Approval:

14.2.1 The Effective Date shall be subject to Regulatory Approval by the CPUC, which shall require findings that this Definitive Agreement and the Amended PPA are reasonable and that payments made pursuant to the PPA and Amended PPA are fully recoverable in PG&E's retail rates.

14.2.2 Within 30 days of execution of this Definitive Agreement, PG&E will initiate the process to secure Regulatory Approval by the CPUC by requesting review of this Definitive Agreement with the CPUC's Office of Ratepayer Advocates, and if applicable, review by the Procurement Review Group authorized by the CPUC for PG&E. If within 45 days of execution of this Definitive Agreement, PG&E has received a letter of non-opposition from the Office of Ratepayer Advocates, then PG&E will make a filing seeking Regulatory Approval by the CPUC within 14 days of receipt of such letter. If within 45 days of execution of this Definitive Agreement, PG&E has not received a letter of non-opposition from the Office of

Ratepayer Advocates, then PG&E will file an application for Regulatory Approval by the CPUC within 14 days of the end of such 45 day period.

15. STAY

15.1 Upon the occurrence, if any, of the Definitive Agreement Termination Date, the Parties will file with FERC to terminate the stay of the FERC Proceeding.

16. GENERAL PROVISIONS

16.1 **Effect on PPA:** Except as provided in the Settlement Documents, all provisions of the PPA shall remain in effect and unchanged.

16.2 **No Waiver:** None of the provisions of the Settlement Documents, including this paragraph, shall be considered waived by a Party unless such waiver is given in writing. The failure of any Party to insist in any one or more instances upon strict performance of any of the provisions of the Settlement Documents or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.

16.3 **Further Agreements:** This Definitive Agreement shall not be amended, changed, modified, abrogated, or superseded by a subsequent agreement unless such subsequent agreement is in the form of a written instrument signed by all of the Parties; *provided* that an instrument which affects only certain of the Parties shall be effective if signed by such Parties but shall not be effective with respect to the rights and obligations of any other Parties.

16.4 **Entire Agreement; Conflict; Advice of Counsel; Fees and Expenses:** The Settlement Documents constitute the entire agreement of the Parties concerning the subject matter thereof and supercede any and all prior negotiations, correspondence, undertakings, and agreements between the Parties, including, without limitation, the MOU, concerning the subject matter of the Settlement Documents. Notwithstanding the foregoing, to the extent there is a conflict or inconsistency between the provisions of this Definitive Agreement and the provisions of the Amended PPA, the terms of this Definitive Agreement shall control. The Parties have read the Settlement Documents, have had the advice and assistance of legal counsel in entering into them, and have not been influenced to any extent whatsoever by any representations or statements made by any Party other than those in the Settlement Documents. The Parties, and each of them, shall bear their own attorneys' fees and costs arising from or pertaining to (i) the negotiation, preparation and implementation of the Settlement Documents and (ii) the obtaining of the required Regulatory Approvals.

16.5 **Successors and Assigns:** This Definitive Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.

- 16.6 **Construction:** The Settlement Documents have been drafted by the Parties hereto and the parties to the FERC Proceeding and shall not be construed against any such party as the sole drafter.
- 16.7 **Governing Law:** The Settlement Documents shall be governed by and construed under the laws of the State of California without regard to its conflict of laws principles.
- 16.8 **Headings:** The headings used in the Definitive Agreement are for convenience and reference purposes only and do not themselves constitute any of the terms of the Definitive Agreement.
- 16.9 **No Precedent; Use in Litigation; No Third Party Beneficiaries:** Each Party agrees that the Settlement Documents arise from unique facts and circumstances and, as such, the various provisions of the Settlement Documents shall not, except as expressly provided for in the Settlement Documents, be used as evidence relevant to, or the basis for disputing the validity or appropriateness of, any determination of avoided costs or otherwise before the FERC, CPUC or any court or other judicial or quasi-judicial body, and nothing herein may be used as an admission against any Party. The Settlement Documents shall not be construed as creating any rights or benefits of any kind or nature whatsoever in any third party or class of persons not parties to the Settlement Documents, except to the extent that this Definitive Agreement, by its express terms, inures to the benefit of persons or entities not signatories hereto.
- 16.10 **Obligations Severable:** Each Party shall be severally, and not jointly, liable for any failure to perform its obligations under the Definitive Agreement and Amended PPA. Notwithstanding the foregoing, nothing in this Section 16.10 or elsewhere in the Settlement Documents shall be construed as either creating or eliminating such joint and several liability of a Party as may already exist or not exist under a particular PPA.
- 16.11 **Notice:**
- 16.11.1 Any notice, demand, or request permitted or required under this Definitive Agreement shall be delivered in writing by overnight delivery service, United States Mail, fax and/or electronic mail directed as specified in Attachment B. Notice given by overnight delivery or mail shall be effective upon actual receipt. Notice given by fax or electronic mail shall be effective upon actual receipt if received during the recipient's Business Day, or at the beginning of the recipient's next Business Day after receipt if not received prior to the cessation of the recipient's previous Business Day.
- 16.11.2 The names and addresses for notice specified in Attachment B may be changed from time to time by written notice by a Party to the other Parties without a need for an amendment to this Definitive Agreement.

17. EXECUTION

This Definitive Agreement, as well as the PPA Amendments, shall be executed by exchanging counterpart signature pages by facsimile as provided in Section 16.11 above, with original signatures exchanged by mail as also provided in Section 16.11.

Each Party represents and warrants that the person who signs below on behalf of the Party has authority to execute this Definitive Agreement on behalf of such Party and to bind such Party to this Definitive Agreement.

IN WITNESS WHEREOF, the Parties have caused this Definitive Agreement to be executed by their duly authorized representatives as of the dates set forth below.

**Pacific Gas and Electric
Company**

By: Frank De Rosa
Frank De Rosa
Director, Power Contracts
Date: 6/11/04

**POSDEF POWER COMPANY, LP,
a California limited partnership**

By: Acme POSDEF Partners, L.P.
Its General Partner

By: CH POSDEF, Inc.
Its Managing General Partner

By: _____
Michael L. Leighton
President
Date: _____

**ACME POSDEF PARTNERS, L.P.
a California limited partnership**

By: CH POSDEF, Inc.
Its Managing General Partner

By: _____
Michael L. Leighton
President
Date: _____

17. EXECUTION

This Definitive Agreement, as well as the PPA Amendments, shall be executed by exchanging counterpart signature pages by facsimile as provided in Section 16.11 above, with original signatures exchanged by mail as also provided in Section 16.11.

Each Party represents and warrants that the person who signs below on behalf of the Party has authority to execute this Definitive Agreement on behalf of such Party and to bind such Party to this Definitive Agreement.

IN WITNESS WHEREOF, the Parties have caused this Definitive Agreement to be executed by their duly authorized representatives as of the dates set forth below.

**Pacific Gas and Electric
Company**

By: _____
Frank De Rosa
Director, Power Contracts
Date: _____

**POSDEF POWER COMPANY, LP,
a California limited partnership**

By: Acme POSDEF Partners, L.P.
Its General Partner

By: CH POSDEF, Inc.
Its Managing General Partner

By: _____
Michael L. Leighton *RL6*
President

Date: June 14, 2004

**ACME POSDEF PARTNERS, L.P.
a California limited partnership**

By: CH POSDEF, Inc.
Its Managing General Partner

By: _____
Michael L. Leighton *RL6*
President

Date: June 14, 2004

Attachment A

**THIRD AMENDMENT
TO THE
LONG-TERM ENERGY AND CAPACITY
POWER PURCHASE AGREEMENT
BETWEEN
PACIFIC GAS AND ELECTRIC COMPANY
AND
POSDEF POWER COMPANY, L.P.
PG&E Log No. 16C007**

THIS THIRD AMENDMENT is by AND BETWEEN PACIFIC GAS AND ELECTRIC COMPANY (“PG&E”), a California corporation, and POSDEF POWER COMPANY, LP (“Seller”), a California limited partnership. Seller and PG&E are sometimes referred to herein individually as a “Party” and jointly as the “Parties.”

1. RECITALS

The Parties enter into this Amendment with reference to the following facts, among others:

- 1.1 PG&E and Seller’s predecessor in interest, Cogeneration National Corporation (“CNC”), executed a Long-Term Energy and Capacity Power Purchase Agreement in 1984 with PG&E signing on October 18, 1984 and CNC signing on October 12, 1984 (such agreement as amended as of the date this Third Amendment becomes effective, the “**Agreement**”). The Agreement, among other things, provides for the sale to PG&E of electrical power generated by a coal and petroleum coke fueled electric generating project located in Stockton, California and identified by PG&E as PG&E Log No. 16C007 (the “**Facility**”).
- 1.2 The Agreement has previously been amended on two occasions. The First Amendment was effective on August 29, 1986, and the Second Amendment was signed by Cogeneration National Corporation on May 24, 1991 and by PG&E on June 4, 1991.
- 1.3 Certain claims related to the Agreement have been raised in regulatory proceedings pending before the Federal Energy Regulatory Commission (“**FERC**”) (the “**Dispute**”). The Dispute concerns, among other things, the status of the Facility as a QF within the meaning of the Public Utility Regulatory Policies Act of 1978 (“**PURPA**”) and FERC’s regulations implementing PURPA.

- 1.4 PG&E and Seller have agreed to resolve the Dispute as it applies to the Agreement pursuant to the terms of a "Definitive Agreement," dated **June 14, 2004** ("**Definitive Agreement**"), which is being concurrently executed by PG&E, Seller, and the other participants in the FERC proceeding (described in Section 1.3) who hold an ownership interest in the Facility. In the Definitive Agreement, which is hereby incorporated herein by this reference, PG&E and Seller have agreed, among other things, to execute this Third Amendment for the purpose of implementing certain terms and conditions of the Definitive Agreement.

2. AGREEMENT

In consideration of the promises, mutual covenants and agreements set forth herein, and for other good and valuable consideration as set forth herein, the Parties, upon the occurrence of the Effective Date (as defined below) determined in accordance with the terms of the Definitive Agreement, hereby amend the Agreement effective as of the Effective Date, as follows:

- 2.1 **Early Termination of the POSDEF PPA.** Article 12 of the Agreement is hereby replaced in its entirety with the following new section:

"This Agreement shall be binding upon execution and remain in effect until October 25, 2013."

- 2.2 **Waived Requirements and Rights.** Article 1 of the Agreement is hereby replaced in its entirety with the following new section:

"(a) Seller is under no obligation to comply with the QF (as defined below) requirements set forth in 16 U.S.C. § 796(17) (A) (ii), 16 U.S.C. § 796(17)(C)(ii) and 18 C.F.R. §§ 292.204(a)(1) and 292.206 (the "Waived QF Requirements").

(b) Seller will, at its sole discretion, be either a qualifying facility as defined in PURPA and in regulations of FERC, Title 18 Code of Federal Regulations, Sections 292.201 through 292.207 ("**QF**"), an exempt wholesale generator under Section 32(a)(1) of the Public Utility Holding Company Act ("**EWG**"), or both during the term of the Agreement. Seller's status as either a QF, an EWG or both shall not affect any other rights, obligations or liabilities of either PG&E or Seller arising under state or federal law except to the extent provided in this Third Amendment, and neither PG&E nor Seller shall assert Seller's status as a QF, an EWG, or both as a basis for avoiding or modifying any terms or conditions of the Agreement.

(c) Seller waives, on behalf of itself and any predecessors, successors, or subsequent owners of the Facility (i) any and all rights, whether arising under state or federal law as a result of any past, present or future status it

may have or have had as a QF, or otherwise, to require PG&E to purchase any output of the Facility other than pursuant to the terms of the Agreement, and (ii) any and all rights it might have to benefit from any order of the CPUC except as expressly described in the Agreement. Seller shall include this waiver in any agreement(s) for the sale, lease, or transfer of the Facility.

(d) Seller may seek approval of the rates provided in the Agreement or which are otherwise applicable to sales made under the Agreement and seek market-based rate authorization from the FERC, pursuant to Section 205 of the Federal Power Act, as amended, for the sales provided for in the Agreement. Neither the seeking nor the granting of such rate acceptance or approval shall constitute a basis for altering, amending or avoiding any of the terms or conditions of the Agreement.”

- 2.3 **Commitment of Parties.** The third and fourth sentences of the first paragraph of Article 2 are amended by adding the words “, except as set forth in Article 2A below” to the end of each sentence, so that the first paragraph of Article 2 now reads as follows:

“The prices to be paid Seller for energy and/or capacity delivered pursuant to this Agreement have wholly or partly been fixed at the time of execution. Actual avoided costs at the time of energy and/or capacity deliveries may be substantially above or below the prices fixed in this Agreement. Therefore, the Parties expressly commit to the prices fixed in this Agreement for the applicable period of performance and shall not seek to or have a right to renegotiate such prices for any reason, except as set forth in Article 2A below. As part of its consideration for the benefit of fixing part or all of the energy and/or capacity prices under this Agreement, Seller waives any and all rights to judicial or other relief from its obligations and/or prices set forth in Appendices B, D, and E, or modification of any other term or provision for any reason whatsoever, except as set forth in Article 2A below.”

- 2.4 **Effect of CPUC or California State Legislature Changes on Energy Prices.** A new Article 2A is inserted after Article 2 of the Agreement as follows:

**“ARTICLE 2A EFFECT OF CPUC OR CALIFORNIA
STATE LEGISLATURE CHANGES ON ENERGY PRICES**

(a) In the event that the CPUC or California state legislature changes the formula used by the CPUC to compute full short-run avoided operating costs that is generally applicable to qualifying facilities that have executed a Standard Offer #4 Contract with PG&E, such as this Agreement, then, on the date on which such change becomes effective, and continuing until such time as such rate is no longer applicable, the energy rate for power purchases made pursuant to the Agreement shall,

without further action by the Parties or otherwise, be the revised rate adopted by the CPUC or California state legislature.

(1) Nothing herein shall preclude any Party from participating in any CPUC proceeding affecting full short-run avoided operating costs or from seeking rehearing or other appropriate review of the CPUC order(s) or decision(s) effecting such a change in full short-run avoided operating costs.

(2) In the event that the CPUC or California state legislature changes full short-run avoided operating costs, then Seller shall thereafter seek FERC acceptance of such rate as changed, effective as of the effective date of the change by the CPUC or California state legislature, to the extent such acceptance is necessary to make such rate effective. PG&E will support the acceptance by FERC of such changed rate as requested by Seller if reasonably requested by Seller, but shall have no obligation to support any justification of such request by Seller, whether factual, legal, or argumentative.

(b) In the event that the CPUC modifies, revises, or restates contractual terms that are generally applicable to all QFs that have executed a Standard Offer #4 Contract (also known as Interim Standard Offer 4) with PG&E, such as the Agreement, such changes will also apply to the Agreement; *provided, that:*

(1) No such change by the CPUC shall apply to the terms of the Agreement to the extent amended by this Third Amendment (such terms the "Amended Terms").

(2) Any change by the CPUC to the termination dates applicable to power purchase agreements PG&E has with QFs, including without limitation any increase in the time period during which PG&E is obligated to purchase capacity or energy from such QFs beyond that contained in such agreements, however such increase might be implemented, shall not modify the term of this Agreement as set forth in Article 12.

(3) In the event that the CPUC revises contractual terms that are generally applicable to all QFs that have executed a Standard Offer #4 Contract with PG&E, such as the Agreement (other than to the extent such revisions change the Amended Terms), then Seller shall thereafter seek FERC acceptance of such terms as changed, effective as of the effective date of the change by the CPUC, to the extent such acceptance is necessary to make such terms effective, unless the CPUC gives QFs with Standard Offer #4 Contracts with PG&E the discretion or option to choose to implement the contract change or not, in which case the Parties

agree that such discretion or option shall apply similarly to Seller. PG&E will support the acceptance by FERC of such changed terms requested by Seller if reasonably requested by Seller, but shall have no obligation to support any justification of such request by Seller, whether factual, legal, or argumentative.

(c) No Party shall oppose any filing at the FERC to implement contract changes directed by the CPUC or California state legislature to the extent such changes affect the Agreement as provided in this Third Amendment.”

2.5 Rate of Delivery. Article 3(b) of the Agreement is hereby amended to read in its entirety: “Seller shall provide capacity and energy from its forty-four thousand kilowatts (44,000 kW) Facility located at the Port of Stockton in Stockton, California. Notwithstanding Article 3(d), Seller shall limit the Facility’s actual rate of delivery into the PGandE system to 50,000 kW. Seller warrants and covenants that it will use commercially reasonable efforts to maintain the energy output of the Facility commensurate with historical average levels.”

2.6 Definition of FERC. Article A-1 “Definitions” in Appendix A to the Agreement is amended by adding the definition of FERC, as follows:

“FERC – The Federal Energy Regulatory Commission.”

3. EFFECTIVE DATE

This Amendment shall become effective on the Effective Date of the Definitive Agreement, as that term is defined in Section 5.1 therein.

4. OTHER TERMS AND CONDITIONS

4.1 None of the provisions of this Third Amendment, including this paragraph, shall be considered waived by either Party except when such waiver is given in writing. The failure of either Party to insist in any one or more instances upon strict performance of any of the provisions of this Third Amendment or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.

4.2 This Third Amendment shall not be amended or modified except by a writing signed by both Parties.

4.3 This Third Amendment shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.

- 4.4 This Third Amendment is the result of negotiation and each Party has participated in its preparation. Accordingly, any rules of construction to the effect that an ambiguity is to be resolved against the drafting party shall not be employed in the interpretation of this Third Amendment.
- 4.5 This Third Amendment shall be interpreted and governed under the laws of the State of California (without giving effect to choice of laws provisions that might apply the law of a different jurisdiction).
- 4.6 Except as expressly amended hereby, all the terms, definitions, and conditions contained in the Agreement, as amended, shall remain in full force and effect, and apply to this Third Amendment as though incorporated herein.
- 4.7 Each Party represents and warrants that the person who signs below on behalf of such Party has received all requisite authorizations required to execute this Third Amendment on behalf of such Party and to bind such Party to the Third Amendment. Without in any way limiting the foregoing, Seller represents and warrants that it has sufficient authority to execute this Third Amendment on behalf of itself and all other Parties, if any, that hold an ownership or other interest in the Facility, or any portion thereof, and that this Third Amendment will represent a binding obligation upon the Facility and all of its owners in accordance with its terms.
- 4.8 This Third Amendment may be executed in one or more counterparts, each of which shall be deemed an original document and which together shall constitute a single instrument.

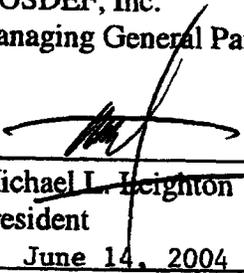
[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Parties have caused this Third Amendment to be executed by their duly authorized representatives as of the dates set forth below.

POSDEF POWER COMPANY, LP,
a California limited partnership

By: Acme POSDEF Partners, L.P.
Its General Partner

By: CH POSDEF, Inc.
Its Managing General Partner

By: 
Michael L. Heighon *126*
President
Date: June 14, 2004

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation

By: _____
Frank DeRosa
Director, Power Contracts
Date: _____

IN WITNESS WHEREOF, the Parties have caused this Third Amendment to be executed by their duly authorized representatives as of the dates set forth below.

POSDEF POWER COMPANY, LP,
a California limited partnership

By: Acme POSDEF Partners, L.P.
Its General Partner

By: CH POSDEF, Inc.
Its Managing General Partner

By: _____
Michael L. Leighton
President
Date: _____

PACIFIC GAS AND ELECTRIC COMPANY,
a California corporation

By: Frank DeRosa
Frank DeRosa
Director, Power Contracts
Date: 6/11/04

Attachment B

NOTICE

Notices under this Definitive Agreement shall be given in writing via fax and/or electronic mail as specified below and shall be effective upon receipt:

If to PG&E:

Frank De Rosa
Director Gas and Electric Supply
245 Market Street
Mail Code N12E
San Francisco, CA 94105
(415) 973-9176, 973-0070
FAX: (415) 973-9176
Email: fxd4@pge.com

If to POSDEF:

Tom Grieser
Vice President - Business Management
c/o FPLE Energy, LLC
700 Universe Blvd.
Juno Beach, FL 33408
561-691-7171
FAX: 561-304-5161
Email: Tom_Grieser@fpl.com

ATTACHMENT G

**RELEASE AGREEMENT
BETWEEN
PACIFIC GAS AND ELECTRIC COMPANY,
AND
COGENERATION NATIONAL CORPORATION,
SITHE ENERGIES, INC.,
AND
EXELON SHC, INC.**

June 14, 2004

1. PARTIES

- 1.1 The Parties to this Release Agreement ("**Release Agreement**") are, on the one hand, Pacific Gas and Electric Company, a California corporation ("**PG&E**"), and on the other hand, Cogeneration National Corporation (a California corporation), Sithe Energies, Inc., and Exelon SHC, Inc. (both Delaware corporations) (collectively, the "**Project Affiliates**").
- 1.2 PG&E and the Project Affiliates are referred to collectively in this Release Agreement as the "**Parties**" and individually as a "**Party**."

2. RECITALS

- 2.1 The Project Affiliates own interests in POSDEF Power Company, LP. POSDEF Power Company, LP, is a party to a power purchase agreement ("**PPA**") with PG&E effective as of October 18, 1984, which provides for the sale to PG&E of electric energy and capacity from a QF coal and petroleum coke fueled electric generating project located in Stockton, California (the "**Project**").
- 2.2 The Parties and POSDEF are presently engaged in certain regulatory proceedings before the Federal Energy Regulatory Commission in the matter of *Sithe Energies, Inc., et al.*, Docket Nos. EL04-26-000 and QF85-311-004, which, among other things, concerns claims arising from the relationship between PG&E, as purchaser, and POSDEF, as Seller, under the PPA.
- 2.3 POSDEF and PG&E have entered into (i) that certain Definitive Agreement of even date herewith (the "**Definitive Agreement**"), and (ii) the PPA amendments, an executed copy of which is attached to the Definitive Agreement as Attachment A (the "**PPA Amendments**"; the PPA as amended by the PPA Amendments, the "**Amended PPA**"), and the Project Affiliates and PG&E are entering into this Release Agreement. The Parties, POSDEF and FERC Trial Staff have also entered into a consent agreement as part of this settlement ("**Consent Agreement**") (the Definitive Agreement, the PPA Amendments, this Release Agreement, and the Consent Agreement are collectively referred to in this Release Agreement as the "**Settlement Documents**").
- 2.4 Prior to the execution of the Settlement Documents, POSDEF and the Parties agreed to take certain actions in anticipation of the Settlement Documents being

executed, as set forth in a confidential Memorandum of Understanding, dated April 14, 2004 (“MOU”). The MOU memorialized both the essential terms that the Parties agreed to include in the Settlement Documents as well as those actions that the Parties agreed to take prior to the execution of the Settlement Documents. The MOU also identified those provisions thereof that would be binding immediately upon the parties to the MOU upon its execution as distinguished from obligations that would be created only upon the execution of the Settlement Documents and satisfaction of the conditions set forth in the Settlement Documents.

3. **AGREEMENT**

In consideration of the promises, mutual covenants and agreements hereinafter set forth, the Parties agree to the following:

4. **DEFINITIONS**

The following capitalized terms, when used in this Release Agreement and Attachment A shall have the meanings specified in this Section 4.

- 4.1 **“Amended PPA”** has the meaning specified in Section 2.3.
- 4.2 **“Attachment A”** means Attachment A to this Release Agreement which contains the names and addresses of individuals for notice pursuant to Section 9.9.
- 4.3 **“Business Day”** means a day on which Federal Reserve member banks are open for business (excluding Saturday or Sunday) in Pacific Prevailing Time. A Business Day for each Party shall start at 8:00 a.m. and end at 5:00 p.m. in Pacific Prevailing Time.
- 4.4 **“Claims”** has the meaning specified in Section 6.1.
- 4.5 **“Consent Agreement”** has the meaning specified in Section 2.3.
- 4.6 **“CPUC”** means the California Public Utilities Commission or its successor.
- 4.7 **“Definitive Agreement”** has the meaning specified in Section 2.3.
- 4.8 **“Definitive Agreement Termination Date”** has the meaning specified in Section 5.2 of the Definitive Agreement.
- 4.9 **“Effective Date”** means the date on which the Definitive Agreement becomes effective as provided in Section 5.1 thereof.
- 4.10 **“FERC”** means the Federal Energy Regulatory Commission or its successor.

- 4.11 **“FERC Proceeding”** means the matter of *Sithe Energies, Inc., et al.*, Docket Nos. EL04-26-000 and QF85-311-004; *provided, however*, that the term FERC Proceeding does not include any matter related to LUZ Solar Partners III, Ltd., which in the same proceeding is set for hearing in Docket Nos. EL04-26-000 and QF86-734-006.
- 4.12 **“FPA”** means the Federal Power Act of 1920, as amended.
- 4.13 **“MOU”** has the meaning specified in Section 2.4.
- 4.14 **“PG&E”** has the meaning specified in Section 1.1.
- 4.15 **“POSDEF”** means POSDEF Power Company, LP, and Acme POSDEF Partners, L.P.
- 4.16 **“PPA”** has the meaning specified in Section 2.1.
- 4.17 **“PPA Amendments”** has the meaning specified in Section 2.3.
- 4.18 **“Project”** has the meaning specified in Section 2.1.
- 4.19 **“Project Affiliates”** has the meaning specified in Section 1.1.
- 4.20 **“PURPA”** means the Public Utility Regulatory Policies Act of 1978.
- 4.21 **“QF”** means a qualifying facility as defined in PURPA and in regulations of FERC, Title 18 Code of Federal Regulations, Sections 292.201 through 292.207.
- 4.22 **“Regulatory Approvals”** means that the responsible government agencies, FERC and the CPUC, have issued a final order, no longer subject to rehearing or appeal, approving the Settlement Documents without modification thereto, or in a manner that is not unacceptable in its reasonable business judgment (taking into account all of its circumstances, including but not limited to circumstances not pertaining to the PPA, Amended PPA, Project or the other Parties) to a Party whose rights or obligations under the Settlement Documents are materially adversely affected by such modification.
- 4.23 **“Release Agreement”** shall have the meaning specified in Section 1.1.
- 4.24 **“Settlement Documents”** has the meaning specified in Section 2.3
- 4.25 **“Standard Offer #4 Contract”** means PG&E’s CPUC-approved version of the Standard Offer #4 Contract.
- 4.26 **“Waived QF Requirements”** means any covenant (and any other contract provision) eliminated from the Amended PPA as provided in the Definitive

Agreement, which covenant or provision would otherwise require that POSDEF be or remain a QF during the term of the Amended PPA or otherwise comply with the FERC's or CPUC's QF requirements, including, without limitation, those requirements set forth in 16 U.S.C. § 796(17) (A) (ii), 16 U.S.C. § 796(17)(C)(ii) and 18 C.F.R. §§ 292.204(a)(1) and 292.206.

5. EFFECTIVE DATE; TERMINATION

- 5.1 This Release Agreement shall be effective as of the Effective Date.
- 5.2 This Release Agreement shall terminate automatically upon the occurrence of any Definitive Agreement Termination Date.
- 5.3 The following provisions of this Release Agreement shall survive such termination: Section 1 (Parties), Section 2 (Recitals), Section 3 (Agreement), Section 4 (Definitions), Section 5 (Effective Date; Termination), Section 7.2 (necessary approvals), Section 9 (General Provisions) and Section 10 (Execution).

6. RELEASES; WAIVER OF CIVIL CODE § 1542

- 6.1 As of the Effective Date, PG&E, on the one hand, and the Project Affiliates, on the other hand, each acting for itself and its affiliates, will mutually release and discharge one another and each of the other's respective past, present, and future, direct and indirect parent companies, partners, shareholders, subsidiaries, affiliates, directors and officers from any and all claims, obligations, losses, causes of action, allegations, demands and liabilities, of whatsoever kind and nature, character and description, whether in law or equity, whether sounding in tort, contract or under other applicable law, whether known or unknown, whether anticipated or unanticipated, or whether asserted or unasserted, of or to a Party, in any forum (including state or federal court, the FERC or the CPUC) (collectively, "Claims") based on or arising out of: (i) lack of compliance with the Waived QF Requirements to the extent they would otherwise apply to the Project at any time prior to or following the Effective Date; (ii) PG&E's Claims asserted in the FERC Proceeding; and (iii) any Claims which arise from any subsequent FERC Proceeding or any other proceeding, in either case to the extent such proceeding is based on the issue of POSDEF's QF status.
- 6.2 Parties do not admit liability as to any of the matters released in this Release Agreement, and this Release Agreement shall establish no precedents with respect to other parties selling pursuant to other power purchase agreements, or disputes other than those described in Section 6.1 of this Release Agreement.
- 6.3 Each of the Parties believes that it is fully familiar with facts giving rise to this settlement, but agrees that the Settlement Documents shall remain fully effective and binding as to each of them even if the facts turn out to be different from what

they now believe them to be or there are additional future investigations of POSDEF and its affiliates as to the matters which are the subject of the Settlement Documents. Further, as to specific matters released in Section 6.1, each of the Parties waives the benefit of California Civil Code §1542 (or any similar law from another jurisdiction). Section 1542 of the California Civil Code provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”

Such waiver is not a mere recital but a knowing and intentional waiver of a known right undertaken after consultation with counsel and with a full understanding of the risks and uncertainties inherent in such a release. Notwithstanding the waiver of Civil Code §1542, the Parties, and each of them, acknowledge that the releases in the Release Agreement are specific to the matters set forth in the releases and are not intended to create general releases as to all Claims, or potential Claims, between the Parties.

- 6.4 As of the Effective Date, the release provisions shall be deemed ratified by the Project Affiliates and PG&E, confirming that such release provisions are, as of such date, in full force and effect and not subject to any further conditions, in accordance with the terms, conditions and applicable dates, as provided in such release provisions without modification.
- 6.5 As of the Effective Date, PG&E, on the one hand, and the Project Affiliates, on the other hand, represent and warrant each to the other that, as of the date on which each such Party executes this Release Agreement, it is, without investigation, unaware of any defenses to the validity of these release provisions, other than Section 1542 of the California Civil Code, which has been expressly waived in this Release Agreement.

7. COVENANTS AT EXECUTION OF THE RELEASE AGREEMENT

- 7.1 Effective upon execution of the Release Agreement, each of the Parties covenant (i) that neither it nor its affiliates will challenge or seek to avoid or alter in any way any provision of the Amended PPA pursuant to either Section 205 or Section 206 of the FPA or pursuant to any authority granted by the CPUC, and (ii) that neither it nor its affiliates will assert rate authority obtained pursuant to Section 205 of the FPA, as a basis, whether directly or indirectly, for avoiding or altering in any way any provision of the Amended PPA, in either case unless such changes are made as a result of an order by the CPUC of general applicability to QFs

having Standard Offer #4 Contracts with PG&E as described in Section 8 of the Definitive Agreement except to the extent that any such order is inconsistent with the provisions of the Settlement Documents.

- 7.2 In addition to the foregoing, effective upon execution of the Release Agreement, each Party represents and warrants that it has obtained all necessary approvals to enter into and execute this Release Agreement (excluding the approvals which are conditions precedent to the effectiveness of the Definitive Agreement). The Parties agree to notify each other promptly in writing in the event it is determined that any approval contemplated in this Release Agreement will not be forthcoming. In such event, any Party may notify the FERC or CPUC of such non-approval without prior notice to the other Parties.

8. DISPOSITION OF FERC PROCEEDING AND OTHER MATTERS

- 8.1 Within five (5) Business Days following the Effective Date, PG&E will withdraw with prejudice, or, where required by applicable rules of procedure, seek permission from the applicable agency to withdraw with prejudice any and all interventions, complaints, allegations, and motions in the FERC Proceeding that are based on the Claims released and/or waived in the Settlement Documents.
- 8.2 Each of the Parties shall bear its own attorneys' fees and costs in the FERC Proceeding.
- 8.3 Each of the Parties covenants that, after the Effective Date, it will not bring, enter into, participate or intervene in or otherwise pursue, directly or indirectly, any subsequent actions or proceedings to the extent arising from or related to any of the Claims released in the Settlement Documents, except for the purpose of enforcing any of the terms of the Settlement Documents.
- 8.4 As of the Effective Date, PG&E, on the one hand, and the Project Affiliates, on the other hand, as to each other, irrevocably waive, discharge and agree to forego any rights they have or may have to the benefit of any ruling(s) of FERC in the FERC Proceeding (or any subsequent proceedings which concern the same general factual allegations as form the basis of the Claims released and/or waived in the Settlement Documents) in respect of the rates PG&E must pay, refunds of prior amounts paid by PG&E, or other economic effect upon or under the PPA. To the extent any Party actually receives any funds from another Party on account of such rights or benefits the receipt of which would be inconsistent with the waiver, discharge, etc., provided for in this paragraph, such Party will promptly pay such funds over to the other Party.

9. GENERAL PROVISIONS

- 9.1 **No Waiver:** None of the provisions of this Release Agreement, including this paragraph, shall be considered waived by a Party unless such waiver is given in writing. The failure of any Party to insist in any one or more instances upon strict performance of any of the provisions of this Release Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.
- 9.2 **Further Agreements:** This Release Agreement shall not be amended, changed, modified, abrogated or superseded by a subsequent agreement unless such subsequent agreement is in the form of a written instrument signed by all of the Parties; *provided* that an instrument which affects only certain of the Parties shall be effective if signed by such Parties but shall not be effective with respect to the rights and obligations of any other Parties.
- 9.3 **Entire Agreement; Conflict; Advice of Counsel; Fees and Expenses:** The Settlement Documents constitute the entire agreement of the Parties concerning the subject matter thereof and supercede any and all prior negotiations, correspondence, undertakings, and agreements between the Parties, including, without limitation, the MOU, concerning the subject matter of the Settlement Documents. Notwithstanding the foregoing, to the extent there is a conflict or inconsistency between the provisions of this Release Agreement and the provisions of the Amended PPA, the terms of this Release Agreement shall control. The Parties have read the Settlement Documents, have had the advice and assistance of legal counsel in entering into them, and have not been influenced to any extent whatsoever by any representations or statements made by any Party other than those in the Settlement Documents. The Parties, and each of them, shall bear their own attorneys' fees and costs arising from or pertaining to (i) the negotiation, preparation and implementation of the Settlement Documents and (ii) the obtaining of the required Regulatory Approvals.
- 9.4 **Successors and Assigns:** This Release Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns.
- 9.5 **Construction:** The Release Agreement has been drafted by all of the Parties and shall not be construed against any Party as the sole drafter.
- 9.6 **Governing Law:** The Release Agreement shall be governed by and construed under the laws of the State of California without regard to its conflict of laws principles.

- 9.7 **Headings:** The headings used in the Release Agreement are for convenience and reference purposes only and do not themselves constitute any of the terms of the Settlement Documents.
- 9.8 **No Precedent; Use in Litigation; No Third Party Beneficiaries:** Each Party agrees that the Settlement Documents arise from unique facts and circumstances and, as such, the various provisions of the Settlement Documents shall not, except as expressly provided for in the Settlement Documents, be used as evidence relevant to, or the basis for disputing the validity or appropriateness of, any determination of avoided costs or otherwise before the FERC, CPUC or any court or other judicial or quasi-judicial body, and nothing herein may be used as an admission against any Party. The Settlement Documents shall not be construed as creating any rights or benefits of any kind or nature whatsoever in any third party or class of persons not parties to the Settlement Documents.
- 9.9 **Notice:**
- 9.9.1 Any notice, demand, or request permitted or required under this Release Agreement shall be delivered in writing by overnight delivery service, United States Mail, fax and/or electronic mail directed as specified in Attachment A. Notice given by overnight delivery or mail shall be effective upon actual receipt. Notice given by fax or electronic mail shall be effective upon actual receipt if received during the recipient's Business Day, or at the beginning of the recipient's next Business Day after receipt if not received prior to the cessation of the recipient's previous Business Day.
- 9.9.2 The names and addresses for notice specified in Attachment A may be changed from time to time by written notice by a Party to the other Parties without a need for an amendment to this Release Agreement.

10. EXECUTION

This Release Agreement shall be executed by exchanging counterpart signature pages by facsimile as provided in Section 9.9.1 above.

Each Party represents and warrants that the person who signs below on behalf of the Party has authority to execute this Release Agreement on behalf of such Party and to bind such Party to this Release Agreement.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, the Parties have caused this Release Agreement to be executed by their duly authorized representatives as of the dates set forth below.

**Pacific Gas and Electric
Company**

By: Frank DeRosa
Frank DeRosa
Director, Power Contracts
Date: 6/11/04

Cogeneration National Corporation

By: _____
(print) _____
Its _____
Date: _____

Sithe Energies, Inc.

By: _____
(print) _____
Its _____
Date: _____

Exelon SHC, Inc.

By: _____
(print) _____
Its _____
Date: _____

IN WITNESS WHEREOF, the Parties have caused this Release Agreement to be executed by their duly authorized representatives as of the dates set forth below.

Pacific Gas and Electric Company

By: _____
Frank DeRosa
Director, Power Contracts
Date: _____

Cogeneration National Corporation

By: Bruce J. Vrobel
(print) Bruce J. Vrobel
Its CEO
Date: 6-14-04

Sithe Energies, Inc.

By: Bruce J. Vrobel
(print) Bruce J. Vrobel
Its CEO
Date: 6-14-04

Exelon SHC, Inc.

By: _____
(print) _____
Its _____
Date: _____

IN WITNESS WHEREOF, the Parties have caused this Release Agreement to be executed by their duly authorized representatives as of the dates set forth below.

Pacific Gas and Electric Company

By: _____
Frank DeRosa
Director, Power Contracts
Date: _____

Cogeneration National Corporation

By: _____
(print) _____
Its _____
Date: _____

Sithe Energies, Inc.

By: _____
(print) _____
Its _____
Date: _____

Exelon SHC, Inc.

By: *[Signature]*
(print) Thomas J. Cullen, Jr.
Its Vice President
Date: 6/11/04

Attachment A

NOTICE

Notices under this Release Agreement shall be given in writing via fax and/or electronic mail as specified below and shall be effective upon receipt:

If to PG&E:

Frank De Rosa
Director Gas and Electric Supply
245 Market Street
Mail Code N12E
San Francisco, CA 94105
(415) 973-9176, 973-0070
FAX: (415) 973-9176
Email: fxd4@pge.com

If to Acme POSDEF Partners, L.P.

Tom Grieser
Vice President - Business Management
c/o FPLE Energy, LLC
700 Universe Blvd.
Juno Beach, FL 33408
561-691-7171
FAX: 561-304-5161
Email: Tom_Grieser@fpl.com

If to Cogeneration National Corporation:

Scott G. Silverstein
Sithe Energies, Inc.
335 Madison Ave.
28th Floor
New York, NY 10017-4605
FAX 212-351-0183
E-mail ssilverstein@sithe.com

If to Sithe Energies, Inc.:

Scott G. Silverstein
Sithe Energies, Inc.
335 Madison Ave.
28th Floor
New York, NY 10017-4605
FAX 212-351-0183
E-mail ssilverstein@sithe.com

If to Exelon SHC, Inc.:

John C. Halderman
Exelon Business Services Company
2301 Market Street/23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
FAX: (215) 568-3389
email: john.halderman@exeloncorp.com

ATTACHMENT H

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served by first class mail, postage pre-paid, upon all parties listed on the official service list maintained by the Secretary of the Commission in this proceeding.

Dated at Washington, D.C., this 14th day of June 2004.

A handwritten signature in black ink, appearing to read "Paul Silverman". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Paul Silverman
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7278

Submission Contents

POSDEF POWER COMPANY, LP et al submit Settlement Agreements under EL04-26-000 and QF85-311-004.

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