

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

EcoEléctrica, L.P.

Docket No. QF95-328-006

ORDER GRANTING APPLICATION FOR RECERTIFICATION AS QUALIFYING
COGENERATION FACILITY

(Issued September 17, 2004)

1. In this order we grant an application by EcoEléctrica, L.P. (EcoEléctrica) for Commission recertification of its Peñuelas, Puerto Rico cogeneration facility as a qualifying facility (QF) following changes in the upstream ownership and generating capacity of the facility.

Background

2. On April 2, 2004, as supplemented on April 12, 2004 and on July 7, 2004, EcoEléctrica filed an application for Commission recertification of the facility as a QF.¹ The application reflects changes in upstream ownership of the facility, changes in operation of the facility, and changes to the declared capacity of the facility since the facility was last certified as a QF by the Commission.

¹ EcoEléctrica initially filed a notice of self-certification on September 18, 1995, in Docket No. QF95-328-000. The Commission certified the facility as a QF in Docket No. QF95-328-001 in a November 1, 1996 order. *EcoEléctrica, L.P.*, 77 FERC ¶ 61,117, *reh'g denied*, 77 FERC ¶ 61,344 (1996). On December 15, 1997, EcoEléctrica filed a notice of self-recertification in Docket No. QF95-328-003.

On December 2, 2003, the Commission approved a settlement in Docket Nos. EL03-47-002 and QF95-328-004 concerning EcoEléctrica's compliance with the ownership requirements for QF status. *EcoEléctrica, L.P.*, 105 FERC ¶ 61,325 (2003).

On April 1, 2004, EcoEléctrica filed a notice of self-recertification in Docket No. QF95-328-005. A day later, EcoEléctrica filed the instant application for recertification.

3. EcoEléctrica's facility is a 563 MW net capacity topping-cycle cogeneration facility located in Peñuelas, Puerto Rico. The facility consists of two nominal 171,690 kW combustion turbine generators, two heat recovery steam generators (HRSGs), a nominal 214,000 kW reheat steam turbine generator, and electrical interconnection equipment. The electric output of the facility is sold to the Puerto Rico Electric Power Authority (PREPA).

4. Steam extracted from the low-pressure drum of the HRSG and the low-pressure stage of the steam turbine is delivered to a desalinization plant located adjacent to the facility. The desalinization plant, which is owned and operated by EcoEléctrica, produces distilled water. The distilled water is sold to the Puerto Rico Aqueduct and Sewer Authority (PRASA) under a Water Supply Agreement between PRASA, PREPA, and EcoEléctrica. PRASA then sells the distilled water to various parties, including the sale of a portion of the water back to EcoEléctrica.

5. The application indicates that ownership changes have been made since the May 28, 1996 application for Commission certification.² The facility is now a wholly-owned, indirect subsidiary of EcoEléctrica Holding, Ltd., which is owned in equal shares between EME del Caribe (EME) and Buenergia Gas & Power, Ltd. (Buenergia). EME is indirectly wholly-owned by Edison International.³ Buenergia is indirectly owned by several organizations and individuals.⁴

6. Notices of EcoEléctrica's filings were published in the *Federal Register*, 69 Fed. Reg. 20,001, 43,576 (2004), with protests and interventions due on or before July 30, 2004.

² At that time, the facility was indirectly owned in equal shares by Kenetech Energy Systems, Inc. and Enron Corp.

³ Edison International is an exempt utility holding company under section 3(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), 15 U.S.C. § 79c(a)(1) (2000). Accordingly, Edison International's ownership interest is considered interest held by an electric utility holding company under 18 C.F.R. § 292.206(c) (2004).

⁴ Companies holding indirect ownership interest in Buenergia are Holding de Infraestructuras y Servicios Urbanos S.A. (4.75 percent), Caja da Ahorros y Pensiones de Barcelona (approx. 2.5 percent), Caixa Holdings, S.A. (approx. 35 percent), other equity owners (approx. 20 percent), individuals (approx. 33 percent), and General Electric Company (5 percent).

7. A timely motion to intervene and protest was filed by the Environmental Action Center, *Sur Contra la Contaminación* and the Union of Electrical and Irrigation Industry Workers (collectively, Intervenors). Intervenors ask that recertification of the facility as a QF be denied.

8. Intervenors present several arguments in support of their position. First, Intervenors point out that the application submitted by EcoEléctrica implies that some of the distilled water produced at the facility is to be used within its own boiler.

9. Second, Intervenors argue that the Commission did not address arguments previously made in protest to the earlier certification of the facility in Docket No. QF95-328-001. Specifically, Intervenors state that the Commission did not address the argument that EcoEléctrica's representation that it would produce 4,000,000 gallons of distilled water per day was inconsistent with certain statements made in EcoEléctrica's Environmental Impact Statement regarding the amount of water to be extracted from and discharged into the sea.

10. Third, Intervenors argue that, because the facility has now been in operation for a number of years, EcoEléctrica should be ordered to produce documents providing evidence of the sale of the distilled water. The instant filing, Intervenors claim, does not substantiate any sale of water, and is therefore deficient.⁵ Intervenors also point out that the south coast of Puerto Rico, where EcoEléctrica's facility is located, experiences serious water shortages. Intervenors claim that if "PRASA is not making good use of the water supposedly sold to it from EcoEléctrica, the public can make appropriate claims here within Puerto Rico."⁶

11. Finally, Intervenors argue that EcoEléctrica violates the avoided cost requirements of the Public Utility Regulatory Policies Act of 1978 (PURPA) because the facility's sale of electric energy does not result in an avoided cost to PREPA or the consumers in Puerto Rico. Intervenors further state that, "[t]he Commission must require

⁵ Intervenors ask that the Commission require EcoEléctrica to produce: (1) a copy of the Water Supply Agreement between PRASA, PREPA and EcoEléctrica; (2) proof of the sale of distilled water to PRASA and/or PREPA from 2000 through 2004; (3) a water extraction permit from the Puerto Rico Department of Natural and Environmental Resources; (4) monthly or bi-monthly water extraction reports from 2000 through 2004; and (5) facility records for production of distilled water from 2000 through 2004 and of use of distilled water in EcoEléctrica's boiler from 2000 through 2004.

⁶ Protest at 2.

EcoEléctrica to submit a complete copy of the Power Purchasing Agreement and its amendments to demonstrate that there is an avoided cost as required by PURPA."⁷

12. On May 21, 2004, EcoEléctrica filed a request for leave to answer Intervenors' protest, together with an answer. EcoEléctrica argues that requiring EcoEléctrica to file with the Commission documents to support the declarations in the application or to show that the residents of Puerto Rico realize an avoided cost does not properly fall within the scope of the QF certification process. Furthermore, EcoEléctrica contends that Intervenors ignore Commission precedent that the use of steam to produce distilled water is common, and therefore presumptively useful.

13. On July 2, 2004, the Commission's Director, Division of Tariffs and Market Development—South, Office of Markets, Tariffs and Rates sent EcoEléctrica a letter requesting that EcoEléctrica:

file within seven (7) days from the date of this letter a copy of the Water Supply Agreement between EcoEléctrica, Puerto Rico Aqueduct and Sewer Authority, and Puerto Rico Electric Power Authority, or other proof of the sale of distilled water as referred to in your application.

14. On July 7, 2004, EcoEléctrica filed a copy of the Water Supply Agreement between EcoEléctrica, PRASA, and PREPA dated May 6, 1997, as well as the first amendment to that agreement dated October 17, 1997. EcoEléctrica requested confidential treatment of those documents pursuant to 18 C.F.R. § 388.112. EcoEléctrica claims that the documents are exempt from mandatory public disclosure because they contain privileged and confidential commercial and financial information that if disclosed will result in substantial harm to EcoEléctrica.

15. On July 30, 2004, Intervenors filed a protest to EcoEléctrica's July 7 filing. Intervenors claim that the Water Supply Agreement is insufficient evidence. Intervenors claim that PRASA may have agreed to purchase water if produced, but that EcoEléctrica may not be required to produce water. Intervenors claim that EcoEléctrica must produce additional evidence to demonstrate that the production and sale of water from its cogeneration facility has actually occurred. Intervenors also claim that EcoEléctrica has not substantiated its claim that public disclosure of the Water Supply Agreement would result in substantial harm.

⁷ Protest at 3.

16. On September 7, 2004, Intervenors filed a pleading titled “Urgent Motion for Leave to Submit New Information.” In that document Intervenors state that they have just received notification from the Office of the Controller of Puerto Rico that the Water Supply Agreement was never filed with that office. Intervenors claim that under Puerto Rican law a contract that has not been submitted to the Office of the Controller is “null and non-executable.”⁸

17. On September 10, 2004, EcoEléctrica filed an answer to Intervenors’ September 7 filing. EcoEléctrica claims that Intervenors’ September 7 filing raises an issue that is wholly irrelevant to the QF certification process. EcoEléctrica continues that Intervenors’ assertion that the Water Supply Agreement is “null and non-executable” is “patently incorrect.”⁹ EcoEléctrica points out that the Puerto Rico Legislature, in response to the court case cited by Intervenors, passed legislation which provides that a government contract is not annulled for failure to register the contract with the Office of the Controller.¹⁰ EcoEléctrica states that in any event PRASA, not EcoEléctrica, has the obligation to file the contract with the Controller; EcoEléctrica has contacted PRASA and has been advised that PRASA will file the Water Supply Contract with the Controller shortly.¹¹

Discussion

Procedural Matters

18. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), Intervenors’ timely, unopposed motion to intervene serves to make them a party to this proceeding.

19. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), prohibits answers to protests unless otherwise ordered by the decisional authority. We are not persuaded to accept EcoEléctrica’s May 21 answer to Intervenors’ protest and will, therefore, reject it.

⁸ Intervenors’ September 7 filing at 1.

⁹ EcoEléctrica September 10 answer at 2.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 3.

Application for Recertification

20. Under 18 C.F.R. § 292.203(b) (2004), a facility seeking certification or recertification as a qualifying cogeneration facility must meet the ownership criteria for QF status specified in 18 C.F.R. § 292.206 (2004), as well as any applicable operating and efficiency standards specified in 18 C.F.R. § 292.205 (2004), in order to receive QF status. By definition, a cogeneration facility also must produce “forms of useful thermal output.” See 18 C.F.R. § 292.202(c) (2004). As discussed below, we find that EcoEléctrica's facility, notwithstanding Intervenors' objections, satisfies the requirements for QF status.

21. In view of many of the arguments made by Intervenors, we believe it appropriate to summarize, as a preliminary matter, the Commission's process of certifying QFs before proceeding to address the merits of EcoEléctrica's application. As we have explained in numerous orders, the Commission acts upon the information presented in the application and the responsive pleadings.¹² The Commission renders what is essentially a declaratory order deciding whether the facility, as described in the application and pleadings meets the statutory and regulatory requirements set forth in PURPA and the Commission's implementing regulations.¹³

22. Turning to the instant filing, we look first at EcoEléctrica's compliance with the ownership requirements for QF status. The ownership requirements for QF status, set forth in 18 C.F.R. § 292.206 (2004), require that no more than 50 percent of the equity ownership in a QF may be held, directly or indirectly through subsidiaries, by an electric utility or utilities or by an electric utility holding company or companies, or any combination thereof. According to the application, and Intervenors do not argue to the contrary, no more than 50 percent of the facility is owned, directly or indirectly through subsidiaries, by an electric utility or utilities or by an electric utility holding company or companies, or any combination thereof. Based on this representation, we find that the facility satisfies the Commission's ownership criteria.

¹² See, e.g. *Arroyo Energy, Limited Partnership*, 62 FERC ¶ 61,257, *reh'g denied* 63 FERC ¶ 61,198 (1993); *Cogentrix of Mayaguez, Inc.*, 59 FERC ¶ 61,159, *reh'g denied*, 59 FERC ¶ 61,392 (1992); *Inter-Power of New York, Inc.*, 55 FERC ¶ 61,387 (1991); *Georgetown Cogeneration, L.P.*, 54 FERC ¶ 61,049, *reh'g denied*, 55 FERC 61,038 (1991).

¹³ See *Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,361 at 62,393 & n.12 (1991), *aff'd sub nom. Michgian Municipal Cooperative Group v. FERC*, Nos. 91-1366, *et al.* (D.C. Cir. March 26, 1993) (unpublished decision); *EcoEléctrica*, 77 FERC ¶ 61,344 at 62,510-11.

23. Based on the information provided by EcoEléctrica, we also find that the facility will meet the operating and efficiency standards established in 18 C.F.R. § 292.205 (2004).

24. Intervenors' arguments in this proceeding go to the need for a cogeneration facility to produce useful thermal output. They argue that the thermal output of the facility is not "useful" for purposes of certification, and that EcoEléctrica has not substantiated any sale of water (if no water is being produced by the thermal output of the facility, the facility also would not satisfy the operating and efficiency standards).¹⁴ We find Intervenors' arguments unpersuasive.

25. The original 1996 order,¹⁵ in which the facility was certified as a QF, addressed the argument raised in the current protest regarding whether or not the facility can utilize a portion of the distilled water produced within the facility for boiler make-up.¹⁶ That order stated that the Commission's analysis "is not altered by the fact that EcoEléctrica represents that a portion of the distilled water produced at the desalin[iz]ation plant will be used in its own boiler."¹⁷ Once the distilled water is sold to an unaffiliated entity, the

¹⁴ Intervenors also argue EcoEléctrica has not demonstrated that either PREPA or the consumers in Puerto Rico realize an avoided cost through the operation of the facility. This argument is based on a misunderstanding of the meaning of the term avoided cost as it is used in the Commissions regulations, and a misconception of how the concept of avoided cost applies to the certification of a QF. There is no requirement that an applicant for QF certification demonstrate that the operation of the facility will result in an avoided cost to consumers. Rather, avoided cost is a concept used in determining the price that the interconnecting utility is obligated under PURPA to pay the QF for its electric output. *See* 18 C.F.R. § 292.304 (2004). Moreover, as we found in 1996, this issue is outside the scope of this proceeding. *EcoEléctrica*, 77 FERC ¶ 61,344 at 62,511. In any event, to the extent that PREPA pays a negotiated rate for its purchase of electric output from EcoEléctrica, that negotiated rate is consistent with our avoided cost regulations. *See* 18 C.F.R. § 292.301(b) (2004).

¹⁵ *See supra* note 1.

¹⁶ Intervenors' argument repeats an argument made in opposition to the facility's certification as a QF in 1996. There have been no changes since 1996 in how the water produced by the facility is to be sold or used, however. Intervenors' argument thus constitutes an impermissible collateral attack on the 1996 order.

¹⁷ *EcoEléctrica*, 77 FERC ¶ 61,117 at 61,452 n.7.

Commission does not consider for purposes of its QF certification determination how that entity then uses the distilled water; the use that an unaffiliated party makes of the distilled water purchased at arm's-length is irrelevant.¹⁸ We see no persuasive reason not to follow this precedent.

26. Intervenors' objections surrounding the alleged inconsistency between EcoEléctrica's statements about distilled water production contained in EcoEléctrica's 1996 filing under Docket No. QF95-328-001 and EcoEléctrica's Environmental Impact Statement are unsupported. In fact, none of the filings now or previously made in support of QF certification for the facility have made any claims regarding the amount of distilled water that is to be produced. Rather, the filings simply provide information about thermal output, and the information provided has not been demonstrated to be inconsistent with the Environmental Impact Statement.¹⁹ In any event, Intervenors' claims on this issue go to a filing made in 1996, and not to the instant filing.

27. We also disagree that EcoEléctrica is obliged, in the context of an application for Commission certification or recertification, to provide any more information about the distilled water than what it has provided. Members of the public are encouraged to bring allegations of a sham QF to the Commission's attention when such situations are known. However, such allegations must demonstrate more than what Intervenors here have shown to succeed.²⁰ In this case, Intervenors have provided allegations, but no evidence that substantiates any of these allegations or even demonstrates reasonable grounds for suspicion. Intervenors state in their protest that "to the best of our knowledge,

¹⁸ See *Brazos Electric Power Cooperative v. Tenaska IV Texas Partners, Ltd.*, 83 FERC ¶ 61,176 at 61,727, *reh'g denied*, 85 FERC ¶ 61,097 (1998), *aff'd*, *Brazos Electric Power Cooperative, Inc. v. FERC*, 205 F.3d 235 (5th Cir. 2000), *reh'g denied en blanc*, 214 F.3d 214 (5th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000); *Wilbur Power LLC*, 103 FERC ¶ 61,183, *clarified*, 104 FERC ¶ 61,055 at 61,201 (2003); *Brooklyn Navy Yard Cogeneration Partners, L.P.*, 74 FERC ¶ 61,015 at 61,046 (1996).

¹⁹ EcoEléctrica's current and previous applications vary in the amount of thermal output they commit EcoEléctrica to produce, but none makes a commitment to an average useful thermal output of more than 131,521,466 btu's per hour. April 2, 2004 Application at 8. A simple distillation process utilizing this amount of heat would create no more than 350,000 gallons per day of distilled water, not the 4,000,000 gallons per day claimed by the Intervenors.

²⁰ If Intervenors have actual evidence that there are no sales of water from EcoEléctrica's facility, they may seek decertification pursuant to 18 C.F.R. § 292.207(d) (2004).

EcoEléctrica does not and has not sold distilled water to PRASA.”²¹ Intervenors’ “best of our knowledge” allegation of no water sales does not constitute a sufficient basis to deny certification. In fact, EcoEléctrica has filed a copy of the Water Supply Agreement,²² demonstrating that EcoEléctrica does indeed have an agreement to sell distilled water produced by its facility.²³ Intervenors nevertheless claim that still more evidence is needed of an actual sale and of the quantity of water sold. As discussed above, however, Intervenors’ unsupported allegations do not require that EcoEléctrica support its sworn statements with additional evidence beyond what it already has provided.

28. Intervenors’ suggestion that there may be better uses for any water produced by desalinization is beyond the scope of this proceeding; such arguments do not belong here, where the relevant question is whether EcoEléctrica’s facility meets the requirements for QF status.

29. In conclusion, we find that, notwithstanding Intervenors’ protests, the declarations made in the instant filing including the Water Supply Agreement sufficiently demonstrate that the facility satisfies the ownership criteria²⁴ and technical criteria²⁵ for certification as a qualifying cogeneration facility.

²¹ Protest at 2.

²² Notwithstanding Intervenors’ claim that the contract is void, that does not appear to be the case given the legislation cited by EcoEléctrica. In any case, as we explain above, our determination of QF status is essentially a declaratory order and is based on the information before us, and EcoEléctrica here represents (and Intervenors have introduced no compelling information to the contrary) that the contract is a valid agreement and has not been annulled.

²³ Intervenors seek to have the Water Supply Agreement made public. Given that the filing of the Water Supply Agreement confirms EcoEléctrica’s sworn statement that a contract to sell the water produced by its facility exists, the precise terms of the sale are not relevant to this determination. Therefore, we see no need to make public the Water Supply Agreement. In any event, Intervenors suggest that the agreement is available to them pursuant to procedures in Puerto Rico. July 30, 2004 protest at 1 (“By law, all contracts and agreements with public agencies are public documents, both in Puerto Rico and the United States.”).

²⁴ 18 C.F.R. § 292.206 (2004).

²⁵ 18 C.F.R. § 292.205 (2004).

The Commission orders:

The application for recertification of qualifying facility status filed on April 2, 2004, as completed on July 7, 2004, by EcoEléctrica, pursuant to 18 C.F.R. § 292.207(b) (2004), and section 3(18)(B) of the Federal Power Act, 16 U.S.C. § 796(18)(B) (2000), is hereby granted, provided the facility is owned and operated in the manner described in the application and this order.²⁶

By the Commission. Commissioner Kelliher concurring with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

²⁶ Certification as a qualifying facility serves only to establish eligibility for benefits provided by PURPA, as implemented by the Commission's regulations, 18 C.F.R. Part 292 (2004). It does not relieve a facility of any other requirements of local, state or federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

EcoElectrica, L.P.

Docket No. QF95-328-006

(Issued September 17, 2004)

Joseph T. KELLIHER, Commissioner *concurring*:

I agree with the Commission's decision to recertify EcoElectrica, L.P.'s (EcoElectrica) Penuelas, Puerto Rico cogeneration facility as a qualifying facility. I write separately, however, to express my view that the Commission should have granted recertification without requiring EcoElectrica to submit additional evidence of its sales of distilled water.

EcoElectrica supported its application for recertification with a sworn statement attesting to the existence of a contract to sell the water produced by its facility. Although several Protestors²⁷ questioned the adequacy of EcoElectrica's evidence of its sales of distilled water, they put forward no evidence of their own to demonstrate reasonable grounds for questioning the existence of a contract for sale of EcoElectrica's distilled water. Despite the lack of any evidence to the contrary, the Commission nonetheless required EcoElectrica to submit further evidence of its distilled water sales. I believe that imposing this additional evidentiary burden on EcoElectrica was entirely unnecessary in light of Protestors' failure to introduce any compelling information to the contrary. Protestors must do more than set forth allegations; they must put forward evidence to support their positions.

I would have granted the application for recertification of EcoElectrica's qualifying facility based on the uncontested evidence submitted in the application without requiring

²⁷ Environmental Action Center, *Sur Contra la Contaminacion* and the Union of Electrical and Irrigation Industry Workers.

further supplementation of the record.

Joseph T. Kelliher