

143 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Southwest Power Pool, Inc.

Docket No. ER13-878-000

ORDER ACCEPTING IN PART AND REJECTING IN PART
PROPOSED TARIFF REVISIONS

(Issued April 5, 2013)

1. On January 22, 2013, Southwest Power Pool, Inc. (SPP) filed revisions to its Open Access Transmission Tariff (Tariff) proposing a method to allocate Energy Imbalance Service (EIS) Market charges and payments that are associated with the output of involuntarily-registered Qualifying Facilities (QFs) in section 1.2.2(g) of Attachment AE of SPP's Tariff. In this order, we accept, in part, the proposed Tariff revisions effective April 1, 2012, and reject, in part, the proposed Tariff revisions.

I. Background

2. In Docket No. ER09-149-000, the Commission accepted a SPP Tariff provision, requiring that all loads and Resources, excluding Behind the Meter Generation less than 10 MW, be registered in the SPP EIS Market.¹ The Commission accepted that Tariff provision conditioned on SPP's making a compliance filing removing the obligation for a QF selling its output to its host utility under the Public Utility Regulatory Policies Act of 1978 (PURPA)² to actively participate in the EIS Market or be subject to any charges or payments related to the EIS Market.³

¹ *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 (2008).

² 16 U.S.C. § 824a-3 (2006).

³ *Southwest Power Pool*, 125 FERC ¶ 61,314 at PP 36-38, 40; *see also Southwest Power Pool, Inc.*, 127 FERC ¶ 61,041 (2009); SPP Tariff, Attachment AE, § 1.2.2(g).

3. Subsequently, in Docket No. ER09-149-001,⁴ SPP sought clarification on whether it would be acceptable for SPP to allocate any EIS charges associated with QF generation to the purchasing utility. The Commission denied SPP's request for rehearing, explaining that SPP would need to make a filing pursuant to section 205 of the Federal Power Act (FPA) seeking approval to allocate to the purchasing utility any EIS charges associated with QF generation.⁵

4. In Docket No. ER12-1600-000, SPP filed unexecuted service agreements to involuntarily-register Exelon Generation Company, LLC's (Exelon Generation) 12 wind QFs in the EIS Market effective April 1, 2012. In that proceeding, Xcel Energy Services Inc. (Xcel), protesting on behalf of its subsidiary Southwestern Public Service Company (SPS), contended that SPP had provided informal notice that it would assess charges and payments attributable to Exelon Generation's QFs to SPS. Xcel further claimed that SPP had already begun doing so.⁶ In accepting SPP's involuntary registration of Exelon Generation's QFs, the Commission reiterated that SPP cannot charge a QF's host utility for EIS charges associated with generation from the QF absent authorization pursuant to section 205 of the FPA.⁷ The Commission also noted that SPP had not as of the time of the order made a section 205 filing requesting such authority.

5. In Docket No. ER12-2602-000, SPP filed a request for a temporary limited waiver of certain provisions in Attachment AE of SPP's Tariff to avoid the market resettlement of EIS charges and payments associated with the generation from QFs that SPP involuntarily-registered in the EIS Market.⁸ SPP noted that it did not have the authority under its Tariff to charge a QF's host utility under PURPA for EIS charges/credits attributable to generation by the involuntarily-registered QFs, but that it planned to propose amendments to Attachment AE in a stakeholder process; the proposed amendments would authorize SPP to assess the host utility with EIS Market

⁴ See *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,135 (2009).

⁵ *Id.* P 12.

⁶ *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,235, at P 20 (2012).

⁷ *Id.* P 38 (citing *Southwest Power Pool*, 126 FERC ¶ 61,135 at P 12).

⁸ SPP requested waiver of Tariff provisions relating to EIS market charges and payments, including but not limited to: section 5.2 (Energy Imbalance Service Charges/Credits); section 5.3 (Under-Scheduling Charges); section 5.4 (Over-Scheduling Charges); section 5.5 (Uninstructed Deviation Charges); section 5.6 (Revenue Neutrality); and section 7 (Billing) of Attachment AE. SPP's September 7, 2012 Filing at 4.

charges/credits associated with mandatory purchases from the involuntarily-registered QF's generation. SPP asserted that it anticipated filing the Tariff amendments resulting from the stakeholder process within the next six months, and for good cause, would request an effective date of April 1, 2012. SPP stated that a short-term temporary Tariff waiver of Attachment AE provisions was necessary to enable SPP to implement the planned EIS Market amendments (assuming the Commission accepts them) commencing April 1, 2012, without resettlement of EIS Market charges/credits.⁹

6. The Commission granted temporary waiver.¹⁰ In granting the temporary limited waiver, the Commission expressed concern that deferring settlement of the amounts at issue could disrupt the market in the future if the accrued charges/credits are substantial due to a protracted deferral period. Accordingly, the Commission found that SPP should act expeditiously to resolve this matter through its stakeholder process. Therefore, the Commission directed SPP to either file its planned Tariff amendments within 90 days of the date of the order or withdraw its request for waiver and resettle the EIS Market. The Commission additionally emphasized that it was not addressing the effective date or the merits of any planned Tariff amendments, because it would be premature to act on a filing not before the Commission.

II. SPP's Filing

7. SPP filed proposed Tariff revisions to allocate EIS Market payments and charges that are associated with the generation of an involuntarily-registered QF to the host utility purchasing the output from such a QF.

Section 1.2.2(g) of Attachment AE (with proposed revisions italicized) states:

All loads and all Resources, excluding Behind The Meter Generation less than 10 MW, must register. Failure or refusal to register a Resource will result in the Transmission Provider filing an unexecuted version of the service agreement as specified in Attachment AH of this Tariff for that Resource with the Commission under the name of the generation interconnection customer under an interconnection agreement with the Transmission Provider or the applicable Transmission Owner. In the case of a Qualifying Facility exercising its rights under PURPA to deliver all of its net output to its host utility, such registration will not require the

⁹ SPP explained that absent a waiver, under Attachment AE, the charges/credits owing to the generation of a QF exercising its PURPA rights to sell its output to its host utility would have to be uplifted to the entire EIS Market.

¹⁰ *Southwest Power Pool Inc.*, 141 FERC ¶ 61,102 (2012) (November 6 Order).

Qualifying Facility to participate in the EIS Market or subject the Qualifying Facility to any charges or payments related to the EIS Market. *Any EIS Market charges or payments associated with the output of such Qualifying Facility will be allocated to the Market Participant representing the host utility purchasing the output of the Qualifying Facility under PURPA, and the Market Participant will be provided the settlement data required to verify the settlement charges and payments. If the host utility disputes the EIS Market charges or payments associated with the output of the Qualifying Facility on the basis that there exists a dispute between the Qualifying Facility and the host utility regarding the host utility's obligation to purchase the Qualifying Facility output under PURPA, then, until final resolution of the legal dispute, the Transmission Provider, at the host utility's request, may hold in an interest bearing escrow account EIS Market payments due to the host utility, net of any EIS Market charges associated with the Qualifying Facility output. If such charges exceed the payments due, the host utility shall pay the amount of charges in excess of the payments due. Alternatively, the host utility, the Qualifying Facility, and the Transmission Provider may reach an alternative agreement regarding disposition of such funds that shall take effect upon approval by FERC. The host utility shall notify the Transmission Provider of the resolution of the dispute. Upon resolution of the dispute, the Transmission Provider shall release any remaining balance from the escrow account in accordance with the resolution of the dispute.*

8. According to SPP, the proposed Tariff revisions were developed and approved through the SPP stakeholder process. SPP requests waiver of the Commission's prior notice requirements and an April 1, 2012 effective date. SPP states that waiver is appropriate because it would allow SPP to apply the Tariff revisions to the EIS Market charges and credits associated with the generation of the first QFs involuntarily-registered as of April 1, 2012. In addition, SPP states, an effective date of April 1, 2012 for the proposed Tariff revisions is necessary to avoid a resettlement of the EIS Market with regard to the EIS Market charges and credits currently being held in escrow in accordance with the waiver granted in Docket No. ER12-2602-000. In the absence of Commission approval of this request for waiver, according to SPP, it will be required to uplift those charges and credits being held in escrow to the entire EIS Market.

III. Notice of Filing and Responsive Pleadings

9. Notice of SPP's Filing was published in the *Federal Register*, 78 Fed. Reg. 9683 (2013), with interventions and protests due on or before February 25, 2013. Xcel filed a motion to intervene on behalf of its affiliate SPS. Sunflower Electric Power Corporation and Mid-Kansas Electric Company, LLC also jointly filed a motion to intervene. Exelon Corporation (Exelon), on behalf of Exelon Wind, LLC (Exelon Wind), filed a motion to

intervene and protest and Western Farmers Electric Cooperative (Western Farmers) filed a motion to intervene and comment. SPP, in response to Exelon's protest, filed a motion for leave to answer and answer.

10. Exelon argues that the proposed Tariff language would grant a host utility, in its sole discretion, the right to declare that there is a dispute regarding its obligation to purchase the QF's output under PURPA, and based on that claim, require SPP to escrow the QF-related payments indefinitely. Exelon also argues that SPP does not set forth any mechanisms, procedures, or timeline for the dispute to be resolved. According to Exelon, the Exelon Wind QFs' host utility, SPS, has asserted that there is a dispute regarding its obligation to purchase the Exelon Wind QFs' output and on this basis has withheld all payments due to the Exelon Wind QFs under PURPA since April 1, 2012.

11. Exelon requests that the Commission accept SPP's proposal to settle EIS Market charges with the host utility. However, Exelon requests that the Commission reject SPP's proposed revisions to escrow payments attributable to QF output in the event that the host utility disputes its PURPA obligation to purchase the QF output, or in the alternative, conditionally accept SPP's proposed revision, but direct SPP to file a mechanism to bring such disputes to the Commission for timely, open and transparent resolution, and require SPP to file an unexecuted service agreement with the host utility to settle EIS Market charges or payments.

12. Western Farmers states that it has no issues with SPP's proposed Tariff revisions, but only reiterates its concern that it first raised in Docket No. ER12-2602-000; SPP's request for an April 1, 2012 effective date would amount to retroactive approval. Western Farmers avers that granting the waiver for the Tariff revisions to be effective April 1, 2012 is problematic if it forms the basis for a retroactive effective date for Tariff amendments that have not yet been drafted. Western Farmers states that it does not believe that avoiding uplift charges is a reason for retroactive approval in this case, i.e., making the filing effective April 1, 2012, and argues that SPP has not provided any other support for a retroactive effective date. However, Western Farmers states it does not object to an effective date that is on or after the date of SPP's filing.

13. In its answer to Exelon's protest, SPP contends that the dispute regarding the EIS Market charges or credits does not pertain to SPP, but rather, is a legal dispute between the involuntarily-registered QF and the host utility relating to the host utility's obligation to purchase the QF's output under PURPA. SPP maintains that it would be inappropriate for it to file an additional unexecuted service agreement for the host utility with the Commission. SPP asserts that Exelon's contention that the Tariff provision would result in non-payment to a QF for its PURPA sales is outside the scope of this proceeding and SPP's Tariff. SPP further states that it cannot subject an involuntarily-registered QF to EIS Market charges or credits regardless of whether it holds the money in escrow or pays it to the host utility. SPP, therefore, asks the Commission to reject Exelon's alternative

proposal, since SPP is not a party to the dispute and because it is a matter outside of its Tariff.

IV. Discussion

A. Procedural Matters

14. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2012), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

15. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept SPP's answer because it has provided us information that has assisted us in our decision-making process.

B. Commission Determination

16. The Commission accepts that part of SPP's proposed Tariff revisions that allocate the EIS Market charges and payments attributable to the output of an involuntarily-registered QF to the QF's host utility. Specifically, the Commission accepts SPP's proposed revisions to section 1.2.2(g) of Attachment AE of its Tariff that state:

Any EIS Market charges or payments associated with the output of such Qualifying Facility will be allocated to the Market Participant representing the host utility purchasing the output of the Qualifying Facility under PURPA, and the Market Participant will be provided the settlement data required to verify the settlement charges and payments.

This part of the proposed Tariff revision is just and reasonable. As the host utility with the purchase obligation under PURPA is obligated to purchase the output of the QF, it is appropriate to allocate any EIS Market charges and credits associated with the output of the involuntarily-registered QF to the host utility with the PURPA purchase obligation rather than uplifting the charges and credits to the entire EIS Market.

17. However, the Commission rejects the remaining portion of SPP's proposed Tariff revisions providing that SPP would hold the funds in escrow if the utility declares that it disputes its obligation under PURPA to purchase from the QF. We find it unreasonable to permit the host utility to unilaterally require SPP to escrow EIS Market charges and payments indefinitely simply because it declares that it disputes its obligation to purchase the involuntarily-registered QF's output. Utilities have an absolute obligation to purchase a QF's output, unless the Commission expressly grants relief from that purchase obligation; the statutory obligation to purchase unscheduled QF energy is not subordinate

to tariff considerations such as those proposed here.¹¹ Accordingly, we find that the host utility should not be able to unilaterally require SPP to escrow EIS Market charges and payments indefinitely based on a simple statement that it disputes its obligation to purchase the involuntarily-registered QF's output. We direct SPP to make a compliance filing, within 30 days of the date of this order, to remove the rejected language.

18. Under section 210(a) of PURPA, as implemented by the Commission in section 292.303(a) of its regulations, a utility has an obligation to purchase electric energy from QFs.¹² A utility cannot dispute its PURPA mandatory purchase obligation through a tariff provision.¹³ The Commission has jurisdiction over the determination and enforcement of a utility's PURPA mandatory purchase obligation.

19. There are only three exceptions to the statutory purchase obligation. The first requires an electric utility to file for termination of its mandatory purchase obligation pursuant to section 210(m) of PURPA, which requires that an electric utility prove that it provides nondiscriminatory access to certain statutorily defined markets. The second possible exemption to the mandatory purchase obligation is contained in section 292.304(f)(1) of the Commission's regulations, which provides with certain limitations, that an electric utility is not required to purchase energy or capacity from a QF "during any period during which, due to operational circumstances, purchases from QFs will result in costs greater than those which the utility would incur if it did not make such purchases, but instead generated an equivalent amount of energy itself."¹⁴ In Order No. 69, the Commission explained that this section was intended to deal with particular circumstances that can occur during light loading periods, in which a utility operating only base load units would be forced to cut back output from those units in order to accommodate the unscheduled QF energy purchases.¹⁵ Section 292.304(f) applies only to such light loading scenarios, and cannot be relied upon to curtail purchases of

¹¹ Section 210(a) of PURPA, 16 U.S.C. § 824a-3(a) (2006); *Entergy Services, Inc.*, 137 FERC ¶ 61,199, at PP 52-58 (2011), *reh'g pending*.

¹² 18 C.F.R. § 292.303(a) (2012).

¹³ *Entergy Services, Inc.*, 137 FERC ¶ 61,199 at P 52.

¹⁴ 18 C.F.R. § 292.304(f)(1) (2012).

¹⁵ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,886 (1980).

unscheduled QF energy for general economic reasons.¹⁶ The third exception to the mandatory purchase obligation is contained in section 292.307(b) of the Commission's regulations,¹⁷ which provides that a utility may, during a system emergency, discontinue purchases from a QF if such purchases would contribute to such emergency. Section 292.101(b)(4) of the Commission's regulations,¹⁸ defines "system emergency" as "a condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." In the absence of a Commission determination that one of these exceptions apply, a utility may not be relieved of the mandatory purchase obligation.

20. Finally, the Commission disagrees with Western Farmers' contention that the requested effective date, i.e., April 1, 2012, should not be granted. The rule against retroactive ratemaking does not extend to cases where the customers are on notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.¹⁹ Western Farmers and other entities in SPP's EIS Market were on notice that SPP would seek authority to allocate the EIS Market payments or charges, associated with generation from a QF, to the QF's host utility.²⁰

¹⁶ See *Entergy Services, Inc.*, 137 FERC ¶ 61,199, at P 56 (2011). The Commission has explained that many avoided-cost rates are calculated on an average or composite basis, and already reflect the variations in the value of the purchase in the lower overall rate. In such circumstances, the utility is already compensated, through the lower rate it generally pays for unscheduled QF energy, for any periods during which it purchases unscheduled QF energy even though that energy's value is lower than the true avoided cost. On the other hand, for avoided-cost rates that are determined in real-time, such avoided costs adjust to reflect the low (or zero or negative) value of the unscheduled QF energy, allowing the QF to make its own curtailment decisions. In neither case is the utility authorized to curtail the QF purchase unilaterally.

¹⁷ 18 C.F.R. § 292.307(b) (2012).

¹⁸ 18 C.F.R. § 292.101(b)(4) (2012).

¹⁹ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,174, at P 140 (2010) (citing *Consolidated Edison Co. of New York, Inc. v. FERC*, 374 F.3d 964, 968-70 (D.C. Cir. 2003)); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,203, at PP 20-22 (2004).

²⁰ *Southwest Power Pool, Inc.*, 139 FERC ¶ 61,235, at P 38 (2012).

21. The Commission grants SPP's request for waiver of the 60-day prior notice requirement and requested April 1, 2012 effective date.²¹ As noted in the November 6 Order, the Commission granted SPP's request for waiver of its Tariff provision effective from April 1, 2012, so that SPP may escrow and defer uplifting the EIS charges and credits until it filed its revised Tariff provisions addressing the QF-associated EIS Market charges/credits. Since the Commission finds above that is appropriate to allocate any EIS Market charges and credits associated with the output of the involuntarily-registered QF to the host utility with the PURPA purchase obligation rather than uplifting the charges and credits to the entire EIS Market, and the current request for waiver of the Commission's 60-day prior notice requirement aligns the granted relief in the November 6 Order with the current filing, the Commission finds good cause to waive the prior notice requirement. Therefore, we will grant SPP's request for an effective date of April 1, 2012.

The Commission orders:

The proposed Tariff revisions are accepted in part, effective April 1, 2012, and rejected in part, as discussed in the body of this order. Within 30 days of the date of this order, SPP shall make a compliance filing to remove the rejected language, as discussed in the body of this order.

By the Commission. Commissioner Clark is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²¹ 18 C.F.R. § 35.11 (2012).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER13-878-000

(Issued April 5, 2013)

CLARK, Commissioner, *concurring*:

I concur in this decision reluctantly given its rather unappealing result.

The route the Commission finds itself travelling was effectively chosen in its previous decision that a Qualifying Facility (QF) under PURPA not be subject to certain charges or credits in relation to the Southwest Power Pool's (SPP) Energy Imbalance Service market.¹ In the wake of that severance between cost-causer and cost-payer, SPP is left to decide which unlucky entity now gets left holding the bag. SPP, through its stakeholder process, has chosen to stick the bill with the utility that is required to purchase the power from the QF. That seems unfair on its face and is only just and reasonable under the unfortunate circumstances in which SPP finds itself today. This is a case of a utility and its consumers being in the wrong place at the wrong time when a QF seeks to interconnect on the exceedingly favorable terms that have been granted to it by PURPA and this Commission's implementation of that statute.

Another possibility might have been to simply uplift all charges and credits to the market, but that proposal is not before us, and frankly, it is hard to come to terms with any appropriate methodology at this point.

If there is any silver lining in this matter, it may be that SPP's implementation of a fully functioning day-ahead and real-time energy market may someday help resolve the matter more equitably on a going forward basis.²

For these reasons, I respectfully concur with this order.

Tony Clark
Commissioner

¹ *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 (2008).

² Whereby a utility in a fully functioning wholesale market is not required to enter into a new contract or obligation to purchase energy from a QF once the Commission finds that the QF has nondiscriminatory access to that market. *See* 18 C.F.R. § 292.309(a) (2012).