

139 FERC ¶ 61,235
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER12-1600-000

ORDER CONDITIONALLY ACCEPTING SERVICE AGREEMENT

(Issued June 21, 2012)

1. On April 24, 2012, Southwest Power Pool, Inc. (SPP) filed an unexecuted Market Participant Service Agreement (Service Agreement) between SPP and Exelon Generation Company, LLC (Exelon) in accordance with section 1.2.2(g) of Attachment AE, Energy Imbalance Service (EIS) Market, to SPP's Open Access Transmission Tariff (Tariff),¹ because Exelon indicated that it did not intend to register its 12 wind small power production qualifying facilities (QFs) located in Texas as resources in the EIS Market. As discussed below, the Commission conditionally accepts the Service Agreement

¹ Section 1.2.2(g) of Attachment AE to the SPP Tariff states:

All loads and 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 Qualifying Facility to participate in the EIS Market or subject the Qualifying Facility to any charges or payments related to the EIS Market.

effective April 1, 2012, modified as discussed below.² The Commission will direct SPP to make a compliance filing within 30 days of the day of this order to reflect the modifications.

I. Background

2. SPP is a regional transmission organization (RTO) that administers an EIS Market, which is a real-time centralized energy market based on least cost bid-based security constrained economic dispatch and locational marginal pricing.³ SPP launched its EIS Market on February 1, 2007.⁴

3. The Commission first addressed the issue of registering Exelon's wind generation QFs in SPP's EIS Market in its March 22, 2007 order,⁵ finding that SPP had improperly registered QF resources now owned by Exelon, formerly owned by John Deere Wind Energy (JD Wind). In that case, SPP unilaterally registered JD Wind's QFs as resources of Southwestern Public Service Company (SPS), an affiliate of Xcel Energy Services, Inc. (XES) in the EIS Market. JD Wind supported SPP's registration. However, XES, on behalf of SPS, (collectively, XES), complained in Docket No. EL07-28-000 that SPP lacked the authority to register a resource owned and operated by a third-party. The Commission agreed with XES finding that SPP did not operate the resources and that only market participants that operated resources were permitted to register those resources under SPP's Tariff.⁶ However, SPS and the 12 JD Wind QFs entered into a Registration Agreement in 2008 (Registration Agreement), whereby SPS agreed to register JD Wind's QFs in the SPP EIS Market.

4. The Registration Agreement was entered into following a complaint filed by XES in Docket No. EL07-87-000, against SPP and JD Wind asking the Commission to enforce

² Southwest Power Pool, Inc., FERC FPA Electric Tariff, Service Agreements Tariff, [2413 Exelon MPA](#), [2413 Exelon Generation Company Market Participant Agreement, 0.0.0](#)

³ See *Southwest Power Pool, Inc.*, 114 FERC ¶ 61,289, *order on reh'g*, 116 FERC ¶ 61,289, *order on compliance*, 116 FERC ¶ 61,053, *order on reh'g and compliance*, 117 FERC ¶ 61,110 (2006).

⁴ See *Southwest Power Pool, Inc.*, 118 FERC ¶ 61,055 (2007).

⁵ *Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.*, 118 FERC ¶ 61,232, at PP 19-31 (2007) (March 22, 2007 Order).

⁶ *Id.* at P 20.

the March 22, 2007 Order. XES claimed in Docket No. EL07-87-000 that SPP continued to register JD Wind assets to SPS despite the March 22, 2007 Order. The Registration Agreement was entered into while the complaint in Docket No. EL07-87-000 was pending. XES subsequently withdrew its complaint, relying on Rule 216 of the Commission Rules of Practice and Procedure; the withdrawal became effective after 15 days pursuant to Rule 216 of the Commission's Rules of Practice and Procedure.⁷ The Registration Agreement was attached to the withdrawal, but the Parties did not ask that the Commission act on the Registration Agreement as a settlement of the complaint (the Commission never acted on the complaint) or otherwise.⁸

5. In the Registration Agreement, SPS agreed to establish and maintain, during the term of the Registration Agreement, EIS Market registration for 12 JD Wind QFs that are or will be interconnected with the SPS system and which sell or will sell the entire output of energy (net of station power) to SPS under PURPA.⁹ The registration obligation is contingent upon the JD Wind facilities maintaining QF status.¹⁰ SPS would not be obligated to maintain registration of a particular JD Wind facility if SPS is relieved of its obligation under PURPA to purchase the energy output of the particular JD Wind unit. The Registration Agreement provides that SPS may terminate registration of the JD Wind units after certain events.¹¹ The Registration Agreement also states that, if the Registration Agreement is terminated for an individual unit and SPS subsequently elects not to register that unit, then JD Wind or the applicable JD Wind company shall register the unit in the SPP EIS Market unless both of the following conditions apply: (i) SPP shall have modified its rules so that it is clear that the unit need not be registered to either

⁷ 18 C.F.R. § 385.216 (2011).

⁸ XES did not claim, pursuant to 18 C.F.R. § 385.207(j) (2011), that the respondents had satisfied the complaint in whole or in part. The withdrawal simply stated that the Registration Agreement mooted the complaint. The withdrawal also stated that nothing in the Registration Agreement constituted an admission by XES, JD Wind or SPS of the correctness or applicability of any claim, defense, rule, or interpretation of law, allegation of fact or principle. The withdrawal also stated that the Parties are not necessarily agreeing with or conceding the applicability of any principle, or terms and conditions of service, or the application of any rule or interpretation of law that may underlie, or be thought to underlie, the Registration Agreement.

⁹ Registration Agreement, section 1(a).

¹⁰ Registration Agreement, section 1(d).

¹¹ Registration Agreement, section 3.

Party; and (ii) deregistration of the unit will not subject SPS to any SPP EIS Market charges.¹²

6. Subsequently, SPP filed tariff revisions that included a new proposed section 1.2.2(g) of Attachment AE of SPP's Tariff that required all resources in the SPP service territory to be registered in the EIS Market. In a December 18, 2008 order,¹³ the Commission generally agreed with the information-gathering aspect of SPP's proposed EIS Market registration requirement for all resources and conditionally accepted the registration requirement allowing SPP to unilaterally register a resource when the owner of a resource failed or refused to register the resource. The Commission found, however, that to the extent that SPP's proposed registration requirement triggers any charges that change what a QF recovers under its Public Utility Regulatory Policies Act of 1978 (PURPA)¹⁴ purchase obligation, as implemented by the state regulatory authority, that requirement is unjust and unreasonable.¹⁵ The Commission held that SPP may not compel participation in the EIS Market by, or otherwise trigger deviation charges for, QFs exercising their PURPA rights to deliver power to their host utilities.¹⁶ The Commission, therefore, conditioned its acceptance of the revisions to SPP's Tariff on SPP making a compliance filing to remove any obligation for such QF resources to actively participate in the EIS Market or to pay charges that stem from the registration.¹⁷ In the December 18, 2008 Order, the Commission approved additions to section 1.2.1 of Attachment AE of the Tariff specifying that use of the *pro forma* service agreement in Attachment AH of the Tariff when filing service agreements under section 1.2.2(g) of Attachment AE.

7. An April 16, 2009 order¹⁸ accepted SPP's compliance filing which added to section 1.2.2(g) of Attachment AE of SPP's Tariff a provision stating that, in the case of a QF exercising its rights under PURPA to deliver all of its net output to its host utility, such registration will not require the QF to participate in the SPP EIS Market or subject

¹² *Id.*

¹³ *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 (2008) (December 18, 2008 Order).

¹⁴ 16 U.S.C. § 824a-3 (2006).

¹⁵ December 18, 2008 Order, 125 FERC ¶ 61,314, at P 38.

¹⁶ *Id.*

¹⁷ *Id.* at P 40.

¹⁸ *Southwest Power Pool, Inc.*, 127 FERC ¶ 61,041 (2009) (April 16, 2009 Order).

the QF to any charges or payments related to the EIS Market. In its April 16, 2009 Order, the Commission approved SPP's added language to section 1.2.2(g), which was modified to protect the PURPA rights of QFs selling their output directly to a utility.

II. Details of Filing

8. In its filing, SPP describes that, as a result of actions taken by SPS, the Registration Agreement expired on March 31, 2012. Therefore, SPS is no longer registering Exelon's 12 wind QFs in SPP's EIS Market. SPP further states that, in a letter dated February 13, 2012, Exelon informed SPP that, while the QFs would continue exercising PURPA rights to deliver the net output to the host utility, Exelon did not intend to register the 12 wind QFs in the EIS Market. Rather, Exelon recognized SPP was required under section 1.2.2(g) of the SPP Tariff to file an unexecuted Service Agreement for entities that fail or refuse to register in the EIS Market, and Exelon provided SPP the necessary documentation to facilitate the filing of the unexecuted Service Agreement.

9. In the filing, SPP states that it is aware of a dispute between Exelon and SPS regarding the underlying transaction related to the output from these facilities. SPP states that it takes no position in the ongoing dispute between Exelon and SPS. SPP states that rather it is simply acting pursuant to section 1.2.2(g) of Attachment AE to the SPP Tariff, and that the filing of the unexecuted Service Agreement with the Commission is based on Exelon's notice to SPP that Exelon is exercising its PURPA rights and intends not to submit its own EIS Market registration. SPP further states that it will not require Exelon to participate in the EIS Market or subject Exelon to any charges or payments related to the EIS Market.¹⁹

III. Notice of Filing and Responsive Pleadings

10. Notice of SPP's Filing was published in the *Federal Register*, 77 Fed. Reg. 25,714 (2012), with interventions and protests due on or before May 15, 2012. Exelon filed a motion to intervene and protest. XES, on behalf of SPS, filed a motion to intervene and protest. On May 23, 2012, XES filed an answer to Exelon's protest. On May 30, 2012, Exelon filed an answer to XES's protest and answer.

Exelon's Protest

11. In its protest, Exelon supports the filing of the unexecuted Service Agreement, but notes that the unexecuted Service Agreement filed by SPP contains provisions which are inconsistent with and contradictory to the circumstances of a QF selling all of its net

¹⁹ SPP's April 24, 2012 Filing at 2.

output to its host utility under PURPA.²⁰ Exelon proposes what it characterizes as a minimal set of revisions to correct those inconsistencies and contradictions.²¹

12. According to Exelon, Article 2 of the unexecuted Service Agreement incorrectly states that Exelon submitted to SPP an application for participation in the EIS Market, and also registered its resources with SPP.²² Exelon's proposed revisions to clarify that Exelon submitted information to allow SPP to register the Exelon (or Customer) resources in the EIS Market and SPP has registered the resources.²³

13. Exelon urges the Commission to require SPP to amend Article 3 of the unexecuted Service Agreement to include an exemption from being required to obtain transmission service from third parties for QFs, such as Exelon's QFs, which are exercising PURPA rights to deliver all the net output to the host utility.²⁴

14. Exelon additionally points to Article 5 of the unexecuted Service Agreement, requiring that Exelon will take and pay for Imbalance Energy in the EIS Market,²⁵ as directly contradicting section 1.2.2(g). Furthermore, Exelon contends such participation in the EIS Market also would conflict with the Exelon QFs' existing long-term commitment to deliver 100 percent of their net output to their host utility under PURPA.²⁶ Exelon therefore proposes striking Article 5 from the Service Agreement.²⁷

15. Exelon asks the Commission to condition acceptance of the unexecuted Service Agreement to require SPP to revise Article 12 of the unexecuted Service Agreement to state that, in the event of a future amendment to the agreement by SPP, SPP will file an

²⁰ Exelon's Protest at 1.

²¹ *Id.*

²² *Id.* at 5.

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 7.

amended unexecuted Service Agreement with the Commission, consistent with section 1.2.2(g).²⁸

16. Exelon proposes that Article 14 of the unexecuted Service Agreement, which discusses Exelon's obligation to pay SPP for charges and payments related to the EIS Market, be deleted from the unexecuted Service Agreement.²⁹

17. Finally, Exelon requests that the Commission accept SPP's unexecuted Service Agreement, subject to SPP subsequently filing a new Service Agreement containing Exelon's proposed revisions.

XES's Protest

18. In its protest, XES acknowledges that, in Docket No. ER09-149-000, it supported the adoption of section 1.2.2(g) to allow SPP to unilaterally register resources that failed or refused to register themselves in the EIS Market. However, XES contends that it expressed its concern that JD Wind was seeking to undo its Registration Agreement commitments. XES states that it believed Exelon would not be allowed to rely on unilateral registration by SPP, since Exelon had an obligation to register its own resources under the Registration Agreement. Furthermore, XES contends the Commission has previously held that later developments that may cause a settlement to be less desirable are no basis for permitting a party to change its position.³⁰

19. XES argues that the Commission should reject the unexecuted Service Agreement; otherwise, acceptance of the unexecuted Service Agreement will allow Exelon to avoid its contractual obligations stemming from the Registration Agreement, which according to XES, was reached in Docket No. EL07-87-000 before section 1.2.2(g) was approved by the Commission.³¹

20. Additionally, XES states that SPP has provided it informal notice that SPP intends to impose EIS charges and credits on SPS on behalf of Exelon, and started doing so as of April 1, 2012.³² XES argues SPP lacks tariff authority to do so. Moreover, XES argues

²⁸ *Id.*

²⁹ *Id.*

³⁰ XES's Protest at 8. XES cites *Tennessee Gas Pipeline Co.*, 94 FERC ¶ 61,117 at 61,447 (2001); *El Paso Natural Gas Co.*, 89 FERC ¶ 61,164 at 61,491 (1999) (*citing Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62 (D.C. Cir. 1996)).

³¹ XES's Protest at 1.

³² *Id.* at 9.

the Commission's February 19, 2009 Order,³³ refused to render an opinion on any possible future proposal by SPP to allocate EIS charges associated with QFs to the host utility.³⁴ According to XES, the Commission stated that SPP would need to file proposed tariff language in a separate proceeding with necessary documentation and supporting explanation and give interested parties opportunity to comment.³⁵ XES contends that by imposing EIS charges and credits on SPS that are attributable to generation from Exelon's QFs, SPP is engaging in a practice denied by the Commission. XES asks that the Commission not allow SPP to impose these charges on SPS on behalf of Exelon.³⁶

21. XES contends that acceptance of the Service Agreement by the Commission could improperly affect the pending proceeding in Texas State District Court concerning whether Exelon has a legal obligation to register its own resources.³⁷

22. Finally, XES asks that the Commission reject the unexecuted Service Agreement. However, if the Commission decides to accept the unexecuted Service Agreement, XES asks that the Commission acknowledge that the Texas State District Court is the forum for resolving the contract dispute³⁸ and condition its acceptance upon the outcome of the pending court case. XES states that it believes that section 1.2.2(g) is not intended to cover the present scenario where the Registration Agreement provides that Exelon must voluntarily register its facilities and is incapable of legally refusing to register in the EIS Market. XES states that SPS is currently seeking enforcement of its understanding of Exelon's obligations under the Registration Agreement in the Texas state courts. XES argues that if SPS prevails in state court, the Commission should consider Exelon's letter to SPP refusing to register its resources as null and void. XES argues that as matter of policy, the Commission should uphold the settlement agreement in Docket No. EL07-87-000 (the Registration Agreement) and not allow Exelon to invoke section 1.2.2(g) of the SPP Tariff to avoid its obligations under the Registration Agreement. Additionally, XES requests the Commission prevent SPP from utilizing SPS as a settlement agent on behalf of Exelon.

³³ *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,135 (2009) (February 19, 2009 Order).

³⁴ XES's Protest at 12.

³⁵ *Id.*

³⁶ *Id.* at 10-11.

³⁷ *Id.* at 1-2.

³⁸ *Id.* at 12-13.

XES's Answer

23. In its answer to Exelon's comments, XES argues that the Commission should consider Exelon's February 13, 2012 letter null and void and the proposed revisions to the unexecuted Service Agreement moot, because Exelon is legally obligated by the Registration Agreement with SPS to register its own QFs. Additionally, XES argues that based on testimony given by JD Wind in Texas Public Utility Commission, PUCT Docket No. 34442, Exelon's commitment to sell all of its output to SPS for an approximate 20 year term was contingent upon receiving a price that SPS believes is inconsistent with avoided costs.³⁹

Exelon's Answer

24. In its answer to XES's answer, Exelon asks the Commission to reject both XES's protest and XES's answer to Exelon's protest, because XES's pleadings raise issues beyond the scope of this proceeding and are based on erroneous legal arguments and/or misstatements of fact.⁴⁰ Exelon contends that the sole issue of this proceeding is whether the unexecuted Service Agreement is consistent with the Tariff.⁴¹

25. Exelon also argues that the Registration Agreement is non-jurisdictional; is not a Commission-approved settlement; was never before the Commission for approval as a settlement; cannot be applied to take away, waive or cause Exelon to forfeit the PURPA rights for Exelon's QFs to sell all of their net output to their host utility; and cannot be applied to force Exelon's QFs to participate in the EIS Market contrary to their PURPA rights and contrary to section 292.304(d) of the Commission's regulations⁴² and prior Commission's rulings.⁴³ Exelon cites to the Commission's determination in *JD Wind 1* as upholding Exelon's wind generators' rights as QFs to sell their net output to SPS via legally enforceable PURPA contracts.⁴⁴

³⁹ XES's Answer at 3.

⁴⁰ Exelon's Answer at 2.

⁴¹ *Id.*

⁴² 18 C.F.R. § 292.304(d) (2011).

⁴³ *Id.* at 2-3 and 5-8. See also Exelon's answer at 3 (citing *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 (2008), *order on clarification*, 126 FERC ¶ 61,135, *order on compliance*, 127 FERC ¶ 61,041 (2009); see also, 18 C.F.R. § 292.304(d) (2011)).

⁴⁴ In *JD Wind 1, LLC, et al.*, 129 FERC ¶ 61,148, at P 39 (2009) (*JD Wind 1*), the Commission held that, "[U]nder our regulations, JD Wind has the right to choose to sell

(continued...)

26. Exelon further contends that XES unilaterally terminated the Registration Agreement, because XES was unwilling to wait for the outcome of a proceeding in Federal District Court in Texas where the Exelon QFs seek enforcement of the PURPA right to sell all of their net output to SPS under a legally enforceable obligation.⁴⁵ Exelon contends that if the Federal District Court agrees with *JD Wind 1*, then SPS would be required to enter into a legally enforceable obligation with the Exelon QFs, and consequently, the Exelon QFs would have to be registered to SPS.⁴⁶ According to Exelon, XES is seeking to avoid this purchase obligation under PURPA and attempting to force Exelon's QFs to self-register as resources in the EIS Market and thereby forfeit their rights to sell under PURPA.⁴⁷

27. Exelon further contends that the Registration Agreement states that it cannot be construed as a waiver by the parties of their PURPA rights or obligations pertaining to purchases or sales of the electrical output from the JD Wind QFs.⁴⁸ Additionally, Exelon argues that the Registration Agreement required the parties to negotiate any modifications necessary to give effect to future rulings by the Commission.⁴⁹ Exelon states that SPP's registration of Exelon's QFs effectively satisfies the requirement of the terminated Registration Agreement, because the Registration Agreement states that the Exelon QFs are to be registered in the SPP EIS Market, but it does not say how.⁵⁰ Exelon claims it told SPP that it refused to register its own resources, because the wording of the current *pro forma* Service Agreement in Attachment AH of the Tariff would have required the Exelon's QFs to participate in the EIS Market and forfeit their PURPA rights to sell their net output to their host utility, in contradiction to the Commission's regulations, prior rulings and the section 1.2.2(g) of the Tariff.⁵¹

pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred.”

⁴⁵ Exelon's Answer at 4, n.13.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 9, n.33 (citing section 10 of the Registration Agreement).

⁴⁹ *Id.* at 9 (citing section 6 of the Registration Agreement).

⁵⁰ *Id.* at 10.

⁵¹ *Id.* at 8-9.

28. Lastly, Exelon rejects the contention in XES's answer that the commitments by Exelon's QFs to deliver their net output to SPS are contingent upon the price that is to yet to be determined by the Texas Public Utility Commission. Exelon, instead, states that its long-term commitment for its QFs to sell all of their net output to SPS at the forecast avoided cost under PURPA is a firm commitment.⁵²

IV. Determination

Procedural Matters

29. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2)(2011), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We will accept Exelon's and XES's answers because they have provided information that assisted us in our decision-making process.

Substantive Matters

31. We conditionally accept the unexecuted Service Agreement in accordance with section 1.2.2(g) of Attachment AE of SPP's Tariff, to be effective on April 1, 2012, as requested by SPP, subject to the modifications discussed below;⁵³ the unexecuted Service Agreement filed by SPP in this proceeding is the Form of Service Agreement for Market Participants Selling into the Energy Imbalance Service Market contained in SPP's Tariff, also referred to herein as the *pro forma* service agreement, with the addition of filling-in-the-blanks, such as names, addresses, and contacts for the Transmission Provider and Customer.

32. The use of *pro forma* service agreements ensures that customers receive non-discriminatory service and that all customers are treated on a consistent and fair basis. Using *pro forma* service agreements also eliminates the need for a customer to negotiate all of the terms and conditions of each individual agreement.⁵⁴ This reduces transaction

⁵² *Id.* at 11.

⁵³ This effective date is necessary to permit Exelon's QFs to continue making sales to SPS pursuant to Exelon's rights under PURPA.

⁵⁴ *Midwest Independent Transmission System Operator, Inc.*, 111 FERC ¶ 61,421 PP 10-12 (2005).

costs, and reduces the need to file service agreements with the Commission to be evaluated on a case-by-case basis.

33. At the same time, the Commission recognizes there may well be a small number of extraordinary situations where, *e.g.*, reliability concerns, novel legal issues or other unique factors would call for the filing of a non-conforming agreement.⁵⁵ The Commission has made clear that the filing party must clearly identify the portions of the service agreement that differ from its *pro forma* service agreement and explain why the unique circumstances of the interconnection require a non-conforming service agreement.⁵⁶

34. We analyze such non-conforming filings, which we do not expect to be common, to ensure that operational or other reasons necessitate the non-conforming agreement.⁵⁷ We note that the “consistent with or superior to” standard is one of the standards under which the Commission evaluates modifications to a *pro forma* service agreement. A Transmission Provider or customer seeking a case-specific deviation from a *pro forma* service agreement bears an even higher burden to justify and explain what makes the service unique and what concerns or other reasons necessitate the changes.⁵⁸

35. Exelon’s proposed revisions to the unexecuted Service Agreement include:

- Amending Article 2 to clarify that Exelon submitted information to allow SPP to register the Exelon (or Customer) resources in the EIS Market and SPP has registered those resources;⁵⁹
- amending Article 3 to exempt QFs exercising PURPA rights to deliver all the net output to the host utility from being required to obtain transmission service from third parties;⁶⁰

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See, e.g., PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,098, at P 9 (2005) (*PJM Order*); *see also El Paso Electric Co.*, 110 FERC ¶ 61,163, at P 4 (2005).

⁵⁸ *See PJM Order*, 111 FERC ¶ 61,098 at P 9.

⁵⁹ *See, supra*, P 12.

⁶⁰ *See, supra*, P 13.

- deleting Article 5 from the Service Agreement;⁶¹
- revising Article 12 to state that SPP will file any future amendments to the unexecuted Service Agreement with the Commission, consistent with section 1.2.2(g);⁶² and,
- deleting Article 14 from the Service Agreement.⁶³

We find that Exelon's proposed non-conforming revisions to the unexecuted Service Agreement are necessary to reflect Exelon's rights under PURPA. Exelon's proposed changes to the *pro forma* service agreement thus meet the higher standards for deviation from a *pro forma* service agreement. We will therefore accept the unexecuted Service Agreement modified by Exelon's proposed non-conforming changes to that agreement.

36. Additionally, we find that XES's statement that the Registration Agreement was submitted to the Commission as a settlement agreement to be inaccurate.⁶⁴ The Registration Agreement was neither filed with the Commission for Commission approval or as a settlement of a proceeding pending before the Commission. As described above, the Registration Agreement was not filed as a settlement but rather was filed just as an attachment to the motion to withdraw the complaint in Docket No. EL07-87-000. The Commission was not asked to approve the Registration Agreement as a settlement, and did not do so. The Commission similarly was not asked to find that the Registration Agreement represented a satisfaction of the complaint in Docket No. EL07-87-000, and did not do so.

37. We dismiss XES's request to make the Commission's ruling here subject to the outcome of the Texas State District Court proceeding. We are not a party to that Texas state court proceeding, and the parties have not even provided the Commission with copies of pleadings filed in that Texas state court proceeding. We thus do not have enough information to make an informed decision as to whether that state court case will impact the instant proceeding. In any event, it would be premature and speculative to do so now as the Texas state court proceeding is still ongoing. Moreover, as noted above, given that SPS is no longer registering Exelon's resources, and the fact that Exelon indicated to SPP that it did not itself intend to register its resources in the EIS Market,

⁶¹ See, *supra*, P 14.

⁶² See, *supra*, P 15.

⁶³ See *Supra*, P 16.

⁶⁴ 18 C.F.R. § 385.602 (2011) (Rule 602).

here we find that the SPP's Tariff requires the Service Agreement be filed, and that it include terms specific to the rights of QFs.

38. As to any charges or obligations that SPS claims it is incurring, other than referring to an "informal notice" provided by SPP, XES has not provided any evidence that SPS is currently being billed for EIS charges and credits on behalf of Exelon. However, we note that the Commission stated in the February 19, 2009 Order, that SPP does not have authorization under its Tariff to charge a QF's host utility under PURPA for any EIS charges owing to generation by the QF. SPP must make a Federal Power Act section 205 filing, if it desires to request such authorization.⁶⁵ Indeed, SPP itself clarified that the purpose of its request for clarification of the December 18, 2008 Order was to ensure that the December 18, 2008 Order did not prohibit SPP from developing Tariff provisions through its stakeholder process that would allocate any imbalance charges associated with QF generation to the utility purchasing the QF generation under PURPA, not to implement such a tariff change in its request for clarification of, or filing to comply with, the December 18, 2008 Order.⁶⁶

The Commission orders:

(A) The Commission conditionally accepts the unexecuted Service Agreement, effective April 1, 2012, as modified in the body of this order.

(B) Within 30 days of the date of this order, SPP shall file the modifications to the Service Agreement, as discussed in the body of this order.

By the Commission. Commissioner Clark voting present.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁵ February 19, 2009 Order, 126 FERC ¶ 61,135 at P 12.

⁶⁶ April 16, 2009 Order, 127 FERC ¶ 61,041 at P 15.