

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

El Paso Electric Company

Docket Nos. EL06-45-002
EL06-46-002
ER06-803-002

v.

Tucson Electric Power Company

ORDER GRANTING REHEARING

(Issued March 28, 2007)

1. On October 24, 2006, El Paso Electric Company (El Paso) filed a limited request for rehearing of the Commission's October 4, 2006 Rehearing Order.¹ On February 7, 2007, El Paso filed a motion for expedited action on its limited request for rehearing of the Commission's October 4, 2006 Rehearing Order. We will grant El Paso's limited request for rehearing, as discussed below.

Background

2. On January 10, 2006, El Paso filed a complaint against Tucson Electric Power Company (Tucson) raising the issue of whether Tucson must request and obtain transmission service under El Paso's Open Access Transmission Tariff rather than rely on its rights under the already existing Tucson-El Paso Power Exchange and Transmission Agreement (1982 Agreement) in order to transmit power generated at the newly constructed Luna Generating Station across El Paso's transmission system.

¹ *El Paso Elec. Co. v. Tucson Elec. Power Co.*, 117 FERC ¶ 61,017 (2006) (October 4, 2006 Rehearing Order).

3. In a counter-complaint filed on January 11, 2006, Tucson raised “virtually identical issues.”² In the April 24, 2006 Order, the Commission granted El Paso’s complaint and denied Tucson’s counter-complaint without hearing.

4. In the April 24, 2006 Order, the Commission found, among other things, that certain sections of the 1982 Agreement, covering assignments of transmission rights by one party to the other, do provide details as to the direction of service and receipt/delivery points, while other sections of the 1982 Agreement, specifically, sections 6.3 and 6.4, do not. In its request for rehearing of the April 24, 2006 Order, Tucson argued that the Commission should not have ruled that Tucson could only use the rights that were assigned to it in the 1982 Agreement in a limited manner without also relieving Tucson of its obligation to provide transmission service under the 1982 Agreement to El Paso.

5. In the October 4, 2006 Rehearing Order, the Commission found that Tucson’s claim on this matter raised issues of material fact concerning the proper interpretation of sections 6.3 and 6.4 of the 1982 Agreement, and proceeded to set this matter, along with two other issues,³ for hearing.

El Paso Rehearing Request

6. On October 24, 2006, El Paso filed a limited request for rehearing of the October 4, 2006 Rehearing Order stating that the Commission should not have set this issue (that Tucson raised in its rehearing of the April 24, 2006 Order) for hearing. El Paso argues that by addressing this issue in the October 4, 2006 Rehearing Order, the Commission raised an entirely new issue--the third issue set for hearing-- that was not previously addressed in the April 24, 2006 Order, and thus, gave rise to a “wholly new objection” that could not have been anticipated nor addressed by El Paso earlier in the

² *El Paso Elec. Co. v. Tucson Elec. Power Co.*, 115 FERC ¶ 61,101 (2006) (April 24, 2006 Order).

³ October 4, 2006 Rehearing Order, 117 FERC ¶ 61,017. Specifically, the Commission set the following issue for hearing: “whether or not Tucson is being deprived of its transmission rights without being relieved from its transmission burdens as set forth in the 1982 Agreement.” *Id.* P 18. The Commission also set the following issues for hearing: (1) whether or not Tucson’s transmission rights under sections 6.3 and 6.4 of the 1982 Agreement may only be used for transmission of power from Springerville as the receipt point to Greenlee as the delivery point; and (2) whether or not Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna Station to either Springerville or Greenlee.

proceeding. El Paso also claims that unlike the first two issues set for hearing, the third issue does not address interpretation of the relevant provisions of the 1982 Agreement. El Paso adds that by answering the first two questions set for hearing, the Commission will make this third question moot.

7. El Paso states if the Commission determines that Tucson has transmission rights it claims under the 1982 Agreement, El Paso will honor those rights, and thus there would be no basis to relieve Tucson of any of its obligations under the 1982 Agreement because TEP would not be deprived of any right. El Paso adds that similarly, if upon a review of the evidence adduced at hearing the Commission were again to determine that Tucson does not have the transmission rights it claims in this proceeding under the 1982 Agreement, then there is also no basis on which Tucson should be relieved of any obligations under the 1982 Agreement.

8. El Paso requests that the Commission expedite issuance of an order granting El Paso's rehearing request with respect to eliminating the third issue set for hearing in order to avoid waste of the Commission's and parties' resources. El Paso states that with the issuance of the Chief Administrative Law Judge (ALJ) Order designating a Presiding ALJ, hearing procedures under the Commission's regulations have commenced, including discovery and preparation of witness testimony. El Paso claims that it is therefore critical to the efficient use of the Commission's and the parties' resources that the Commission act on the rehearing request at the earliest possible date. El Paso argues that if the Commission does not act soon on the rehearing request, the parties will have to conduct discovery, prepare evidence, including witness testimony, and brief positions concerning the third issue. El Paso adds that the Presiding ALJ will have to review and evaluate this evidence and the parties' briefs with respect to the third issue.

Tucson's Answer

9. Tucson argues, as a practical matter, that there is no need for the Commission to act at all on El Paso's request for rehearing of the October 4, 2006 Rehearing Order. Tucson argues that regardless of whether the Commission denies the request for rehearing on the merits or simply holds the request for rehearing in abeyance, the parties may be expected to proceed with development of an evidentiary record on this issue before the ALJ in accordance with the procedural schedule that has been adopted for this purpose. Tucson adds, that if necessary the Commission will be able to rely on such record when considering the third issue. Tucson concludes, for that reason, there is no need for the Commission to accelerate consideration of El Paso's request for rehearing of the October 4, 2006 Rehearing Order before it would otherwise do so in the ordinary course of business.

10. Tucson claims that the third issue set for hearing by the Commission is relatively succinct, and the burden of preparing for and trying this issue in the context of addressing other matters that have been set for hearing is not onerous. Tucson adds, inasmuch as the Commission has provided for an evidentiary hearing on the first two issues identified above, it is more efficient for the parties to develop a full evidentiary record on the third issue in the same hearing rather than to defer any evidentiary hearing on the third issue until the first two issues have been resolved.

Discussion

A. Procedural Matters

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept Tucson's answer and will, therefore, reject it.

B. Commission Analysis

12. The April 24, 2006 Order described the fact that certain sections of the 1982 Agreement provide details as to the direction of service and receipt/delivery points while other sections do not. This observation did not alter any obligation under the 1982 Agreement so as to deprive Tucson of transmission rights without relieving Tucson of the transmission burdens it assumed in the 1982 Agreement.

13. Tucson incorrectly believed that the Commission's observation on this matter required that Tucson could only use the rights that were assigned to it in a very limited manner without relieving Tucson of the obligation to continue providing transmission service to El Paso. We reiterate that the Commission's finding in the April 24, 2006 Order (that Tucson took issue with) did not alter any of the burdens/obligations regarding transmission rights under the 1982 Agreement, but instead it interpreted the meaning of that agreement such as by noting that certain sections of the 1982 Agreement provide details as to the direction of service and receipt/delivery points while other sections do not.

14. Thus, on further review, the Commission finds that since it was merely interpreting the 1982 Agreement in its April 24, 2006 Order and not altering that agreement, it was inappropriate for Tucson to raise that issue in its request for rehearing of that order. The Commission looks with disfavor on parties raising new issues on

rehearing.⁴ Accordingly, we will grant El Paso' rehearing request, and reject the new claim Tucson raised in its rehearing request of the April 24, 2006 Order.

The Commission orders:

El Paso's request for rehearing is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

⁴ *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270 at 61,922 (2000); *Baltimore Gas & Electric Co.*, 92 FERC ¶ 61,043 at 61,114 (2000).