

122 FERC ¶ 61,222  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

El Paso Electric Company

Docket Nos. OA07-44-000  
OA07-44-001

ORDER ON COMPLIANCE FILING

(Issued March 11, 2008)

1. On July 13, 2007, as amended on July 23 and August 20, 2007, pursuant to section 206 of the Federal Power Act (FPA),<sup>1</sup> El Paso Electric Company (El Paso) submitted a compliance filing as required by Order No. 890.<sup>2</sup> In this order, we accept El Paso's filing and require a further compliance filing, as discussed below.

**I. Background**

2. In Order No. 890, the Commission reformed the *pro forma* Open Access Transmission Tariff (OATT) to clarify and expand the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. Among other things, Order No. 890 amended the *pro forma* OATT to require greater consistency and transparency in the calculation of available transfer capability, open and coordinated planning of transmission systems and standardization of charges for generator and energy imbalance services. The Commission also revised various policies governing network resources, rollover rights and reassignments of transmission capacity.

3. The Commission established a series of compliance deadlines to implement the reforms adopted in Order No. 890. Transmission providers that have not been approved as independent system operators (ISO) or regional transmission organizations (RTO), and whose transmission facilities are not under the control of an ISO or RTO, were directed to submit, within 120 days from publication of Order No. 890 in the *Federal Register* (i.e., July 13, 2007), section 206 compliance filings that conform the non-rate terms and

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<sup>1</sup> 16 U.S.C. § 824e (2000 & Supp. V 2005).

<sup>2</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (Order No. 890), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (January 16, 2008), FERC Stats. And Regs. ¶ 31,261 (2007) (Order No. 890-A).

conditions of their OATTs to those of the *pro forma* OATT, as reformed in Order No. 890.<sup>3</sup>

## **II. El Paso's Filing**

4. On July 13, 2007, El Paso made a compliance filing to revise its OATT to reflect the changes required by Order No. 890. In addition, El Paso states that it has filed an Attachment J (Procedures for Addressing Parallel Flows) that specifies that El Paso utilizes the Western Electricity Coordinating Council's (WECC) Unscheduled Flow Mitigation Plan and the WECC Standard IRO-Std-006-0 (Qualified Path Unscheduled Flow Relief), as amended and approved by the Commission. El Paso also states that it has filed creditworthiness procedures and made other revisions such as correcting cross-references, pagination, and designations, among other things. El Paso requests an August 1, 2007 effective date for its energy and generator imbalance schedules and a July 13, 2007 effective date for its remaining tariff sheets.

5. On July 23, 2007, El Paso filed errata to correct certain typographical errors in its July 13, 2007 compliance filing.

6. On August 20, 2007, El Paso filed a motion for leave to answer that also amended its filing to include clustering provisions, an imbalance penalty crediting mechanism and a methodology for distributing late study penalties. El Paso requests an August 1, 2007 effective date for its imbalance revenue crediting mechanism and a July 13, 2007 effective date for its remaining tariff sheets.

## **III. Notice of Filing and Responsive Pleadings**

7. Notice of El Paso's July 13, 2007 filing was published in the Federal Register, 72 Fed. Reg. 41,727 (2007), with interventions and protests due on or before August 3, 2007. Notice of El Paso's July 23, 2007 filing was published in the Federal Register, 72 Fed. Reg. 70,830 (2007), with interventions and protests due on or before December 26, 2007. Notice of El Paso's August 20, 2007 filing (motion for leave to answer, answer and amended filing) was published in the Federal Register, 72 Fed. Reg. 72,692 (2007), with comments due on or before December 26, 2007. Powerex Corp. (Powerex) filed a timely motion to intervene and comments and subsequently filed a clarification to its comments.

8. In its comments, Powerex raises issues regarding El Paso's creditworthiness provisions; the lack of a stated rate for unreserved use penalties; the lack of a mechanism

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<sup>3</sup> The original 60-day compliance deadline provided for in Order No. 890 was extended by the Commission in a subsequent order. *See Preventing Undue Discrimination and Preference in Transmission Service*, 119 FERC ¶ 61,037 (2007).

to credit imbalance penalties, unreserved use penalties or late study penalties; the lack of a clustering provision; and El Paso's title for its point-to-point service agreement.

9. On August 20, 2007, El Paso filed an answer to Powerex's protest and also proposed to amend its filing in response to Powerex's protest. The details are discussed further below.

#### **IV. Discussion**

##### **A. Procedural Matters**

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

##### **B. Substantive Matters**

11. For the reasons stated below, we will accept El Paso's compliance filing, subject to a further compliance filing.

##### **1. Creditworthiness**

12. In Order No. 890, the Commission required transmission providers to amend their OATTs to include a new attachment that sets forth the basic credit standards the transmission provider uses to grant or deny transmission service. This attachment must specify both the qualitative and quantitative criteria that the transmission provider uses to determine the level of secured and unsecured credit required. In addition, the Commission required transmission providers to address six specific elements regarding the transmission provider's credit requirements.<sup>4</sup>

13. Powerex states that El Paso's creditworthiness provisions allow the transmission provider to perform credit evaluations from time-to-time; however, the provisions do not specify the criteria that would trigger the credit re-evaluation. Powerex also contends that El Paso's creditworthiness provisions do not contain a provision that provides customers with a reasonable opportunity to contest determinations of credit levels or collateral requirements.

14. In its answer, in response to Powerex's contention that El Paso's OATT should specify the criteria that would trigger credit re-evaluations, El Paso explains that many circumstances could require El Paso to request confirmation that the customer continues to satisfy the credit requirements in its OATT. For example, El Paso states that a

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<sup>4</sup> Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 1656-61.

customer could change the volume of service it takes, the customer's prior credit support could become stale, or the customer's financial status could change due to a credit rating agency down-grade. As a result, El Paso argues that it is not feasible to anticipate every circumstance and set forth a definitive list of the events pursuant to which an additional credit review might be required.

15. Also, in response to Powerex's contention that El Paso's creditworthiness provisions do not contain a provision that provides customers with a reasonable opportunity to contest determinations of credit levels or collateral requirements, El Paso states that section 2.4 of its creditworthiness provisions clearly indicate that the "Transmission Customer may request in writing that the Transmission Provider reevaluate the level of security of performance provided. . . ." Further, El Paso contends that there is no time limit on when the customer may exercise the reevaluation right.

16. We find that El Paso's proposed OATT language that allows the transmission provider to perform credit evaluations from "time-to-time" fails to provide the specific criteria that trigger a credit re-evaluation and allows the transmission provider too much discretion in choosing when to perform credit re-evaluations.<sup>5</sup> Accordingly, El Paso must remove this tariff language. El Paso must also submit revised OATT language that sets forth the specific criteria it proposes to use to determine when a credit re-evaluation is required, such as those submitted in El Paso's answer. Therefore, we direct El Paso to file, within 30 days of the date of this order, revised tariff sheets that reflect the criteria that would trigger a credit re-evaluation.

17. In addition, we disagree with Powerex's contention that El Paso's creditworthiness provisions do not contain a provision that provides customers with a reasonable opportunity to contest determinations of credit levels or collateral requirements. We find that section 2.4 of El Paso's creditworthiness provisions set forth that a customer may request that the transmission provider reevaluate the level of security required.

## **2. Unreserved Use Penalties**

18. In Order No. 890, the Commission determined that transmission customers would be subject to unreserved use penalties in any circumstance where the transmission customer uses transmission service that it has not reserved and the transmission provider has a Commission-approved unreserved use penalty rate explicitly stated in its OATT.<sup>6</sup>

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<sup>5</sup> See *Maine Public Service Company*, 122 FERC ¶ 61,073 at P 14 (2008); *South Carolina Electric & Gas Company*, 122 FERC ¶ 61,070 at P 12 (2008); *Entergy Services, Inc.*, 106 FERC ¶ 61,039 at P 14 (2004).

<sup>6</sup> Order No. 890, FERC Stats. And Regs. ¶ 31,241, at P 834, 848.

19. Powerex contends that it is unclear whether or not El Paso has identified the applicable charges for penalties, specifically unreserved use penalties, in its OATT. As a result, Powerex argues that El Paso should be prohibited from charging penalties until the charges are clearly set forth in its OATT.

20. In response to Powerex's assertion that El Paso has not specified an unreserved use penalty rate in its OATT, El Paso states that it does not intend to charge for unreserved use penalties at this time.

21. We note that El Paso's OATT does not explicitly state an unreserved use penalty rate and, as a result, El Paso may not charge transmission customers for unreserved use penalties. We find that this satisfies Powerex's concerns.

### **3. Credits for Imbalance Penalties**

22. Order No. 890 required transmission providers to develop a mechanism to credit imbalance revenues in excess of the transmission provider's incremental costs to all non-offending customers and the transmission provider on behalf of its own customers.<sup>7</sup>

23. In its protest, Powerex argues that El Paso has not proposed a mechanism to credit imbalance penalties to customers.

24. In its August 20 amendment, in response to Powerex's protest, El Paso proposed to amend its filing to include a methodology for distributing imbalance penalties. Specifically, El Paso proposed to distribute imbalance penalty revenues to non-offending customers (determined on an hourly basis) by computing the total imbalance penalty revenue for each hour and distributing it proportionately based upon the amount of revenue received from each non-offending customer in that hour relative to the total amount of revenue received from non-offending customers in that hour.

25. We find that El Paso's crediting mechanism for imbalance revenues complies with Order No. 890.

### **4. Credits for Unreserved Use Penalties and Late Study Penalties**

26. Order No. 890 required transmission providers to indicate how they propose to distribute late-study penalties to unaffiliated transmission customers.<sup>8</sup> Order No. 890 also required the transmission provider to make a filing that includes a mechanism

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<sup>7</sup> *Id.* P 727.

<sup>8</sup> *Id.* P 861.

through which it would identify non-offending transmission customers and a method by which it would distribute unreserved use penalties it receives to the identified transmission customers.<sup>9</sup>

27. In its protest, Powerex argues that El Paso has not proposed a mechanism to credit unreserved use penalties or late study penalties to customers.

28. In its August 20 amendment, in response to Powerex's protest, El Paso proposed to amend its filing to include a methodology for distributing late study penalties. Specifically, El Paso proposed to distribute late study penalties by determining the total amount of late study penalties at the end of each year and distributing them among all non-affiliated transmission customers taking service in that calendar year, based upon the relative amount of service taken. El Paso also stated that it would propose a mechanism for crediting unreserved use penalties at the time it proposes to charge unreserved use penalties.

29. We find that El Paso's crediting mechanism for late-study penalties complies with Order No. 890.<sup>10</sup> In addition, as discussed above, because El Paso has not proposed to assess unreserved use penalties and therefore is not authorized to charge customers for unreserved use penalties, it is unnecessary for El Paso to propose a mechanism for crediting unreserved use penalties to customers at this time.

## 5. Clustering

30. In Order No. 890, the Commission did not generally require transmission providers to study transmission requests in a cluster, although the Commission did encourage transmission providers to study transmission requests in a cluster when it is reasonable to do so. The Commission also explicitly required transmission providers to

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<sup>9</sup> *Id.*

<sup>10</sup> Order 890-A, at paragraph 472, clarified that "each transmission provider also must submit a one-time compliance filing under FPA section 206 proposing the transmission provider's methodology for distributing revenues from late study penalties and, if applicable, unreserved use penalties." We note that El Paso has satisfied this one-time compliance filing obligation, as clarified in Order No. 890-A. We also remind El Paso that, as set forth in paragraph 472 of Order No. 890-A, "each transmission provider must report on its penalty assessments and distributions in an annual compliance report to be submitted on or before the deadline for submitting FERC Form-1, as established by the Commission's Office of Enforcement each year. This annual compliance report should be filed under the same docket as the docket in which the proposed one-time compliance filing is submitted."

consider such clustering studies if the customers involved ask that their transmission requests be considered as a cluster and the transmission provider can reasonably accommodate the request. As a result, the Commission directed transmission providers to include tariff language in their Order No. 890 compliance filings that describes how the transmission provider will process requests for cluster studies and how it will structure transmission customers' obligations when they have joined a cluster.<sup>11</sup>

31. In its protest, Powerex argues that El Paso did not propose any clustering provisions.

32. In its August 20 amendment, in response to Powerex's protest, El Paso proposed to amend its filing to include clustering provisions. The proposed amendment indicates that El Paso may propose a cluster study, provided the customers consent, or it will consider clustering if a customer requests a cluster study. In addition, the amendment sets forth that the customers have the option not to participate in a cluster study and may withdraw during the formation of the cluster (refusing to be included in the System Impact Study) or after the completion of the System Impact Study but prior to commencement of the Facilities Study. The clustering provisions also indicate that the cost of a cluster study will be allocated equally among all participating customers, among other things. We find that El Paso's clustering provisions, as proposed comply with the requirements of Order No. 890.

## **6. Rollover Rights**

33. In Order No. 890, the Commission adopted a five-year minimum contract term in order for a customer to be eligible for a rollover right and adopted a one-year notice period. The Commission determined that this rollover reform should be made effective at the time of acceptance by the Commission of a transmission provider's coordinated and regional planning process. The Commission explained that rollover reform and transmission planning are closely related, because transmission service eligible for a rollover right must be set aside for rollover customers and included in transmission planning.<sup>12</sup>

34. El Paso has included the rollover reforms in section 2.2 of its revised tariff sheets, with a requested effective date of July 13, 2007. However, El Paso's Attachment K, setting forth its transmission planning process, which was filed on December 7, 2007 in Docket No. OA08-30-000 has not yet been accepted by the Commission. This is contrary to Order No. 890's requirement that rollover reforms are not to become effective until after a transmission provider's Attachment K is accepted. Therefore, we direct El Paso to

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<sup>11</sup>*Id.* P 1370-71.

<sup>12</sup> *Id.* P 1231, 1265.

file, within 30 days of the date of this order, a revised tariff sheet that reflects the previous language of section 2.2. El Paso should re-file the rollover reform language established in Order No. 890 within 30 days after acceptance of its Attachment K, requesting an effective date commensurate with the date of that filing.

## **7. Simultaneous Submission Window**

35. In Order No. 890, the Commission decided to retain its first-come, first-served policy regarding transmission service requests. However, the Commission required those transmission providers who set a “no earlier than” time limit for transmission service requests to treat all such requests received within a specified period of time, or window, as having been received simultaneously. Although the Commission left it to the transmission providers to propose the amount of time the window would be open, the Commission stated that the window should be open for at least five minutes unless the transmission provider presents a compelling rationale for a shorter window. The Commission also required each transmission provider that is required to, or decides to, deem all requests submitted within a specified period as having been submitted simultaneously to propose a method for allocating transmission capacity if sufficient capacity is not available to meet all requests submitted within that time period.<sup>13</sup>

36. El Paso has not addressed whether or not it has adopted the use of a simultaneous submission window. Since it is unclear whether El Paso has appropriately adopted or wishes to adopt the use of a “no earlier than” time limit for the submission of transmission service requests, we direct El Paso to file, within 30 days of the date of this order, a further compliance filing either (1) indicating that it is currently in compliance with the use of a simultaneous submission window as required in Order No. 890 referencing the Commission order where such variation from the *pro forma* OATT was accepted by the Commission, or (2) propose a tariff provision to comply with the remaining compliance requirements of Order No. 890 for adoption of a simultaneous submission window.<sup>14</sup>

## **8. Miscellaneous**

### **a. Attachment A-1 (Form for Service for Resale, Assignment or Transfer of Long-Term Firm PTP Service)**

37. Powerex argues that El Paso’s Attachment A-1 (Form for Service for Resale, Assignment or Transfer of Long-Term Firm PTP Service) should include short-term point-to-point transmission service in addition to long-term firm point-to-point service.

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<sup>13</sup> *Id.* P 1418-22.

<sup>14</sup> *Id.*

38. El Paso states that this title was a requirement of the *pro forma* Order No. 890 OATT, and thus, it does not believe it should be required to revise Attachment A-1 at this time.

39. We agree with El Paso that this was a requirement of the *pro forma* Order No. 890 OATT, and thus, deny Powerex's request. However, we also note that in Order No. 890-A, the Commission revised the *pro forma* OATT and addressed the concern raised by Powerex.<sup>15</sup>

**b. Effective Date**

40. We grant El Paso's request for an August 1, 2007 effective date for its imbalance provisions and the associated imbalance revenue crediting mechanism finding that this is consistent with the Order Granting Extension of Compliance Action Dates.<sup>16</sup>

41. Accordingly, we will accept El Paso's compliance filing, as modified, to be effective July 13, 2007 and August 1, 2007. We also direct El Paso to file, within 30 days of the date of this order, a further compliance filing as required above.

The Commission orders:

(A) El Paso's compliance filing is hereby accepted, effective July 13, 2007 and August 1, 2007, as discussed in the body of this order.

(B) El Paso is hereby directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>15</sup> See Order No. 890-A at P 424.

<sup>16</sup> Preventing Undue Discrimination and Preferences in Transmission Services, 119 FERC ¶ 61,037 (2007).