

133 FERC ¶ 61,163  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Montana Electric  
Generation & Transmission Cooperative, Inc.

v.

Docket No. EL10-82-000

NorthWestern Corporation

ORDER ON COMPLAINT

(Issued November 18, 2010)

1. On August 20, 2010, Southern Montana Electric Generation & Transmission Cooperative, Inc. (Southern Montana) filed a complaint under section 206 of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure,<sup>2</sup> against NorthWestern Corporation (NorthWestern) maintaining that NorthWestern is violating Commission orders and NorthWestern's Open Access Transmission Tariff (OATT) by billing Southern Montana for long-term firm point-to-point transmission service without a valid service agreement as required under the OATT and Commission policy. For the reasons discussed below, we agree with Southern Montana and grant relief as discussed below.

**I. Background**

2. Southern Montana states that it is a not-for-profit, member-owned electric generation and transmission cooperative that provides wholesale electric energy and related transmission services to five electric distribution cooperatives and one municipal utility in Montana. It is not a public utility that is subject to Commission jurisdiction

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<sup>1</sup> 16 U.S.C. § 824c (2006).

<sup>2</sup> 18 C.F.R. § 385.206 (2010).

under sections 205 and 206 of the FPA because it is a Rural Utilities Service (RUS) financed electric cooperative. Southern Montana owns no generation capacity, and it meets all of its members' power needs by purchasing power from Western Area Power Administration, Bonneville Power Administration, and PPL Montana.

3. Southern Montana states that NorthWestern is an electric and natural gas utility that conducts business in Montana, South Dakota, Nebraska, Iowa, and North Dakota. It owns and operates electric and natural gas distribution and transmission facilities located primarily in Montana and South Dakota.

4. Southern Montana states that in April 2004, it and NorthWestern executed a standard form of service agreement for firm point-to-point transmission service. It states that it entered into this agreement in connection with a request for firm transmission service to transmit 3 MW and 4 MW from Bonneville Power Administration. Southern Montana states that the final two pages of this four-page agreement contain specifications for requests for long-term, i.e., one year or more, firm point-to-point transmission service. The major specifications, such as the term of the transaction, capacity and energy to be transmitted, delivery and receipt points, and maximum energy and capacity to be transmitted, all provide that these parameters will be "[a]s requested/accepted on the OASIS," i.e., that they will be established through being requested and accepted on NorthWestern's Open Access Same Time Information System (OASIS).<sup>3</sup>

5. Southern Montana states that on March 21, 2005, it applied for 65 MW of long-term firm point-to-point transmission service from NorthWestern's system to Avista Corporation's (Avista) system in Idaho for a period of 20 years starting March 2010. This service was needed to market excess capacity and off-peak energy from a coal-fired generation facility (the coal plant) that Southern Montana intended to construct at a capacity that exceeded the short-term future needs of its load. The excess capacity and off-peak energy would be marketed off-system until Southern Montana's load grew to the point where it needed the coal plant's full capacity.

6. Southern Montana states that on August 30, 2005, it and NorthWestern executed a system impact study agreement for the Avista service request. It states that NorthWestern was aware that the requested point-to-point transmission service to Avista was associated with potential sales of excess capacity and energy from the planned coal plant. NorthWestern suspended the system impact study until interconnection issues were resolved. On November 1, 2007, NorthWestern and Southern Montana executed a Large Generator Interconnection Agreement to interconnect the coal plant.

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<sup>3</sup> For the reader's convenience, a copy of this agreement, which is based on the agreement found in the *pro forma* OATT, is attached to this order.

7. Southern Montana states that its proposed coal plant subsequently encountered significant legal, regulatory, and financial obstacles. Southern Montana lost most of its financing for the facility when the RUS, which initially agreed to cover the financing requirements, withdrew from the project on February 19, 2008. Southern Montana states that it is now pursuing the construction of a gas-fired generation facility, which eliminates the need for the transmission service to Avista. This is because the facility can be built in increments as needed to meet Southern Montana's load, and thus there will be no excess energy or capacity that it will need to market.

8. Southern Montana states that on February 7, 2008, a NorthWestern employee called Southern Montana's power scheduler, and informed him that NorthWestern intended to move forward with the request for transmission service to Avista. Southern Montana's power scheduler responded that he would contact NorthWestern in the near future to proceed. Southern Montana states that NorthWestern contends that following this conversation, the NorthWestern employee sent an email to the General Manager and CEO of Southern Montana, regarding this request. The email stated that NorthWestern was in a position to move forward on two transmission service requests made by Southern Montana, including the 20-year 65 MW point-to-point request, from study status to "approved." It also stated:

. . . since we haven't had any recent discussions about these requests that were made . . . 2-3 years ago, we wanted to provide some notice to you that we were going to be acting on the requests. We also wanted to make sure Southern [Montana] was fully informed of its responsibility associated with its confirming the requests – especially the 65 MW Point-To-Point request: once confirmed, Southern [Montana] will be responsible for the monthly payments beginning with the start date associated with the requests . . . This is why I said [in a conversation with Southern Montana's power scheduler on the same day] the Point-To-Point request may be of greater concern, since Network service is charged based upon a customer's load, while Point-To-Point is basically a take-or-pay situation based upon reserved capacity.<sup>4</sup>

9. Southern Montana states that its General Manager and CEO does not recall seeing this email and that Southern Montana has no record of receiving it.

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<sup>4</sup> Complaint, Exhibit F, Attachment 3.

10. Southern Montana states that on February 11, 2008, Southern Montana's power scheduler telephoned a NorthWestern employee to seek assistance regarding the OASIS entries needed for the request for long-term firm point-to-point transmission service to Avista's system. Because NorthWestern requires yearly and monthly transmission service to start and end at 00:00 Pacific Time (01:00 Mountain Time), the NorthWestern employee asked that the original request be withdrawn and that a new request be submitted with corrected start and stop times. Accordingly, Southern Montana's power scheduler queued the replacement request on February 11, 2008, and he withdrew the original request on the same day. Southern Montana states that NorthWestern instructed its power scheduler to mark the replacement reservation as "pre-confirmed" to expedite acceptance without the need for any further action on Southern Montana's part. Southern Montana's power scheduler states in his affidavit attached to the complaint that the NorthWestern employee did not explain that submitting a pre-confirmed request would obligate Southern Montana to the long-term firm point-to-point transmission service. He also states that there was no discussion of a take-or-pay obligation.

11. Southern Montana's power scheduler also states in his affidavit that his employment at Southern Montana began in June 2007, and immediately prior to that he was a student at Idaho State University. He states that at the time of the February 7, 2008 conversation with NorthWestern he did not have any familiarity or experience with submitting and confirming transmission service requests on OASIS.

12. Southern Montana states that on January 18, 2010, NorthWestern informed it that Southern Montana is responsible for the 20-year term of the Avista service and that NorthWestern would commence billing the monthly charges for this request in March 2010. Southern Montana states that this means that it would be held responsible for payment of approximately \$53 million over the next 20 years. Southern Montana responded to NorthWestern by arguing that there was no binding agreement between the parties for this service. Southern Montana also stated that it has no need for the service and does not want it.

13. Southern Montana states that on February 4, 2010, NorthWestern replied that it is NorthWestern's long-time practice to execute "enabling agreements"<sup>5</sup> with its customers for both firm and non-firm transmission service as a contractual basis for transmission service requests on NorthWestern's OASIS that it accepts. Southern Montana states that NorthWestern alleges that Southern Montana executed such an agreement on April 1, 2004. Southern Montana states that the agreement in question was the one it executed on

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<sup>5</sup> For purposes of this discussion "enabling agreement" and "umbrella agreement" are used as equivalent terms that refer to a single master agreement that covers multiple individual transactions.

April 1, 2004 to support a wholly separate request for 3 MW and 4 MW of firm service from Bonneville Power Administration across North Western's system, and it was not intended to bind Southern Montana for the long-term service to Avista that is at issue here. Nevertheless, Southern Montana states that NorthWestern takes the position that by confirming the request on the NorthWestern OASIS in 2008, Southern Montana became obligated for the long-term firm point-to-point transmission service to Avista.

14. Southern Montana states that while it disagrees with NorthWestern's position, on February 17, 2010, it requested that NorthWestern agree to mediation using the Commission's Dispute Resolution Service and hold in abeyance any billing until a mutually agreeable resolution was reached. However, on April 5, 2010, NorthWestern sent Southern Montana an invoice for monthly payment for the long-term firm transmission service to Avista. On April 26, 2010, Southern Montana and NorthWestern met to discuss, among other things, how to proceed, but they did not resolve their differences as to whether the parties executed a valid service agreement for the service in question or whether Southern Montana is obligated to pay for this service. Southern Montana states that the parties did agree to make a good faith effort to file with the Commission a joint petition for a declaratory order requesting the Commission to resolve these matters. However, Southern Montana states that the negotiations reached an impasse, and it informed NorthWestern that it would proceed unilaterally to seek a resolution of this matter.

15. Southern Montana states that pending resolution of this dispute, it has contracted with NorthWestern to extend commencement of the Avista service in accordance with section 17.7 of the NorthWestern OATT, and under the contract it paid NorthWestern \$216,233.33 for this purpose.<sup>6</sup> It states that it has expressly agreed with NorthWestern that in doing this it is not conceding any obligation for the service.

## **II. Complaint**

16. Southern Montana makes two basic arguments in its complaint. First, it argues that it is not obligated for the 65 MW of firm point-to-point transmission service on NorthWestern's transmission system because the parties did not execute a transaction-specific agreement setting forth the terms and conditions of the service. According to Southern Montana, both Commission policy and NorthWestern's OATT require a

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<sup>6</sup> Complaint at Exhibit J, consisting of a letter agreement dated May 12, 2010, providing, among other things, for the refund of the payment should Southern Montana prevail at the Commission (Letter Agreement). In this order, we find for Southern Montana, and therefore we expect that NorthWestern will refund this payment consistent with the Letter Agreement.

transaction-specific agreement in the case of long-term firm point-to-point service. Second, Southern Montana argues that regardless of Commission policy and the OATT requirements, there is no evidence that Southern Montana agreed to bind itself contractually because there is no executed written agreement for the service in question and no other basis to conclude that there was a meeting of the minds through which Southern Montana agreed to obligate itself.

17. Based on these arguments, Southern Montana requests that the Commission: (1) find that Southern Montana is not obligated for the transmission service in question; (2) find that there was no meeting of the minds between the parties sufficient to form a binding contract; and (3) direct NorthWestern to cease billing Southern Montana for the long-term firm point-to-point transmission service and to refund the money that Southern Montana paid to NorthWestern to extend the commencement of service under section 17.7 of the OATT.

18. Southern Montana argues that it cannot be held liable under an enabling or umbrella agreement that covers multiple transactions for long-term firm point-to-point transmission service. According to Southern Montana, such an agreement would be contrary to the Commission's long-standing policy of requiring a separate, transaction-specific service agreement to create contractual obligations between a transmission provider and a customer for long-term firm point-to-point transmission service. Southern Montana maintains that a single *pro forma* enabling agreement can be used for multiple transactions only in the case of short-term transmission service. It states that the Commission adopted this position in Order No. 888-A. Specifically, Southern Montana states that the Commission held that there is no reason to require a separate service agreement for every short-term transaction, but in the case of long-term firm point-to-point transmission service, additional pages, specifically pages 3 and 4 of the *pro forma* agreement, containing transaction-specific information would be required.<sup>7</sup>

19. Southern Montana notes that NorthWestern's OATT contains a form of service agreement that is identical to the *pro forma* agreement that is set forth in Order No. 888-A. Southern Montana states that NorthWestern did not request that it execute a transaction-specific agreement for the 65 MW, 20-year firm service in question and that pages 3 and 4 of the agreement that it signed in 2004 provide only that the specifications for service, e.g., receipt and delivery points, capacity and energy to be transmitted, and the transmission charge, are "[a]s requested/accepted on the OASIS." Southern Montana

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<sup>7</sup> Complaint at 12 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,302-303 (1997)).

maintains that these specifications do not constitute the transaction-specific information that Order No. 888-A requires, and therefore they are not legally binding.

20. Southern Montana argues that in Order No. 890-A, the Commission confirmed that a *pro forma* enabling agreement and OASIS postings can create a binding agreement only for short-term service. As discussed more fully below, it states that the Commission clarified that in cases where transmission capacity is reassigned, the transmission provider and the assignee may rely on OASIS to provide information on contract terms for short-term and non-firm reservations of capacity. Southern Montana states that the Commission also noted that long-term agreements for reservations of primary capacity rely on specifications made in pages 3 and 4 of the *pro forma* agreement, and it extended this requirement of transaction-specific information to long-term reassignments of transmission capacity.<sup>8</sup>

21. Southern Montana thus maintains that because of the fundamental differences between short-term and long-term transmission service, a written, transaction-specific contract is required for long-term service. It states that this is necessary to provide reliable evidence of the existence of a contract and to prevent ambiguity, confusion, and fraud. Southern Montana states that the Commission's policy of requiring a transaction-specific service agreement for long-term firm transmission service serves a function comparable to that served by the Statute of Frauds in basic contract law, i.e., to provide reliable evidence of the existence and terms of a contract. According to Southern Montana, the risk of costly misunderstandings counsels in favor of requiring more than a simple enabling agreement and OASIS posting for long-term service agreements.

22. Southern Montana maintains that the Commission has ruled that an enabling agreement may not be used to establish a contractual basis for long-term firm transmission service. It states that in a case involving American Electric Power Service Corp. (AEP) and Duke Energy Trading and Marketing, LLC (Duke), Duke argued that AEP had improperly submitted Duke's umbrella service agreement for short-term firm point-to-point transmission service and made it appear that Duke had executed a long-term agreement by filing with it two new specifications for long-term firm point-to-point transmission service between Duke and AEP. Southern Montana states that AEP argued that Duke had executed an umbrella agreement covering all firm service, but the

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<sup>8</sup> Complaint at 13 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 423, P 424 n.164 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

Commission disagreed and concluded that AEP's filing did not contain a proper agreement for new long-term point-to-point firm service.<sup>9</sup>

23. Southern Montana also references a deficiency letter issued in another case that stated that the filing company indicated its submittal under consideration was a service agreement for long-term firm point-to-point service, however, the filing company had only filed an umbrella agreement and had failed to complete and/or include the specifications pages that are required for such service, i.e., pages 3 and 4 of the agreement.<sup>10</sup> Finally, Southern Montana states that the Commission has even rejected transaction-specific service agreements for failure to specify actual receipt and delivery points and has directed that a service agreement be revised to specify whether each of six ancillary services would be provided under the agreements.<sup>11</sup>

24. Southern Montana argues that NorthWestern's OATT by its terms requires a separate, transaction-specific service agreement for a long-term firm point-to-point transmission service request once the request is accepted. It points to section 13.4 of the OATT, which states that NorthWestern will offer a standard form of service agreement for firm point-to-point transmission service to a customer *when it submits* a completed application for long-term firm point-to-point service, but NorthWestern will offer a standard form firm point-to-point service agreement to a customer when it *first submits* a completed application for short-term firm point-to-point transmission service.<sup>12</sup>

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<sup>9</sup> Complaint at 16 (citing *American Elec. Power Serv. Corp.*, 101 FERC ¶ 61,384, at P 11 (2002) (*American Electric Power*)).

<sup>10</sup> Complaint at 16 (citing Letter of Deficiency to PacifiCorp, Docket No. ER01-2525-000 (Aug. 2, 2001)).

<sup>11</sup> Complaint at 16-17 (citing *Western Resources, Inc.*, 81 FERC ¶ 61,269 (1997) (*Western Resources*)).

<sup>12</sup> The entire provision as set forth in the Complaint at 17 reads as follows:

The Transmission Provider shall offer a standard form Service Agreement for Firm Point-To-Point Transmission Service (Attachment A) to an Eligible Customer when it submits a Completed Application for Long-Term Firm Point-To-Point Transmission Service. The Transmission Provider shall offer a standard form Firm Point-To-Point Transmission Service Agreement (Attachment A) to an Eligible Customer when it first submits a Completed Application for Short-Term Firm Point-To-Point Transmission Service pursuant to the

(continued...)

According to Southern Montana, the distinction between “when it submits” and “when it first submits” implies that a single umbrella agreement may be appropriate for short-term service but not for long-term service.

25. Southern Montana also maintains that the form of service agreement that it signed in 2004 diverges from the standard form of service agreement attached to NorthWestern’s OATT. It states that pages 3 and 4 of the agreement it signed contain specifications for service in the following form: “As requested/accepted on the OASIS.” The Standard Form Service Agreement attached to NorthWestern’s OATT does not contain this language, and Southern Montana maintains that the phrase “[a]s requested/accepted on the OASIS” is not the transaction-specific information that Order No. 888-A and the NorthWestern OATT require. Southern Montana argues that actions by a transmission provider that are not consistent with the terms and conditions specified in its OATT are unreasonable. It states that NorthWestern’s OATT requires a transaction-specific service agreement, and by not offering such an agreement NorthWestern has acted unreasonably and in violation of the filed rate.

26. Southern Montana maintains that even if it is NorthWestern’s business practice, as posted on its OASIS, to execute umbrella agreements for both firm and non-firm service, this cannot override NorthWestern’s obligation under its OATT to tender a transaction-specific agreement for long-term firm point-to-point transmission service. Southern Montana also argues that Order No. 890-A permits setting the terms of a transaction on OASIS only in the case of short-term reservations.<sup>13</sup> In addition, it states that

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Tariff. Executed Service Agreements that contain the information required under the Tariff shall be filed with the Commission in compliance with applicable Commission regulations.

<sup>13</sup> Southern Montana bases this conclusion on the following language from Order No. 890-A:

Like short-term firm and non-firm reservations of primary capacity, the transmission provider and assignee may rely on OASIS to provide information regarding the reseller, quantity, and price associated with a particular reassignment of service. This information would then become part of the binding agreement between the transmission provider and assignee governing the assignment, just as confirmation of short-term firm and non-firm transaction on OASIS constitute binding contractual commitments.

(continued...)

NorthWestern's business practices do not specify that confirmation on OASIS commits a customer for long-term service.

27. With respect to its claim that there was no meeting of the minds between the parties sufficient to form a binding contract, Southern Montana maintains that it clearly did not intend to commit itself to the long-term firm service in dispute here when it signed the April 2004 agreement for what it maintains was separate and distinct service. Southern Montana states that while its General Manager and CEO does not recall receiving an email sent by a NorthWestern employee on February 7, 2008, the absence of a response to it means that the email does not constitute a binding agreement that commits Southern Montana to long-term firm service.

28. Southern Montana states that the submission by its power scheduler of a new pre-confirmed request on NorthWestern's OASIS does not by itself provide a basis to conclude that Southern Montana committed itself to the 20-year firm service in question. It states that NorthWestern's OATT defines a "Pre-Confirmed Application" as an "[a]pplication that commits the Eligible Customer to execute a Service Agreement upon receipt of notification that the Transmission Provider can provide the requested service."<sup>14</sup> Southern Montana states that at this time NorthWestern did not offer a written service agreement setting forth terms and conditions of service as section 13.4 of the OATT requires, and no such agreement was executed. Southern Montana thus concludes its power scheduler's actions do not provide a basis to find that Southern Montana had committed itself contractually.

29. Southern Montana also states that its power scheduler did not have authorization to execute a contract or to take any other action that would have the effect of committing Southern Montana to 20 years of transmission service on a take-or-pay basis. Southern Montana maintains that it would not have committed to such service at the time because there was no need for it once its plans to develop the coal plant were terminated.

30. On the basis of these arguments, Southern Montana requests the Commission to (1) find that Southern Montana is not obligated for the transmission service because the parties did not execute a transaction-specific service agreement setting forth the terms and conditions of the long-term firm point-to-point service as required by the OATT and

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Complaint at 20-21 (citing Order No. 890-A, 121 FERC ¶ 61,297 at P 423). According to Southern Montana, the two references to short-term transactions in this passage make clear the Commission's intent to limit the use of OASIS postings as the basis of a binding agreement to short-term transactions.

<sup>14</sup> Complaint at 25 (citing OATT § 1.39).

Commission policy; (2) find that there was no meeting of the minds between the parties sufficient to form a binding contract; and (3) direct NorthWestern to cease billing Southern Montana for the long-term firm transmission service and to refund the money Southern Montana paid to NorthWestern to extend the commencement of service under section 17.7 of the OATT.

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

31. Notice of the Complaint was published in the *Federal Register*, 75 Fed. Reg. 53687 (2010), with interventions and protests due on or before September 9, 2010. PPL EnergyPlus, LLC and PPL Montana, LLC filed a motion to intervene.

32. On September 9, 2010, NorthWestern filed an answer to the Complaint. On September 24, 2010, Southern Montana filed a response to NorthWestern's answer. On October 12, 2010, NorthWestern filed a motion to reject Southern Montana's answer.

#### **A. NorthWestern's Answer**

33. NorthWestern denies the allegations in the complaint and maintains that the agreement that Southern Montana disputes is consistent with Commission policy and the NorthWestern OATT. NorthWestern states that consistent with Order No. 888 and the *pro forma* OATT, its OATT contains one *pro forma* umbrella service agreement that covers both short-term and long-term point-to-point transmission service requests. Attachment A to the OATT has one form of service agreement for firm point-to-point transmission service consisting of pages 1 and 2 of the agreement, and it also includes the Commission's form of specifications for long-term firm point-to-point transmission service, which consists of pages 3 and 4 of the agreement. NorthWestern says that taken together, these forms are used for all long-term transactions on its system.

34. NorthWestern states that in the case of long-term transmission service, the parties insert specifications of service on pages 3 and 4 of the form of service agreement. On NorthWestern's system, the term of the transaction, start date, description of the capacity and energy to be transmitted, point(s) of delivery and point(s) of receipt are typically specified with the phrase "as requested/accepted on the OASIS." NorthWestern states that consistent with the Commission's regulations, it does not file these forms of service agreement, but retains the original agreement in its files and reports each completed agreement in its Electric Quarterly Reports.

35. NorthWestern states that in 2004 it executed an umbrella service agreement with Southern Montana for long-term firm point-to-point transmission service. It states that the parties agreed that certain specifications of service under the agreement, such as the term of the transaction, start date, description of the capacity and energy to be transmitted, point(s) of delivery and point(s) of receipt are "as requested/accepted on the OASIS." NorthWestern states that the parties could have entered into a more specific

agreement if the customer is offered partial interim service or ultimately requests transmission service that results in the need for new facilities. NorthWestern states that none of Southern Montana's requests for long-term firm point-to-point transmission service required new facilities, and therefore "the parties chose to enter into the umbrella Service Agreement."<sup>15</sup>

36. NorthWestern states that while Southern Montana claims that the *pro forma* contract is ambiguous, it has been clear enough for the parties to conduct business. It states that since the execution of the Service Agreement, Southern Montana used the OASIS to complete requests for 3 MW and 4 MW of long-term firm point-to-point transmission service, and it later took and paid for these reservations. NorthWestern states that Southern Montana's claim constitutes a collateral attack on NorthWestern's filed tariff and is contradicted by the parties' course of dealing under that tariff. According to NorthWestern, the only difference between the first two transactions and the request for 65 MW of firm point-to-point service is the change in circumstances regarding Southern Montana's planned coal plant.

37. NorthWestern states that Southern Montana cites no support for its claim that pages 3 and 4 of the agreement, noting that specifications are "[a]s requested/accepted on the OASIS," are not the transaction-specific information that Order No. 888-A requires. It states that Southern Montana misreads *American Electric Power*. According to NorthWestern, that case involved an attempt by a transmission provider to bootstrap long-term firm point-to-point service onto a pre-existing agreement for short-term point-

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<sup>15</sup> NorthWestern Answer at 10. NorthWestern supports its description of the circumstances in which individual agreements are used by citing: <http://www.oatioasis.com/NWMT/NWMTdocs/ServiceAgreements.html>. This webpage states that the firm and non-firm point-to-point transmission service agreements "are considered 'enabling' agreements that allow for all OASIS business." It also states that "[a]s described in the customer registration document (found under the 'Customer Registration' folder under the OASIS documents area):

'If a customer is offered Partial Interim Service or ultimately requests transmission service that results in the need for new facilities, service agreements specific to the requests may be drafted and tendered to the customer in accordance with NorthWestern's FERC Open Access Transmission Tariff.'

The customer registration document describes the necessary steps for registering a company on NorthWestern's OASIS. This webpage is reproduced in Attachment 2 to the Complaint.

to-point service. AEP sought to convert an executed transmission service agreement for short-term service into one for long-term service by appending pages 3 and 4 to the existing agreement. NorthWestern states that *American Electric Power* did not involve an enabling agreement that provides that specifications for long-term service would be “as requested and confirmed on OASIS.”

38. NorthWestern objects to Southern Montana’s reliance on a deficiency letter as precedent and maintains that such documents have no precedential value. It also maintains that the other cases that Southern Montana cites are not on point.

39. NorthWestern argues that Southern Montana has not shown that Order No. 888 and Order No. 890 support its claim. According to NorthWestern, Order No. 888-A does not prohibit enabling agreements for long-term firm service but instead clarifies that the form of service agreement for point-to-point transmission service in the OATT is used for both short-term and long-term service and that pages 3 and 4 of the agreement are required only for long-term firm point-to-point service. NorthWestern states that Order No. 890-A states that the specifications attachment for the form of service agreement will apply to reassignments of transmission service and that given that long-term agreements for reservations of primary capacity rely on the specifications attachment, similar practices would be used regarding long-term reassignments of transmission capacity. It also states that “actual uses of primary and secondary capacity should be scheduled on OASIS consistent with applicable business procedures.”<sup>16</sup>

40. NorthWestern also maintains that Southern Montana is incorrect in contending that long-term firm transmission service contracts are not valid unless they are individually filed with, and accepted by, the Commission. NorthWestern states that in Order No. 2001, the Commission adopted regulations that eliminated the requirement to file such long-term agreements for generally applicable services for which a public utility has a standard form of service agreement under its tariff. The Commission did not distinguish there between a standard form of agreement for long-term and one for short-term transmission service.

41. In addition, NorthWestern argues that Southern Montana cannot selectively apply the terms of the Service Agreement. It states that Southern Montana did not object to the form or terms of the Service Agreement when entering into it in 2004, and it raised no objections to the terms when it reserved and confirmed two separate requests for long-term firm point-to-point service totaling 7 MW. NorthWestern states that in those cases

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<sup>16</sup> Answer at 12-13 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at n.164.)

Southern Montana requested and confirmed the specific terms of the service on NorthWestern's OASIS.

42. NorthWestern states that Southern Montana's employee completed its long-term firm service reservation in 2008 when he confirmed the service. It states that while Southern Montana now argues that its General Manager and CEO never received a NorthWestern employee's email stating that NorthWestern was prepared to move forward on its transmission reservation, the NorthWestern OASIS does not require that transactions be completed by the chief executive of a transmission customer. NorthWestern states that Southern Montana's power scheduler voluntarily contacted NorthWestern, corrected Southern Montana's reservation, and confirmed the request for 65 MW of long-term firm point-to-point transmission service on NorthWestern's OASIS in 2008. NorthWestern states that Southern Montana's power scheduler took these steps four days after speaking with a NorthWestern employee and after that employee sent to Southern Montana's General Manager and CEO an email correctly explaining the contractual significance of these steps.

43. NorthWestern maintains that Order No. 638 confirms that it is Commission policy that transactions under conforming umbrella agreements for transmission service should be completed and confirmed using OASIS.<sup>17</sup> NorthWestern argues that this policy presupposes that transmission providers, customers and potential customers, and the Commission can rely on OASIS transactions as the effective, binding contractual record. NorthWestern states that if no contract arises from confirmation of an OASIS reservation for long-term services until an individual service agreement for the transaction is executed off-OASIS and filed and accepted by the Commission, the status of service requests would become uncertain until the Commission acts on the filing. Transmission providers would not be certain how much available transmission capability they can offer on their transmission systems during the 60-day notice period when individual long-term contracts are pending Commission review.

44. NorthWestern argues that Southern Montana cannot escape its obligation based on its subjective motivation. It states that if Southern Montana had problems with its proposed generation facility, it could have withdrawn the service request at any time before confirmation. NorthWestern states that its employee's phone conversation with Southern Montana's power scheduler on February 7, 2008, as well as the email sent the same day to Southern Montana's General Manager and CEO, put Southern Montana on

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<sup>17</sup> Answer at 14 (citing *Open Access Same-Time Information System and Standards of Conduct*, Order No. 638, FERC Stats. & Regs. ¶ 31,093, at 31,414-415 (2000)).

notice that it must take action on the request after acceptance or Southern Montana would lose the service.

45. NorthWestern states that Southern Montana cannot seek to have its OASIS reservation annulled by alleging that Southern Montana's power scheduler was not familiar with the workings of OASIS and was susceptible to manipulation. It states that a confirmed reservation can only be annulled by mutual agreement of the parties or by a showing of system malfunction regarding the reservation, neither of which occurred here.

46. NorthWestern states that whether Southern Montana's power scheduler was authorized to confirm the transactions on OASIS is not NorthWestern's concern because Southern Montana held him out as its agent. Southern Montana's power scheduler frequently conducted business with NorthWestern on behalf of Southern Montana, and NorthWestern had every reason to rely on the power scheduler's apparent authority to transact as an authorized agent of Southern Montana.

#### **B. Southern Montana's Response**

47. In its response to NorthWestern, Southern Montana states that it is not asserting that service agreements for long-term firm transmission service must be individually filed with and approved by the Commission. It is arguing that Commission policy and NorthWestern's OATT require the parties to execute a service agreement containing transaction-specific information on pages 3 and 4 for each long-term firm transmission service request and that Southern Montana is not contractually obligated for transmission service if this does not occur.

48. Southern Montana states that it raised its power scheduler's lack of authority to execute a binding contract not to provide a reason why Southern Montana is not obligated to take the service in question but rather to underscore the wisdom of the Commission's policy that requires separate service agreements with transaction-specific information for each request for long-term service. Southern Montana states that the dispute concerns the tariff, and it is not making a factual dispute the primary basis for its complaint. Southern Montana also states that it is not arguing that the *pro forma* contract terms are ambiguous.

49. Southern Montana argues that NorthWestern's use of the phrase "[a]s requested/accepted on the OASIS" in the specifications attachment to the standard form of service agreement undermines the Commission's requirement of a specifications page altogether. In the case of short-term reservations, the Commission permits the parties to rely on OASIS to provide information regarding the parties, quantity, and price associated with a particular request. On the other hand, Southern Montana maintains that the Commission has stated that "long-term agreements for reservations of primary

capacity rely on the specifications attachment” instead of OASIS.<sup>18</sup> Southern Montana states that if the language “[a]s requested/accepted on OASIS” is sufficient for long-term agreements, there would be no need for the Commission to require a separate specifications attachment.

50. Southern Montana argues that it is not making a collateral attack on NorthWestern’s OATT but instead is requesting the Commission to uphold the OATT by finding that NorthWestern’s practice of using umbrella agreements for long-term firm transmission service violates the express terms of section 13.4 of the OATT. It states that this section requires a separate, transaction-specific service agreement for each request for long-term firm service.

51. With regard to the reservation of 3 and 4 MW of long-term firm service, Southern Montana states that it had no reason to believe that the written agreement executed for these two transactions could serve as the contractual basis for the wholly unrelated request for 20 years of firm point-to-point service. Southern Montana states that there are significant differences between the initial two transactions and the one in dispute here. The requests for 3 and 4 MW were for two and three years, respectively. By contrast, the service at issue here is a 20-year, \$53 million commitment tied to the construction of a 268-MW coal plant. Southern Montana maintains that differences between the two requests with respect to scale and the degree of uncertainty regarding cost, delay, and regulation show that NorthWestern should have tendered a transaction-specific service agreement. Southern Montana also argues that past infractions of NorthWestern’s OATT and Commission policy do not justify subsequent violations.

### **C. NorthWestern’s Motion to Reject**

52. NorthWestern maintains that Southern Montana’s answer does not provide any additional facts that will aid the Commission’s decision-making but rather restates the arguments made in the complaint. NorthWestern also states that Southern Montana’s answer fails to address the fundamental issue, which is whether it is contractually obligated to take and pay for the service in question. It states that Southern Montana does not disprove that it requested and confirmed service on OASIS and that it is obligated to take and pay for the service as provided in the agreement between it and NorthWestern.

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<sup>18</sup> Answer at 6 (citing Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 424 n.164).

#### IV. Discussion

##### A. Procedural Matters

53. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

54. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to an answer, unless otherwise ordered by the decisional authority. We will accept Southern Montana's answer to NorthWestern because it provided information that assisted us in our decision-making process.

##### B. Commission Determination

55. As an initial matter, we note that the form of service agreement for firm point-to-point transmission service attached to NorthWestern's OATT conforms in all material respects to the form of service agreement found in Attachment A to the *pro forma* OATT. As discussed more fully below, we agree with Southern Montana that this form of service agreement is meant to serve as an umbrella agreement that covers multiple transactions only in the case of requests for short-term service. Requests for long-term firm point-to-point service require individual, transaction-specific agreements in which all four pages of the form agreement are completed and specifications for the individual transaction in question are supplied on pages 3 and 4. Order No. 888-A requires this conclusion, and the other sources cited below reinforce it.<sup>19</sup>

56. Order No. 888 included a form of service agreement for firm point-to-point service, but the Commission did not discuss the agreement in the body of that order. On rehearing of Order No. 888, however, it was argued that it was burdensome to require a separate completed application and service agreement for each transaction for short-term firm and non-firm transmission service. It was proposed that there be a non-transaction specific service agreement for such service. The Commission responded that the service agreement for non-firm point-to-point service was in fact an umbrella agreement that

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<sup>19</sup> We agree with NorthWestern that *American Electric Power* and the other cases cited by Southern Montana, with the exception of *Western Resources*, are not directly on point or do not apply here. We thus do not address them. However, the Commission rulemaking orders we cite in the body of this order provide ample support for our conclusions, which also are supported by our decision in *Western Resources* as noted below.

covered multiple transactions.<sup>20</sup> It also found that the arguments raised were persuasive with respect to firm service and that there should be streamlined procedures in the case of short-term firm point-to-point transmission service.<sup>21</sup>

57. Accordingly, in Order No. 888-A, the Commission agreed that there was “no compelling reason to require the submission of separate service agreements for every short-term firm transaction.”<sup>22</sup> As a result, it stated that it would:

adopt an “umbrella” service agreement approach (as is currently used for non-firm point-to-point transactions) and require a service agreement of general applicability to be filed with the Commission when the first short-term firm transaction is arranged between the transmission provider and customer.”<sup>23</sup>

58. The Commission subsequently dropped the filing requirement in Order No. 2001. However, we disagree with NorthWestern that the form of service agreement for firm point-to-point service serves as an umbrella agreement for both short- and long-term service because there is a *pro forma* agreement that covers both short-term and long-term service requests. Although there is a single agreement, it is to be deployed differently depending on whether the request is for short-term or long-term service. The Commission’s conclusions in Order No. 888-A mean that only pages 1 and 2 are used for short-term service, but all four must be used in the case of requests for long-term service. In other words, Order No. 888-A excepted short-term service from the requirement of individual, transaction-specific agreements for firm point-to-point transmission service, but it left in place the requirement for such agreements in the case of long-term service.<sup>24</sup>

59. Order No. 890-A is consistent with this conclusion. There the issue was whether an assignee of transmission capacity would be required to execute a service agreement with the transmission provider. The Commission confirmed the conclusion it reached in Order No. 890 that all reassignments must be accomplished through executing a service agreement with the service provider, but it also stated that it “did not intend to impose

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<sup>20</sup> Order No. 888-A, FERC Stats. & Regs. at 30,302.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Order No. 888-A, FERC Stats. & Regs. at 30,302.

contracting obligations that are more onerous than the acquisition of primary transmission capacity. . . .”<sup>25</sup> It thus stated that the requirement:

does not mean . . . that all of the terms and conditions of a particular assignment must be stated in the service agreement. *Like short-term firm and non-firm reservations of primary capacity*, the transmission provider and assignee may rely on OASIS to provide information regarding the reseller, quantity, and price associated with a particular reassignment of service.<sup>26</sup>

The Commission went on to note that “[w]e understand that long-term agreements for reservations of primary capacity rely on the specifications attachment, so we would expect similar practices to be used regarding long-term reassignments of transmission capacity.”<sup>27</sup> The Commission thus explicitly limited the use of OASIS for contractually establishing certain basic terms and conditions of service to short-term firm and non-firm reservations. The use of these procedures for long-term firm reservations was not contemplated.

60. The language that NorthWestern cites to argue a contrary position is in fact consistent with this conclusion. As NorthWestern notes, after stating that long-term agreements for reservations of primary capacity rely on the specifications attachment and that it would expect similar practices to be used regarding long-term reassignments of transmission capacity, the Commission stated that “[a]s with any transaction, however, *actual uses* of primary and secondary capacity should be scheduled on OASIS consistent with applicable business procedures.”<sup>28</sup> This does not mean, as NorthWestern suggests, that OASIS was to be used to create binding contractual relations for long-term firm point-to-point transmission service. The Commission rather stated that “actual uses” of capacity should be scheduled on OASIS. In other words, once a separate, binding contract for long-term firm point-to-point service had been executed, OASIS was to be used to implement that contract.

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<sup>25</sup> Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 at P 422.

<sup>26</sup> *Id.* P 423 (emphasis supplied).

<sup>27</sup> *Id.* at n.164.

<sup>28</sup> *Id.* (emphasis supplied).

61. We therefore agree with Southern Montana that NorthWestern's approach undermines the requirement that pages 3 and 4 of the *pro forma* agreement be used in the case of transactions for long-term firm point-to-point service. Indeed, under NorthWestern's approach these pages become a mere formality that eliminates virtually all difference between the process of contracting for short-term and that of contracting for long-term firm point-to-point service. Under NorthWestern's approach, in the case of long-term service, the parties simply commit in writing that they will proceed according to the procedures used for short-term service. That is, they simply commit in writing that the specifications will be supplied "[a]s requested/accepted on the OASIS," which mimics the approach taken with short-term firm and non-firm service. This is a distinction without a material difference and does not provide the transaction-specific information required by Order Nos. 888 and 890 for long-term firm transmission service.<sup>29</sup>

62. We also agree with Southern Montana that NorthWestern's OATT by its terms requires a separate, transaction-specific service agreement for a long-term firm point-to-point request once the request is accepted. Section 13.4 of NorthWestern's OATT, which is consistent with the *pro forma* OATT, states that NorthWestern will offer a standard form of service agreement for firm point-to-point transmission service to a customer *when it submits* a completed application for long-term firm point-to-point service, but that NorthWestern will offer a standard form firm point-to-point service agreement to a customer when it *first submits* a completed application for short-term firm point-to-point service. We agree that the distinction between "when it submits" and "when it first submits" means that a single umbrella agreement may be appropriate for short-term service but not for long-term service. This distinction first appears in the *pro forma* OATT attached to Order No. 888-A, and it reflects the Commission's determination in that order to adopt streamlined umbrella agreement procedures for short-term, but not long-term, firm point-to-point service.

63. NorthWestern states that it enters into transaction-specific agreements for long-term firm point-to-point transmission service only when the customer is offered partial interim service or the customer ultimately requests transmission service that results in the need for new facilities. NorthWestern does not specify where these conditions appear in its OATT, and its sole support for them is a document on its OASIS that provides instructions on how to register a company on the OASIS. Such documents cannot

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<sup>29</sup> See, e.g., *Western Resources, Inc.*, 81 FERC, at 62,322-323 (rejecting five transaction-specific service agreements for failure to specify actual receipt and delivery points and directing that the service agreements be revised to specify whether each of six ancillary services would be provided under the agreements).

override the terms of NorthWestern's OATT, which requires a separate, transaction-specific service agreement for all long-term firm point-to-point requests once they have been accepted.<sup>30</sup>

64. We disagree with NorthWestern that Order No. 638 supports the use it is making of OASIS in entering into long-term transactions. First, we note that NorthWestern's claim is that Order No. 638 sets forth a Commission policy that calls for completion and confirmation of transactions under conforming umbrella agreements for transmission service using OASIS.<sup>31</sup> Since, as discussed above, the Commission has not authorized use of an umbrella agreement for multiple requests for long-term firm point-to-point transmission service, such a policy on the use of OASIS would not apply to such service in any case. However, the reference in Order No. 638 to the use of OASIS for contracting that NorthWestern cites is explicitly designated in that order as applying to on-line price negotiation in short-term markets.<sup>32</sup> Nothing in Order No. 638 suggests that the policy also was intended to apply to long-term firm point-to-point service.

65. We consider this dispute to be limited to whether NorthWestern has properly complied with its OATT and Commission policy on entering into a contract for long-term firm transmission service for the particular 65 MWs of service at issue. As described above, we find that it has not, and therefore we do not need to consider such factual issues as Southern Montana's intent, an email communication that may or may not have been received, or Southern Montana's power scheduler's level of experience with scheduling on OASIS. We note in this connection only that one of the primary purposes of requiring a written, transaction-specific agreement for each request for long-term firm point-to-point transmission service is to avoid as far as possible disputes such as the one presented in here. In addition, based upon the analysis set forth above, we likewise do not need to make a finding on whether there was a meeting of the minds between the parties sufficient to form a binding contract.

66. Finally, our conclusion is not affected by the fact that Southern Montana took service for 3 MW and 4 MW of long-term firm point-to-point transmission service under

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<sup>30</sup> See *Dynegy Midwest Generation, Inc. and Dynegy Power Marketing, Inc. v. Commonwealth Edison Company*, 101 FERC ¶ 61,295 (2002) (finding that a Commonwealth Edison Company business practice was not consistent with or superior to its *pro forma* tariff, and directing that it be revised), *reh'g dismissed*, 108 FERC ¶ 61,175 (2004).

<sup>31</sup> Answer at 14.

<sup>32</sup> Order No. 638, FERC Stats. & Regs. at 31,414.

the procedures that we are rejecting here. As a matter of contract law, a prior course of dealing becomes significant only when contractual requirements are unclear and prior dealings can aid in contract interpretation.<sup>33</sup> Here the requirements are clear, and we therefore do not need to consider the parties' past practice for interpretative purposes. More importantly, as indicated above, business practice cannot override tariff requirements,<sup>34</sup> and the prior agreements between Southern Montana and NorthWestern therefore do not create a precedent that supersedes the requirements of NorthWestern's OATT in this case. In order to avoid future confusion, we direct NorthWestern to revise its OASIS-posted business practices so that they are consistent with the terms of section 13.4 of its OATT, which, as discussed above, requires a separate, transaction-specific service agreement for a long-term firm point-to-point request once the request is accepted.

67. Accordingly, we find that Southern Montana is not obligated for the transmission service in dispute, and we direct NorthWestern to cease billing Southern Montana for that service.

The Commission orders:

The relief requested in Southern Montana's complaint is hereby granted as discussed and to the extent specified in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>33</sup> See Restatement of the Law, Second, Contracts, § 203(b) (express terms are given greater weight than course of performance, course of dealing, and usage of trade, course of performance is given greater weight than course of dealing or usage of trade, and course of dealing is given greater weight than usage of trade).

<sup>34</sup> See *supra* P 63 & n.31.

**Attachment 1**

**Service Agreement Between Southern Montana and NorthWestern**

**PAGE 1 of 4**

Service Agreement For  
Firm Point-To-Point Transmission Service

- 1.0 This Service Agreement, dated as of April 1, 2004 is entered into, by and between **NorthWestern Energy, a division of NorthWestern Corporation**, (the Transmission Provider), and **Southern Montana Electric G&T Cooperative, Inc.** (Transmission Customer) .
- 2.0 The Transmission Customer has been determined by the Transmission Provider to have a Completed Application for Firm Point-To-Point Transmission Service under the Tariff.
- 3.0 The Transmission Customer has provided to the Transmission Provider an Application deposit in the amount of \$ N/A, in accordance with the provisions of Section 17.3 of the Tariff.
- 4.0 Service under this agreement shall commence on the later of (1) the requested service commencement date, or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) such other date as it is permitted to become effective by the Commission. Service under this agreement shall terminate on such date as mutually agreed upon by the parties.
- 5.0 The Transmission Provider agrees to provide and the Transmission Customer agrees to take and pay for Firm Point-To-Point Transmission Service in accordance with the provisions of Part II of the Tariff and this Service Agreement.

6.0 Any notice or request made to or by either Party regarding this Service Agreement shall be made to the representative of the other Party as indicated below.

Transmission Provider:

**NorthWestern Energy**  
ATTN: Manager  
Electric Transmission Marketing  
40 E. Broadway  
Butte, MT 59701  
FAX: (406) 497-2054

Transmission Customer:

**Southern Montana Electric G&T**  
ATTN: Tim R. Gregori  
  
3521 Gabel Road, Suite 5  
Billings, Montana 59102  
FAX: 406-294-9529

7.0 The Tariff is incorporated herein and made a part hereof.

IN WITNESS WHEREOF, the Parties have caused this Service Agreement to be executed by their respective authorized officials.

<b>SOUTHERN MONTANA ELECTRIC G&amp;T COOPERATIVE, INC.</b>	<b>NORTHWESTERN ENERGY, A Division of NORTHWESTERN CORPORATION</b>
BY: _____ [Signature] _____ Tim R. Gregori	BY: _____ [Signature] _____ Ted Williams
Title: General Manager	Title: Director, Transmission Marketing
Date: _____ 1 April 2004 _____	Date: _____ 4/6/2004 _____

Specifications for Firm Point-To-Point  
Transmission Service

- 1.0 Term of Transaction: **As requested/accepted on the OASIS**
- Start Date: **As requested/accepted on the OASIS**
- Termination Date: **Upon sixty (60) days notice by either Party.  
All obligations shall remain after termination until satisfied.**
- 2.0 Description of capacity and energy to be transmitted by  
Transmission Provider including the electric Control Area in  
which the transaction originates.
- As requested/accepted on the OASIS**
- 3.0 Point(s) of Receipt: **As requested/accepted on the OASIS**
- Delivering Party: **As requested/accepted on the OASIS**
- 4.0 Point(s) of Delivery: **As requested/accepted on the OASIS**
- Receiving Party: **As requested/accepted on the OASIS**
- 5.0 Maximum amount of capacity and energy to be transmitted  
(Reserved Capacity): **As requested/accepted on the OASIS**
- 6.0 Designation of party(ies) subject to reciprocal service  
obligation:
- 7.0 Name(s) of any Intervening Systems providing transmission  
service: **To be provided as necessary**

- 8.0 Service under this Agreement may be subject to some combination of the charges detailed below. (The appropriate charges for individual transactions will be determined in accordance with the terms and conditions of the Tariff.)
- 8.1 Transmission Charge: **As specified on the OASIS for each transaction.**
- 8.2 System Impact and/or Facilities Study Charge(s):  
**To be specified when appropriate, zero otherwise.**
- 8.3 Direct Assignment Facilities Charge:  
**To be specified when appropriate, zero otherwise.**
- 8.4 Ancillary Services Charges: **Unless otherwise specified on the OASIS for each transaction, the Scheduling, System Control and Dispatch Service and Reactive supply and Voltage Control from Generation Sources Service will each be at the maximum rate as specified in the Tariff. All other Ancillary Services will be requested, accepted, and charged as defined on the OASIS for each transaction.**