

117 FERC ¶ 61,017
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. EL06-45-001
EL06-45-001
EL06-46-001
ER06-803-001

v.

Tucson Electric Power Company

ORDER ON REHEARING AND ESTABLISHING HEARING AND SETTLEMENT
JUDGE PROCEDURES

(Issued October 4, 2006)

1. Tucson Electric Power (Tucson) filed a timely request for rehearing of the Commission order issued in this proceeding on April 24, 2006.¹ The April 24 Order granted El Paso Electric Company's (El Paso) January 10, 2006 complaint and denied Tucson's January 11, 2006 related complaint.² In this order, we grant, in part, and deny, in part, Tucson's request for rehearing and establish hearing and settlement judge procedures, as discussed below.

Background

2. In its January 10, 2006 complaint, El Paso stated that Tucson, the partial owner of the newly constructed Luna Generating Station (Luna Station), asserted that it (Tucson) would transmit power over El Paso's transmission system from Luna to either the Springerville or Greenlee substations without first requesting service under El Paso's

¹ *El Paso Electric Co. v. Tucson Electric Power Co.*, 115 FERC ¶ 61,101 (2006) (April 24 Order).

² Additionally, the April 24 Order accepted El Paso's firm and non-firm transmission service agreements filed on March 28, 2006 in Docket No. ER06-803-000, and granted El Paso's request for waiver of the 60-day notice requirement for these additional transmission service agreements.

Open Access Transmission Tariff (OATT) but rather in accordance with the Tucson-El Paso Power Exchange and Transmission Agreement (1982 Agreement).³ According to El Paso this would be in clear violation of the provisions of the Second Revised Interconnection Agreement (Revised Interconnection Agreement) dated August 5, 2005. El Paso asserted that provisions in the Revised Interconnection Agreement make it clear that Tucson is obligated to request transmission service under the OATT of El Paso or any utility that owns transmission capacity interconnected at the Luna Substation. Concurrently, in Docket No. ER06-466-000, El Paso filed an unexecuted transmission service agreement to provide Tucson with 190 MW of firm point-to-point transmission service from the Luna 35 kV substation to the Springerville 345 kV substation under El Paso's OATT.

3. Tucson's January 11, 2006 complaint against El Paso raised virtually identical issues as El Paso raised in its complaint. Tucson stated that El Paso unjustifiably refused to respect the pre-Order No. 888 transmission rights that it argues were available to Tucson under the 1982 Agreement. Consequently, Tucson has not agreed to OATT service from El Paso.

4. The 1982 Agreement provides for an exchange of power between El Paso and Tucson along with certain transmission rights. Under the 1982 Agreement, Tucson agreed to take power from El Paso in Tucson's service territory and El Paso would take an equivalent amount of Tucson power at one of Tucson's facilities interconnected to El Paso's system. The 1982 Agreement further provides that "[t]he Parties agree to cooperate in the construction of El Paso's Springerville-Luna 345 kV circuit," and establishes the rights and responsibilities of each of the parties with respect to the construction and maintenance of that line. Under section 6.3 of the 1982 Agreement, El Paso "assigns to [Tucson] 200 megawatts of transmission rights in the Springerville – Luna 345kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee." Section 6.4 states that the "assignment of transmission rights from [El Paso] to [Tucson] in the Springerville-Luna-Greenlee circuits shall begin with the commercial operating date of the Springerville-Luna circuit and shall continue for a term of 40 years from that date."⁴

³ Tucson Electric Power Company, FERC Electric Rate Schedule No. 49.

⁴ Under section 6.1 of the 1982 Agreement, El Paso assigns to Tucson "200 MW of [El Paso's] firm transmission rights and a proportional amount of nonfirm rights in the Palo Verde-Westwing Circuit No. 1 for deliveries from Westwing to Palo Verde. [El Paso] will participate in the Palo Verde-Westwing Circuit No. 2 or an alternative third line east from Palo Verde and will assign to [Tucson] 100 MW of firm transmission rights and a proportional amount of nonfirm rights for deliveries from Westwing to Palo Verde in this Circuit No. 2 or to Palo Verde over the alternative third line east."

5. Based on its review of the 1982 Agreement and related extrinsic evidence, the Commission found, in its April 24 Order, that Tucson's request to transmit power over El Paso's transmission system from Luna to either the Springerville or Greenlee substations is not covered under the 1982 Agreement. Additionally, the Commission found that the Revised Interconnection Agreement does not obligate owners of the Luna Station, including Tucson, to purchase transmission service under El Paso's OATT. The Commission also found that Tucson's concerns regarding the Swap and Purchase Agreement between Phelps Dodge and El Paso went beyond the scope of the complaints and would not be addressed in the proceedings in Docket Nos. EL06-45-000, EL06-46-000, and ER06-803-000.

Tucson's Rehearing Request

6. In its request for rehearing, Tucson argues that the Commission should not have found that sections 6.3 and 6.4 of the 1982 Agreement are ambiguous. Tucson also argues that the Commission should not have used extrinsic evidence in order to construe the intended meaning of sections 6.3 and 6.4 of the 1982 Agreement.

7. Tucson argues, contrary to the Commission's conclusion in the April 24 Order, that there is only one reasonable interpretation of the language contained in sections 6.3 and 6.4 of the 1982 Agreement—that Tucson obtained 200 MWs of unrestricted transmission rights in specified transmission facilities that could be used by Tucson as needed for a period of 40 years from the commercial operation date of the Springerville-Luna 345 kV transmission circuit.

8. Tucson adds that the Commission should not have found that the 1982 Agreement only allows Tucson to use the transmission path covered under sections 6.3 and 6.4 of the 1982 Agreement as a single continuous path from Springerville to Greenlee but instead that Tucson may also use this path for transmission of electricity from the Luna Station to either Greenlee or Springerville. Tucson also states that the Commission's finding that the 1982 Agreement only allows Tucson to use the path covered under sections 6.3 and 6.4 of the 1982 Agreement for back-up transmission service when its own line from Springerville to Greenlee is out of service is not supported by substantial evidence. Indeed, Tucson argues that, contrary to a classification as a back-up service, it regularly relies on its transmission rights under sections 6.3 and 6.4. Tucson claims that the Commission should not have ruled that Tucson could not use transmission rights that it claims were assigned to it in the 1982 Agreement for transmission of power from the Luna Station to the Tucson transmission system without first holding an evidentiary hearing to address these concerns.

9. Specifically, Tucson states that the April 24 Order's conclusion that Tucson may only use the transmission rights assigned to it in sections 6.3 and 6.4 of the 1982 Agreement for transmission of power from Springerville to Greenlee is contrary to the

affidavit of Thomas Delawder, a former Senior Official of Tucson.⁵ Additionally, Tucson claims that the Commission was incorrect to infer in the April 24 Order that Tucson's transmission rights are limited in the future due to the fact that Tucson primarily used its transmission rights in the past for transmission from Springerville to Greenlee. Tucson states that it historically used its transmission rights in this manner simply because it has not had any generation sources on intermediate points along the Springerville-Luna or Luna-Greelee transmission lines for which other uses would be needed.

10. Tucson also argues that the April 24 Order deprived Tucson of transmission rights under the 1982 Agreement without relieving Tucson of the transmission burdens it assumed in the 1982 Agreement. Tucson states that it and El Paso agreed in Article 6 of the 1982 Power Agreement to assign certain transmission rights to the other party. Tucson argues that the Commission should not have ruled 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.

11. Lastly, Tucson argues that the Commission should not have ruled that the issues relating to the Phelps Dodge Swap and Purchase Agreement are outside the scope of this proceeding.

Discussion

12. We grant, in part, and deny, in part, Tucson's request for rehearing. As we stated in our April 24 Order and reiterate here, we find sections 6.3 and 6.4 of the 1982 Agreement to be ambiguous.⁶ However, in light of the further explanation provided by Tucson in its request for rehearing regarding Thomas Delawder's testimony at the 1987 hearing before the NMPSC (along with the related correspondence), we find that

⁵ Tucson claims that not only is the Commission's conclusion that the 1982 Agreement was intended to permit transmission of power in only one direction, from Springerville to Greenlee, contrary to Thomas Delawder's affidavit, but this conclusion is also inconsistent with other evidence including: the language of the 1982 Agreement, a July 1984 Memo, a February 4, 1983 letter, and Thomas Delawder's August 25, 1987 testimony from proceedings before the New Mexico Public Service Commission (NMPSC). Tucson claims that this additional evidence demonstrates that the Commission misconstrued the evidence relating (in regards to the transmission rights at issue in the instant proceeding) to a 1987 hearing before the NMPSC (along with the related correspondence) regarding a certificate of convenience and necessity for what was known as the Arizona Interconnection Project.

⁶ April 24 Order at P 32.

Tucson's request for rehearing raises issues of material fact relating to determining the parties' intent in regards to delivery points that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures we will order in this proceeding.

Sections 6.3 and 6.4

13. We reiterate our finding in the April 24 Order that sections 6.3 and 6.4 are ambiguous as to whether El Paso would provide the point-to-point service that Tucson requested. In the April 24 Order, we found, after careful consideration of the language of sections 6.3 and 6.4, the parties' arguments with respect to how the sections should be interpreted, particularly in conjunction with related sections within the 1982 Agreement that demonstrate that the parties know how to clarify such matters, that there was no meeting of the minds and that sections 6.3 and 6.4 are ambiguous with respect to direction of service and receipt/delivery points. We are not convinced by Tucson's arguments to the contrary.

14. We also disagree with Tucson's claim that the Commission should not have considered extrinsic language in an effort to determine the parties' intent in regards to the ambiguous language. As we noted in the April 24 Order, it is well-settled that where "the contract at issue contains ambiguous language, it is appropriate for [the Commission] to consider extrinsic evidence."⁷ Given that we found in the April 24 Order sections 6.3 and 6.4 of the 1982 Agreement to be ambiguous and continue to find those sections to be ambiguous herein, the Commission may appropriately rely on extrinsic evidence.⁸ Accordingly, we deny Tucson's request for rehearing on this issue.

Hearing and Settlement Judge Procedures

15. Tucson claims that the Commission erred by ruling that Tucson could not use transmission rights that it claims were assigned to it in the 1982 Agreement for transmission of power from Luna Station to the Tucson transmission system without first holding an evidentiary hearing to address these concerns. We grant rehearing on this issue.

⁷ April 24 Order at P 35 (citing *PacifiCorp v. Reliant Energy Services, Inc.*, 103 FERC ¶ 61,355 (2003)); *see also Ohio Power Co. v. FERC*, 744 F.2d 162, 168 (2004) ("Extrinsic evidence regarding the interpretation of a contract is considered when the meaning of the contract cannot be determined from its text and structure or from the application of canons of contract interpretation.").

⁸ *Id.*

16. In reconsidering the extrinsic evidence, the Commission finds that disputes of material fact exist regarding the interpretation of the extrinsic evidence. Specifically, Tucson's characterizes Thomas Delawder's testimony given on August 25, 1987 before the NMPSC and related correspondence as demonstrating that the parties intended to *limit* the circumstances under which Tucson may schedule deliveries of electricity into Southern New Mexico and not as *expanding* Tucson's deliverability flexibility. Tucson further indicates that the purpose of the testimony was to assure participants in the NMPSC proceeding that scheduled deliveries by Tucson over the transmission line would not adversely affect El Paso's import capability into southern New Mexico over that facility and was not meant to adversely impact or change their original rights under the 1982 agreement.

17. In addition, as noted by Tucson in its rehearing request, the first of the draft letters aimed at documenting the limitation discussed during the NMPSC proceeding was actually prepared by El Paso⁹ which, if accepted by Tucson, would have established an absolute prohibition on delivery of power by Tucson to any intermediate points of delivery. Again, Tucson argues from these letters that the parties sought to document an agreement with respect to *limits* on the use of intermediate delivery points and the need for such a limiting amendment demonstrates that the 1982 Agreement otherwise conveyed flexibility with respect to delivery and receipt points.

18. On further consideration, the Commission finds that this evidence raises issues of material fact concerning the proper interpretation of sections 6.3 and 6.4 of the 1982 Agreement that should be set for hearing. Accordingly, we are setting the following issues for hearing: (1) whether or not the transmission rights given to Tucson in 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; (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; and (3) 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.

19. While we are setting these disputed matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their disputes before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603

⁹ The Commission stated in its April 24 Order that it appears that Tucson sought El Paso's approval in 1987 to schedule power at intermediate points along the Springerville-Greenlee line under certain circumstances.

of the Commission's Rules of Practice and Procedure.¹⁰ If the parties desire, they may, by mutual agreement, request a specific judge as the Settlement Judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹¹

20. The Settlement Judge shall report to the Chief Judge and the Commission within 30 days of the date of this order concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

Phelps Dodge Swap and Purchase Agreement

21. Concerning Tucson's statement that the Commission should not have ruled that the issues relating to the Phelps Dodge Swap and Purchase Agreement are outside the scope of this proceeding, we reiterate here (as we initially stated in the April 24 Order) that the merits, meaning and availability to other parties of the Swap and Purchase Agreement were not raised in the complaints and, to the extent that such matters are to be considered, that would be covered in the proceeding in Docket No. ER06-557-000. We find here, as we did in the April 24 Order, that Tucson's argument pertaining to the Swap and Purchase Agreement is outside the scope of this instant proceeding.

Commission orders:

(A) Tucson's request for rehearing is granted, in part, and denied, in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act (FPA),¹² particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the issues outlined in paragraph 18 of this order in Docket Nos. EL06-45-001 and EL06-46-001. Furthermore, Docket No. EL06-45-001 is hereby consolidated with

¹⁰ 18 C.F.R. § 385.603 (2006).

¹¹ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

¹² 16 U.S.C. § 824e (2000).

Docket No. EL06-46-001 for purposes of hearing and decision. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Paragraphs (C) – (E) below.

(C) Pursuant to Rule 603 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2006), the Chief Administrative Law Judge is hereby directed to appoint a Settlement Judge in this proceeding within fifteen (15) days of the date of this order. Such Settlement Judge shall have all the powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the Settlement Judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge in writing or by telephone within five (5) days of the date of this order.

(D) Within thirty (30) days of the date of this order, the Settlement Judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the Settlement Judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties’ progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge’s designation, convene a prehearing conference in this proceeding in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission’s Rules of Practice and Procedure.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.