

125 FERC ¶ 61,171
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. EL06-45-003
EL06-46-003

v.

Tucson Electric Power Company

ORDER ON INITIAL DECISION

(Issued November 13, 2008)

1. This case is before the Commission on exceptions to the September 6, 2007 Initial Decision¹ issued in these proceedings. The central issue is whether the parties' 1982 agreement allows Tucson Electric Power Company (Tucson) to utilize its entitlement to 200 MW to transmit 190 MW of power from the Luna substation to Springerville or Greenlee. In this order, we affirm the Initial Decision in part and reverse it in part.

I. Background

2. Tucson and El Paso Electric Company (El Paso) are vertically-integrated public utilities that are directly interconnected at two substations, known as Springerville and Greenlee, in central eastern Arizona, near the New Mexico border. Tucson's principal generating assets include two coal-fired generating units at the Springerville substation, in far eastern Arizona; an interest in the Navajo station at Page, Arizona; and an interest in the Four Corners and San Juan stations at Farmington, New Mexico. El Paso is engaged in generation, transmission, and distribution of electricity in west Texas and southern New Mexico. Within its control area, it owns approximately 800 MW of generation and has a native load of more than 1,428 MW. El Paso also owns a share of

¹ *El Paso Electric Company v. Tucson Electric Power Company*, 120 FERC ¶ 63,016 (2007) (Initial Decision).

the generating capacity in the Palo Verde nuclear generating station, (Palo Verde) which is outside its control area in Arizona, west of the city of Phoenix.

3. In January 1982, Tucson proposed an energy exchange agreement in which capacity and energy from El Paso's share of Palo Verde would be delivered to Tucson at substations closer to Tucson's native load and the California market, and a corresponding amount of capacity and energy from certain Tucson generating units located in eastern Arizona and northern New Mexico would be delivered to El Paso at substations near the New Mexico and Arizona border.²

4. The arrangement offered advantages to both parties. El Paso could deliver energy to its system without building transmission facilities or incurring transmission costs, and Tucson could receive energy at the Palo Verde trading hub for sale directly into California.³ At that time, both Tucson and El Paso also needed additional transmission capacity in the eastern Arizona and western New Mexico transmission corridor. While El Paso sought to transmit power east from Palo Verde, Tucson was considering building a second north-south 345 kV line between Springerville and Greenlee.

5. On January 18, 1982, representatives from both Tucson and El Paso met for several hours and discussed the proposed power exchange between them, cooperation of both in the construction of a new 345 kV transmission line between Tucson's Springerville substation and El Paso's western New Mexico Luna substation, and the assignment by each party to the other of transmission rights in transmission facilities that it owned.⁴ Tucson's representative prepared an outline of the principles for the proposed transmission arrangements the next day. The outline was admitted in evidence at the hearing in this matter.⁵

6. On January 27, 1982, Tucson circulated a draft of a proposed power exchange and transmission agreement. Several months thereafter, the parties entered into the Tucson – El Paso Power Exchange and Transmission Agreement dated as of April 19, 1982 (1982 Agreement).⁶ In the 1982 Agreement, El Paso agreed to deliver up to 300 MW of capacity and energy from Palo Verde to Tucson at either the Palo Verde switchyard or the Westwing switchyard, at Tucson's option, and Tucson agreed to deliver a

² Initial Decision P 4.

³ *Id.*

⁴ *Id.* P 6.

⁵ *Id.*

⁶ *Id.* P 7.

corresponding amount of capacity and energy to El Paso at either Greenlee, Springerville, Coronado, San Juan, or Four Corners, at El Paso's option.

7. The 1982 Agreement also provided that Tucson and El Paso would cooperate in the construction of a new 345 kV transmission line between Tucson's Springerville substation and El Paso's Luna substation, which were not then directly connected. El Paso agreed to build a single circuit 210-mile line from Luna to a point approximately 12 miles east of the Springerville switchyard at its sole cost, while Tucson agreed to build double circuit towers over the remaining 12 miles to the Springerville switchyard, one-half of which conductor space on the transmission towers was to be dedicated to the Luna-Springerville line, with the remaining half reserved by Tucson for its future use. Tucson agreed to construct any facilities in its Springerville switchyard necessary to connect the new line, and El Paso agreed to reimburse Tucson for one-half of such costs of construction.

8. Finally, Tucson and El Paso agreed in the 1982 Agreement to assign certain transmission rights in facilities that they owned to each other. One of these assignments led to the dispute in this matter and is set forth below:

6.3 [El Paso] hereby assigns to [Tucson] 200 megawatts of transmission rights in the Springerville-Luna 345 kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee.

6.4 This 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.⁷

9. The 1982 Agreement also includes three subsections pursuant to which Tucson assigned rights to El Paso in its transmission system. One subsection sets forth transmission rights that were to become effective on the commercial operating date of the Springerville-Luna 345 kV line as follows (the remaining two expired on that date):

6.5.3 Beginning with the commercial operating date of the Springerville-Luna 345 kV circuit, [Tucson] hereby assigns to [El Paso] 150 megawatts of transmission rights in [Tucson's] 345 kV system between Springerville and either of Four Corners, San Juan, or Coronado. Such rights [sic] may be utilized by [El Paso] at its option in whole or in part to either of these delivery points. This assignment of rights shall include transmission in both directions and shall be for a term of forty (40) years.

⁷ *Id.* P 10.

10. The 1982 Agreement was filed at the Commission, accepted for filing via letter order dated March 11, 1983, and remains on file as a filed rate schedule of both Tucson and El Paso.⁸
11. Tucson has used its rights under the 1982 Agreement at various times to schedule the transmission of power from Springerville to Greenlee.
12. The current dispute arose when in 2005, Tucson acquired a one-third ownership interest in the Luna station, a 570 MW combined-cycle generating unit that is connected to El Paso's transmission system at the Luna substation. At that time, Tucson proposed to use the transmission rights in the 1982 Agreement to deliver power from the Luna station to either Greenlee or Springerville. El Paso's position is that the 1982 Agreement permits only Springerville as the point of receipt and Greenlee as the point of delivery. El Paso argues here that Tucson must purchase new transmission service from El Paso or the Public Service Company of New Mexico to transmit power from the Luna station. In October 2005, El Paso sent Tucson a letter acknowledging that it understood that Tucson believed the 1982 Agreement allowed Tucson to transmit power from the Luna station to Tucson's system, an interpretation with which El Paso disagreed. El Paso advised Tucson that Tucson was required to submit a transmission request to El Paso to provide the transmission Tucson needed to transmit power from the Luna station.⁹
13. On January 10, 2006, El Paso filed a complaint against Tucson with the Commission in Docket No. EL06-45-000 seeking an order that Tucson was required to purchase transmission service from El Paso under El Paso's OATT before it could use El Paso's transmission system for transmitting the output of the Luna Station. The following day, Tucson filed a complaint against El Paso with the Commission in Docket No. EL06-46-000 seeking an order stating that it was permitted to use the 1982 Agreement as a basis for its right to transmit the output of the Luna station to Tucson's system.
14. Unable to resolve the dispute, on February 1, 2006, the parties filed an unexecuted transmission service agreement and subsequently, on March 21, 2006, entered into an executed transmission service agreement (collectively, Interim Transmission Service Agreements) to deliver power from Tucson's share of the Luna station.

⁸ Docket No. ER83-311-000.

⁹ The Presiding Judge found that "[b]ased on currently effective transmission rates" (at the time of the hearing in this case) the cost of twelve months' of transmission service for 190 MW of power and mandatory ancillary services for Tucson under El Paso's Open Access Transmission Tariff (OATT) would have exceeded \$5 million. Initial Decision P 27.

15. On April 24, 2006, the Commission granted the El Paso complaint and dismissed the Tucson complaint.¹⁰ On May 24, 2006, Tucson filed a request for rehearing. On October 4, 2006, the Commission granted the rehearing request in part, and established hearing and settlement judge procedures.¹¹ In the order on rehearing, the Commission found that the language in sections 6.3 and 6.4 of the 1982 Agreement was ambiguous, as it had found in its original order. The Commission, however, also found on rehearing that the evidence submitted raised issues of material fact with respect to the interpretation of those sections. Accordingly, the Commission set the following issues for hearing:

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;

and

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.

16. A hearing took place on May 22, 2007, through May 24, 2007, to consider these issues. The Presiding Judge issued the Initial Decision on September 6, 2007.

II. Discussion

A. Presiding Judge's Findings

17. The Presiding Judge found that while only a transaction involving a back-up of transmission over the complete circuits from Springerville to Greenlee was discussed when the parties negotiated the 1982 Agreement, that limited discussion was not dispositive of the dispute in this case. He found that “[t]he key to the construction is in the actual language that was adopted and the motivations of the parties at that time, as reflected in that language, regardless of whether the parties only discussed the back-up scenario in negotiating the 1982 Agreement.”¹²

18. The Presiding Judge found that “[a]t the hearing in this proceeding, there was a lot of after-the-fact testimony and the introduction of many after-the-fact documents, all to little effect. Only one witness who had been present at the 1982 negotiations, Frederic E.

¹⁰ *El Paso Electric Company v. Tucson Electric Power Company*, 115 FERC ¶ 61,101 (2006).

¹¹ *Id.*, order on reh’g, 117 FERC ¶ 61,017 (2006).

¹² Initial Decision P 44.

Mattson of [El Paso], testified and, while his testimony as to what transpired at the meeting was credible and not contradicted, it did not fully illuminate the thought processes of either [Tucson], the side drafting the agreement (of which he was not part) or [El Paso], the side acquiescing to that language after three months of review before final adoption.”¹³

19. The Presiding Judge found that while back-up deliveries from Springerville to Greenlee were the only matters discussed when the 1982 Agreement was negotiated, “[Tucson] drafted the Agreement and, unsurprisingly, gave itself rights that were as extensive as it believed would be acceptable to [El Paso]. The Agreement was to have a 40 year life, to begin after the construction of the Springerville-Luna segment was completed some time in the future, and it would be expected that [Tucson] would give itself as broad rights as possible for future use, even if any specific other needs were not currently foreseen.”¹⁴

20. The Presiding Judge found that while Tucson drafted the 1982 Agreement, El Paso reviewed it over a three-month period and made extensive changes to it, yet not to sections 6.3 and 6.4, which survived to the final version in their original states.¹⁵ The Presiding Judge found that since sections 6.3 and 6.4 were maintained in their original state for three months of revisions to other sections, El Paso “can be considered as having acquiesced to any such broadened rights implicit in the language” of those sections.¹⁶

21. The Presiding Judge found that while Tucson’s primary interest in the parties’ exchange was to provide back-up to Tucson’s existing Springerville to Greenlee line, the parties did not limit Tucson’s rights to back-up service only. The Presiding Judge stated that the reason for this was that El Paso’s only significant need was to transmit power in the direction of and exit at Luna, and even Tucson’s extensive use of El Paso’s system to transmit power from Springerville for delivery at Greenlee would not interfere with El Paso’s needs.¹⁷

22. The Presiding Judge found that while some sections of the 1982 Agreement assigned transmission points “for deliveries” from specific points of receipt to specific

¹³ *Id.* P 43.

¹⁴ *Id.* P 47.

¹⁵ *Id.* P 48.

¹⁶ *Id.*

¹⁷ *Id.* P 50.

points of delivery, sections 6.3 and 6.4 did not limit transmission to deliveries from Springerville to Greenlee.¹⁸

23. The Presiding Judge found that the underlying rationale for the parties' exchange was a fortuitous match of resources and needs: El Paso needed transmission capacity in an easterly direction to transmit power from Palo Verde to its load while Tucson needed transmission to back up its north to south Springerville to Greenlee line.¹⁹ The Presiding Judge therefore found that Tucson should be permitted to transmit up to 200 MW on any segment on which it engages in a "permissible transaction."²⁰

24. The Presiding Judge found that Tucson should be able to simultaneously schedule service under the 1982 Agreement for 200 MW from Luna to Greenlee, and another 200 MW from Luna to Springerville, without compromising security. The Presiding Judge also found specifically, however, that Tucson should not be able to schedule 200 MW from Luna to Greenlee at the same time it schedules 200 MW from Springerville to Greenlee, because such scheduling would raise the transmission level to 400 MW on the Luna to Greenlee segment.²¹ The Presiding Judge found that because transmission from Luna to Greenlee could not be accomplished simultaneously with the transmission of 200 MW from Springerville to Luna, the service from Luna to Greenlee must be characterized as non-firm under Western Electricity Coordinating Council rules.²²

25. The Presiding Judge concluded with the following:

- (a) The transmission rights given to [Tucson] in Sections 6.3 and 6.4 of the 1982 Agreement do not limit its use to the transmission of power from Springerville, as the receipt point, to Greenlee, as the delivery point.
- (b) [Tucson] may use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to both Springerville and Greenlee, as long as transmissions at any one time under the Agreement do not exceed 200 MW on any segment of the circuit.²³

¹⁸ *Id.* P 51.

¹⁹ *Id.* P 38.

²⁰ *Id.* P 61.

²¹ *Id.*

²² *Id.* P 69.

²³ *Id.* P 123.

B. Briefs On Exceptions**1. Tucson**

26. In its October 9, 2007 brief on exceptions, Tucson states that the Presiding Judge erred in characterizing the transmission service to which Tucson is entitled under the 1982 Agreement from Luna to Springerville as non-firm.²⁴ Tucson also states that the Presiding Judge erred in failing to require El Paso to refund to Tucson all amounts collected for transmission of power from the Luna station to the Tucson system during the pendency of this proceeding in excess of amounts that it would have collected under the 1982 Agreement, with interest calculated under section 35.19a of the Commission's regulations.²⁵

27. Tucson states that characterizing the transmission service from Luna to Greenlee as non-firm is erroneous, contrary to the record and may preclude Tucson from considering Luna station as a firm generation resource.²⁶

28. Tucson states that El Paso "has described those transmission rights as firm transmission rights, and has reserved 200 MW of transmission capacity on the Luna via Hidalgo to Greenlee 345 kV transmission line for use by [Tucson] under the 1982 Agreement."²⁷

29. Tucson opines that in determining that the service from Luna to Greenlee would have to be characterized as non-firm under WECC rules, the Presiding Judge may have been misled by provisions for "so-called re-direct rights" under section 22.1 of the *pro forma* tariff as revised in Order No. 890.²⁸ The Presiding Judge stated that Tucson's "rights with regard to the non-firm that it would have under the [1982] Agreement, from Luna to Greenlee, would not seem to add anything to the rights it would have . . . under Section 22.1 of the current pro-forma OATT" Tucson quotes from El Paso's Reply Brief in which El Paso states that "rights that are in the OATT cannot be automatically imputed to the 1982 Agreement."²⁹ Tucson states that the OATT section on re-direct rights does not apply to the transmission rights it was assigned in the 1982 Agreement

²⁴ Tucson Brief on Exceptions at 6.

²⁵ *Id.*

²⁶ *Id.* at 7.

²⁷ *Id.* at 8 and 13.

²⁸ *Id.* at 14.

²⁹ *Id.* at 14, quoting Brief of El Paso Electric Company Opposing Tucson Electric Power Company's Exceptions at 27.

and that all potential receipt and delivery points on transmission lines to which Tucson was assigned under the 1982 Agreement are for firm transmission service.³⁰

30. Tucson argues that it is entitled to a refund with interest of the amount by which it has paid El Paso for transmission during the pendency of this case.³¹ Tucson states that it entered into interim transmission agreements under El Paso's OATT for transmission service pending the outcome of this case, and that while the parties "expected" that the amounts Tucson paid thereunder would be placed in an escrow account, the parties subsequently agreed to dispense with escrow.³² Tucson is entitled, it therefore argues, to a refund, with interest at the rate set forth in 18 C.F.R. § 35.19a (2008).³³

31. Tucson argues that the interim transmission agreements were necessitated by El Paso's unreasonable refusal to provide transmission service from the Luna station under the 1982 Agreement. Tucson states, moreover, that the Commission's alternative dispute resolution procedures have prolonged the length of these proceedings.³⁴

32. Tucson states that the Commission has ordered refunds where a transmission provider overcharged a transmission customer because the transmission provider misunderstood the applicable tariff, made a billing error or erroneously restricted market prices.³⁵

2. El Paso

33. In its October 9, 2007 brief on exceptions, El Paso argues that the Commission should reverse the Initial Decision and instead find that sections 6.3 and 6.4 of the 1982 Agreement may only be used for transmission from Springerville as the receipt point to Greenlee as the delivery point. El Paso asserts that the Presiding Judge made ten errors in his decision.

³⁰ *Id.* at 15.

³¹ *Id.*

³² *Id.* at 17, n.11.

³³ *Id.*

³⁴ *Id.* at 18.

³⁵ *Id.* at 18-19 citing *New York Power Authority v. Consolidated Edison Company of New York, Inc.*, 115 FERC ¶ 61,088 (2006); *Exelon Corporation v. PPL Electric Utilities Corporation and PJM Interconnection, LLC*, 111 FERC ¶ 61,065 (2005); *H.Q. Energy Services (U.S.), Inc. v. New York Independent System Operator, Inc.*, 113 FERC ¶ 61,184 (2005).

34. El Paso states that Arizona law governs the 1982 Agreement and the Presiding Judge failed to apply Arizona law in interpreting ambiguous contract terms, relying instead on a “natural reading” of the ambiguous language.³⁶

35. El Paso argues that the only needs a party expressed when the 1982 Agreement was negotiated were to transmit power from Springerville to Greenlee, and that the Presiding Judge did not give proper weight to its witness’s testimony that the only rights the parties discussed were transmission from Springerville to Greenlee over El Paso’s system.³⁷ El Paso argues that there was no evidence that the parties intended that sections 6.3 and 6.4 of the 1982 Agreement should allow a use other than from Springerville to Greenlee, but that contrary to this evidence and contrary to Arizona law, which requires that contracts be interpreted based on the specific transactions the parties had in mind at the time of the contract, the Presiding Judge relies on uncommunicated intentions.

36. El Paso states that the Presiding Judge failed to give appropriate weight to section 6.4 of the 1982 Agreement, specifically, the language describing the assignment of rights as “the Springerville-Luna-Greenlee circuits.”³⁸ El Paso argues that the naming of the transmission rights as the parties did in section 6.4 indicates that Tucson only received rights to transmit power in a continuous path in the direction of Springerville to Luna to Greenlee, and not the reverse.

37. El Paso argues that the Presiding Judge based his finding on only the 1982 Agreement and did not give due regard to credible extrinsic evidence.³⁹

38. El Paso states that the Presiding Judge’s conclusions are “riddled with contradictions to his findings, internal inconsistencies and logical fallacies.”⁴⁰ For example, El Paso argues that El Paso would not have left rights to deliver power at either Luna or Hidalgo unstated, because the path was important to El Paso, and therefore the parties intended “the Springerville-Luna-Greenlee circuits” to mean delivery at Greenlee only. El Paso states that in addition, the Presiding Judge’s decision does not match either

³⁶ El Paso Brief on Exceptions at 16-17.

³⁷ *Id.* at 22-23.

³⁸ *Id.* at 24.

³⁹ *Id.* at 26.

⁴⁰ *Id.*

party's interpretation of the contract, and that means that he did not ascertain their intent, which is the purpose of this proceeding.⁴¹

39. El Paso argues that the Presiding Judge did not give reasonable weight to "industry circuit naming conventions" which it states require a finding that the flow described in sections 6.3 and 6.4 of the 1982 Agreement can only be from Springerville through Luna to Greenlee.⁴²

40. El Paso also argues that the Presiding Judge failed to give proper effect to the fact that the 200 MW in the 1982 Agreement was limited to one continuous circuit.⁴³ And El Paso states that the Presiding Judge should have interpreted the 1982 Agreement's use of "in both directions" in one section (6.5.3) as limiting rights in other sections of the agreement to a single direction.⁴⁴

41. El Paso states that the Presiding Judge should have affirmed the Commission's conclusion in its Order on Complaints in favor of El Paso.⁴⁵ El Paso disputes the Presiding Judge's finding that the testimony of Thomas Delawder was not credible. Specifically, El Paso disagrees with the Presiding Judge's conclusion about Mr. Delawder's testimony that while Tucson had the right to use intermediate points of delivery under the 1982 Agreement, it would not use them unless El Paso entered into a further agreement.

42. El Paso argues that the Presiding Judge erred in interpreting the 1982 Agreement based on to what the parties *might* have agreed, rather than upon what they *actually* agreed.⁴⁶ Specifically, El Paso points to the Presiding Judge's conclusion that if Tucson had asked for additional transmission rights from Luna to Springerville, El Paso would likely have agreed to such additional transmission rights. El Paso states that the Presiding Judge was improperly relying on a hypothetical question posed to El Paso's witness, John Whitacre.

43. El Paso argues that while section 22.1 of the *pro forma* OATT in Order No. 890 allows firm point-to-point customers to redirect their firm service to alternate receipt and

⁴¹ *Id.* at 30.

⁴² *Id.* at 31-32.

⁴³ *Id.* at 33.

⁴⁴ *Id.* at 34.

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 38.

delivery points, provided that service to or from the alternate points is non-firm, section 22.1 does not apply to the 1982 Agreement.⁴⁷

44. El Paso states that the Presiding Judge did not give due consideration to the parties' course of conduct before litigation.⁴⁸ El Paso states that the parties have followed a course of conduct that shows that Tucson's rights are "continuous and unidirectional" from Springerville via Luna to Greenlee.⁴⁹ El Paso states that from 1982 until the time of the hearing in this matter, Tucson had only scheduled use of its rights under sections 6.3 and 6.4 to move power from Springerville to Greenlee.⁵⁰

45. El Paso disagrees with the Presiding Judge's statement that "the 1982 Agreement was for the benefit of each company's generation, and it is the unregulated generation that should foot the bill, not the companies' regulated transmission customers, who receive no benefits."⁵¹ El Paso asserts that such statement concerns matters outside the scope of this proceeding.

46. El Paso takes issue with the way the Presiding Judge approached the possibility that Tucson committed a breach of ethics if it intended to use the 1982 Agreement to send power from Luna to Springerville or Hidalgo and did not discuss it directly with El Paso while the parties negotiated the agreement. El Paso implies that if the Presiding Judge believed Tucson could have intentionally used ambiguous words to preserve an argument, he did not properly interpret the evidence at the hearing and should have found that Tucson committed an ethical breach.⁵²

47. El Paso concludes by stating that to affirm the Initial Decision would contravene the Commission's policies regarding the sanctity of contracts and fair, competitive access to transmission.⁵³

⁴⁷ *Id.* at 40.

⁴⁸ *Id.* at 41.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 44.

⁵² *Id.* at 45-46.

⁵³ *Id.* at 47-48.

C. Briefs Opposing Exceptions

1. Staff

48. In its October 29, 2007 brief opposing El Paso's exceptions, Commission Trial Staff (Staff) states that the Presiding Judge correctly found that Tucson may transmit power from Luna to either Springerville or Greenlee under the 1982 Agreement.⁵⁴

49. Overall, Staff disagrees with El Paso's assertion that the Presiding Judge violated Commission policy regarding the sanctity of contracts and open access to transmission services. Staff states that the Presiding Judge's decision is not about the sanctity of the 1982 Agreement, rather, the decision is one of interpretation. Similarly, Staff states that Tucson seeks to use transmission service it already has, not to establish a new type of transmission service.⁵⁵

50. With regard to specific El Paso and Tucson exceptions, Staff asserts that El Paso raises the choice of law question too late; in fact for the first time in its brief on exceptions.⁵⁶ Staff argues that, regardless of El Paso's untimely argument, the Presiding Judge applied principles of contract interpretation that comport with Arizona law, specifically noting that the parties were sophisticated, had prior dealings and that El Paso made no changes in sections 6.3 and 6.4, despite numerous chances to do so.⁵⁷

51. Staff also argues that El Paso's assertion that the Presiding Judge found its witness's testimony was credible and not contradicted is incomplete. Staff quotes the Presiding Judge's finding that while the testimony was credible and not contradicted, it did not fully illuminate the thought processes of either Tucson or El Paso at the time the 1982 Agreement was negotiated and drafted. Staff states that El Paso's assertion is

⁵⁴ Staff Brief Opposing Exceptions at 1.

⁵⁵ *Id.* at 8.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 11.

untimely (inasmuch as it raises the choice of law question again) and simply does not counter the Presiding Judge's determinations.⁵⁸

52. Staff disagrees with El Paso that the Presiding Judge did not consider section 6.4 of the 1982 Agreement. Staff states that the Presiding Judge referred to section 6.4 in at least four paragraphs and analyzed it, concluding that the use of the phrase "Springerville-Luna 345 kV circuit" did not convey directionality, because to do so would have "restricted its use in the direction of Luna, while it would have insured that there would be no deliveries at Luna, which would also have prevented deliveries to Greenlee, which was the specific motivation for granting Tucson its rights in sections 6.3 and 6.4 of the 1982 Agreement."⁵⁹

53. Staff disagrees with El Paso's statement that the Presiding Judge did not use extrinsic evidence in deciphering the parties' intentions in the 1982 Agreement.⁶⁰ Rather, Staff argues, the Presiding Judge found no credible extrinsic evidence addressing the ambiguity in sections 6.3 and 6.4.⁶¹ Staff asserts that the lack of credible extrinsic evidence forced the Presiding Judge to turn to the language of those sections itself, and the Presiding Judge's interpretation of the language included a thorough parsing of the relevant sections of the 1982 Agreement.⁶²

54. Staff excepts to El Paso's characterization of the Presiding Judge's interpretation of the contract language as internally inconsistent, arbitrary and capricious.⁶³ First, Staff notes that the Presiding Judge found that sections 6.3 and 6.4 are different from other sections of the 1982 Agreement in that they are less limited and less explicit about directionality. Staff states that the Presiding Judge's careful parsing of the language of the entire 1982 Agreement shows that his analysis is not capricious.⁶⁴

55. Staff disagrees with El Paso that the Presiding Judge based his opinion on what the parties might have agreed to rather than what they actually agreed to.⁶⁵ Staff states that

⁵⁸ *Id.* at 13.

⁵⁹ *Id.* at 14-15.

⁶⁰ *Id.* at 15.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 16.

⁶⁴ *Id.* at 17.

⁶⁵ *Id.* at 18.

after an opportunity to review the witnesses' testimony and extensive cross examination, the Presiding Judge gave the proper weight to the testimony, finding Mr. Mattson's testimony credible but not dispositive and Mr. Delawder's testimony not credible. Staff states that absent any definitive extrinsic evidence, the Presiding Judge's natural reading of the 1982 Agreement is reasonable.⁶⁶

56. Staff disputes El Paso's assertion that the Presiding Judge ignored evidence of the parties' course of conduct and operating procedures.⁶⁷ Staff points out that the Presiding Judge stated that he had reviewed such evidence. Staff notes, moreover, with regard to course of conduct, that Tucson had little reason to use its bidirectional rights in the Springfield to Luna line until 2005, when it purchased a share of the Luna station.⁶⁸

57. Staff argues that while the Presiding Judge's application of redirect rights under El Paso's OATT to the 1982 Agreement was incorrect, any error was not relevant, because this issue was not part of this proceeding.⁶⁹

58. Staff also agrees with both Tucson and El Paso that whether or not the 1982 Agreement is properly accounted for in the parties' OATT rates, Tucson and El Paso's rates are not part of this proceeding.⁷⁰

59. Finally, Staff states that the Commission must address the matter of refunds. The Commission did not address refunds in the initial order, because it denied Tucson's complaint. On rehearing, the Commission did not address refunds, and Staff argues that it should have done so. If it rules in favor of Tucson in this proceeding, Staff states that the Commission needs to address the issue of refunds and order them.⁷¹

2. Tucson

⁶⁶ *Id.* at 18-19.

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 20.

⁶⁹ *Id.* at 23.

⁷⁰ *Id.*

⁷¹ *Id.* at 23-24. Staff's position on refunds is somewhat unclear. While it states that if the Commission "agrees with Tucson, it needs to address the issue of refunds and order them" in its conclusion, Staff states that "the Commission should further find that the refunds requested by Tucson are inappropriate in these dockets" *Id.* at 25.

60. In its October 29, 2007 brief opposing El Paso's exceptions, Tucson disagrees that the Initial Decision raises policy issues, including the Commission's view of the sanctity of contracts. Tucson states that this case is about the proper interpretation of the 1982 Agreement.⁷² No party sought contract reformation or abrogation, and therefore this case does not raise any Commission policy regarding the sanctity of contracts.⁷³

61. Tucson also disputes that the Initial Decision raises any issues about the Commission's open access policy. Tucson points out that when open access transmission policies were established in Order No. 888, the Commission made it clear that existing contracts would not be abrogated. Tucson argues that since the Initial Decision is an interpretation of one of these grandfathered contracts, open access policy is not implicated in this case.⁷⁴

62. Tucson states that the Presiding Judge followed Arizona contract law interpretation principles and fully considered the extrinsic evidence surrounding the parties' negotiations at the time they entered into the 1982 Agreement.⁷⁵

63. Tucson argues that where a transmission line segment is defined by its end points only, those points may be used as points of receipt or delivery.⁷⁶ Tucson states that sections 6.3 and 6.4 of the 1982 Agreement do not limit the direction in which transmission may be used. Tucson states that El Paso's witness acknowledged that the 1982 Agreement does not identify source or sink points.⁷⁷

64. Tucson states, however, that the Presiding Judge clearly examined the extrinsic evidence carefully, because he understood that to allow delivery of power at any intermediate points between Springerville and Greenlee could potentially have interfered with El Paso's need to move power east from Palo Verde. The Presiding Judge found, therefore, that there would be only one-way service from Luna via Hidalgo to Greenlee and two-way service on the new circuit to be constructed between Springerville and Luna.⁷⁸

⁷² Tucson Brief Opposing Exceptions to Initial Decision at 6.

⁷³ *Id.*

⁷⁴ *Id.* at 7.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 13.

⁷⁷ *Id.* at 13, n.4

⁷⁸ *Id.* at 20.

65. Tucson states that the Presiding Judge properly considered the meaning of section 6.4 of the 1982 Agreement.⁷⁹ Tucson states that the parties' use of the plural in "Springerville-Luna-Greenlee circuits" shows that Tucson was granted transmission rights in multiple circuits and that nothing in the 1982 Agreement requires that two circuits be used in concert to form a single path.⁸⁰ Tucson states, moreover, that the phrase "the Springerville-to-Luna-to-Greenlee path" does not appear anywhere in the 1982 Agreement.⁸¹

66. As a general matter, Tucson states that the Presiding Judge thoroughly considered extrinsic evidence in reaching his decisions.⁸² Tucson recounts the Presiding Judge's review of such evidence and concludes that El Paso's assertion that he did not consider it reflects El Paso's disagreement with the conclusions the Presiding Judge reached with regard to such extrinsic evidence.⁸³

67. Tucson states that El Paso has not identified any contradictions, internal inconsistencies or logical fallacies in the Initial Decision.⁸⁴ Tucson states that merely because the Presiding Judge disagreed with an El Paso position, such as on the meaning of a hyphen, industry conventions or language omissions, or disagreed with both parties' positions on a topic, does not render the Initial Decision contradictory, inconsistent, illogical, or arbitrary and capricious.⁸⁵

68. Tucson disputes El Paso's position that the Presiding Judge should have affirmed the Commission's original determination on the parties' complaints. Tucson argues that the reason the Commission ordered rehearing was for the Presiding Judge to develop the factual record in the case, and that the Presiding Judge was free to reach his own conclusions in the Initial Decision.⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 22.

⁸² *Id.* at 23.

⁸³ *Id.* at 24.

⁸⁴ *Id.* at 25.

⁸⁵ *Id. passim* at 24-32.

⁸⁶ *Id.* at 32-34.

69. Finally, Tucson argues that El Paso failed to demonstrate that the Presiding Judge improperly relied on post-hoc speculation or post-1982 evidence in reaching his decision, or that he “rewarded” Tucson for submitting evidence that was not credible.⁸⁷

3. El Paso

70. In its October 29, 2007 brief opposing Tucson’s exceptions, El Paso disputes both exceptions Tucson raised to the Initial Decision. First, El Paso argues that even if Tucson could establish a right to transmission service from Luna to Greenlee under the 1982 Agreement, the Presiding Judge was correct in finding any such service to be non-firm. Along these lines, El Paso states that the Presiding Judge “correctly recognized that if [Tucson] has firm rights on the Springerville to Greenlee path, it cannot simultaneously have firm rights on the Luna to Greenlee path because it is physically impossible for [El Paso] to provide 400 MWs of firm service from Luna to Greenlee.”⁸⁸ El Paso asserts that Tucson’s proffered interpretation that its rights under the 1982 Agreement are for firm transmission is contrary to the laws of physics.⁸⁹

71. Second, El Paso states that the Presiding Judge properly ordered no refund in the Initial Decision. El Paso argues that the Initial Decision is not a final order, and unless and until the Commission decides the case, ordering refunds would be premature.⁹⁰ Moreover, El Paso asserts that until this order, the only filed rate in existence is El Paso’s OATT rate; El Paso would have been in violation of such filed rate if it refunded transmission charges to Tucson.⁹¹

72. El Paso also argues that the service agreement by which El Paso provided transmission service under its OATT, expired on May 31, 2006, and while that agreement provided for escrow, interest and refund, it only covered two months of interim transmission service.⁹² In contrast, the blanket OATT agreement under which El Paso is

⁸⁷ *Id.* at 35-42.

⁸⁸ Brief of El Paso Electric Company Opposing Tucson Electric Power Company’s Exceptions at 6.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.* at 8.

⁹¹ *Id.* at 9.

⁹² *Id.* at 10. El Paso states that upon the expiration of the service agreement, the parties agreed that El Paso would provide transmission to Tucson under a pre-existing blanket OATT agreement.

presumably still providing Tucson transmission service contains no escrow or refund provisions.⁹³

73. El Paso states that none of the Commission's recognized precedent for ordering refunds without an explicit agreement to do so, such as charging more than a filed rate, correcting billing errors and restitution, apply in this case.⁹⁴

74. El Paso states that Tucson introduces the issue of refunds for the first time in its brief on exceptions and "therefore neither the Commission nor [El Paso] has had an opportunity to explore critical terms concerning any possible refund."⁹⁵ El Paso states that Tucson has not identified specific charges for which it claims refunds and a start and stop date for the accrual of such refunds.⁹⁶

D. Motion for Leave to Answer and Answer

75. On November 6, 2007, El Paso requested permission for a limited answer to correct "significant misinformation" contained in Staff's brief opposing exceptions. El Paso states that contrary to Staff's assertions, El Paso did not raise the choice of law issue (i.e., Arizona contract law applies) for the first time in its brief on exceptions, but rather raised the issue in its post hearing briefs.⁹⁷

76. On November 19, 2007, Staff requested permission to answer El Paso's answer. Staff agrees that the 1982 Agreement provides that Arizona law applies to this dispute.⁹⁸ And while Staff does not concede that El Paso properly raised the choice of law issue, it states that the argument is irrelevant because the Presiding Judge followed the proper standard to interpret the parties' intentions when the contract was formed. Staff therefore argues that "when" El Paso raised the choice of law issue is irrelevant and that the Commission should disregard El Paso's discussion about when it occurred.⁹⁹

⁹³ *Id.*

⁹⁴ *Id.* at 12-13.

⁹⁵ *Id.* at 13.

⁹⁶ *Id.* at 14.

⁹⁷ Motion for Leave to Answer and Answer of El Paso Electric Company to the Brief Opposing Exceptions of Commission Trial Staff at 2-3.

⁹⁸ Answer to El Paso's Motion to Commission Trial Staff's Brief Opposing El Paso's Brief Opposing Exceptions at 2.

⁹⁹ *Id.* at 3.

III. Commission Determination

77. The Commission adopts the Presiding Judge's decision in part and reverses it in part. We affirm the determinations that:

The transmission rights given to Tucson in sections 6.3 and 6.4 of the 1982 Agreement are not restricted for transmission of power from Springerville as the receipt point to Greenlee as the delivery point; and

Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to either Springerville or Greenlee.

78. However, we disagree and reverse the Presiding Judge on two points:

Tucson may not use its rights granted under the 1982 Agreement to transmit 200 MW from Luna to Greenlee and simultaneously 200 MW from Luna to Springerville; and

The nature of the service from Luna to Greenlee should be characterized as firm service rather than non-firm.

We also order El Paso to return and pay Tucson interest on the funds Tucson has paid El Paso for transmission service from Luna during the pendency of this dispute, pursuant to the rate set forth in 18 C.F.R. § 35.19a(a)(2)(iii) (2008).

A. The 1982 Agreement does not restrict Tucson's rights to the exclusive use of Springerville as the receipt point and Greenlee as the delivery point.

79. We disagree with El Paso's argument in its brief on exception that the 1982 Agreement may only be used for transmission from Springerville as the receipt point to Greenlee as the delivery point. Sections 6.3 and 6.4 of the 1982 Agreement do not name Springerville and Greenlee as exclusive receipt and delivery points. We agree with the Presiding Judge that while some sections of the 1982 Agreement name specific points of receipt and delivery, sections 6.3 and 6.4 simply do not.¹⁰⁰ The Presiding Judge interpreted the absence of any explicit limitations on points of receipt or delivery in sections 6.3 and 6.4 as allowing Tucson to transmit power from Luna to either Greenlee or Springerville. We find that this is a reasonable interpretation of the 1982 Agreement.

80. We agree with Staff that the Presiding Judge's conclusion that the phrase, "Springerville-Luna 345 kV circuit" does not convey a specific flow direction. While the

¹⁰⁰ Initial Decision P 51.

Presiding Judge acknowledged that source to sink is a common way to refer to transmission paths, he ultimately concluded that the presence of specific flow direction language in other parts of the 1982 Agreement indicates that if the parties had intended to limit the direction on the Springerville-Luna 345 kV circuit, they knew how to do so.¹⁰¹ Again, we find that the Presiding Judge reasonably interpreted the parties' intentions as set forth in the 1982 Agreement.

B. Tucson may not use its rights granted under the 1982 Agreement to simultaneously transmit 200 MW from both Luna to Greenlee and Luna to Springerville.

81. We find that the Presiding Judge correctly determined that Tucson may use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to both Springerville and Greenlee, as long as transmission at any one time under the 1982 Agreement does not exceed 200 MW on any segment of the circuit. However, to the extent that the Presiding Judge found that such a determination would allow Tucson to *simultaneously* transmit 200 MW from Luna to Greenlee and 200 MW from Luna to Springerville, the Commission reverses the Presiding Judge.

82. Section 6.3 of the 1982 Agreement is explicit on its face that Tucson is entitled to 200 MW of transmission capacity. It states that “[El Paso] hereby assigns to [Tucson] 200 megawatts of transmission rights.” The Presiding Judge’s finding is unclear and could be read to entitle Tucson to as much as 400 MW. Such a result plainly exceeds the transmission rights allocated in section 6.3 of the 1982 Agreement. We find that Tucson may, under the 1982 Agreement, simultaneously transmit power from Luna to Greenlee and Luna to Springerville but Tucson may do so only if the total amount of scheduled capacity on both segments does not exceed 200 MW.

C. The nature of the transmission service from Luna to Greenlee should be characterized as firm rather than non-firm.

83. The Presiding Judge found that the transmission service to which Tucson is entitled under the 1982 Agreement is non-firm service. We have reviewed the record in these proceedings and find that the 1982 Agreement provides Tucson with rights to firm capacity. In testimony in these proceedings, El Paso witness John Whitacre stated that under the 1982 Agreement, Tucson has the right to firm capacity from Springerville to Greenlee.¹⁰² Given El Paso’s acknowledgement that Tucson’s service on this circuit is firm, we find no basis for the Presiding Judge’s conclusion that the service is non-firm, and accordingly, reverse his decision on this issue.

¹⁰¹ *Id.*

¹⁰² EPE-025 at 23:8-17.

D. The Commission orders El Paso to refund and pay Tucson interest on the funds Tucson has paid El Paso for transmission service from Luna during the pendency of this dispute, pursuant to the rate set forth in 18 C.F.R. § 35.19a(a)(2)(iii) (2008).

84. Tucson states that it is entitled to a refund of the amount it has paid El Paso for transmission during the pendency of these proceedings. The Presiding Judge did not address the issue of refunds.

85. The parties' March 21, 2006 transmission service agreement states that:

The Transmission Provider and the Transmission Customer agree that for the term of this service agreement Transmission Customer will make payments equal to the charges under this agreement into an escrow account. If FERC should determine that the Transmission Customer's transmission of power from Luna to Springerville or from Luna to Greenlee is provided for by the Tucson – El Paso Power Exchange and Transmission Agreement, dated April 19, 1982, the funds in the escrow account (including any interest earned by the escrow account) shall be returned to Transmission Customer. In the alternative, if FERC determines that the Transmission Customer is required to obtain OATT service, then within 10 days of issuance of FERC's order, the funds in the escrow account (including any interest earned by the escrow account) shall be paid to Transmission Provider.¹⁰³

86. The parties now state that Tucson paid for transmission service directly and did not use an escrow account. El Paso does not dispute that it received such payments, nor did it file a replacement agreement. Rather, El Paso continued to perform as if the March 21, 2006 transmission service agreement continued in effect.

87. El Paso now argues that the Commission's original order in this case, before rehearing, is the Commission's "final order on the merits." Therefore, argues El Paso,

¹⁰³ Docket No. ER06-603-000, Attachment A at section 6.0.

the interim service agreements “expired” 30 days after such order.¹⁰⁴ El Paso’s expiration argument is inconsistent with El Paso’s continued performance without filing a replacement service agreement. It is also inconsistent with the parties’ intent in the March 21, 2006 transmission service agreement that El Paso should return such payments to Tucson if the Commission rules in Tucson’s favor. Accordingly, we order El Paso to return to Tucson sums it received from Tucson for transmission service from Luna that could have been provided under the 1982 Agreement as described herein.

88. As shown above, the parties did not provide for a rate of interest in the March 21, 2006 agreement. Nonetheless, they clearly provided for interest, and in the absence of a specific rate, we order El Paso to pay interest at the Commission’s rate, which is set forth in 18 C.F.R. § 35.19a(a)(2)(iii) (2008).

E. Other Arguments on Exception and in Motions for Leave to Answer and Answer.

89. El Paso asserts that the Presiding Judge failed to apply Arizona law to the 1982 Agreement. We disagree. As Staff points out, under Arizona law, “the contract must be interpreted to give effect to the expressed intent of the parties at the time of contract formation.”¹⁰⁵ The Presiding Judge reviewed evidence of such intent extensively, and reflected his interpretation of the parties’ intentions in the findings and conclusions of the Initial Decision.¹⁰⁶ In fact, the entire hearing centered on the issue of the parties’ intentions at the time of the 1982 Agreement’s formation, and El Paso’s argument that the Presiding Judge did not apply Arizona law is not supported by the record. Given our conclusion that the Presiding Judge applied Arizona law, El Paso and Staff’s disagreement in their motions for leave to answer and answers about whether such issue was properly raised is moot and we deny the motions.

90. While we agree with El Paso that the parties discussed the back-up transmission of power between Springerville and Greenlee when they negotiated the 1982 Agreement, the Presiding Judge found that this was not the only purpose of section 6.3 and 6.4, and we agree with his finding.¹⁰⁷ As the Presiding Judge found after his careful review and

¹⁰⁴ Brief of El Paso Electric Company Opposing Tucson Electric Power Company’s Exceptions at 9.

¹⁰⁵ Staff Brief Opposing Exceptions at 10, citing *Ashton v. Ashton*, 359 P.2d 400, 402-403 (Ariz. 1961) and *Taylor v. State Farm Mut. Auto Ins. Co.*, 854 P.2d 1134, 1139 (Ariz. 1993).

¹⁰⁶ Initial Decision P 82-120.

¹⁰⁷ *Id.* P 47.

consideration of all of the evidence, including the testimony of the parties, while only the back-up of deliveries from Springerville to Greenlee was discussed, Tucson drafted the 1982 Agreement, which had a 40-year life, beginning after the Springerville-Luna line was completed, and Tucson gave itself extensive rights for possible future use.¹⁰⁸ The Presiding Judge found that El Paso had ample opportunity in the negotiations to limit Tucson's rights, but did not do so. We find the Presiding Judge's decision to be reasonable given the evidence presented.

91. The Commission agrees with the parties that re-direct rights under section 22.1 of the *pro forma* OATT do not apply to their dispute. However, while the Presiding Judge discussed re-direct rights under section 22.1 of the *pro forma* OATT, we find that he did not rely upon any provisions in the OATT to render his findings.¹⁰⁹

92. The Commission finds that El Paso's assertion that the Presiding Judge's conclusions are "riddled with contradictions to his findings, internal inconsistencies and logical fallacies" is neither supported by El Paso's arguments nor evident in the Initial Decision. In fact, El Paso only supports these assertions with its statements that its interpretation of sections 6.3 and 6.4 "gives meaning to each term of the contract and does not require the addition of words not already in the contract."¹¹⁰ Without specific examples of alleged contradictions, inconsistencies or logical fallacies, El Paso's assertions are merely arguments. Regardless, as we have stated above, we find that the Presiding Judge reasonably reviewed all of the evidence and his interpretation of the 1982 Agreement is reasonable based on such evidence.

93. The balance of El Paso's exceptions, including its proffered interpretation of the fact that the 1982 Agreement was "for" 200 MW, the Presiding Judge's reliance on the omission of bidirectional language in sections 6.3 and 6.4, and his alleged failure to give due consideration to evidence of the parties' course of conduct before litigation, go to the weight the Presiding Judge gave to all of the testimony. As stated by Staff, the Presiding Judge found no credible extrinsic evidence addressing the ambiguity in sections 6.3 and 6.4.¹¹¹ We agree with the Presiding Judge and Staff that while testimony was credible and not contradicted, it did not fully illuminate the thought processes of either Tucson or

¹⁰⁸ *Id.* We do not find Tucson's broad language to be unethical behavior on the part of Tucson given the ample time El Paso had to review these rights and seek more restrictive language when the parties were negotiating the 1982 Agreement.

¹⁰⁹ *Id.* P 70-71.

¹¹⁰ El Paso Brief on Exceptions at 29-30.

¹¹¹ Staff Brief Opposing Exceptions at 15.

El Paso at the time the 1982 Agreement was negotiated and drafted.¹¹² Therefore the Presiding Judge turned to interpretation of the language of sections 6.3 and 6.4 themselves. There is nothing in the record in this case that shows that the Presiding Judge did less than thoroughly review and give proper weight to the testimony and evidence presented. He took an active role in questioning the witnesses, did not limit either of the parties' arguments or presentations, and thoroughly considered such evidence in the Initial Decision.

94. Finally, the Commission agrees with Tucson, El Paso and Staff that the Presiding Judge's observations about whether the 1982 Agreement is properly accounted for in the parties' rates is not before the Commission.

The Commission orders:

(A) The Initial Decision is affirmed in part and reversed in part, as discussed in the body of this order.

(B) The transmission rights given to Tucson in sections 6.3 and 6.4 of the 1982 Agreement are not restricted for transmission of power from Springerville as the receipt point to Greenlee as the delivery point.

(C) Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to either Springerville or Greenlee so long as it transmits no more than 200 MW over all segments combined.

(D) The transmission service under the 1982 Agreement is firm.

(E) El Paso must pay to Tucson all sums with interest at the rate set forth in 18 C.F.R. § 35.19a(a)(2)(iii) (2008) that Tucson has paid it for transmission under the February 2, 2006 and March 21, 2006 transmission service agreements consistent with this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹² *Id.* at 13.

