

132 FERC ¶ 61,017  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company

Docket Nos. EL06-45-004  
EL06-46-004

v.

Tucson Electric Power Company

ORDER DENYING REHEARING

(Issued July 7, 2010)

1. In the Order on Initial Decision in this proceeding,<sup>1</sup> the Commission affirmed the Initial Decision in part and reversed it in part. On December 15, 2008, El Paso Electric Company (El Paso) submitted a request for rehearing. For the reasons discussed below, we deny the rehearing request.

**I. Background**

2. In 1982, El Paso and Tucson Electric Power Company (Tucson) entered into the Tucson – El Paso Power Exchange and Transmission Agreement (1982 Agreement). In the 1982 Agreement, El Paso and Tucson agreed to exchange capacity and energy so that each company could facilitate delivery from generating units closer to its native load. The 1982 Agreement also provided that Tucson and El Paso would cooperate in the construction of a new 345 kV transmission line between a Tucson substation and an El Paso substation, which were not directly connected at that time. Finally, in the 1982 Agreement, Tucson and El Paso agreed to assign to each other certain transmission rights in facilities that they each owned.

3. 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

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<sup>1</sup> *El Paso Electric Company v. Tucson Electric Power Company*, 125 FERC ¶ 61,171 (2008) (Order on Initial Decision).

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 one of two points of delivery. 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.<sup>2</sup>

4. On January 10, 2006, in Docket No. EL06-45-000, El Paso filed a complaint against Tucson seeking an order that Tucson was required to purchase transmission service from El Paso under El Paso's Open Access Transmission Tariff (OATT) before it could use El Paso's transmission system to transmit the output of the Luna Station. The following day, Tucson filed a complaint against El Paso in Docket No. EL06-46-000 seeking an order stating that it was permitted to use the 1982 Agreement to transmit the output of the Luna station to Tucson's system.

5. Unable to resolve the dispute, on February 1, 2006, the parties filed an unexecuted transmission service agreement with the Commission and subsequently, on March 21, 2006, entered into an executed transmission service agreement (collectively, Interim Transmission Service Agreements) to transmit power from Tucson's share of the Luna station to Tucson's system.

6. On April 24, 2006, the Commission granted the El Paso complaint and dismissed the Tucson complaint.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>2</sup> 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. *El Paso Electric Company v. Tucson Electric Power Company*, 120 FERC ¶ 63,016, at P 27 (2007) (Initial Decision).

<sup>3</sup> *El Paso Electric Company v. Tucson Electric Power Company*, 115 FERC ¶ 61,101 (2006).

<sup>4</sup> *El Paso Electric Company v. Tucson Electric Power Company*, 117 FERC ¶ 61,017 (2006).

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:

- (a) 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
  - (b) 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.
7. The Presiding Judge made the following findings:
  - (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; and
  - (b) Tucson may use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to either Springerville or Greenlee.<sup>5</sup>
8. In its Order on Initial Decision, the Commission adopted the Presiding Judge's decision in part and reversed it in part. Specifically, the Commission made the following findings:
  - (a) 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
  - (b) Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna station to either Springerville or Greenlee.<sup>6</sup>
9. The Commission reversed the Presiding Judge on two points and held, however, that Tucson may not use its rights granted under the 1982 Agreement to transmit 200 MW from Luna to Greenlee and simultaneously transmit 200 MW from Luna to

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<sup>5</sup> *Id.* P 123.

<sup>6</sup> *See*, Order on Initial Decision at P 77.

Springerville. The Commission found further that the nature of the service from Luna to Greenlee should be characterized as firm rather than non-firm service.<sup>7</sup>

10. El Paso filed a request for rehearing of the Order on Initial Decision. Pursuant to Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2010), El Paso also filed motions to lodge. Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2010), Tucson filed answers to the motions to lodge.

## **II. Discussion**

### **A. Parties' Intent**

11. El Paso argues that, in accordance with Arizona law, if contract language is found to be ambiguous, extrinsic evidence must be used to ascertain the parties' intentions. El Paso further contends that, if the Presiding Judge had properly relied on extrinsic evidence to ascertain the parties' intent, he could only have determined that the parties' bargain was for only one continuous path (from Springerville to Greenlee), rather than granting additional point-to-point transmission rights. El Paso cites various examples of extrinsic evidence that it alleges the Presiding Judge did not consider.

12. As an initial matter, we note that El Paso raises the same argument now on rehearing concerning whether the Presiding Judge considered all of the extrinsic evidence that it raised in its brief on exceptions to the Initial Decision.<sup>8</sup> In the Order on Initial Decision, the Commission addressed this argument when it determined that "[t]here 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."<sup>9</sup> We find that El Paso's argument that the Presiding Judge did not consider all of the extrinsic evidence to be no more convincing now than when the Commission considered this argument in the Order on Initial Decision.

13. Moreover, even in examining the extrinsic evidence that El Paso argues the Presiding Judge did not consider, we continue to find El Paso's arguments unconvincing. In support of its interpretation of the parties' intent, El Paso quotes six paragraphs from the Initial Decision to show that the Presiding Judge should not have concluded that the

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<sup>7</sup> *Id.* P 78.

<sup>8</sup> *Id.* P 93.

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

“1982 Agreement provides for any use of Luna or Hidalgo by Tucson.”<sup>10</sup> The Commission is not persuaded by El Paso’s use of selected paragraphs or portions of paragraphs from the Presiding Judge’s Initial Decision. El Paso, in quoting selected paragraphs as support for its argument that the Presiding Judge did not make reasonable conclusions concerning the parties’ intent, ignores the Presiding Judge’s final conclusion on this issue, which he based on a balancing of all of the evidence in the record.

14. For example, El Paso refers to witness Frederic Mattson’s “eyewitness account” of the conference at which the 1982 Agreement was negotiated, and quotes the Presiding Judge as stating, “I fully accept [Mr. Mattson’s] emphatic assertions (Tr. 185, 194-95) that only a transaction involving a back-up of transmission over the complete circuit(s) from Springerville to Greenlee was discussed at the three-and-a-half-hour conference called by [Tucson] and held in its offices to discuss its proposed agreement.”<sup>11</sup> However, El Paso omits from the quoted material the Presiding Judge’s conclusion, which is contained in the same paragraph of the Initial Decision. In his conclusion, the Presiding Judge stated that the key to the construction of the parties’ intent was in the language that was adopted and not in the “ambiguous, and opinionated declarations of the respective companies’ employees, mostly self-serving and after the fact.”<sup>12</sup>

15. El Paso also neglects to mention other evidence that the Presiding Judge analyzed, which led to his decision, such as his extensive review of the configuration of transmission lines and load at the time of the 1982 Agreement. He noted that Tucson’s principal interest in negotiating the 1982 Agreement was to obtain the broadest possible rights to use the El Paso system, even if Tucson did not intend at the time to expand its generation resources.<sup>13</sup> The Presiding Judge also observed that the 1982 Agreement did not expressly limit the use of El Paso’s transmission system to a path from Springerville to Greenlee.<sup>14</sup> These observations help demonstrate that the Presiding Judge conducted an extensive review and discussion of the evidence and then relied on the weight of the evidence to ascertain the intent of the parties.

16. El Paso further argues that, contrary to the Commission’s finding, the 1982 Agreement contains a written prohibition that restricts the transmission of power to

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<sup>10</sup> El Paso Request for Rehearing at 40 and 41.

<sup>11</sup> *Id.* at 37.

<sup>12</sup> Initial Decision at P 44.

<sup>13</sup> *Id.* P 47, 63-64.

<sup>14</sup> *Id.* P 51.

intermediate points such as Luna and Hidalgo.<sup>15</sup> El Paso states that sections 6.3 and 6.4 must be read together to understand that this written prohibition is “embedded in the contract language.”<sup>16</sup>

17. We note that, in the Order on Initial Decision, the Commission found that the Presiding Judge reasonably 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.<sup>17</sup> We find that El Paso has not presented any convincing evidence to demonstrate that the Presiding Judge’s interpretation of the 1982 Agreement was unreasonable. In essence, El Paso argues that if the 1982 Agreement is read a very particular way, the Presiding Judge should have understood that a prohibition is “embedded in the contract language.” We find no merit to this argument because El Paso’s reliance on its narrow reading of language in the 1982 Agreement ignores the many other factors that the Presiding Judge relied on to reach his interpretation of language that the Commission found to be ambiguous.<sup>18</sup>

18. Furthermore, we find no merit to El Paso’s argument that extrinsic evidence demonstrates that neither El Paso nor the New Mexico Public Service Commission (New Mexico PSC) would have accepted language that provided for any use of Luna or Hidalgo without written restrictions on their use as delivery points. Specifically, while El Paso quotes testimony from the New Mexico PSC proceeding, this testimony simply does not support the assertion that the New Mexico PSC would not have accepted language that provided for any use of Luna or Hidalgo without written restrictions on their use as delivery points.<sup>19</sup>

19. In an attempt to demonstrate that El Paso would not have accepted language that provided for any use of Luna or Hidalgo without written restrictions on their use as delivery points, El Paso asserts that Tucson’s use of Luna as a point of delivery would

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<sup>15</sup> El Paso Request for Rehearing at 45.

<sup>16</sup> *Id.*

<sup>17</sup> Order on Initial Decision at P 79.

<sup>18</sup> *See also, Florida Power and Light Co.*, 67 FERC ¶ 61,141 at 61,396 and n. 11 (1994) (the Commission has every right to expect parties to express clearly their intentions and not require the Commission to read into agreements what is not spelled out).

<sup>19</sup> *See generally*, El Paso Request for Rehearing at 47-49 (El Paso’s discussion of the proceedings and some testimony before the New Mexico PSC).

severely compromise El Paso's ability to use its investment in the Springerville – Luna line and undermine El Paso's ability to facilitate the transfer of power into southern New Mexico. However, we find that this argument is unpersuasive because the 1982 Agreement, in fact, provided for the transfer of 200 MW from Springerville in the direction of Luna and as such the 1982 Agreement did not affect transfers into southern New Mexico that had not already been considered. We further note that, when evaluating transfers into southern New Mexico, power tends to flow from Springerville in the direction of Luna. Considering this fact, it is likely that a counterflow transfer of power from Luna in the direction of Springerville would have the potential to improve El Paso's capacity to transfer power into southern New Mexico, from Springerville to Luna.

20. El Paso also relies on the Commission's original order on the complaints in which the Commission held that sections 6.3 and 6.4 of the 1982 Agreement are ambiguous, to argue that that order is "in direct conflict" with the Commission's subsequent findings in the Order on Initial Decision. In making this argument, El Paso selectively focuses on Commission findings in that order and ignores the fact that the Commission subsequently issued a rehearing order in which it found that there were issues of material fact with respect to the interpretation of sections 6.3 and 6.4 of the 1982 Agreement that warranted an evidentiary hearing.

21. We find that El Paso misunderstands the Commission's original order on the complaints and the rehearing order in this proceeding. Specifically, we note that in the rehearing order, the Commission directed the development of an evidentiary record. The Presiding Judge satisfied the Commission's directive through his development of a fuller record that better illuminated the parties' intent in the 1982 Agreement. For El Paso to assert that the subsequent Order on Initial Decision is trumped by the earlier, original order on the complaints demonstrates its misunderstanding of the purpose of these orders, rather than Commission error as El Paso alleges. A possibly changed outcome in the Commission's Order on Initial Decision is fully contemplated by the fact that the Commission ordered an evidentiary hearing and is simply the result of the development of a fuller evidentiary record upon which the Commission based its decision in the Order on Initial Decision.

22. El Paso further contends that, because El Paso owned only 200 MW of capacity between Hidalgo and Greenlee, even though it had greater capacity available on other segments, the assignment of only 200 MW of capacity to Tucson necessarily demonstrates that the parties intended that Tucson only be granted rights to a single Springerville to Greenlee path (which includes the Hidalgo to Greenlee segment).<sup>20</sup> We do not agree with El Paso that, simply because El Paso had more capacity than 200 MW on parts of the Springerville to Greenlee path, but at the same time the 1982 Agreement

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<sup>20</sup> *Id.* at 55.

limited Tucson to 200 MW, this necessarily demonstrates that the parties intended that Tucson only be granted rights to a single Springerville to Greenlee path. There are many possible reasons to explain why El Paso and Tucson agreed to a 200 MW capacity limitation in the 1982 Agreement. It is not logical to assume, and the record does not support a finding, that the *only* reason for this 200 MW capacity limitation was that the parties intended that Tucson would be granted rights to a single designated path alone. For this reason, we find that El Paso's assumption concerning the meaning behind the 200 MW capacity limitation to Tucson is unconvincing.<sup>21</sup>

23. El Paso argues that, had the Presiding Judge not relied on "implicit, unstated, assumption[s]," the Presiding Judge should have interpreted the plain language of the 1982 Agreement consistent with El Paso's interpretation."<sup>22</sup> In order to understand how the Presiding Judge should have interpreted the "plain language" of the 1982 Agreement in accordance with El Paso's interpretation, El Paso states that the 1982 Agreement must be read using "industry convention which describes circuits in the direction of the predominant flow."<sup>23</sup>

24. We note that the Commission addressed this issue in the Order on Initial Decision when it disagreed with El Paso concerning the use of industry convention to interpret flow direction in the 1982 Agreement.<sup>24</sup> Specifically, the Commission agreed with the Presiding Judge's conclusion that the phrase, "Springerville-Luna 345 kV circuit" does not convey a specific flow direction.<sup>25</sup> In agreeing with the Presiding Judge, the Commission stated that "[w]hile the 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

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<sup>21</sup> As stated above, the Presiding Judge thoroughly analyzed all of the evidence in the record, which led to his decision concerning the configuration of transmission lines and load at the time of the 1982 Agreement. He noted that Tucson's principal interest in negotiating the 1982 Agreement was to obtain the broadest possible rights to use the El Paso system, even if Tucson did not intend at the time to expand its generation resources. The Presiding Judge also observed that the 1982 Agreement did not expressly limit the use of El Paso's transmission system to a path from Springerville to Greenlee.

<sup>22</sup> El Paso Request for Rehearing at 56.

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

<sup>24</sup> Order on Initial Decision at P 80.

<sup>25</sup> *Id.*

the parties had intended to limit the direction on the Springerville-Luna 345 kV circuit, they knew how to do so.”<sup>26</sup>

25. El Paso has presented no evidence to show that the Presiding Judge’s careful consideration of this issue is incorrect. El Paso points only to the use of the conjunctive “and” in section 6.3 of the 1982 Agreement to tie a description of the planned circuit to a description of the existing circuit.<sup>27</sup> El Paso contends that the parties’ use of the phrase “the existing 345 kV circuit from Luna via Hidalgo to Greenlee,” when read using the conjunction “and” to tie in a description of the planned circuit from Springfield to Luna makes clear that the circuits must be used together: one providing the Path 47 predominant flow and the other providing the counterflow.<sup>28</sup>

26. We find El Paso’s reliance on a single conjunction to provide definitive clarity concerning the parties’ intent, notwithstanding the weight of the record as a whole, is unconvincing. We note that the word “and” could easily mean “also” or “additionally,” so that section 6.3 is simply a list of the two circuits designated for assignment of capacity. El Paso’s strained interpretation of the meaning of the conjunction provides us no persuasive reason to depart from our finding that the weight of the evidence, including other language in the 1982 Agreement, demonstrates that if the parties had intended to limit the direction on the Springerville-Luna 345 kV circuit, the parties would have done so using more explicit language.<sup>29</sup>

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<sup>26</sup> *Id*; *See supra*, n.18.

<sup>27</sup> Section 6.3 of the agreement states that “EPE [El Paso] hereby assigns to TEP [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.”

<sup>28</sup> El Paso Request for Rehearing at 56.

<sup>29</sup> *See supra*, n.18. El Paso also argues that it would not have granted Tucson rights to transmit power from Springerville to Luna without an offsetting counterflow, because to do otherwise would impair El Paso’s rights to import its Palo Verde Station power into southern New Mexico. El Paso’s argument is unreasonable because Tucson had no need to transfer power from Springerville terminating at Luna because Tucson had no load to supply at Luna. As such, it would be unnecessary to have an offsetting counterflow from Luna to Springerville. Moreover, we note that power transmitted from Luna would characteristically act as a counterflow to transfers into southern New Mexico from either Greenlee or Springerville.

**B. Standard of Review**

27. El Paso also argues that “[b]y implicitly adding unwritten terms to the Agreement, the Commission acts in violation of the *Mobile-Sierra* doctrine since it has made no showing that a reformation of the contract is required by the public interest.”<sup>30</sup> We find unavailing El Paso’s argument that the *Mobile-Sierra* legal doctrine regarding the standard of review for changes to a contract is relevant to the Commission’s resolution of the complaints that arose from El Paso and Tucson’s contract dispute. The Presiding Judge and the Commission engaged in an effort to interpret, not reform, a contract. Accordingly, we find no merit to El Paso’s argument that the Commission’s interpretation of this contract is subject to the *Mobile-Sierra* doctrine.

**C. Public Policy Consideration**

28. El Paso further argues that “[t]he Commission’s failure to give effect to the bargain—as struck—works against policies to encourage infrastructure investments because it suggests that the Commission places little value on preserving the value of an investment on the terms the parties intended at the time the bargain was made.”<sup>31</sup> The Commission disagrees with El Paso’s argument that the Commission cares little for preserving the value of an investment on the terms the parties intended at the time the bargain was made. Rather, the Commission’s task in this case is to determine the parties’ intentions. The fact that El Paso disagrees with the Commission’s determination does not amount to Commission disregard for public policy.

**D. Lack of a Rational Explanation**

29. El Paso states that the Commission offers no rational explanation for its “change in direction” between the original order on the complaints and the Order on Initial Decision. As explained more fully above, El Paso misapprehends the relationship between the two. The Order on Initial Decision should not be simply a “rubber stamp” of a preceding Commission order because, in that order, the Commission had to consider additional relevant evidence concerning the intent of the parties. After the Commission determined on rehearing that the evidence submitted raised issues of material fact and ordered a hearing to resolve these issues, the Presiding Judge conducted a thorough evidentiary hearing to determine the parties’ intent. Once the Commission had the opportunity to evaluate the Presiding Judge’s findings based on that fuller evidentiary record, the Commission could rely and has relied on this record to reach its findings in the Order on Initial Decision.

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<sup>30</sup> *Id.* at 51-52.

<sup>31</sup> *Id.* at 61.

**E. Firm Rights to Transmit Power from Luna to Greenlee or Springerville**

30. El Paso contends that the Commission erred in rejecting the Presiding Judge's finding that Tucson's right to transmit power from Luna to Greenlee is non-firm. El Paso states that "[i]t is physically impossible for [El Paso] to provide [Tucson] with 200 MWs of firm service from Springerville to Greenlee (via Luna) and also 200 MWs of firm service from Luna to Greenlee"<sup>32</sup> (for a total of 400 MW on the Luna to Greenlee path) because El Paso's maximum total transfer capability on the Hidalgo (located between Luna and Greenlee) to Greenlee segment is 200 MW.

31. In the Order on Initial Decision, the Commission stated "[h]owever, 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."<sup>33</sup> The Order on Initial Decision further recognized that the Presiding Judge's finding was unclear, could entitle Tucson to as much as 400 MW and plainly exceeded the rights allocated in section 6.3 of the 1982 Agreement.<sup>34</sup>

32. In short, in the Order on Initial Decision, the Commission confirmed that the 1982 Agreement provides for only 200 MW of transmission rights in total, and as such, is firm under the terms of the agreement. As stated in the Order on Initial Decision, the Commission reviewed the record and found that the 1982 Agreement provides Tucson with rights to firm capacity. Furthermore, also as stated in the Order on Initial Decision, an El Paso witness confirmed that Tucson has the right to firm capacity from Springerville to Greenlee.<sup>35</sup>

**F. Refunds**

33. El Paso states that the Commission erred in its determination that El Paso has a contractual obligation to pay refunds, and interest on such refunds, under the Interim Transmission Service Agreements.<sup>36</sup> Specifically, El Paso contends that the Commission ordered refunds based on the erroneous assumption that the parties were performing

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<sup>32</sup> El Paso Request for Rehearing at 28.

<sup>33</sup> Order on Initial Decision at P 81.

<sup>34</sup> *Id.* P 82.

<sup>35</sup> *Id.* P 83.

<sup>36</sup> El Paso Request for Rehearing at 28.

under the Interim Transmission Service Agreements. El Paso states that the Commission, in ordering refunds in the Order on Initial Decision, was incorrect in the latter two of the following three findings: (1) El Paso and Tucson had executed the Interim Transmission Service Agreements; (2) El Paso did not file a replacement agreement; and (3) El Paso continued to perform as if the March 21 2006 transmission service agreement was in effect.<sup>37</sup> El Paso states that the Commission recognized in its original order on the complaints that the parties expressly limited the term of the Interim Transmission Service Agreements to the shorter of the adoption of a permanent transmission service agreement or one additional calendar month (in this case no later than May 31, 2006). Moreover, El Paso states that, following the termination of the Interim Transmission Service Agreements, a replacement agreement was not necessary because El Paso and Tucson operated under two previously existing 1998 blanket service agreements, which allowed for payments to be made directly, rather than through the use of an escrow account.<sup>38</sup>

34. We find that El Paso is incorrect that the Interim Transmission Service Agreements were not in effect after May 31, 2006. There are specific provisions for termination set forth in the Interim Transmission Service Agreements. Under Specifications For Firm Point-To-Point Transmission Service, section 1.0 provides for termination as follows:

Termination Date: The date of Final Decision by FERC in Docket No. EL06-45 and/or EL06-46 establishing whether the Transmission Customer is required to take service under the Transmission Provider's OATT; provided that, if FERC determines that the Transmission Customer is required to take service under the Transmission provider's OATT, Transmission Provider shall continue to provide Transmission Service under this Service Agreement for a period equal to the shorter of one full calendar month or until a new service agreement has been accepted.

35. El Paso's interpretation of the termination date established under the Interim Transmission Service Agreements is mistaken. Indeed El Paso's reliance on the Commission's earlier, original order on the complaints as the final order in this proceeding is misplaced. El Paso argues that the Commission's first order in this proceeding is the Commission's "final order on the merits." El Paso then comes to the erroneous conclusion that the Interim Transmission Service Agreements "expired" one additional calendar month after April 24, 2006. As noted above, El Paso misunderstands the Commission's original order on the complaints and the rehearing order in this proceeding. In the Commission's rehearing order, the Commission directed the

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<sup>37</sup> *Id.* at 77.

<sup>38</sup> *Id.* at 74.

development of an evidentiary record, which resulted in the administrative law judge's initial decision that informed the Commission concerning the issues in this proceeding. Because the Commission's original order on the complaints was not the Commission's final decision establishing whether the transmission customer is required to take service under the transmission provider's OATT, El Paso is incorrect that the Interim Transmission Service Agreements were not in effect after May 31, 2006.

36. Based upon the forgoing set of facts, we find that the Interim Transmission Service Agreements were still in effect beyond the May 31, 2006 termination date asserted by El Paso. Service under the two 1998 blanket agreements proffered by El Paso is only for service that is not covered by the 1982 Agreement. Because service from Luna to Greenlee or from Luna to Springerville is provided by way of the 1982 Agreement, we find that Tucson did not take service under the two 1998 agreements as argued by El Paso.

37. El Paso also argues that, even if the Interim Transmission Service Agreements were in effect, they do not provide for the relief that the Commission ordered. El Paso contends that, because there is no obligation in the Interim Transmission Service Agreements for El Paso to pay Tucson, the Commission erred in finding that these agreements create a contractual obligation for El Paso to pay refunds.

38. We note that the Commission already made a determination in the Order on Initial Decision concerning the parties' intent regarding refunds. Specifically, the Commission found that the parties intended in the March 21, 2006 transmission agreement that, if the Commission were to rule in Tucson's favor regarding its dispute with El Paso, El Paso should return payment that Tucson made for transmission service.<sup>39</sup> The relevant section of the parties' Interim Transmission Service Agreements states the following:

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

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<sup>39</sup> Order on Initial Decision at P 87.

escrow account (including any interest earned by the escrow account) shall be paid to Transmission Provider.<sup>40</sup>

39. We find that the language in the Interim Transmission Service Agreements that states that “the funds in the escrow account (including any interest earned by the escrow account) shall be returned to Transmission Customer” demonstrates that the parties intended that Tucson’s payments be returned to it. The fact that these funds were paid directly to El Paso, rather than into an escrow account, does not change the parties’ intent that El Paso should not retain these funds and that these funds should be returned to Tucson. We reaffirm our finding that El Paso must refund these charges to Tucson.

40. El Paso argues that it should not be required to pay Tucson interest on the sums Tucson has paid to it under the March 21, 2006 transmission agreement because such sums were not paid into an escrow account. El Paso also argues that the Commission erred in finding that the parties did not provide for a rate of interest. El Paso states that, because the Interim Transmission Service Agreements contemplated the use of an escrow account, the rate of interest could only be a “bank rate” and not the Commission’s interest rate.<sup>41</sup>

41. Notwithstanding the fact that Tucson has paid El Paso for transmission service for over four years, and El Paso has had full use of those funds—they have not been sequestered in an escrow account—Commission precedent is clear that when refunds are appropriate, the payment of interest is also appropriate, particularly when “the Company had the use of the customer’s money,” which is the case here.<sup>42</sup> El Paso argues that the parties intended a “bank rate” for any interest because the parties intended to sequester the funds in an escrow account; however, the parties did not do so. While the Commission always has the authority to waive its regulations, including those concerning interest on refunds, the Commission’s interest rate, which is tied to the prime rate, is a reasonable rate.<sup>43</sup> We will, therefore, apply the Commission’s interest rate to the repayment ordered herein.

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<sup>40</sup> *Id.* P 85 (quoting Docket No. ER06-603-000, Attachment A at section 6.0).

<sup>41</sup> El Paso Request for Rehearing at 80-81.

<sup>42</sup> *E.g.*, *Southern Natural Gas Co.*, 14 FERC ¶ 61,244, at 61,481-82 (1981); *see also*, *Cambridge Electric Light Co.*, 67 FERC ¶ 61,368, at 62,262 (1994).

<sup>43</sup> *Rate of Interest on Amounts Held Subject to Refund*, Order No. 47, FERC Stats. & Regs. ¶ 30,083, at 30,550, *order on reh’g*, Order No. 47-A, FERC Stats. & Regs. ¶ 30,099 (1979), *clarified*, FERC Stats. & Regs. ¶ 30,121 (1980).

42. Finally, El Paso argues that Tucson and the Commission did not fulfill various prerequisites necessary to obtain and order refunds. El Paso states that the Commission did not articulate any basis for ordering refunds, “[e]xcept for its mistaken view that [El Paso] had a contractual obligation to refund.”<sup>44</sup> We find this argument to be unpersuasive because, as quoted above, El Paso had an obligation to pay back funds pursuant to the terms it agreed to in the Interim Transmission Service Agreements. Because the Commission has wide latitude when fashioning remedies, including the unexceptional power to enforce contracts, and due to El Paso’s obligations under its agreement with Tucson, there is simply no merit to El Paso’s argument that the Commission could not order refunds in this case.<sup>45</sup>

43. El Paso also argues that Tucson “belatedly” raised the refund issue in its brief on exceptions to the Initial Decision, rather than in its complaint.<sup>46</sup> Specifically, El Paso contends that, because Tucson raised the refund issue “belatedly,” there is no established refund effective date as there would have been had Tucson requested refunds in its complaint. In essence, El Paso argues that absent a refund effective date, which would have provided notice to El Paso that it might be liable for refunds, the Commission should not order refunds. As an initial matter, we note that both Tucson and El Paso in the Interim Transmission Service Agreements agreed to a date upon which refunds should be made. In this agreement, both El Paso and Tucson decided that, upon the Commission’s final order in this case, *all* the funds in the escrow account are to be refunded to the prevailing party. Clearly, El Paso was on notice that it could be liable for refunds of the amounts that were to be deposited in escrow. As the courts have stated, the Commission’s authority is at its “zenith” when it comes to fashioning remedies.”<sup>47</sup> In this case, the Commission agrees with the parties that the equitable remedy is to follow the intent of the parties that refunds are appropriate (which is also consistent with the Commission’s general practice of ordering refunds).<sup>48</sup> For the above reasons, we find no

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<sup>44</sup> El Paso Request for Rehearing at 82.

<sup>45</sup> *City of Vernon, California*, 112 FERC ¶ 61,207, at P 79 (2005); *See also, e.g., Westar Energy Inc., v. FERC*, 568 F.3d 985, 989 (D. C. Cir. 2009) (Commission’s general practice is to order refunds); *accord, Towns of Concord v. FERC*, 955 F.2d 67, 76 (D. C. Cir. 1992).

<sup>46</sup> *City of Vernon* at 82.

<sup>47</sup> *Louisiana Public Serv. Comm’n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967), and citing *Arizona Corp. Comm’n v. FERC*, 397 F.3d 952, 956 (D.C. Cir. 2005) (noting that FERC wields maximum discretion when choosing a remedy)).

<sup>48</sup> *See supra*, n.47.

merit to El Paso's argument that the Commission could not order refunds because Tucson did not request refunds until it filed its brief on exceptions to the Initial Decision.

**G. Motion to Lodge**

44. El Paso moved to lodge with the Commission a complaint that Tucson filed in U.S. District Court for the District of Arizona, No. 4:08-CV-680-TUC-CKJ, and El Paso moved to dismiss such complaint and the resulting court order. Tucson filed answers to the motions to lodge.

45. Motions to lodge pleadings from other forums may be appropriate in some instances to supplement the Commission's record. El Paso's motions, however, do not relate to the issues in this rehearing. Accordingly, we will deny El Paso's motion to lodge.

The Commission orders:

- (A) El Paso's request for rehearing is hereby denied.
- (B) El Paso's motions to lodge are hereby denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.