

153 FERC ¶ 61,125  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Alterna Springerville LLC, LDVF1 TEP LLC,  
Wilmington Trust Company, and William J. Wade

v.

Docket No. EL15-17-001

Tucson Electric Power Company

ORDER DENYING REHEARING

(Issued October 30, 2015)

1. On February 19, 2015, the Commission issued an order that denied a complaint by Alterna Springerville LLC, LDVF1 TEP LLC, Wilmington Trust Company, and William J. Wade (collectively, Complainants) against Tucson Electric Power Company (Tucson) arguing that the terms of a Facility Support Agreement entitled them to firm transmission service over a specified path from Springerville Unit 1 to a specific delivery point at Palo Verde (Complaint).<sup>1</sup> In this order, we deny Complainants' request for rehearing.

**I. Background**

2. On November 7, 2014, Complainants filed the Complaint asserting that Tucson denied firm transmission service rights to the Palo Verde delivery point which Complainants asserted they are entitled to under a Facility Support Agreement executed in 1986, as amended and restated in 1992 (1992 FSA) in favor of transmitting Tucson's own generation and generation owned by others. Specifically, the Complaint alleged that Tucson: (1) denied Complainants firm transmission service in violation of certain

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<sup>1</sup> *Alterna Springerville LLC v. Tucson Elec. Power Co.*, 150 FERC ¶ 61,094 (2015) (February 2015 Order).

pre-Open Access Transmission Tariff (OATT) contractual commitments; (2) failed to reserve transmission capacity needed to provide that transmission service, as required by Tucson's OATT; (3) unduly discriminated against Complainants with regard to transmission access; and (4) granted undue preference for its own generation with regard to transmission access.

3. In the February 2015 Order, the Commission denied the Complaint on the basis that Complainants failed to show that section 5.1 of the 1992 FSA requires Tucson to provide firm transmission service from Springerville Unit 1 to the point of interconnection of Tucson's transmission system at Palo Verde, as requested by Complainants.<sup>2</sup> The Commission found that the language in section 5.1 of the 1992 FSA is clear and unambiguous and that the transmission service under the 1992 FSA is not dependent on the point of interconnection being "commercially feasible," as Complainants assert.<sup>3</sup> The Commission explained that, because the language of the 1992 FSA is unambiguous, it would not be appropriate for the Commission to consider extrinsic evidence in interpreting the contract.<sup>4</sup> Furthermore, the Commission reasoned that, even if it were to consider the extrinsic evidence proffered by Complainants, the evidence had little, if any, probative value.<sup>5</sup> The Commission also held that Complainants failed to provide sufficient persuasive evidence to support their allegation that the Four Corners and San Juan points of interconnection are not "reasonably acceptable" because they are not "commercially feasible."<sup>6</sup>

4. The Commission also found that Tucson did not violate its OATT by failing to set aside transfer capability for Complainants, noting that Complainants do not hold a right of first refusal for transmission from Springerville Unit 1 to Palo Verde.<sup>7</sup> The Commission further found that Tucson has not engaged in undue discrimination or preference in providing transmission service to Salt River Project because the

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<sup>2</sup> February 2015 Order, 150 FERC ¶ 61,094 at P 18.

<sup>3</sup> *Id.* P 19.

<sup>4</sup> *Id.* (citing *Duquesne Light Co. et al.*, 138 FERC ¶ 61,111, at P 25 (2012); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004); *Mid-Continent Area Power Pool*, 92 FERC 61,229, at 61,755 (2000)).

<sup>5</sup> *Id.* P 20.

<sup>6</sup> *Id.* P 21.

<sup>7</sup> *Id.* P 26.

transmission path utilized by Salt River Project has no impact on available transfer capability over the transmission path requested by Complainants.<sup>8</sup> The Commission also found that Tucson did not violate sections 2.1, 5.1, or 5.4<sup>9</sup> of the 1992 FSA, and that Tucson's transmission of generation over its transmission system does not constitute "action . . . which would have any adverse effect on" Complainants, in violation of section 2.1 of the 1992 FSA.<sup>10</sup> Finally, the Commission denied Complainants' request for the same discounted rates charged to Salt River Project because Complainants request transmission service over a different path, to a different point of delivery, than Salt River Project.<sup>11</sup>

5. On March 23, 2015, Complainants filed a request for rehearing. On April 7, 2015, Tucson filed an answer to Complainants' request for rehearing. On April 22, 2015, Complainants filed an answer to Tucson's answer.

## II. Discussion

### A. Procedural Matters

6. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 713(d)(1) (2015), prohibits an answer to a request for rehearing. Accordingly, we reject Tucson's answer and Complainants' answer to Tucson's answer.

7. In support of their request for rehearing, Complainants filed supplementary evidence, including new exhibits to support their argument that section 5.1 of the FSA requires that Tucson deliver Complainants' energy entitlement to the specific point of delivery at Palo Verde. The Commission generally does not allow the introduction of new evidence at the rehearing stage of a proceeding;<sup>12</sup> the Commission's procedures

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<sup>8</sup> *Id.* P 39.

<sup>9</sup> Section 5.4, Service Continuity, is not a subject of this rehearing.

<sup>10</sup> February 2015 Order, 150 FERC ¶ 61,094 at P 40.

<sup>11</sup> *Id.* P 41.

<sup>12</sup> *See, e.g., So. Cal. Edison Co.*, 137 FERC ¶ 61,016, at P 11 (2011) (citing *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 & n.64 (1994) ("The Commission generally will not consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target."); *Ark. Power & Light Co.*, 52 FERC ¶ 61,029, at 61,156 & n.14 (1990); *Philadelphia Elec. Co.*, 58 FERC ¶ 61,060, at 61,133 & n.4 (1992); *Cities and Villages of Albany and Hanover v. Interstate Power Co.*, 61 FERC ¶ 61,362, at 62,451 & n.4 (1992); *TransCanada Power Mktg. Ltd.*

(continued...)

encourage the timely submission of evidence and, consequently, the Commission adheres to the general rule that the record, once closed, will not be reopened.<sup>13</sup> For these reasons, we reject Complainants' supplement to the record.

**B. Substantive Matters**

**1. Interpretation of Section 5.1 of the 1992 FSA**

**a. Request for Rehearing**

8. Complainants seek rehearing of the Commission's finding that Complainants failed to submit "sufficient persuasive evidence to support their allegation that the Four Corners and San Juan points of interconnection are not 'reasonably acceptable' because they are not 'commercially reasonable.'"<sup>14</sup> Specifically, Complainants assert that they filed a complaint under section 206 of the FPA and presented substantial evidence demonstrating that Tucson's initial offer of transmission did not meet with their reasonable approval, and, therefore, the burden was then placed on Tucson to come forward with evidence demonstrating that Complainants' rejection of Tucson's offer was unreasonable.<sup>15</sup> Complainants contend that Tucson recognized its evidentiary burden by offering an affidavit alleging that Tucson's offer was, in fact, "commercially feasible."<sup>16</sup> However, according to Complainants, the Commission erred by failing first to determine whether the Tucson affidavit was sufficient to meet Tucson's evidentiary burden.<sup>17</sup>

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*v. ISO New England Inc.*, 123 FERC ¶ 61,149, at P 22 (2008); *Boralex Livermore Falls LP*, 123 FERC ¶ 61,279, at P 23 (2008); *N.Y. Indep. Sys. Operator, Inc.*, 125 FERC ¶ 61,299, at P 34 (2008); *Startrans IO, L.L.C.*, 130 FERC ¶ 61,209, at P 22 (2010)).

<sup>13</sup> *So. Cal. Edison Co.*, 137 FERC ¶ 61,016 at P 11 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,014, at P 24 (2010); *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)).

<sup>14</sup> Request for Rehearing at 3 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 21).

<sup>15</sup> *Id.* at 26 (citing *Nantahala Power & Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152, at 61,276, *reh'g denied*, Opinion No. 139-A, 20 FERC ¶ 61,430 (1982), *aff'd*, 727 F.2d 1342 (4th Cir. 1984)).

<sup>16</sup> *Id.* (citing Tucson Answer, Attachment 1, Affidavit of Michael Bowling, at 2).

<sup>17</sup> *Id.* at 27.

Complainants assert that the Commission improperly shifted the evidentiary burden to Complainants.<sup>18</sup>

9. Complainants also seek rehearing of the Commission's finding that the meaning of the term "reasonable approval" in section 5.1 of the 1992 FSA is clear and unambiguous, on several grounds.<sup>19</sup> First, Complainants argue that the Commission inappropriately found that the meaning of section 5.1 is "unambiguous" and that it would not consider extrinsic evidence proffered by Complainants.<sup>20</sup> Complainants contend that the Commission's refusal to consider Complainants' extrinsic evidence was erroneously based upon the restrictive "plain meaning" view of the parol evidence rule which permits consideration of extrinsic evidence only after a finding that the contested language is ambiguous.<sup>21</sup> Complainants note that section 8.14 of the 1992 FSA requires that the contract be construed in accordance with the laws of the State of Arizona, which provides that, when there is a contract dispute, finders of fact are required to consider and admit into evidence extrinsic evidence, even when the contract language appears, at first blush, to be unambiguous, unless the extrinsic evidence directly contradicts the plain language of the contract.<sup>22</sup>

10. Second, Complainants claim that the meaning of "reasonable approval" in section 5.1 of the 1992 FSA is not unambiguous, contrary to the Commission's finding, and therefore the Commission erred in finding that no fact finding is needed.<sup>23</sup> Complainants state that the Commission has previously ruled that the "test for determining whether the language in a contract is ambiguous is whether the language at issue 'is reasonably susceptible of different constructions or interpretations.'"<sup>24</sup> According to Complainants, they have demonstrated that their reasonable approval right means that they do not have to accept Tucson's proffer of delivery points at Four Corners

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<sup>18</sup> *Id.* (citing February 2015 Order, 150 FERC ¶ 61,094 at P 21).

<sup>19</sup> *Id.* at 4 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

<sup>20</sup> *Id.* at 28 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

<sup>21</sup> *Id.* (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

<sup>22</sup> *Id.* (citing *Smith v. Melson, Inc.*, 659 P.2d 1264, 1266-67 (Ariz. 1983) (en banc)).

<sup>23</sup> *Id.* at 29 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

<sup>24</sup> *Id.* at 30 (citing *El Paso Elec. Co. v. Tucson Elec. Power Co.*, 115 FERC ¶ 61,101, at P 32 (2006)).

and San Juan because such points do not provide access to an electric market that is “commercially feasible.”

11. Complainants contend that, by finding that “Tucson may fulfill its obligation under section 5.1 by offering delivery points at Four Corners and San Juan,” the Commission offers no explanation as to what reasonable approval means, which undermines the assertion that the term is unambiguous. Additionally, Complainants assert that the cases cited in support of the Commission’s finding that the term “reasonable approval” is unambiguous do not lend it any credence.<sup>25</sup> Complainants also state that the Commission’s conclusion that the term “reasonable approval” is unambiguous defies common sense. Complainants maintain that, whether or not an approval is “reasonable” requires an understanding of the precise facts and circumstances that gave rise to the approval obligation in the first instance.

12. Complainants note that substantial Commission resources are routinely devoted to determining whether proposed rates are “just and reasonable” under the FPA, and that the Commission routinely sets matters for hearing because it recognizes that these are fact-based issues that cannot be resolved without the benefit of the record created via an evidentiary hearing.<sup>26</sup> Accordingly, Complainants conclude that the Commission should grant rehearing and set for evidentiary hearing the issue of whether Complainants’ rejection of Tucson’s offer of transmission service to San Juan/Four Corners was unreasonable.<sup>27</sup>

13. Third, Complainants argue that the Commission’s interpretation of section 5.1 of the 1992 FSA is contrary to its plain meaning and, therefore, unlawful. Complainants contend that it would be contrary to their economic interest, and lacking in common sense, for Complainants to approve points of interconnection proposed by Tucson that are not, in their judgment, commercially feasible. Under such circumstances, Complainants argue, the only possible interpretation of the language “subject to such Owner Trustee’s reasonable approval” is that the points of interconnection to which electricity supplied by

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<sup>25</sup> *Id.* at 30-31 (citing *Duquesne Light Co.*, 138 FERC ¶ 61,111; *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154).

<sup>26</sup> *Id.* at 32 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,147 (2015); *Duke Energy Carolinas, LLC*, 150 FERC ¶ 61,118 (2015); *Pub. Serv. Co. of Colo.*, 149 FERC ¶ 61,208 (2014); *Nev. Power Co. & Sierra Pac. Co. v. Enron Power Mktg. Co., Inc.*, 108 FERC ¶ 61,074, at P 34 (2004)).

<sup>27</sup> *Id.* (citing Motion for Partial Summary Disposition at 4, 25-26).

Springerville Unit 1 is to be delivered are ones that Complainants deem to be commercially feasible.

14. Fourth, Complainants argue that the Commission's finding that "Tucson may fulfill its obligation under section 5.1 by offering delivery points at Four Corners and San Juan"<sup>28</sup> is unreasonable because it entirely excises from the contract Complainants' reasonable approval right.<sup>29</sup> Complainants argue that the Commission's findings violate the rules of contract construction, which require the finder of fact to avoid interpretations of contracts that render contract provisions meaningless or superfluous,<sup>30</sup> and divining the parties' intent under a contract requires a court to "give full meaning and effect to all of its provisions."<sup>31</sup> Complainants also assert that, by concluding that "it would be illogical to expect Tucson to set aside available transfer capability throughout Tucson's entire system on all possible paths,"<sup>32</sup> the Commission is imposing limitations on Tucson's obligations that are not set forth in the contractual language.

15. Fifth, Complainants state that, when the 1992 FSA was executed, the concept of available transfer capability on designated transmission paths did not exist, and, therefore, argue that consideration of available transfer capability is an after-the-fact rationale that has no bearing on the parties' intent. Complainants contend that, since 1986, Tucson knew that this power may be intended for the California market after the lease expired, and it had ample time in which to enhance its transmission system, and/or acquire additional contractual transmission rights on other utility systems, as needed, in order to address such concerns.<sup>33</sup> Complainants argue that it is incumbent on the Commission to protect the rights of Complainants based on the language of the 1992 FSA and the conditions which existed at the time such language was written.

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<sup>28</sup> *Id.* at 33 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 18).

<sup>29</sup> *Id.* at 34 (citing *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 449 (D.C. Cir. 2005)).

<sup>30</sup> *Id.* (citing *Manley v. AmBase Corp.*, 337 F.3d 237, 250 (2d Cir. 2003)).

<sup>31</sup> *Id.* (citing *Katel Ltd. Liability Co. v. AT&T Corp.*, 607 F.3d 60, 64 (2d Cir. 2010)).

<sup>32</sup> *Id.* (citing February 2015 Order, 150 FERC ¶ 61,094 at P 27).

<sup>33</sup> *Id.* at 35.

**b. Commission Determination**

16. We will deny Complainants' request for rehearing of the Commission's finding that Complainants failed to submit "sufficient persuasive evidence to support their allegation that the Four Corners and San Juan points of interconnection are not 'reasonably acceptable' because they are not 'commercially reasonable.'" Complainants are incorrect that the burden was on Tucson to demonstrate that Complainants' rejection of Tucson's offer was unreasonable. The Complaint set forth a specific request for "the issuance of an order requiring [Tucson] to transmit [Complainants'] entitlement share of energy that they schedule and direct [Tucson] to generate from Unit 1 of the Springerville Generating Station in Springerville, Arizona [], on a firm basis to the point of interconnection of [Tucson's] transmission system at the Palo Verde switchyard beginning on January 1, 2015, consistent with Complainants' contractual and legal rights."<sup>34</sup> Having filed the Complaint under section 206 of the FPA, it was Complainants' burden to establish a *prima facie* case that the contractual and legal rights of the 1992 FSA obligated Tucson to specify a point of delivery of Palo Verde.<sup>35</sup> Only after Complainants have established a *prima facie* case should any burden shift to Tucson to raise an affirmative defense.<sup>36</sup> In the February 2015 Order, the Commission found that Complainants' failed to establish a *prima facie* case, required in a complaint proceeding and, therefore, no inappropriate shift of burden occurred. Accordingly, we will deny Complainants' request for rehearing on this issue.

17. We also reject Complainants' assertion that the Commission inappropriately found that the meaning of section 5.1 is "unambiguous" and that it would not consider extrinsic evidence proffered by Complainants. It is true that the Arizona courts have adopted the view that extrinsic evidence is considered, and is admissible, if a judge finds that the contract language is "reasonably susceptible" to the interpretation asserted by its

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<sup>34</sup> Complaint at 2.

<sup>35</sup> See, e.g., *Nantahala Power & Light Co.*, Opinion No. 139, 19 FERC ¶ 61,152 at 61,276 ("As the judge properly points out, the burden of proof in a [section] 206 complaint proceeding is on the complainant. The burden consists of coming forward with a *prima facie* case and once this initial burden is met, the burden shifts to the respondent to make an affirmative defense. The judge does not distinguish the test for ultimate burden of proof from that of establishing a *prima facie* case. The test for *prima facie* evidence is whether there are facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain") (citations omitted).

<sup>36</sup> See *id.*

proponent.<sup>37</sup> However, the Arizona Supreme Court has also stated that “the court must *first decide what the agreement says* and, as a preliminary matter, must decide if it reasonably could be interpreted in different ways, given the language and the factual context surrounding the making of the agreement.”<sup>38</sup> In this case, the Complainants requested that the Commission find that the 1992 FSA requires Tucson to transmit Complainants’ entitlement shares of energy from the Springerville Unit 1 to the point of interconnection at Palo Verde.<sup>39</sup> As the Commission found, there is nothing in section 5.1 that specifies Palo Verde as the point of interconnection, nor is there anything in section 5.1 that indicates that Complainants are the ones to specify the point of interconnection in the first instance.<sup>40</sup>

18. Moreover, the Commission further found that, *even considering the extrinsic evidence proffered by Complainants*, it did not appear that the evidence created any condition or obligation applicable to Tucson, after expiration of the lease, to provide transmission service to Palo Verde, or any point specified by Complainants’ in the first instance.<sup>41</sup> Specifically, the Commission found that the extrinsic evidence (i.e., the 1992 FSA and the 1982 Revenue Ruling) did not create any condition or obligation applicable to Tucson, after expiration of the lease, to provide transmission service to a specific point of delivery that the Complainants deemed “commercially feasible.”<sup>42</sup> Therefore, in the February 2015 Order, the Commission correctly analyzed the admissibility of the extrinsic evidence and found that the contract language did not support Complainants’ interpretation that section 5.1 of the 1992 FSA required Tucson to specify a point of interconnection at Palo Verde. In other words, although Tucson committed to provide transmission service to Complainants, commencing January 1, 2015, it never committed to Palo Verde as the point of interconnection. Accordingly, we will deny Complainants’ request for rehearing on this issue.

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<sup>37</sup> See, e.g., *Taylor v. State Farm Mut. Auto Ins. Co.*, 854 P.2d 1134, 1140 n.2 (Ariz. 1993) (emphasis added).

<sup>38</sup> *Id.* at 1155 n.2.

<sup>39</sup> Complaint at 2.

<sup>40</sup> February 2015 Order, 150 FERC ¶ 61,094 at P 19.

<sup>41</sup> *Id.* P 20.

<sup>42</sup> *Id.*

19. We reject Complainants' contention that the Commission failed in finding that no fact finding is needed and that the meaning of "reasonable approval" in section 5.1 of the 1992 FSA is not unambiguous. We clarify that, in the February 2015 Order, the Commission was not making a determination on the meaning of "reasonable approval" in section 5.1, but instead found that, "[w]ith regard to Complainants' claim that *Tucson is obligated to offer Palo Verde as the delivery point*," section 5.1 is unambiguous.<sup>43</sup> In other words, in the February 2015 Order the Commission found that Tucson is not obligated by section 5.1 to offer the specific point of Palo Verde as the delivery point, and did not make any finding with regard to the meaning of the term "reasonable approval."

20. We also reject Complainants' contention that the Commission's interpretation of section 5.1 of the 1992 FSA is contrary to its plain meaning and unlawful. Indeed, we find that Complainants' position that "only deliveries to [Tucson's] interconnection point at Palo Verde would meet with their reasonable approval"<sup>44</sup> conflicts with the plain meaning of section 5.1. While we understand Complainants' assertion that Palo Verde is the only "reasonably acceptable" delivery point, that preference does not mean that Tucson must offer that specific point under the 1992 FSA. It is true that, under section 5.1 of the 1992 FSA, the point of delivery is subject to Complainants' reasonable approval; however, the delivery point is to be first "specified from time to time by Tucson." Also, as Tucson noted in its answer to the Complaint, the 1992 FSA did not specify a precise point of delivery or firm transmission path to which Complainants would have been entitled.<sup>45</sup> Therefore, the Commission's interpretation of section 5.1 does not turn on whether Tucson or Complainants decide what is "reasonably acceptable," but rather on the fact that Complainants are not entitled, under section 5.1, to dictate the specific point of delivery, when Tucson has not offered service to that interconnection point. Accordingly, we will deny Complainants' request for rehearing on this issue.

21. We also reject Complainants' argument that the Commission's finding that Tucson may fulfill its obligation under section 5.1 of the 1992 FSA by offering points of delivery at Four Corners and San Juan is unreasonable because it excises from the contract Complainants' reasonable approval right. As discussed above, the Commission focused on Complainants' request, which was, in effect, a request that the Commission find that Tucson must offer a point of interconnection, specified by Complainants, which the

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<sup>43</sup> *Id.* P 19 (emphasis added).

<sup>44</sup> Request for Rehearing at 2.

<sup>45</sup> Tucson Answer at 21-22.

Complainants claim is the only “reasonably acceptable” point of interconnection.<sup>46</sup> We affirm the finding in the February 2015 Order that section 5.1 of the 1992 FSA does not provide Complainants with the right to specify their preferred point of interconnection, and, instead, provides them with a right to “reasonable approval” of the points of interconnection “specified from time to time by Tucson.” The Commission did not take away Complainants’ reasonable approval or rejection rights as to Four Corners or San Juan; rather, it found that Tucson could offer those points under section 5.1, and Complainants could, under reasonable grounds, choose to accept or reject them. At this time, there is no available transfer capability over the path requested by Complainants, and so Tucson did not offer a point of delivery to Palo Verde, and instead, offered two other available points of interconnection. Because the 1992 FSA did not specify a precise point of delivery or firm transmission path to which Complainants would have been entitled, this was proper.<sup>47</sup> Accordingly, we will deny Complainants’ request for rehearing on this issue.

22. We find Complainants’ argument that the concept of available transfer capability did not exist at the time the 1992 FSA was executed to be unpersuasive. While it is true that the concept of available transfer capability on designated transmission paths did not exist at the time that the 1992 FSA was executed, the concept of available transfer capability has always existed because transmission capacity has always been limited. Further, the reality is that Complainants are seeking to commence firm transmission service *now*, when the concept of available transfer capability does exist, and this measure is the means by which Tucson plans its existing transmission system. As Complainants have acknowledged, they have never submitted any deposits,<sup>48</sup> and it would be unreasonable to expect Tucson to reserve transmission capacity, enhance its transmission system, or acquire additional contractual transmission rights on other utility systems, when the transmission service for which Complainants contracted was for future service when future conditions were unknown (i.e., whether Complainants would even take service at all as opposed to selling their entitlement shares). Accordingly, we will deny Complainants’ request for rehearing of this issue.

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<sup>46</sup> Complaint at 2.

<sup>47</sup> Tucson Answer at 21-22.

<sup>48</sup> Motion for Partial Summary Disposition at 2 n.3. Complainants assert that they did not provide deposits because Tucson stated that it had no available transfer capability on the requested path, and since Complainants seek service pursuant to the 1992 FSA, this issue is irrelevant. *Id.*

## 2. Other Extrinsic Evidence

### a. Request for Rehearing

23. Complainants seek rehearing of the Commission's finding that "it would be inappropriate to rely on the 1982 Revenue Ruling in interpreting the 1992 FSA, when the purpose of the 1986 ruling effectively expired once the five-year depreciation period ended and the tax savings were realized (i.e., in 1991)."<sup>49</sup> Complainants state that the 1986 ruling was a private letter ruling obtained by Alamito Company (Alamito) from the Internal Revenue Service (IRS) which addressed only the specific depreciation schedule (in this case a five-year depreciation schedule) that could be used with respect to Springerville Unit 1. On the other hand, the 1982 Revenue Ruling was published by the IRS as an official interpretation for the information and guidance of taxpayers generally, which did not specify a depreciation method, but rather specified the necessary elements of a transaction structure that would entitle a lessor to true lease treatment and the resulting tax benefits. Complainants argue that it is the obligation to comply with true lease requirements throughout the lease term that established the contractual wheeling requirements that are the subject of the Complaint. Thus, they assert, the Commission's finding incorrectly conflates these two separate concepts and is therefore fundamentally erroneous.<sup>50</sup>

24. In addition, Complainants seek rehearing of the Commission's finding that "there are no statements in the 1986 or 1992 FSAs to support the argument that the parties relied on the 1982 Revenue Ruling or contemporaneous documents in drafting and executing the 1992 FSA (i.e., the documents are not mentioned or incorporated by reference in the 1992 FSA)."<sup>51</sup> Complainants further state that the Commission erred in finding that "[i]t also does not appear that the 1982 Revenue Ruling created any condition or obligation applicable to Tucson, after expiration of the lease, to provide transmission service to a specific point of delivery that the Complainants deemed "commercially feasible." Likewise, the 1992 FSA does not reflect any such specific obligation.

25. Complainants argue that the Commission's findings demonstrate a misreading or miscomprehension of the Menaker Affidavit, the 1986 and 1992 transaction documents referenced therein, and the other pleadings filed in this docket. Complainants state that

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<sup>49</sup> Request for Rehearing at 5 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 20); *see* Complaint, Ex. 1 (Menaker Aff.), Att. B (1982 Revenue Ruling).

<sup>50</sup> Request for Rehearing at 42-43.

<sup>51</sup> *Id.* at 5 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

Mr. Menaker is personally knowledgeable about the tax considerations underlying the development of the 1986 and 1992 transaction documents, including the 1992 FSA, and, therefore, his affidavit has substantial probative value. Complainants point out that the affidavit was not challenged by Tucson and, notwithstanding, the Commission chose to ignore the Menaker Affidavit. According to Complainants, the Commission's refusal to consider the Menaker Affidavit and the balance of this extrinsic evidence constitutes reversible error because it was a threshold finding flatly contrary to applicable law. Complainants add that the Commission's alternative but superficial consideration of this evidence to support its findings demonstrates a miscomprehension of the Springerville transaction in all material respects.<sup>52</sup>

26. Complainants reiterate that the Menaker Affidavit explains that the 1982 Revenue Ruling, which set forth the IRS rules for insuring that a power plant lease qualified as a "true lease," provided the blueprint for the 1986 sale-leaseback transaction of Springerville Unit 1. Complainants state that the requirement that the Springerville Unit 1 sale-leaseback transaction must continue to comply with the IRS's true lease requirements remain unchanged. Therefore, Complainants assert that the Commission erred in finding that neither the 1982 Revenue Ruling nor the 1992 FSA created "any condition or obligation applicable to Tucson, after expiration of the lease, to provide transmission service to a specific point of delivery that the Complainants deemed 'commercially feasible.'"<sup>53</sup>

27. Moreover, Complainants argue that the Commission erred in finding that the 1992 FSA is a stand-alone document to be interpreted independent of the 1992 Revenue Ruling's true lease requirements. They contend that the 1992 FSA is one of many interrelated "Operative Documents" that are part of the 1992 Participation Agreement. For example, Complainants note that, while the precise words "1982 Revenue Ruling" do not appear in the Operative Documents, Exhibit B to the 1992 Participation Agreement reaffirms that the residual value of Springerville Unit 1, at the end of the lease term, as required by the 1982 Revenue Ruling, will be at least 20 percent of the asset's economic value as calculated at the beginning of the lease. Accordingly, Complainants argue that the 1992 FSA cannot be considered in isolation, and must instead be construed in conjunction with the related 1992 Participation Agreement documents, which were entered into to restructure the 1986 sale-leaseback transaction in order to allow Tucson to avoid bankruptcy.<sup>54</sup>

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<sup>52</sup> *Id.* at 37-39.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 39-42.

28. Accordingly, Complainants claim that the February 2015 Order is arbitrary and capricious and an abuse of discretion because it is based on a fundamental misapprehension and/or confusion of virtually all the relevant facts and law, and that the Commission's findings are contrary to the requirements of reasoned decision making and are therefore contrary to law.<sup>55</sup>

29. Moreover, Complainants seek rehearing of the Commission's finding that the 1992 FSA is "where the parties first expressed a post-lease firm transmission service obligation."<sup>56</sup> According to Complainants, this finding is unsupported and contrary to unrebutted evidence submitted by Complainants and is therefore arbitrary and capricious and contrary to the requirements of reasoned decision making.<sup>57</sup> Complainants contend that Tucson agreed in Service Schedule C to the original 1984 Interconnection Agreement between Tucson and Alamito, which had a term of 50 years from 1984, to engage in a power exchange in which Tucson would accept Alamito's entitlement to generation of Springerville Unit 1, which states that Tucson shall deliver "a like amount of capacity and associated energy for the account of Alamito to the Westwing Switchyard or, upon the request of Alamito and to the extent of Tucson's delivery capabilities, to the [Palo Verde], or, in part, to one or more other mutually-agreed-to Exchange Points of Delivery."<sup>58</sup> Complainants contend that Tucson's post-lease commitment was relied upon in the R.W. Beck Appraisal and the equity investors when they entered into the sale-leaseback transaction. According to Complainants, this shows that the post-lease firm transmission service rights existed long before the 1992 FSA.<sup>59</sup>

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<sup>55</sup> *Id.* at 5 (citing 5 U.S.C. §§ 706(2)(A), (C); *see also Motor Vehicles Mfg. Ass'n*, 463 U.S. 29, 42-43, 48-50 (1983); *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1115 (D.C. Cir. 2002); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1163-65 (D.C. Cir. 1998) (stating that failure to address a relevant argument is not a product of reasoned decision-making); *Shurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (stating that courts will vacate an agency decision if "[k]ey concepts are left unexplained," and "key evidence overlooked"))).

<sup>56</sup> *Id.* (citing February 2015 Order, 150 FERC ¶ 61,094 at P 19).

<sup>57</sup> *Id.* (citing 5 U.S.C. § 706(2)(A); *Shurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043 at 1050).

<sup>58</sup> *Id.* at 44.

<sup>59</sup> *Id.* at 44-45.

30. Finally, Complainants argue that the Commission's rejection of Complainants' market evidence was unreasonable. They state that Attachment B to the Mirich Affidavit showed that the volumes of electricity being traded at Four Corners were substantially lower than volumes of electricity traded at Palo Verde, and that the volume of electricity trades in the Four Corners market had declined substantially from 2009 through 2012. Complainants add that the Mirich Affidavit properly concluded that Four Corners is not a liquid market and that the addition of 195 MW of capacity at that location would dramatically increase available supplies, which would likely cause then preexisting prices at that location to plummet. Therefore, Complainants assert that it is arbitrary and capricious, and unreasonable, for the Commission to rule summarily that Complainants' rejection of the Four Corners market was unreasonable and to find that the Four Corners market can be deemed a commercially feasible market for electricity supplied from Springerville Unit 1 notwithstanding the fact that the prices of electricity at that point are likely to plummet by the addition of Complainants' Springerville Unit 1 output.<sup>60</sup>

**b. Commission Determination**

31. We will deny Complainants' request for rehearing of the Commission's findings that "it would be inappropriate to rely on the 1982 Revenue Ruling in interpreting the 1992 FSA, when the purpose of the 1986 ruling effectively expired once the five-year depreciation period ended and the tax savings were realized (i.e., in 1991),"<sup>61</sup> and that "there are no statements in the 1986 or 1992 FSAs to support the argument that the parties relied on the 1982 Revenue Ruling or contemporaneous documents in drafting and executing the 1992 FSA (i.e., the documents are not mentioned or incorporated by reference in the 1992 FSA)."<sup>62</sup>

32. Complainants miss the point of these findings entirely. As discussed above, section 5.1 of the 1992 FSA does not require Tucson to provide firm transmission service to Palo Verde, the point of interconnection requested by Complainants. Complainants attempt to use the prologue of the sale-leaseback transaction, including the 1992 Revenue Ruling, as the basis to obligate Tucson to provide Complainants transmission service to Palo Verde. However, the background events leading to the transaction do not impose any obligation on Tucson to provide Complainants transmission service to this specific delivery point at Palo Verde.

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<sup>60</sup> *Id.* at 45-46.

<sup>61</sup> February 2015 Order, 150 FERC ¶ 61,094 at P 20.

<sup>62</sup> *Id.* P 19.

33. Complainants argue that their supporting documents demonstrate that the sale and lease-back of Springerville Unit 1 would not have occurred absent compliance with the 1982 Revenue Ruling's "true lease" requirements. While it may be true that the transaction would not have occurred if not for the 1982 Revenue Ruling, nothing in the 1982 Revenue Ruling governs or implicates the transmission service to be offered to Complainants under the 1992 FSA, and, therefore nothing in the 1982 Revenue Ruling demonstrates that: (1) Tucson has denied firm transmission service rights to which Complainants are entitled under section 5.1 of the 1992 FSA, in favor of transmitting Tucson's own generation and generation owned by others; (2) Tucson has violated its OATT by failing to set aside transmission for Complainants' energy entitlements; or (3) Tucson, in using transmission capacity needed by Complainants for other purposes, has violated the 1992 FSA and is engaging in undue discrimination and preference, which together form the basis for the Complaint.

34. Complainants argue that the "true lease" requirements were the primary reason why section 5.1 of the 1992 FSA granted Complainants the "reasonable approval" transmission right. While this may be the case, the fact that the 1982 Revenue Ruling contains a true lease requirement does not impose any obligation on Tucson to provide Complainants transmission service to Palo Verde, which is the basis for the Complaint. Likewise, whether or not the 1992 FSA is where Complainants and Tucson first expressed a post-lease firm transmission service obligation, the fact remains that nothing in Complainants' supporting documentation demonstrates that Tucson has an obligation to provide Complainants transmission service to a single specified delivery point at Palo Verde, or that Tucson has committed the violations alleged by Complainants.

35. Therefore, the Commission's findings in the February 2015 Order are not made in error, are not arbitrary and capricious, are not based on a misunderstanding of Complainants' supporting documentation, and are not contrary to the requirements of reasoned decision making. Rather, the Commission's findings are based on an assessment of whether Tucson has committed any of the violations alleged by Complainants, and the answer is no.

36. Finally, contrary to Complainants' assertion, the Commission did not make a finding or opine on whether the Four Corners market can be deemed a commercially feasible market for electricity supplied from Springerville Unit 1 after the addition of Complainants' generation entitlement. Rather, the Commission found that Complainants did not provide sufficient persuasive evidence to support their allegation that the Four Corners and San Juan points of interconnection are not reasonably acceptable because they are not commercially feasible.<sup>63</sup> Indeed, as Complainants note, the

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<sup>63</sup> *Id.* P 21.

Complaint merely showed that the volumes of electricity being traded between 2009 and 2012 at Four Corners were lower than volumes of electricity traded at Palo Verde, without showing the actual prices.<sup>64</sup> The Commission found that Complainants' supporting documentation was not sufficient to prove that the Four Corners market would not be commercially feasible. Because Complainants did not make a sufficient showing, the Commission found that Tucson may fulfill its obligation by offering service to the contested delivery points. Accordingly, we will deny Complainants' requests for rehearing.

### 3. Evidentiary Hearing

#### a. Request for Rehearing

37. Complainants seek rehearing of the Commission's dismissal of Complainants' request for partial summary judgment and establishment of a limited evidentiary hearing.<sup>65</sup> Complainants state that this proceeding involves complex legal and factual issues that the Commission either failed to acknowledge or misapprehended in the February 2015 Order. Complainants assert that Tucson's procedural failure under Rule 213 of the Commission's Rules of Practice and Procedure<sup>66</sup> to "[a]dmit or deny, specifically and in detail, each material allegation" of the Complaint should have resulted in partial summary judgment for the six implicated issues, as identified in the Motion for Partial Summary Disposition.<sup>67</sup>

38. In addition, Complainants contend that the Commission erred in determining that it could summarily dispose of the three following issues: (1) whether Complainants had acted within their contractual rights to reject the delivery points offered by Tucson; (2) whether a proposed sale of transmission rights to Salt River Project was contractually barred because it would have an adverse impact on Tucson's ability to transmit Complainants' power to a commercially feasible delivery point; and (3) whether Tucson is contractually obligated to accord Complainants the same discounted rate for transmission as it has provided to Salt River Project.<sup>68</sup> Complainants assert that an

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<sup>64</sup> Request for Rehearing at 45-46.

<sup>65</sup> *Id.* at 5, 7 (citing February 2015 Order, 150 FERC ¶ 61,094 at P 18).

<sup>66</sup> 18 C.F.R. § 385.213(c)(2)(1) (2015).

<sup>67</sup> Request for Rehearing at 46 (citing 18 C.F.R. § 385.217 (2014)).

<sup>68</sup> *Id.* at 48 (citing Motion for Partial Summary Disposition at 4-5, 25-26).  
Complainants also raise this argument separately, and we discuss it more fully below.

evidentiary hearing is required where there are disputed issues of material fact that cannot properly be resolved on the basis of the pleadings,<sup>69</sup> and the Commission may reach decisions without holding evidentiary hearings only when there are no material facts in dispute.<sup>70</sup> Complainants argue that the Commission abused its discretion by ruling summarily against Complainants without first setting these disputed issues of material fact for hearing.<sup>71</sup> Complainants also claim that the Commission's February 2015 Order is unreasonable and arbitrary considering that Tucson conceded the existence of disputed issues of material fact.<sup>72</sup>

39. Complainants contend that the Commission erred in summarily dismissing the Motion for Partial Summary Disposition and denying the Complaint because it "fail[ed] to give a reasonable explanation for how it reached its decision."<sup>73</sup> According to Complainants, there is a complete dearth of "reasoned consideration" of the issues<sup>74</sup> and the February 2015 Order is replete with errors that deny Complainants due process. Complainants assert that only through discovery and cross-examination of the issues can all salient facts related to this dispute be presented in a fashion that gives the Commission sufficient information to make a reasoned decision.<sup>75</sup>

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<sup>69</sup> *Id.* at 49 (citing *Moreau v. FERC*, 982 F.2d 556, 560 (D.C. Cir. 1993); *Woolen Mill Assocs. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990)).

<sup>70</sup> *Id.* (citing *Pub. Serv. Co. of N.H. v. FERC*, 600 F.2d 944 (D.C. Cir. 1979)); *id.* at 50 (citing *Kourouma v. FERC*, 723 F.3d 274, 277-78 (D.C. Cir. 2013); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d at 1154).

<sup>71</sup> *Id.* at 49 (citing *Kourouma v. FERC*, 723 F.3d 274 at 279).

<sup>72</sup> *Id.* (citing Tucson Response to Motion for Partial Summary Disposition at 5-7, 11).

<sup>73</sup> *Id.* at 51 (citing *El Paso Elec. Co. v. FERC*, 201 F.3d 667, 671 (2000)).

<sup>74</sup> *Id.* at 52 (citing *Borden, Inc. v. FERC*, 855 F.2d 254, 258-59 (5th Cir. 1988); *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992)).

<sup>75</sup> *Id.* (citing *Env'tl. Action, Inc. v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993); *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994); *Wis. v. FERC*, 104 F.3d 462, 467 (D.C. Cir. 1997)).

**b. Commission Determination**

40. We will deny Complainants' request for rehearing on the dismissal of their request for partial summary judgment and establishment of a limited evidentiary hearing. We note that Complainants' reliance on *Kourouma v. FERC* is, in fact, quite apt, because the D.C. Circuit found that the Commission had not abused its discretion by making a summary disposition.<sup>76</sup> Notably, the fact that summary disposition was not in favor of Mr. Kourouma did not render the decision a legal error, as is the case here. We disagree with Complainants' assertion that Tucson failed to respond to the Complaint's material allegations, in violation of Rule 213 of the Commission's Rules of Practice and Procedure. On the contrary, we find that Tucson's answer to the Complaint, and accompanying affidavits, sufficiently met the requirements of Rule 213(c).

41. We also reject Complainants' contention that the Commission inappropriately disposed of certain issues that the Complainants argue should be set for evidentiary hearing. First, Complainants misconstrue the Commission's finding with regard to contractual rights. In the main, the Commission found in the February 2015 Order that the 1992 FSA did not require *Tucson* to specify *Palo Verde* as the point of interconnection. The Commission did not find that Complainants had no right to reject the points actually offered by Tucson, as contended by Complainants. The Complaint squarely sought an order stating that Tucson must offer Palo Verde as a point of interconnection, because the contract required this result.<sup>77</sup> The Commission issued an order addressing that point, and found that Tucson was permitted, under the 1992 FSA to offer Four Corners and San Juan as points of interconnection. Therefore, the matter of whether Complainants acted within their rights to reject the delivery points was not at issue, as the Commission did nothing to limit those rights, as discussed above.

42. With regard to the second and third issues raised by Complainants relating to Salt River Project, we affirm that these are material facts that are not in dispute, and, therefore, no evidentiary hearing was required on these points. Accordingly, we will deny Complainants' request for rehearing on these issues.

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<sup>76</sup> *Kourouma v. FERC*, 723 F.3d at 277-78.

<sup>77</sup> Complaint at 2.

#### 4. Mobile-Sierra<sup>78</sup>

##### a. Request for Rehearing

43. Complainants request rehearing of the Commission's interpretation that section 5.1 was clear and unambiguous, and allege that the Commission modified the 1992 FSA without complying with either *Mobile-Sierra* or Commission precedent.<sup>79</sup> Complainants assert that the Commission's rationalization that it "would be illogical to expect Tucson to set aside available transfer capability throughout Tucson's entire system on all possible paths"<sup>80</sup> does not meet the high standard imposed on those who seek to reform the terms of a contract against the will of a party to the contract.<sup>81</sup> Complainants also assert that the Commission modified the terms of the contract, which it could not do without first determining whether *Mobile-Sierra* protection applies and, if so, whether the record evidence meets the heavy burden of overcoming the presumption of justness and reasonableness under that standard.

44. Complainants further allege that the Commission erred in failing to accord the 1992 FSA *Mobile-Sierra* protection.<sup>82</sup> Complainants assert that the 1992 FSA embodies individualized rates, terms, and conditions that apply only to the entities that are parties to

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<sup>78</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

<sup>79</sup> Request for Rehearing at 6

<sup>80</sup> *Id.* (citing February 2015 Order, 150 FERC ¶ 61,094 at P 27).

<sup>81</sup> *Id.* at 54 (citing *ISO New England Inc.*, 143 FERC ¶ 61,150, at P 132 (2013)).

<sup>82</sup> Complainants state that, in ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the instrument at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length, or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Complainants also state that the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption; the latter constitute tariff rates, terms, or conditions to which the *Mobile-Sierra* presumption does not apply, although the Commission may exercise its discretion to apply the heightened *Mobile-Sierra* standard. *Id.* at 55 (citing *ISO New England, Inc.*, 143 FERC ¶ 61,150 at P 163).

the transaction, and no one has claimed that those parties are unsophisticated. Moreover, Complainants claim that the terms of the 1992 FSA were negotiated freely and at arm's length. Furthermore, Complainants state that the 1992 FSA does not establish rates, terms, or conditions of general applicability, nor did it arise in circumstances that undermine the assurance of justness and reasonableness associated with arm's-length negotiations. Specifically, Complainants aver that the Commission did not find that enforcing the "reasonable approval" requirement of section 5.1 of the 1992 FSA would impair Tucson's ability to continue service, cast an excessive burden upon consumers, or be unduly discriminatory, much less that it would cause any harm to the public.

45. Complainants further argue that, even without regard to *Mobile-Sierra*, the Commission has violated its own precedent favoring the sanctity of contracts. Complainants state that, under the lower "just and reasonable" standard, any party seeking contract modification bears a heavy burden.<sup>83</sup> Complainants assert that the Commission interpreted section 5.1 of the 1992 FSA as if the "reasonable approval" language did not exist, and refused to consider any evidence proffered by Complainants. Complainants state that such action was contrary to Commission precedent acknowledging that an evidentiary hearing and complete record is required before the Commission can ascertain whether the challenged contract would have an adverse effect on the public interest and, if so, whether that effect was of such a magnitude warranting modification of a freely entered into contract.<sup>84</sup>

**b. Commission Determination**

46. We will deny Complainants' request for rehearing of the Commission's interpretation that section 5.1 was clear and unambiguous, and deny the allegation that the Commission modified the 1992 FSA without complying with either *Mobile-Sierra* or Commission precedent. As discussed above, the Commission found that section 5.1 of the 1992 FSA does not provide Complainants with the right to specify their preferred point of interconnection, and instead, provides them with a right to "reasonable approval" or rejection of the points of interconnection "specified from time to time by Tucson." The Commission did not take away Complainants' reasonable approval or rejection rights; rather, it found that Tucson could offer those points under section 5.1, and

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<sup>83</sup> *Id.* at 57 (citing *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381, at P 27 (2002); *Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047, at P 31 (2013), *reh'g denied*, 146 FERC ¶ 61,017, at P 20 (2014)).

<sup>84</sup> *Id.* (citing *PacifiCorp v. Reliant Energy Servs., Inc.*, 99 FERC ¶ 61,381 at P 27 n.21).

Complainants could chose to accept or reject them. Therefore, the Commission did not modify the 1992 FSA.

## 5. Discounted Rates

### a. Request for Rehearing

47. Complainants seek rehearing of the Commission's decision not to require Tucson to offer transmission service to Complainants at discounted rates commensurate with those being charged to Salt River Project.<sup>85</sup> Complainants assert that the Commission's refusal is based on the incorrect assumption that Complainants' rates are to be governed by Tucson's OATT. However, they argue, Complainants' entitlement to rate parity with Salt River Project is based on the provisions of the 1992 FSA.<sup>86</sup>

48. Moreover, with respect to the specific transmission path, Complainants assert that, regardless of whether Tucson transmits Complainants' Springerville Unit 1 entitlements to Four Corners or to Palo Verde, the transmission service will involve the portion of Tucson's transmission system identified as the San Juan-Springerville-Vail Transmission System. According to Complainants, nothing in the 1992 FSA states that Complainants may only receive a Commission-approved rate for transmission service over the San Juan-Springerville-Vail Transmission System, comparable to that on file for another transmission service customer, if the transmission path on which they take service is unconstrained and involves delivery of electricity to the same delivery point on the San Juan-Springerville-Vail Transmission System as that being used by such other customers.<sup>87</sup> According to Complainants, the Commission's finding to the contrary is therefore arbitrary, capricious, and contrary to the requirements of reasoned decision making.<sup>88</sup>

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<sup>85</sup> *Id.* at 6-7.

<sup>86</sup> *Id.* at 6-7, 58-59.

<sup>87</sup> *Id.* at 58-60.

<sup>88</sup> *Id.* at 6-7 (citing 5 U.S.C. §§ 706(2)(A), (D); *Borden, Inc. v. FERC*, 855 F.2d 254 at 258-59 (“The ultimate issue in judicial review of [the Commission’s] determinations is the requirement of reasoned consideration.”) (internal quotation marks and citations omitted); *La. Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101 at 1113 (stating that record must demonstrate that issues on appeal were thoroughly vetted by the Commission); *Env’tl. Action, Inc. v. FERC*, 939 F.2d 1057 at 1061 (federal court will “set aside a decision of the FERC only if it is arbitrary and

(continued...)

**b. Commission Determination**

49. Contrary to Complainants' assertion, the Commission did not deny their request based on the assumption that Complainants' rates are to be governed by Tucson's OATT. Instead, the Commission denied Complainants' request "because Complainants request transmission service over a different path, to a different point of delivery, than Salt River."<sup>89</sup> In other words, the Commission found that the service requested by Complainants is *not* similar to Salt River Project's service. The "Springerville-to-Palo Verde" path over which Complainants seek to take transmission service is separate and apart from the "Springerville-to-Coronado" path involved in Salt River Project's transmission service. Accordingly, we affirm that, because the service requested by Complainants is not similar to Salt River Project's service, Tucson is not required to provide the same rate to Complainants.

50. Further, as we explained in the February 2015 Order, the Commission's policy with respect to the transmission paths on which a discount must be offered is that, if the transmission provider offers a discount on a particular path, i.e., from a point of receipt to a point of delivery, the transmission provider must offer the same discount for the same time period on all unconstrained paths that go to the same point(s) of delivery on the transmission provider's system.<sup>90</sup> As we noted above, this is not the case here. Accordingly, we will deny Complainant's request for rehearing on this issue.

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capricious or otherwise contrary to law"); *PacifiCorp v. Reliant Energy Servs., Inc. et al.*, 105 FERC ¶ 61,184, at P 56 (2003) ("Contract modification is, if anything, contrary to the Commission's policy of respecting contract sanctity and creating the regulatory certainty needed to attract sufficient capital to competitive power markets.")).

<sup>89</sup> February 2015 Order, 150 FERC ¶ 61,094 at P 41.

<sup>90</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,275–76, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

The Commission orders:

Complainants' request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.