

153 FERC ¶ 61,342
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tucson Electric Power Company

Docket No. EC15-31-001

ORDER DENYING REHEARING

(Issued December 28, 2015)

1. On November 12, 2014, Tucson Electric Power Company (Tucson Electric), on behalf of itself and its public utility affiliates,¹ filed an application pursuant to section 203(a)(1) of the Federal Power Act (FPA)² and Part 33 of the Commission's regulations³ requesting authorization to permit Tucson Electric (1) to sell to Salt River Project Agricultural Improvement and Power District (Salt River Project) an approximately 57.44 percent undivided interest in the 345 kilovolt (kV) Springerville-Coronado transmission line (Springerville-Coronado Line) and (2) to acquire from Salt River Project an approximately 42.56 percent undivided interest in certain upgrades

¹ Tucson Electric's energy subsidiaries and affiliates in the United States are: FortisUS Inc. (FortisUS); CH Energy Group Inc.; Central Hudson Gas & Electric Corporation; Central Hudson Enterprises Corporation; Hunterdon Cogeneration Limited Partnership; Plymouth Cogeneration Limited Partnership; CH-Community Wind Energy, LLP; FortisUS Energy Corporation; LRCS Limited Partnership; Luna Power Company, LLC; Millennium Energy Holdings, Inc.; San Carlos Resources Inc.; Southwest Energy Solutions, Inc.; Tucsonel Inc.; UNS Electric, Inc.; UniSource Energy Development Company; UniSource Energy Services, Inc.; and UNS Gas, Inc. Application for Approval Pursuant to Section 203 of the Federal Power Act and Request for Expedited Consideration, Exhibit B: Applicants' Subsidiaries and Affiliates in the United States, Docket No. EC15-31-000 (Nov. 12, 2014) (Section 203 Application).

² 16 U.S.C. § 824b(a)(1) (2012).

³ 18 C.F.R. pt. 33 (2015).

installed by Salt River Project on the Springerville-Coronado Line (Springerville-Coronado Upgrades) (Proposed Transaction).

2. The Commission reviewed the Proposed Transaction under the Commission's Merger Policy Statement⁴ and found that the Proposed Transaction was consistent with the public interest.⁵

3. Alterna Springerville LLC and LDVF1 TEP LLC (together, Intervenors) sought rehearing of the Section 203 Order.⁶ As discussed in further detail below, we deny the request for rehearing.

I. Background

A. The Section 203 Application

4. In the Section 203 Application, Tucson Electric proposed to (1) sell to Salt River Project an approximately 57.44 percent undivided interest in the Springerville-Coronado Line,⁷ along with associated real property interests, and (2) acquire from Salt River

⁴ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000) (Order No. 642), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵ See *Tucson Elec. Power Co.*, 151 FERC ¶ 61,089 (2015) (Section 203 Order).

⁶ Request for Rehearing of Alterna Springerville LLC and LDVF1 TEP LLC, Docket No. EC15-31-001 (filed June 1, 2015) (Request for Rehearing).

⁷ As the term was used in the Section 203 Application, the Springerville-Coronado Line consisted of (1) the 345 kV transmission line that runs between the Springerville Station and the Coronado Generating Station; and (2) a 500/235 kV transformer and associated facilities at the Coronado Generating Station. Section 203 Order, 151 FERC ¶ 61,089 at n.11.

Project an approximately 42.56 percent undivided interest in the Springerville-Coronado Upgrades. According to Tucson Electric, the Proposed Transaction was a component of a larger transaction involving the development of Springerville Units 3 and 4 at the Springerville Generating Station (Springerville Station), a four unit, coal-fired electric generating facility with a combined nameplate rating of 1,766 MW located in eastern Arizona. As explained more fully in the Section 203 Order, pursuant to a series of agreements related to the development of Springerville Units 3 and 4, Tucson Electric agreed to sell to Salt River Project interests in the Springerville-Coronado Line sufficient to provide Salt River Project with transmission rights to move the power it purchases from Springerville Unit 3, and sufficient for Salt River Project to move all of the output of Springerville Unit 4.⁸

5. In the Section 203 Application, Tucson Electric argued that the Proposed Transaction would not have an adverse effect on competition, rates, or regulation, and would not result in the cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company.

B. Protest of the Section 203 Application

6. Intervenors filed a protest of the Section 203 Application, arguing that the Proposed Transaction would have adverse effects on competition and regulation.⁹ In the Protest, Intervenors explained that they were beneficiaries under certain trust agreements between Wilmington Trust Company and William J. Wade (as Trustees) relating to ownership and operation of Springerville Unit 1.¹⁰ Intervenors stated that Tucson Electric leased Springerville Unit 1 from the Trustees pursuant to a facility lease agreement that was scheduled to expire on January 1, 2015 (Lease Agreement), and that, upon expiration of the Lease Agreement, the ownership interests in Springerville Unit 1 held by the Trustees on behalf of Intervenors and leased to Tucson Electric would revert to the Trustees. At that time, Intervenors would become responsible for marketing their respective ownership of the electrical output of Springerville Unit 1.

7. Intervenors explained that since Springerville Unit 1 is connected to the Tucson Electric transmission system, they would need transmission service on the Tucson Electric transmission system to deliver the output of Springerville Unit 1 to wholesale

⁸ *Id.* P 9.

⁹ Protest of Alterna Springerville LLC and LDVF1 TEP LLC, Docket No. EC15-31-000 (Dec. 3, 2014) (Protest).

¹⁰ *Id.* at 2.

electricity markets. In the Protest, Intervenors claimed that the terms of an Amended and Restated Facility Support Agreement between the Trustees and Tucson Electric, as amended and restated as of December 15, 1992 (1992 FSA), obligated Tucson Electric, upon termination of the Lease Agreement, “to provide firm transmission service from Springerville Unit 1 to a point of interconnection with the transmission system of another utility, subject to the reasonable approval of Intervenors, in order to enable Intervenors to market their respective scheduled entitlement shares of the output of Springerville Unit 1.”¹¹ Intervenors claimed that Palo Verde was the only point on Tucson Electric’s transmission system that was commercially reasonable for the sale of electricity from Springerville Unit 1, but that Tucson Electric had refused to provide the transmission service they needed because, according to Intervenors, Tucson Electric asserted that it lacked available transfer capability.¹² Intervenors stated that they required service from Springerville to Vail over the San Juan-Springerville-Vail Transmission System, of which the Springerville-Coronado Line is a part, and then from Vail to Palo Verde.

8. Intervenors claimed that the Proposed Transaction would adversely affect competition given that, upon the expiration of the Lease Agreement, they would become potential competitors of Tucson Electric and other generation suppliers in the Southwestern United States with respect to the sale of electricity at wholesale to purchasers in California. Intervenors asserted that the sale of the interest in the Springerville-Coronado Line to Salt River Project could reduce the amount of transmission capacity on the San Juan-Springerville-Vail Transmission System that could otherwise be used by Tucson Electric to transmit electricity on behalf of Intervenors, which they alleged Tucson Electric was obligated to deliver to Palo Verde pursuant to the 1992 FSA.¹³ Intervenors alleged that the Proposed Transaction would have an adverse effect on regulation because the transfer of the interest in the Springerville-Coronado Line to Salt River Project would reduce the amount of transmission capability within the Commission’s jurisdiction.¹⁴

9. Intervenors raised similar issues related to the 1992 FSA in a complaint filed with the Commission in Docket No. EL15-17-000 (Complaint Proceeding). Intervenors filed the Complaint after Tucson Electric rejected their request for firm transmission service

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.* at 9-10.

over a specified path because there was no available transfer capability on the path.¹⁵ In the Complaint, Intervenors argued that, pursuant to the 1992 FSA, Tucson Electric was obligated to provide firm transmission service over the specified path with delivery at the Palo Verde delivery point; that Tucson Electric violated its open access transmission tariff by failing to set aside transmission for Intervenors' energy entitlements from Springerville Unit 1; and that Tucson Electric was engaging in undue discrimination and preference by entering into certain transmission service agreements with Salt River Project for service over the Springerville-Coronado Line.

10. The Commission denied the Complaint prior to issuance of the Section 203 Order, finding that the 1992 FSA did not obligate Tucson Electric to provide firm transmission service to Palo Verde;¹⁶ that Tucson Electric did not violate its open access transmission tariff by not setting aside transfer capability for Intervenors;¹⁷ and that Tucson Electric did not engage in undue discrimination or preference in providing transmission service to Salt River Project because the transmission path utilized by Salt River Project had no impact on available transfer capability over the transmission path requested by Intervenors.¹⁸ The Commission affirmed its decision on rehearing.¹⁹

C. The Section 203 Order

11. The Commission authorized the Proposed Transaction in the Section 203 Order, rejecting Intervenors' arguments regarding the alleged adverse effects of the Proposed Transaction on competition and regulation.

12. With respect to Intervenors' arguments regarding the effects of the Proposed Transaction on competition, the Commission concluded that the transfer of the interest in

¹⁵ *Alterna Springerville LLC, et al. v. Tucson Elec. Power Co.*, 150 FERC ¶ 61,094, at P 8 (2015) (Complaint Order), *reh'g denied*, 153 FERC ¶ 61,125 (2015) (Complaint Rehearing Order).

¹⁶ Complaint Order, 150 FERC ¶ 61,094 at P 18.

¹⁷ *Id.* P 26.

¹⁸ *Id.* P 39. In the Complaint Proceeding, Tucson Electric explained that the transmission service agreements it entered into with Salt River Project were "a 'stopgap' measure" so that Salt River Project could transmit power to service its load pending consummation of the Proposed Transaction. *Id.* P 33.

¹⁹ *See generally* Complaint Rehearing Order, 153 FERC ¶ 61,125.

the Springerville-Coronado Line to Salt River Project would not impact transmission service on the San Juan-Springerville-Vail Transmission System. The Commission based its conclusion on the Complaint Order, which, as noted above, found that the transmission path to be utilized by Salt River Project would have no impact on available transfer capability over the transmission path requested by Intervenors.²⁰ The Commission also explained that it had already addressed, in the Complaint Order, Intervenors' underlying claim that Tucson Electric was obligated to provide service to Palo Verde based on the 1992 FSA. The Commission stated that it had found that Intervenors had failed to show that the 1992 FSA required Tucson Electric to provide firm transmission service to Palo Verde, and that Tucson Electric could fulfill its obligation under the 1992 FSA by offering delivery points at Four Corners and San Juan.²¹

13. The Commission also rejected Intervenors' claim that the Proposed Transaction would have an adverse effect on regulation, noting that, in evaluating the effect of a proposed transaction on regulation, it focuses on ensuring that the proposed transaction does not result in a regulatory gap at the federal or state level. The Commission stated that it found no evidence that state or federal regulation would be impaired by the Proposed Transaction, and that it would not create a regulatory gap at the federal level because the Commission would retain its regulatory authority over Tucson Electric. With respect to the state level, the Commission noted that no state commission had intervened or raised concerns about the effect of the Proposed Transaction on state regulation, and that Salt River Project has an open access transmission tariff.²²

II. Discussion

A. Request to Defer Action

1. Request for Rehearing

14. Intervenors argue that the Commission committed an error of law in concluding that their request for the Commission to defer action on the Proposed Transaction pending resolution of the Complaint, or, in the alternative, to condition its approval of the Section 203 Application on the outcome of the Complaint, was moot because of the

²⁰ Section 203 Order, 151 FERC ¶ 61,089 at P 31.

²¹ *Id.* P 32 (citing Complaint Order, 150 FERC ¶ 61,094 at P 18).

²² *Id.* P 47.

Complaint Order.²³ According to Intervenors, the Commission granted rehearing of the Complaint Order a week prior to issuing the Section 203 Order, so the issues in the Complaint were actual ongoing controversies that were not moot.²⁴ Intervenors state that the Commission can, and should, grant their request “to defer action or condition action in this proceeding until the Complaint Proceeding is resolved and no longer subject to further action by the Commission.”²⁵

15. Intervenors also argue that the Section 203 Order is “premature and unreasonable” because it depends on findings in the Complaint Order that, at the time, were pending rehearing before the Commission in the Complaint Proceeding.²⁶ Intervenors note, for example, that the Section 203 Order states that the Commission found that Intervenors failed to show that the 1992 FSA requires Tucson Electric to provide firm transmission service to Palo Verde. Intervenors assert that the extent of their rights under the 1992 FSA and related agreements is a central issue in the Complaint Proceeding on rehearing, and claim that the errors in the Complaint Order are compounded by the Section 203 Order, which stands on “factual and legal quicksand” and creates uncertainty for the involved parties.²⁷ Intervenors argue that if the Proposed Transaction closes prior to final resolution of the Complaint Proceeding without being subject to appropriate conditions, the ability of the Commission to grant the relief sought by the Intervenors in the Complaint Proceeding would be compromised.

16. Finally, Intervenors state that the “potentially substantial consequences of reversing the Proposed Transaction could also create an inappropriate incentive for the Commission to maintain the *status quo* on rehearing in the Complaint Proceeding,

²³ Request for Rehearing at 7.

²⁴ Intervenors cite the unpublished, delegated tolling order issued by the Office of the Secretary which granted rehearing of the Complaint Order “for the limited purpose of further consideration,” so that “timely-filed rehearing requests will not be deemed denied by operation of law.” *Alterna Springerville LLC, et al. v. Tucson Elec. Power Co.*, Docket No. EL15-17-001 (Apr. 21, 2015) (unpublished delegated order). As noted above, the Commission subsequently denied rehearing of the Complaint Order on the merits in the Complaint Rehearing Order.

²⁵ Request for Rehearing at 7.

²⁶ *Id.*

²⁷ *Id.* at 8.

regardless of the merits of Intervenor's claims."²⁸ Intervenor's assert that if the Commission does not delay or condition the Section 203 Order, then the pending rehearing of the Complaint Order may be unduly prejudiced, and that the only reasonable and equitable avenue is for the Commission to delay or condition the Proposed Transaction upon final resolution of the relevant issues in the Complaint Proceeding.

2. Commission Determination

17. We deny rehearing. Intervenor's argue that the Commission erred in concluding that their request for the Commission to defer action on the Proposed Transaction pending resolution of the Complaint, or, in the alternative, to condition its approval of the Section 203 Application on the outcome of the Complaint, was moot because of the Complaint Order, which was then pending on rehearing, and that the Section 203 Order was premature because it relied on findings in the Complaint Order. Intervenor's misunderstand the impact of requesting rehearing of a Commission order. It is well-established that requesting rehearing of an order does not, unless specifically ordered by the Commission, operate as a stay of the Commission's order.²⁹ Thus, although Intervenor's requested rehearing of the Complaint Order, the Commission's findings and determinations in that order remained final and effective, and the Complaint Order's precedential value was not undermined.³⁰ Accordingly, the Commission's reliance on the Complaint Order was neither premature nor unreasonable, nor was it legal error for the Commission to find Intervenor's request for relief moot based on the Complaint Order.³¹

²⁸ *Id.*

²⁹ 16 U.S.C. § 8251(c).

³⁰ *See, e.g., ExxonMobil Corp. v. Entergy Servs., Inc.*, 118 FERC ¶ 61,032, at P 13 (2007) ("The Commission may rely on contested orders even though they are pending on rehearing or appeal because the Commission's decisions are final and effective unless they have been stayed."), *order on reh'g*, 119 FERC ¶ 61,261, *aff'd sub nom.*, *ExxonMobil Corp. v. Fed. Energy Reg. Comm'n*, 571 F.3d 1208 (D.C. Cir. 2009); *Cent. Maine Power Co.*, 135 FERC ¶ 61,136, at P 27 (2011) (rejecting argument that the Commission erred in relying on an order pending on rehearing for collateral estoppel purposes).

³¹ As noted above, the Commission has since denied rehearing of the Complaint Order and affirmed its determinations in that order. *See generally*, Complaint Rehearing Order, 153 FERC ¶ 61,125.

18. We also reject Intervenors' suggestion that the Commission would base its decisions on rehearing of the Section 203 Order or the Complaint Order on anything other than the merits or the facts and law of the cases, such as on the basis of the consequences of reversing the Proposed Transaction or maintaining the *status quo*. The Commission decided both the Section 203 Order and this order on the basis of the record before the Commission, and we reject any insinuations that the Commission would do otherwise.

B. Effect on Competition and Regulation

1. Request for Rehearing

19. Intervenors argue that the Proposed Transaction is contrary to the public interest because it will adversely affect competition and regulation.

20. According to Intervenors, the Commission erred in determining that the Proposed Transaction will not have an adverse effect on horizontal competition. Intervenors cite to an investigation of Tucson Electric and certain of its affiliates initiated by the Commission under FPA section 206³² after Tucson Electric and those affiliates failed one of the Commission's market power screens. Intervenors state that the screen failure reflects the fact that Tucson Electric and/or its affiliates control a large portion of the uncommitted generation capacity in the market where the Tucson Electric transmission system is located. Noting that they argued that the Proposed Transaction could prevent their shares of the output of the Springerville Unit 1 from entering the market for sale of electricity at wholesale at Palo Verde, Intervenors argue that such an outcome would exacerbate Tucson Electric's horizontal market power within its Balancing Authority Area while also diluting competition into the California market from Palo Verde.³³

21. Intervenors argue further that the Commission's finding that the transfer of the interest in the Springerville-Coronado Line to Salt River Project will not impact transmission service on the San Juan-Springerville-Wail Transmission System "ignores elementary principles of physics."³⁴ Intervenors assert that the sale of the interest in the Springerville-Coronado Line to Tucson Electric will enable Salt River Project to flow power in either direction between Coronado and Springerville, and that, regardless of whether Salt River Project's intent is to keep its electrons on the Springerville-Coronado

³² 16 U.S.C. § 824e.

³³ Request for Rehearing at 10.

³⁴ *Id.*

Line when electricity is being transmitted between those two points, “some of those electrons will spill onto other portions” of the Tucson Electric transmission system.³⁵ Intervenors conclude that those electrons will therefore affect the amount of available transfer capability on other segments of the Tucson Electric transmission system.

22. Intervenors also assert that, since Tucson Electric’s obligation to transmit electricity for them predates the adoption of Order No. 888,³⁶ such contractual obligation is not subject to consideration of the amount of available transfer capability that may currently exist on the Tucson Electric transmission system. Intervenors note that Tucson Electric has asserted the lack of available transfer capability as the basis to deny them transmission service for delivery of electricity from Springerville Unit 1 to Palo Verde and that, to the extent the Proposed Transaction will affect Tucson Electric’s determination that available transfer capability on that path is insufficient to service Intervenors, the Proposed Transaction will impact competition. According to Intervenors, since available transfer capability is frequently recalculated on an ongoing basis, the likelihood that the available transfer capability calculation will, at times, capture electrons placed on the Springerville-Coronado Line by Salt River Project will increase. Intervenors conclude that, as a result, Tucson Electric may calculate available transfer capability that includes Salt River Project’s electrons and determine there is insufficient available transfer capability for Intervenors’ output, thereby effectively granting Salt River Project priority over Intervenors’ pre-existing transmission rights.³⁷

23. Finally, Intervenors argue that the Commission erred in finding that the Proposed Transaction will not adversely affect federal regulation, noting that, pursuant to the Proposed Transaction, Tucson Electric, a Commission-jurisdictional public utility, will convey 57.44 percent of its interest in an interstate transmission facility to Salt River Project, a political subdivision of the State of Arizona that is statutorily exempt from federal regulation. Thus, Intervenors argue, the Proposed Transaction will result in a loss

³⁵ *Id.* at 11.

³⁶ *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, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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).

³⁷ Request for Rehearing at 10-11.

of Commission regulatory authority over a portion of the Springerville-Coronado line. Intervenors note that the Commission determined that this impact is mitigated by the fact that Salt River Project has an open access transmission tariff, but fault such reasoning because Salt River Project is not obligated to have such a tariff, today, or in the future. Intervenors also assert that the transfer of an interest in the Springerville-Coronado Line could deprive the Commission of the regulatory authority to condition use of that line in a way that protects the rights of Intervenors and others that may be affected by the manner in which Salt River Project uses it.³⁸

2. Commission Determination

24. We deny rehearing. The Commission rejected Intervenors' arguments regarding the alleged adverse impact of the Proposed Transaction on competition in the Section 203 Order and Intervenors have failed to present any arguments on rehearing that would persuade us to find otherwise. The Commission previously considered Intervenors' argument that the Proposed Transaction could prevent their shares of the output of the Springerville Unit 1 from entering the market for sale of electricity at wholesale at Palo Verde, and rejected that claim, finding that, consistent with the Complaint Order, the transfer of the interest in the Springerville-Coronado Line to Salt River Project would "not impact transmission service on the San Juan-Springerville-Vail Transmission System."³⁹ We affirm this conclusion.

25. We likewise reject Intervenors' arguments regarding available transfer capability, and Intervenors' claim that, since Tucson Electric's obligation to transmit electricity for them predates the adoption of Order No. 888, such a contractual obligation is not subject to the amount of available transfer capability that may currently exist on the Tucson Electric Transmission system. As an initial matter, Intervenors' arguments on these issues are based on the flawed premise that Tucson Electric must provide transmission service with Palo Verde as the delivery point under the 1992 FSA. In the Section 203 Order, the Commission noted its finding in the Complaint Order that Intervenors failed to show that the 1992 FSA requires Tucson Electric to provide firm transmission to Palo Verde. As the Complaint Rehearing Order affirms the Complaint Order on this point,⁴⁰ we continue to find Intervenors' arguments unpersuasive. The

³⁸ *Id.* at 12.

³⁹ Section 203 Order, 151 FERC ¶ 61,089 at P 31.

⁴⁰ Complaint Rehearing Order, 153 FERC ¶ 61,125 at P 21 ("We affirm the finding in [the Complaint Order] that section 5.1 of the 1992 FSA does not provide Complainants with the right to specify their preferred point of interconnection, and,

(continued...)

Commission has concluded, and affirmed its conclusion, that Tucson Electric may fulfill its obligation under the 1992 FSA by offering delivery at delivery points other than Palo Verde. Therefore, any arguments premised upon an obligation by Tucson Electric to provide delivery to Palo Verde carry no weight.

26. Moreover, the Commission left undisturbed its finding in the Complaint Order regarding available transfer capability, and we continue to find that the Proposed Transaction will not impact transmission service on the San Juan-Springerville-Vail Transmission System. As the Commission explained in the Complaint Order, while transmission service from Springerville to Coronado (the transmission service provided to Salt River Project) and transmission service from Springerville to Palo Verde (the transmission service requested by Intervenors) share the same point of receipt, the requests do not create competing transmission service because they require separate paths.⁴¹ Further, the Commission noted that even if Salt River Project had no transmission rights over the Springerville to Coronado path, there still would be no available transfer capability for firm transmission service to meet Intervenors' transmission service request. The Proposed Transaction does not change these facts. Intervenors' arguments regarding the transmission service provided to Salt River Project and the transfer to Salt River Project of the interest in the Springerville-Coronado Line are unpersuasive because neither the transmission service provided to Salt River Project nor the transfer of the interest in the Springerville-Coronado Line interfere with the transmission service sought by Intervenors – transmission service which the Commission has now twice found Intervenors are not entitled to under the 1992 FSA.

27. With respect to Intervenors' argument regarding Tucson Electric's obligation to transmit electricity for them predating the adoption of Order No. 888, we note that Intervenors raised the same issue on rehearing of the Complaint Order and the Commission rejected Intervenors' arguments and denied rehearing. We deny rehearing and reject Intervenors' arguments on these points for the same reasons articulated in the Complaint Rehearing Order.⁴²

instead, provides them with a right to 'reasonable approval' of the points of interconnection 'specified from time to time by Tucson.'" (citations omitted)).

⁴¹ Section 203 Order, 151 FERC ¶ 61,089 at P 31. As explained above, the transmission service referred to was a stopgap measure implemented by Tucson Electric and Salt River Project pending consummation of the Proposed Transaction. *See* Complaint Order, 150 FERC ¶ 61,094 at P 33.

⁴² Complaint Rehearing Order, 153 FERC ¶ 61,125 at P 22 ("While it is true that the concept of available transfer capability on designated transmission paths did not exist

(continued...)

28. Finally, we reject Intervenors' claim that the Commission erred in finding that the Proposed Transaction will not adversely affect federal regulation. As the Commission noted in the Section 203 Order, the Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁴³ We do not agree with Intervenors that relinquishment of Commission jurisdiction over a partial interest in a single transmission line will result in a regulatory gap at either the federal or state level, or that the Proposed Transaction will have an adverse effect on regulation. While it is true, as Intervenors point out, that Salt River Project is statutorily exempt from federal regulation, as the Commission noted in the Section 203 Order, Salt River Project has an open access transmission tariff.⁴⁴ The Commission recognizes that Salt River Project is not, as Intervenors observe, required to have such a tariff, but if Salt River Project chose to abandon the tariff, it would lose all of the benefits attendant to having one. We also note that the Commission will retain its regulatory authority over Tucson Electric after the Proposed Transaction is consummated. While a relatively small portion of Tucson Electric's system would no longer be subject to the Commission's jurisdiction as a result of the Proposed Transaction,⁴⁵ on balance, we continue to find that the Proposed Transaction will not have an adverse effect on regulation.

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 [Intervenors] 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 Electric] plans its existing transmission system. As [Intervenors] have acknowledged, they have never submitted any deposits, and it would be unreasonable to expect [Tucson Electric] to reserve transmission capacity, enhance its transmission system, or acquire additional contractual transmission rights on other utility systems, when the transmission service for which [Intervenors] contracted was for future service when future conditions were unknown (i.e., whether [Intervenors] would even take service at all as opposed to selling their entitlement shares)." (emphasis in original) (citations omitted)).

⁴³ Section 203 Order, 151 FERC ¶ 61,089 at P 47 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124).

⁴⁴ *Id.*, 151 FERC ¶ 61,089 at P 47, n.47.

⁴⁵ As noted in the Section 203 Order, Tucson Electric explained that the Proposed Transaction would reduce Tucson Electric's transfer capability over the Springerville-Coronado Line by only 100 MW. *Id.*, 151 FERC ¶ 61,089 at P 45.

The Commission orders:

The request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.