

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

El Paso Electric Company

v.

Docket No. EL06-45-000  
Docket No. EL06-46-000  
Docket No. ER06-803-000  
(Not Consolidated)

Tucson Electric Power Company

ORDER ON COMPLAINTS

(Issued April 24, 2006)

1. On January 10, 2006, El Paso Electric Company (El Paso) filed a complaint against Tucson Electric Power (Tucson) pursuant to section 206 of the Federal Power Act (FPA).<sup>1</sup> El Paso states that Tucson, the partial owner of the newly constructed Luna Generating Station (Luna Station), has asserted that it will transmit power over El Paso's transmission system from Luna to either the Springerville or Greenlee substations without first requesting service under El Paso's Open Access Transmission Tariff (OATT). Concurrently, in Docket No. ER06-466-000, El Paso filed an unexecuted transmission service agreement to provide Tucson with 190 MW of firm point-to-point transmission service from the Luna 35 kV Substation to the Springerville 345 kV substation under El Paso's OATT.
2. On January 11, 2006, Tucson filed a counter complaint against El Paso pursuant to section 206 of the FPA<sup>2</sup> raising virtually identical issues as were raised in El Paso's complaint. Tucson states that El Paso has unjustifiably refused to respect the pre-Order

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<sup>1</sup> 16 U.S.C. § 824e (2000).

<sup>2</sup> *Id.*

No. 888 transmission rights that it argues were assigned to Tucson under the Tucson-El Paso Power Exchange and Transmission Agreement (1982 Agreement).<sup>3</sup> Consequently, Tucson has not agreed to OATT service from El Paso.

3. On February 1, 2006, in Docket No. ER06-603-000, El Paso filed both a withdrawal of El Paso's unexecuted transmission service agreement filed on January 10, 2006, and an interim executed transmission service agreement with Tucson to provide transmission service under El Paso's OATT to allow Tucson to schedule and deliver test power from the Luna Station. On March 22, 2006, the Commission accepted by delegated letter order the withdrawal of El Paso's unexecuted transmission service agreement and accepted its interim transmission service agreement. On March 28, 2006, in Docket No. ER06-803-000, El Paso filed an additional transmission service agreement, to supercede its March 22, 2006 agreement which provides Tucson blanket firm and non-firm transmission service under its OATT, to commence with the commercial operations of the Luna Station and cease once a permanent agreement is reached amongst the parties pending the outcome of these proceedings. For this additional transmission service agreement, El Paso requests waiver of the Commission's 60-day prior notice requirement because El Paso states that the date on which the service under the revised agreements will commence and service under the March 22, 2006 agreement will terminate is uncertain.

4. For the reasons set forth below, the Commission will grant El Paso's complaint and deny Tucson's complaint.

5. Additionally, the Commission accepts El Paso's firm and non-firm transmission service agreements filed on March 28, 2006 in Docket No. ER06-803-000, and will grant El Paso's request for waiver of the 60-day notice requirement for these additional transmission service agreements.<sup>4</sup>

### **Background**

6. Tucson is a vertically-integrated electric utility that provides retail electric service to more than 375,000 customers in Southeastern Arizona. Tucson's service territory consists of a 1,155 square mile area and includes a population of approximately 931,000 in the greater Tucson metropolitan area of Arizona.

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<sup>3</sup> Tucson Electric Power Company, FERC Electric Rate Schedule No. 49.

<sup>4</sup> See *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

7. As of December 31, 2004, Tucson owned or leased approximately 2,000 MW of net generating capability. Tucson states that its principal generating assets are two units at the Springerville Station near Springerville, Arizona; four units at the Sundt Station in Tucson, Arizona; and ownership interests in certain units at the San Juan Station at Farmington, New Mexico; the Navajo Station at Page, Arizona; and the Four Corners Station at Farmington, New Mexico.

8. El Paso is a public utility that generates electric energy, engages in sales at wholesale and retail, transmits electric energy in interstate commerce, and distributes electric energy to customers in Texas and New Mexico. El Paso owns and operates facilities for the transmission of energy. Among such facilities, El Paso owns a portion of, and operates the portion of, the southern New Mexico transmission system that includes the Springerville-Luna and Greenlee-Hidalgo and Hidalgo-Luna circuits (Springerville to Greenlee Line). The Luna Station is interconnected to the system at the Luna Substation along that line.

9. The Springerville-to-Luna-to-Diablo Line is a 310-mile, 345 kV transmission line from the Springerville Station near Springerville, Arizona, to the Luna Substation near Deming, New Mexico, and to the Diablo Substation near Sunland Park, New Mexico. The Luna-to-Hidalgo-to-Greenlee Line includes a 50-mile, 345 kV transmission line between the Luna Substation and the Hidalgo Substation near Lordsburg, New Mexico, and a 60-mile, 345 kV transmission line between the Hidalgo Substation and Tucson's Greenlee Substation near Duncan, Arizona.<sup>5</sup>

10. In 1982, the parties entered into the 1982 Agreement which provided for an exchange of power between El Paso and Tucson along with certain transmission rights. Tucson agreed to take power owned by El Paso located in Tucson's service territory and El Paso would take an equivalent amount of Tucson owned power at one of Tucson's facilities interconnected to El Paso's system. The 1982 Agreement further provides that "[t]he Parties agree to cooperate in the construction of El Paso's Springerville-Luna 345 kV circuit," and establishes the rights and responsibilities of each of the parties with respect to the construction and maintenance of that line.

11. Tucson acquired a one-third interest in the Luna Station, an approximately 570 MW combined cycle generation unit located near Deming, New Mexico, in February 1982.<sup>6</sup> The Luna Station, which is expected to provide Tucson with 190 MW of power

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<sup>5</sup> See Exhibit 1.

<sup>6</sup> Tucson, Phelps Dodge Energy Services, LLC (Phelps Dodge) and PNM Resources, Inc. each purchased a one-third interest in a limited liability company which  
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to serve its retail and wholesale customers, recently began test operation. The Luna Station is scheduled to begin full-scale operation no later than June 30, 2006.

### **El Paso Complaint**

12. In its complaint, El Paso states that Tucson asserts that it will transmit power from the Luna Substation to either Springerville or Greenlee over El Paso's transmission system without requesting and obtaining service under El Paso's OATT but rather in accordance with the 1982 Agreement. According to El Paso this would be in clear violation of the provisions of the Second Revised Interconnection Agreement (Revised Interconnection Agreement) dated August 5, 2005. El Paso asserts that provisions in the Revised Interconnection Agreement make it clear that Tucson is obligated to request transmission service under the OATT of El Paso or any utility that owns transmission capacity interconnected at the Luna Substation. El Paso declares that Tucson has made it clear in writing that it is not required to obtain service pursuant to this requirement of the Revised Interconnection Agreement since it believes already that it has transmission rights under the 1982 Agreement.

13. El Paso asserts that the purpose of the transmission rights granted in the 1982 Agreement was to provide a backup path for the movement of power from Springerville to Greenlee in the event of an outage of transmission directly connecting Springerville and Greenlee. El Paso argues that the transmission right provided by the 1982 Agreement permits Tucson to use 200 MW of capacity along the Springerville to Greenlee Line with Springerville as its point of receipt and Greenlee as its point of delivery. El Paso argues that there are no other points along the path where Tucson is permitted to inject power into El Paso's system and there are no provisions for reversal of power flow along the path of transmission.

14. El Paso argues that the factual record shows that the language of the 1982 Agreement has been consistently interpreted by the parties as providing Tucson with an alternative path to move power from Springerville to Greenlee when alternative paths were unavailable and that the 1982 Agreement has not been read to suggest that it provides a right to move power from Luna to either Springerville or Greenlee. El Paso states that sworn testimony in proceedings subsequent to the 1982 Agreement reflect the understanding that both El Paso and Tucson believed the transmission rights granted to Tucson along the Springerville to Greenlee Line under section 6.3 was uni-directional

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owned the Luna Station in November 2004. The assets were transferred to the new owners in February 2005. Public Service Company of New Mexico (PNM), an affiliate of PNM Resources, Inc., will be the operating agent.

backup service. El Paso further states that sworn testimony indicates that the rights were negotiated for the express purpose of providing an alternative path for Tucson to transmit power from Springerville to Greenlee in the event of an outage of the lines directly connecting Springerville and Greenlee.<sup>7</sup> El Paso states that during the sixteen years since the transmission rights under the 1982 Agreement became effective, there has rarely been a request for transmission over the Springerville to Greenlee Line. El Paso argues that this pattern of usage is consistent with the intent to use the path for backup service.

15. El Paso states that Tucson executed the Revised Interconnection Agreement on August 5, 2005, pursuant to which it agreed to take transmission service under the OATT of El Paso or one of the other appropriate transmission owners. El Paso declares that the Revised Interconnection Agreement is a filed rate and therefore El Paso and Tucson are bound to its terms under both the tenets of contract law and federal energy law. In addition, El Paso declares that in order to further coordinate the operation of the Luna Station, El Paso and PNM (the operating agent for the Luna substation) executed operating procedures for the Luna Station which included a requirement to abide by the Western System Coordinating Council (WSCC) reliability criteria set forth in the WSCC Reliability Criteria Agreement. El Paso points out that once a transmission reservation is made for power scheduled under the applicable OATT, an OASIS reservation number and a NERC-required e-tag are generated for the transaction. El Paso argues that it is a violation of the Western Electricity Coordinating Council's (WECC)<sup>8</sup> reliability criteria for it to allow power to flow without the appropriate tag.<sup>9</sup>

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<sup>7</sup> See, e.g., *In re application of El Paso Elec. Co. Regarding a Certificate of Public Convenience and Necessity for the Arizona Interconnection Project*, Case No. 2044, "Supplemental Testimony of James P. Maloney" at 8 (N.M. Pub. Serv. Commission); *In re application of El Paso Elec. Co. Regarding a Certificate of Public Convenience and Necessity for the Arizona Interconnection Project*, Case No. 2044, "Rebuttal Testimony of Thomas A. Delawder" at 6, 9 (N.M. Pub. Serv. Commission); *In re application of El Paso Elec. Co. Regarding a Certificate of Public Convenience and Necessity for the Arizona Interconnection Project*, Case No. 2044, "Direct Examination of Thomas A. Delawder" at 6 (N.M. Pub. Serv. Commission).

<sup>8</sup> WECC is the successor to the WSCC.

<sup>9</sup> Western Electricity Coordinating Council Minimum Operating Reliability Criteria (Rev. April 6, 2005).

El Paso then argues that the operating procedures agreed to by PNM as Tucson's agent are consistent with NERC and WECC requirements.

16. El Paso requests that the Commission find that (1) Tucson has asserted an intent not to obtain service as required by the Revised Interconnection Agreement, but has instead asserted a right to transmission service under the 1982 Agreement, (2) if Tucson desires to transmit power from the Luna Station to any other point using El Paso-owned transmission, it must obtain and pay for transmission service pursuant to El Paso's OATT as specified in the Revised Interconnection Agreement, (3) that Tucson does not have rights under the 1982 Agreement to transmit power originating at the Luna substation to either Springerville or Greenlee, and (4) it is appropriate to rely on extrinsic evidence because, *inter alia*, the interpretations of the parties of the operative language in the 1982 Agreement conflict.<sup>10</sup>

### **Tucson Complaint**

17. Tucson requests that the Commission issue an order directing El Paso to permit Tucson to use the transmission rights it argues it was granted in the 1982 Agreement to transmit its share of power from the Luna Station. Tucson argues that if El Paso does not allow those rights, El Paso will be in violation of section 6.3 of the 1982 Agreement.

18. Tucson states that it requires the use of the Luna-Springerville and Luna-Hidalgo-Greenlee transmission lines for delivery of electricity supplied by the Luna Station to its service territory. Tucson states that by letter, in anticipation of the commencement of operation of the Luna Station, El Paso advised Tucson that, in El Paso's view, the transmission rights that Tucson acquired under the 1982 Agreement could not be used for the transmission of electricity from the Luna Station to Tucson's service territory. Tucson claims that El Paso asserted preemptively that Tucson does not have the right to use transmission capacity in the Luna-Springerville 345kV transmission line or the Luna-to-Hidalgo-to-Greenlee 345 kV transmission line, which it had acquired pursuant to section 6.3 of the 1982 Agreement, for delivery of electricity from the Luna Station to the Tucson system.<sup>11</sup> Tucson states that El Paso suggested that

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<sup>10</sup> See, e.g., *PacifiCorp v. Reliant Energy Services Inc.*, 103 FERC ¶ 61,355 (2003), citing *Oglethorpe Power Corp. v. Ga. Power Co.*, 69 FERC ¶ 61,208 (1994), *order on rehearing*, 72 FERC ¶ 61,065 (1995); *Delmarva Power & Light Co.*, 69 FERC ¶ 61,444 at 61,525-26 (1994).

<sup>11</sup> See Tucson complaint at Exhibit 3 (letter dated October 6, 2005) and Exhibit 4 (letter dated November 28, 2005).

Tucson should instead acquire the necessary transmission service under El Paso's OATT. El Paso further asserted that it had the right under the Revised Interconnection Agreement for the Luna Station "to curtail or remove the [Luna Station] from service by opening Luna Gas Circuit Breakers 6378B and 9468B if transmission is not purchased or scheduled and tagging procedures are not respected."

19. Tucson states that it is entitled to 200 MW of transmission rights along the Luna – Springerville and Luna – Greenlee 345 kV transmission lines as provided by sections 6.3 and 6.4 of the 1982 Agreement. Tucson argues that there are no provisions in the 1982 Agreement that restrict the sources of power or the direction of power flow that may be transmitted by Tucson over the subject transmission path. Accordingly, Tucson asserts that the 1982 Agreement allows Tucson to use the transmission rights, granted by El Paso, to transmit power from its share of the Luna Station over the Luna – Greenlee or Luna – Springerville transmission path. Therefore, Tucson argues that it is not in violation of the Revised Interconnection Agreement since it provides an allowance for other transmission arrangements.

20. Tucson states that in a letter dated December 14, 1983,<sup>12</sup> El Paso consented to Tucson's use of the rights it was granted in the 1982 Agreement to enhance delivery of power by PNM from the San Juan plant to Greenlee pursuant to an agreement between Tucson and PNM. Tucson then argues that El Paso's consent supports Tucson's interpretation of the flexibility of the use of the subject transmission rights.

21. Tucson states that a September 1987 letter<sup>13</sup> from Tucson to El Paso confirms the understanding of both parties regarding Tucson's rights obtained in the 1982 Agreement. The letter indicates that Tucson may schedule power to intermediate points of delivery along the Springerville to Greenlee Line whenever El Paso agrees that there is unused capacity available into Southern New Mexico. Tucson argues that this clarifies conditions under which Tucson may use its transmission rights to transmit power from Arizona into Mexico; however, there is nothing in the letter that suggest restrictions on Tucson's rights to transmit power in a westerly direction from sources such as the Luna Station in New Mexico. In addition Tucson asserts that since import

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<sup>12</sup> See Tucson complaint at Exhibit 5.

<sup>13</sup> See Tucson complaint at Exhibit 6.

capabilities in an easterly direction are constrained, power flowing in a westerly direction from the Luna Substation will help relieve any constraints that may exist in the west-to-east direction.<sup>14</sup>

22. Tucson argues that El Paso's assertion that Tucson's rights under the 1982 Agreement are limited to the delivery of power in one direction along the Springerville to Greenlee Line is unsupported by the language of the 1982 Agreement. Tucson asserts that when limitations were intended on the use of transmission, language provided in the 1982 Agreement was clear. As an example Tucson refers to section 6.1 of the 1982 Agreement where El Paso assigned Tucson rights in transmission facilities between Westwing and Palo Verde for deliveries from Westwing to Palo Verde, which clearly identifies the direction of power flow. Tucson argues that the absence of any clear language to suggest that the transmission rights under section 6.3 were intended for uni-directional power flow undermines El Paso's claim. Tucson declares that the rights it obtained under section 6.3 are similar to rights Tucson granted El Paso in section 6.5.3, which provides for transmission in both directions. Tucson argues that section 6.3 and section 6.5.3 of the 1982 Agreement were intended to grant to Tucson and El Paso, respectively, reciprocal rights to use certain transmission facilities owned by the other.

23. Tucson states that if it is not permitted to use the rights granted under the 1982 Agreement, it will have to take transmission service under El Paso's OATT, which under current charges would cost Tucson approximately \$5 million annually. Tucson further argues that service under El Paso's OATT may be curtailed before service under the 1982 Agreement and as such would have a significant adverse effect on the reliability of service provided to its customers. Tucson concludes by stating that it is not required under the Revised Interconnection Agreement to take transmission service under El Paso's OATT especially given that the other co-owners at Luna were not likewise taking their transmission service under the OATT.

### **Notice and Pleadings**

24. Notice of El Paso's complaint was published in the *Federal Register*, 71 Fed. Reg. 3074 (2006), with protests and interventions due on or before January 30, 2006.

25. Notice of Tucson's complaint was published in the *Federal Register*, 71 Fed. Reg. 3839 (2006), with protests and interventions due on or before January 31, 2006.

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<sup>14</sup> See Tucson complaint at p. 7.

26. On January 30, 2006, as amended on February 17, 2006, Tucson filed an answer to El Paso's January 10, 2005 complaint. Tucson, in its answer, largely reiterates the same arguments that it made in its January 11, 2006 complaint and asks that El Paso's complaint be denied. In its February 17, 2006 amendment to its answer, Tucson points out that neither PNM nor Phelps Dodge are proposing to obtain transmission service under an OATT for delivery of its entire share of energy from the Luna Station. Tucson states that a Swap and Purchase Agreement between Phelps Dodge and El Paso (Swap and Purchase Agreement) provides that energy available to Phelps Dodge from the Luna Station will be sold and delivered to El Paso at the Luna substation, and an equivalent amount of energy will be sold and delivered by El Paso simultaneously to Phelps Dodge at the Greenlee substation. Tucson argues that such treatment is unduly discriminatory and preferential because El Paso has failed to offer to Tucson a similar opportunity to engage in a swap-and-purchase transaction for supply of energy to the Greenlee substation.

27. On March 2, 2006, El Paso filed a motion to answer and answer to Tucson's amended response stating that Tucson's amended response, even though it addresses the issue of transmission rights, focuses on the Swap and Purchase Agreement between El Paso's Power Marketing Department and Phelps Dodge. El Paso argues that the Swap and Purchase Agreement is a power arrangement which does not involve transmission service. El Paso asserts that its Power Marketing Department is not obligated to offer the same power swap arrangements to other entities. El Paso notes that its Power Marketing Department operates independently from its transmission function as required by the Commission's rules. El Paso argues that Tucson's request for relief in the form of a power swap arrangement should be rejected.

28. On March 10, 2006, Tucson filed an answer to El Paso's March 2, 2006 motion. Tucson requests that the Commission deny El Paso's March 2, 2006 motion. Tucson argues that El Paso proffered several misleading statements and in response Tucson has clarified its position in addition to reiterating several points previously covered in prior pleadings.

29. On January 31, 2006, El Paso filed an answer to Tucson's January 11, 2006 complaint largely reiterating the same arguments that it made in its January 10, 2006 complaint. El Paso argues that although access to transmission service is still available under the 1982 Agreement, Tucson's intention to use its access to transmit power from the Luna Substation to either Springerville or Greenlee amounts to a second and additional purpose, which El Paso argues, is not be permitted under the 1982 Agreement. El Paso also concurs with Tucson's request that the Commission consolidate the proceedings arising from Tucson's complaint. On February 17, 2006, Tucson filed a response to El Paso's answer stating that El Paso has mischaracterized Tucson's request as an intention to use more than the 200 MW of transmission service

granted under the 1982 Agreement. Tucson declares that it will stipulate and agree that if El Paso is delivering Tucson's 190 MW from the Luna Substation to Springerville on a firm basis, Tucson will not rely on the same transmission rights to simultaneously transmit power from Springerville to Greenlee. Tucson argues that its answer should be accepted by the Commission because it is needed to correct the record in this proceeding. Finally, on April 17, 2006, Tucson filed an intervention in support of the firm and non-firm transmission service agreements filed in Docket No. ER06-803-000.

## **Discussion**

### **Procedural Issues**

30. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We will accept the answers of El Paso and Tucson because they have provided information that assisted us in our decision-making process.

### **Commission Determination**

31. Based on our review of the 1982 Agreement and related extrinsic evidence, we find Tucson's request to transmit power over El Paso's transmission system from Luna to either the Springerville or Greenlee substations is not covered under the 1982 Agreement. We believe this is a reasonable interpretation of the evidence on record in this proceeding. Additionally, we find that the Revised Interconnection Agreement does not obligate owners of the Luna Station, including Tucson, to purchase transmission service under El Paso's OATT (or the OATT of one of the other utilities owning the interconnection lines). Finally, we find that Tucson's concerns regarding the Swap and Purchase Agreement between Phelps Dodge and El Paso go beyond the scope of El Paso's complaint and will not be addressed in the instant proceeding.

### **1982 Agreement**

32. We find sections 6.3 and 6.4 of the 1982 Agreement to be ambiguous.<sup>15</sup> 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

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<sup>15</sup> The Commission will consider the disputed contract language here given it implicates El Paso's revised interconnection agreement filed in Docket No. ER05-1390-000, El Paso's Swap and Purchase Agreement currently pending before the Commission in Docket No. ER06-557-000, and the Interim Transmission Agreements currently pending in Docket No. ER06-803-000.

interpretations."<sup>16</sup> Under section 6.3 of the 1982 Agreement, El Paso “assigns to [Tucson] 200 megawatts of transmission rights in the Springerville – Luna 345kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee.” Section 6.4 states that the “assignment of transmission rights from [El Paso] to [Tucson] shall begin with the commercial operating date of the Springerville-Luna circuit and shall continue for a term of 40 years from that date.”

33. The Commission finds that sections 6.3 and 6.4 are not specific as to whether El Paso would provide the point-to-point service that Tucson is presently requesting. El Paso argues that the wording in those sections make clear that they cover only uni-directional transmission service along the Springerville to Greenlee Line.<sup>17</sup> Tucson, on the other hand, argues that sections 6.3 and 6.4 clearly provide flexibility both with respect to the direction of the transmission and the points of receipt and delivery.<sup>18</sup>

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<sup>16</sup> *Ameren Service Company v. FERC*, 330 F.3d at 499 (D.C. Cir. 2003); *see also Duke Power Co. v. FERC*, 864 F.2d 823, 828-29 (D.C. Cir. 1989) (“Because we agree with the Commission that the relevant terms of the agreements are clear and unambiguous, i.e., not reasonably susceptible of different constructions or interpretations . . . .”) (citation omitted).

<sup>17</sup> For example, El Paso argues that Tucson is granted rights in section 6.3 to transmit power over the Springerville to Luna 345 kV circuit and the Luna to Hidalgo to Greenlee 345 kV circuit, not the right to transmit power over the Springerville to Luna 345 kV circuit or the Luna to Hidalgo to Greenlee 345 kV circuit. El Paso argues that the reference in section 6.3 to each segment of the transmission path can not be read as providing service on each segment alone, but on the complete path as a whole using both segments, and to treat them separately would also be in conflict with section 6.4 which refers to an assignment of the Springerville to Greenlee Line. El Paso also argues that this is further emphasized in section 6.4 by the fact that access to the rights would not be made available until completion of the Springerville to Luna segment of the transmission path. At the same time, El Paso acknowledges that a differing interpretation of sections 6.3 and 6.4 is possible thereby rendering the sections ambiguous. *See* El Paso complaint at 33-34.

<sup>18</sup> For example, Tucson argues the use of the word “and” in section 6.3 affirms that Tucson has rights in two separate circuits and that the language in section 6.3 is meant to permit Tucson to use the circuits conjunctively, but does not require Tucson to do so.

34. We find other sections of the 1982 Agreement, covering other assignments of transmission rights by one party to the other, do provide details as to the direction of service and receipt/delivery points. Section 6.5.3 states that “assignment of rights shall include transmission in *both* directions,” and Section 6.1 refers to “nonfirm rights in the Palo Verde-Westwing Circuit No. 1 for deliveries *from* Westwing *to* Palo Verde.” (Emphasis added). While these two sections set forth conditions that are specifically permitted and agreed upon by the parties with respect to the direction of transmission, and the specific points of receipt and delivery, sections 6.3 and 6.4 do not provide such specific guidance.

35. After careful consideration of the language of sections 6.3 and 6.4, the parties’ arguments with respect to how the sections should be interpreted and related sections within the 1982 Agreement that demonstrate that the parties know how to clarify such matters, we find that there was no meeting of the minds and that sections 6.3 and 6.4 are ambiguous with respect to direction of service and receipt/delivery points.<sup>19</sup> It is well-settled that where “the contract at issue contains ambiguous language, it is appropriate for [the Commission] to consider extrinsic evidence.”<sup>20</sup> Upon determining that relevant language in the 1982 Agreement is ambiguous, the Commission may appropriately rely on extrinsic evidence.<sup>21</sup>

36. Accordingly, we find based on the extrinsic evidence provided in Exhibits in both El Paso’s and Tucson’s pleadings that section 6.3 and 6.4 of the 1982 Agreement are not intended to provide the flexibility that Tucson seeks.

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<sup>19</sup> See generally *Colfax Envelope Corp. v. Local No. 458-3M*, 20 F.3d 750, 752, 754 (7th Cir. 1994) (“Most contract disputes arise because the parties did not foresee and provide for some contingency that now has materialized-- so there was no meeting of the minds on the matter at issue . . . . When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That it is what courts and arbitrators are for in contract cases--to resolve interpretive questions founded on ambiguity”).

<sup>20</sup> *PacifiCorp v. Reliant Energy.*, 103 FERC ¶ 61,355 (2003), citing *Oglethorpe Power Corp. v. Ga. Power Co.*, 69 FERC ¶ 61,208 (1994), *order on rehearing*, 72 FERC ¶ 61,065 (1995).

<sup>21</sup> *Delmarva Power & Light.*, 69 FERC at 61,525-26 (1994).

37. Based on our review, we find that the 1982 Agreement does not permit Tucson to include Luna as a point of receipt; rather the 1982 Agreement allows Tucson to use the path covered under sections 6.3 and 6.4 as a single continuous circuit with power entering the El Paso system at Springerville and exiting at Greenlee. This fact is supported by evidence that this line was used infrequently by Tucson and only for back-up service when Tucson's line directly connecting Springerville and Greenlee was out of service or otherwise compromised.<sup>22</sup> Tucson has provided no evidence to the contrary. Furthermore, Tucson's Vice President of Power Supply and System Control testified in 1987 in a proceeding before the New Mexico Public Service Commission (NMPSC) that Tucson would not be permitted under the 1982 Agreement to take delivery at intermediate points (Hidalgo or Luna) between Greenlee and Springerville unless an additional agreement with El Paso was signed.<sup>23</sup> While this testimony pointed out that there was limited flexibility with respect to delivery points under the 1982 Agreement, the Commission finds that there is nothing indicated that would prevent the limited delivery point flexibility from similarly applying with respect to receipt points.

38. Further, this same Tucson witness provided testimony before the NMPSC on behalf of El Paso supporting the interpretation that sections 6.3 and 6.4 were intended to provide back-up service when Tucson's direct line between Springerville and Greenlee was out of service stating that "...200 megawatts of rights that was granted to [Tucson] by El Paso is intended for Tucson to be able to schedule power from Springerville to Greenlee on the El Paso system, ...[w]henver we [Tucson] have insufficient capacity south of Springerville."<sup>24</sup>

39. Finally, the parties point to letters and draft letters they exchanged in 1983 and 1987 as supporting their positions with respect to the 1982 Agreement. For example, it appears that Tucson sought El Paso's approval in 1987 to schedule power at intermediate points along the Springerville to Greenlee Line under certain circumstances.<sup>25</sup> While it does not appear that the parties ever reached agreement with

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<sup>22</sup> See El Paso complaint at Exhibit 9 (Affidavit of Jose Nevarez) and Exhibit 12 (deposition transcripts of Tucson's Vice President, Thomas Delawder).

<sup>23</sup> See El Paso complaint at Exhibit 12, page 9.

<sup>24</sup> See El Paso complaint at Exhibit 12.

<sup>25</sup> See El Paso complaint at Exhibits 13-15 (letters from 1987 wherein the parties discuss rights by Tucson to intermediate delivery points).

respect to such rights by Tucson, we find that the fact that the parties sought to document an agreement with respect to the use of intermediate points makes clear that they did not believe that the 1982 Agreement conveyed such flexibility in and of itself.<sup>26</sup>

40. Based on this evidence, we find that the 1982 Agreement does not allow Tucson to source or sink power at any point along the Springerville to Greenlee Line other than the points of receipt and delivery at Springerville and Greenlee respectively. In addition, we find the aforementioned extrinsic evidence demonstrates that sections 6.3 and 6.4 refer to service that was only intended to provide back-up service when Tucson's direct line between Springerville and Greenlee was out of service or otherwise compromised and does not contemplate use as Tucson desires here without El Paso's consent.

#### Revised Interconnection Agreement

41. El Paso claims that Tucson's actions here will violate the terms of the Revised Interconnection Agreement at section 3.2.2(a), which El Paso argues requires Luna Station owners take transmission service under El Paso's OATT.<sup>27</sup> Tucson claims that pursuant to the Revised Interconnection Agreement, Luna Station owners are not limited to taking transmission service only under El Paso's OATT.

42. We find that the Revised Interconnection Agreement does not require Tucson or other Luna Station owners to obtain transmission service for the Luna Station pursuant to El Paso's OATT or another utility's OATT because other sections of the Revised Interconnection Agreement appear to explicitly allow the use of non-OATT arrangements with respect to power generated at the Luna Station. For example, section 3.3.2 of the Revised Interconnection Agreement states that "[e]ach Party is responsible for making arrangements necessary for it to secure any transmission or other service provided for herein that it may desire...." This reference to transmission service speaks generally of "transmission arrangements" and does not include a specific limitation that transmission service be under an OATT.<sup>28</sup>

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<sup>26</sup> *See also* Tucson complaint at Exhibit 5 (El Paso consented to certain specific uses of the transmission capacity under sections 6.3 and 6.4).

<sup>27</sup> The Commission accepted the Revised Interconnection Agreement on October 7, 2005.

<sup>28</sup> *See also* Revised Interconnection Agreement section 3.2.1 ("[i]nterconnection  
(continued)

43. Clearly El Paso is not consistently interpreting section 3.2.2 as mandating that the Luna Station owners take service under its OATT only or that of another utility, as it is not requiring the other owners of the Luna Station to obtain transmission service under an OATT only. Thus, for example, instead of purchasing transmission service under its OATT, El Paso has entered into the Swap and Purchase Agreement with Phelps Dodge.<sup>29</sup> Accordingly, we find that Tucson is not required under the Revised Interconnection Agreement to purchase transmission service under El Paso's OATT and may avail itself of other available options with respect to delivery of its share of the Luna Station power. However, to transmit energy across the lines some party must have a transmission agreement.<sup>30</sup>

#### Phelps Dodge Swap and Purchase Agreement

44. With respect to Tucson's request for a power swap agreement, the complaints in these dockets relate to a dispute over the interpretation of the 1982 Agreement and the Revised Interconnection Agreement. The merits, meaning and availability to other parties of the Swap and Purchase Agreement were not raised in the complaints here and, to the extent that such matters are to be considered, that would be covered in the proceeding in Docket No. ER06-557-000. Accordingly, we find that Tucson's argument pertaining to the Swap and Purchase Agreement is outside the scope of this instant proceeding and will reject without prejudice Tucson's request for relief in the form of a power swap arrangement.

#### Interim Firm and Non-Firm Transmission Service Agreements

45. With respect to the interim blanket transmission service agreements filed by El Paso on March 28, 2006, we will accept those here effective the date that the Luna Station begins commercial operations. We find that agreements are in the best interest

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service shall not include ... the delivery of energy or ancillary services from the [Luna Station] beyond the Interconnection Point, which services shall be provided separately under Utilities' OATT or under separate arrangements, as applicable"); section 3.2.2(c) (allowing for transmission services arrangements to be made "under applicable tariff").

<sup>29</sup> The Swap and Purchase Agreement is being considered in Docket No. ER06-557-000.

<sup>30</sup> *Tennessee Power Co.*, 90 FERC ¶ 61,238 at 61,761 (2000).

of both parties and provide Tucson a means to transmit their portion of the Luna Station energy beginning with the onset of commercial operation of the Luna Station (proposed no later than June 30, 2006) for a period equal to the shorter of one full additional calendar month after the issuance of this order or until a permanent transmission service agreement has been established.

The Commission orders:

(A) The complaint filed in Docket No. EL06-46-000 by Tucson is hereby denied, as discussed in the body of this order.

(B) The complaint filed in Docket No. EL06-45-000 by El Paso is hereby granted, as discussed in the body of this order.

(C) The firm and non-firm transmission service agreements filed in Docket No. ER06-803-000 are hereby accepted as discussed in the body of this order.

(D) Waiver of the 60-day prior notice requirement for the additional transmission service agreement El Paso filed in Docket No. ER06-803-000, is granted as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

