

150 FERC ¶ 61,094  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

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

v.

Docket No. EL15-17-000

Tucson Electric Power Company

ORDER DENYING COMPLAINT

(Issued February 19, 2015)

1. In this order, the Commission denies a complaint filed on November 7, 2014 by Alterna Springerville LLC, LDVF1 TEP LLC, Wilmington Trust Company, and William J. Wade (collectively, Complainants) against Tucson Electric Power Company (Tucson), requesting firm transmission service over a specified path to a specific delivery point at Palo Verde.

**I. Background**

2. Complainants and Tucson jointly own the Springerville Generating Station (Springerville) Unit 1, a 380 MW coal-fired electric generating facility. Complainants and Tucson are parties to separate leaseback agreements (Lease Agreements), dated December 15, 1986, and amended in 1992, under which Tucson leased a 195 MW energy entitlement in Springerville 1 from Complainants. The Lease Agreements expired on January 1, 2015.<sup>1</sup> Upon expiration of the Lease Agreements, Complainants' energy entitlement, representing 50.5 percent (195 MW) of the generation capacity in Springerville Unit 1, reverted back to Complainants, who are now responsible for marketing their respective generation output.

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<sup>1</sup> Tucson also owns 49.5 percent of Springerville Unit 1, which is designated as a network resource and used to serve its native load.

3. Tucson and Complainants are also parties to a Facility Support Agreement, executed in 1986, as amended and restated in 1992 (1992 FSA), which addresses, among other things, the parties' obligations with respect to maintenance and operation of Springerville Unit 1, cost responsibilities, and post-lease transmission service requirements. Upon expiration of the Lease Agreements, section 5.1 of the 1992 FSA states that Tucson must transmit Complainants' scheduled energy entitlements from Springerville Unit 1 "on a firm (and not interruptible) and non-discriminatory basis, over transmission facilities of Tucson from [Springerville] Unit 1 to a point or points of interconnection specified from time to time by Tucson subject to [Complainants'] reasonable approval (each, a 'Point of Interconnection') with transmission facilities owned by another utility and subject to jurisdiction under the Federal Power Act, as amended."<sup>2</sup>

4. In order to transmit their share of the Springerville Unit 1 generation, Complainants require transmission service from Tucson, over the San Juan-Springerville-Vail transmission system, a network of transmission facilities running from the San Juan Generating Station in northwestern New Mexico to the Vail Substation in southeastern Arizona. Tucson has offered Complainants firm transmission service with a delivery point of the San Juan Generating Station (San Juan) or the Four Corners Power Plant (Four Corners); Complainants requested delivery to Palo Verde.

5. On November 7, 2014, Complainants filed a complaint against Tucson, asserting that Tucson has denied firm transmission service rights to which Complainants are entitled under the 1992 FSA, in favor of transmitting Tucson's own generation and generation owned by others. Complainants allege that Tucson has: (1) denied Complainants firm transmission service in violation of certain 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.

## **II. Notice of Filing and Responsive Pleadings**

6. Notice of Complainants' filing was published in the *Federal Register*, 79 Fed. Reg. 68,433 (2014), with interventions and protests due on or before November 28, 2014. Motions to intervene were filed by Public Service Company of New Mexico (PNM) and El Paso Electric Company (El Paso). On November 11, 2014, Tucson filed a motion for extension of time to answer the complaint and request for expedited treatment. On

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<sup>2</sup> Complaint, Ex. 1 (Menaker Aff.), Att. D (1992 Facility Support Agreement), at § 5.1 (1992 FSA).

November 15, 2014, Complainants filed an answer to the motion for extension of time. On November 18, 2014, the Commission issued a notice granting an extension of time until December 5, 2014. On December 3, 2014, Tucson filed an answer to the complaint (Tucson Answer). On December 12, 2014, Complainants filed a motion for partial summary disposition and establishment of limited evidentiary hearing. On December 29, 2014, Tucson filed an answer to Complainants' December 12, 2014 motion. On December 30, 2014, SunZia Transmission, LLC (SunZia) filed a motion to intervene out of time.

### **III. Discussion**

#### **A. Procedural Matters**

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make PNM and El Paso parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2014), the Commission will grant the late-filed motion to intervene of SunZia given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. Further, we dismiss Complainants' motion for summary disposition as moot, given our resolution of the proceeding in this order.

#### **B. Substantive Matters**

8. Complainants assert that 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. Specifically Complainants state that they have requested firm transmission for their energy entitlement from Springerville Unit 1 to the Palo Verde switchyard, beginning on January 1, 2015. However, Complainants assert that Tucson has indicated that there is no available transfer capability on the path from Springerville Unit 1 to Palo Verde. Complainants state that prior to the expiration of the Lease Agreements, Tucson used the transmission path for its leased interest in the Springerville Unit 1 output, however, Tucson intends to take that transmission capacity after the Lease Agreements expire and use the capacity to transmit energy from a recently-acquired generator, the Gila River Power Station (Gila River), notwithstanding its prior contractual obligations reflected in the 1992 FSA. Therefore, Complainants request that the Commission require Tucson to transmit Complainants' energy entitlement consistent with Tucson's contractual obligations and its OATT.<sup>3</sup> Complainants also request that the Commission require

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<sup>3</sup> *Id.* at 3-4.

Tucson to provide transmission service to Complainants at discounted rates similar to rates reflected in recently filed transmission service agreements with Salt River Project Agricultural Improvement and Power District (Salt River Project).<sup>4</sup>

**1. Tucson's Obligations Under the 1992 FSA**

**a. Complaint**

9. Complainants argue that Tucson has violated pre-OATT contractual commitments by failing to provide firm transmission service for Complainants' energy entitlements from Springerville Unit 1 to the Palo Verde Switchyard. Complainants aver that the sale-and-leaseback transaction was structured to require Tucson to provide Complainants with "commercially reasonable" firm transmission rights after the Lease Agreements expired on January 1, 2015. Specifically, Complainants contend that the sale-and-leaseback transaction involving Springerville Unit 1 hinged on the transaction comporting with an Internal Revenue Service (IRS) Revenue Ruling in April 1982, in which the IRS generally addressed the federal income tax consequences of a sale-and-leaseback transaction of an undivided interest in a coal-fired electric generating facility, and found that the parties were required to structure the transaction so that each Owner/Lessor would, following expiration of the lease, be able to market the electrical output of the facility on a basis that is commercially feasible.<sup>5</sup>

10. Complainants state that the sale-and-leaseback of Springerville Unit 1 was modeled after the transaction described in the 1982 Revenue Ruling and was intended to enable Complainants to take advantage of the tax savings available as a result of the relatively short depreciation life of Springerville Unit 1.<sup>6</sup> Complainants assert that the contractual rights available to them at the termination of the Lease Agreements as of January 1, 2015 were intended to ensure that Complainants would have an asset with a residual value at lease expiration of at least 20 percent of the original value of their

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<sup>4</sup> On October 17, 2014, as amended on November 21, 2014, Tucson filed in Docket No. ER15-124-000 four executed, non-conforming long-term firm point-to-point transmission service agreements (TSAs) with Salt River Project under Tucson's OATT, together with three notices of termination. The TSAs in Docket No. ER15-124-000 are pending.

<sup>5</sup> Complaint at 8 (citing Rev. Rul. 82-61, 1982-1 C.B. 13, appended as Ex. 1 (Menaker Aff.), Att. B (1982 Revenue Ruling)).

<sup>6</sup> In June 1986, Tucson secured a ruling from the IRS, which found that the Springerville Unit 1 was entitled to depreciation for tax purposes over five years rather than over 15 years. *Id.* at 7.

ownership share of Springerville Unit 1 that could be sold to someone other than Tucson. Complainants further assert that other contemporaneous documents, including an appraisal by R. W. Beck and various memoranda, support Complainants' argument. Complainants claim that the investors involved in the transaction relied on the analyses in these documents when evaluating potential investments in Springerville Unit 1 and that the sale-and-leaseback transaction documents make clear that the parties' intent was for the IRS-required residual value of Springerville Unit 1 to be realized by Complainants following expiration of the Lease Agreements, because they would be granted transmission service that would allow them to sell their energy entitlements on a commercially feasible basis.

11. Complainants also assert that the subsequent restructuring of the sale-and-leaseback transaction reaffirmed Tucson's firm transmission obligations. Complainants state that, in 1992, the 1986 FSA was amended in a manner that preserved Complainants' ability to sell their scheduled energy entitlements from Springerville Unit 1 to persons other than the lessee (i.e., Tucson), on a "commercially feasible basis." Specifically, Complainants argue that sections 2.1, 5.1, and 5.4 of the 1992 FSA obligate Tucson, upon expiration of the Lease Agreements, to transmit electricity from Springerville Unit 1 on behalf of the entitlement owners on a firm and non-discriminatory basis to a point or points of interconnection on the Tucson transmission system that meet Complainants' reasonable approval. The relevant 1992 FSA provisions are:

Section 2.1. Maintenance of Project Documents; Alternate Operating Agreement. Tucson hereby covenants and agrees (i) to maintain in full force and effect the Project Documents, (ii) to cause the Facility to be operated in accordance with the terms of the Project Documents, (iii) to perform all of its duties and obligations set forth therein and to exercise all of its rights thereunder to cause the operator thereunder (whether or not Tucson) to perform its duties and obligations and (iv) not to take any action, including any modification or amendment to or waiver of the Project Documents, thereunder or permit any action to be taken thereunder which would have any adverse effect on [Complainants] or [their] respective Undivided Interest . . . .

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Section 5.1. Wheeling Service. From and after the Lease Termination Date with respect to [Complainants], Tucson shall wheel such

[Complainants'] Entitlement Share of all Energy generated by [Springerville] Unit 1 and the surpluses purchased from Tucson and scheduled by [Complainants] pursuant to Section 5.7, on a firm (and not interruptible) and nondiscriminatory basis, over transmission facilities of Tucson from [Springerville] Unit 1 to a point or points of interconnection specified from time to time by Tucson subject to [Complainants'] reasonable approval (each, a "Point of Interconnection") with transmission facilities owned by another utility and subject to jurisdiction under the Federal Power Act, as amended.

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Section 5.4. Service Continuity. Tucson shall use reasonable diligence in accordance with Prudent Utility Practice to prevent and minimize interruption of wheeling service supplied hereunder, but does not guarantee such service against interruptions due to Uncontrollable Forces. In the event sufficient transmission capacity is not available, because of Uncontrollable Forces, to serve [Complainants'] power schedules, such schedules shall be reduced on a pro rata basis in accordance with [Complainants'] respective Entitlement Shares. No reduction of [Complainants'] power schedules due to Uncontrollable Forces will discriminate against [Complainants] relative to Tucson's other firm (and not interruptible) wheeling customers.

12. Thus, Complainants assert that the 1992 FSA explicitly protects their rights to have their scheduled energy entitlements from Springerville Unit 1 delivered on a firm and nondiscriminatory basis from Springerville Unit 1 to markets that are reasonably acceptable to Complainants and precludes Tucson from taking actions that would have an adverse effect on Complainants, such as denying them transmission rights to make room for other generation, including generation owned by Tucson.

13. Complainants contend that the only delivery point on Tucson's system that is commercially reasonable for sale of energy entitlement from Springerville Unit 1 is Palo Verde. Complainants note that, although Tucson concedes its obligation to provide firm transmission service, the delivery points offered by Tucson to Complainants are not liquid markets because they are thinly traded, and the addition of Complainants' energy

entitlement from Springerville Unit 1 (collectively 195 MW) would cause market prices at those locations to plummet.<sup>7</sup> Specifically, Complainants state that Tucson has offered delivery points to either San Juan or Four Corners, both of which are north of Springerville Unit 1. Complainants assert that, in order for energy from Springerville Unit 1 to be transmitted to Palo Verde through either of those delivery points, Complainants would need to purchase additional transmission from another transmission provider. Complainants claim that, based on expected energy prices in the region over the remaining service life of Springerville Unit 1, the additional costs for transmission service that Complainants would incur would make it impossible for Complainants to secure reasonable market prices for their energy entitlements from Springerville Unit 1.<sup>8</sup> Complainants argue that Palo Verde is the only delivery point which is reasonably acceptable to Complainants because it is the only delivery point which preserves the residual value of Complainants' beneficial interests in Springerville Unit 1, as required by the sale-and-leaseback transaction. Complainants contend that section 5.1 of the FSA requires Tucson to provide transmission service to deliver power from Springerville Unit 1 to Palo Verde, and that Tucson has violated section 5.1 by refusing to provide that service for Complainants.

**b. Answer**

14. Tucson states that the complaint lacks merit and should be dismissed because Tucson has complied with the 1992 FSA that forms the basis of the complaint. Tucson states that it has not violated the terms of the 1992 FSA by failing to provide Complainants firm transmission service, or by granting Salt River Project transmission service, or by reserving firm transmission for its own load-serving needs. Tucson alleges that the complaint twists the language of the 1992 FSA in an effort to impose an obligation on Tucson, and to claim rights for Complainants, which do not exist.

15. Tucson argues that section 5.1 of the 1992 FSA requires Tucson to transmit the energy entitlements from Springerville Unit 1 to one or more points of interconnection that are: (1) specified by Tucson; and (2) subject to the "reasonable approval" of Complainants. Tucson states that its obligation under section 5.1 was fulfilled when it offered to transmit power to one or more points of interconnection that provide access to transmission facilities owned by other utilities (i.e., Four Corners and San Juan). Tucson asserts that section 5.1 of the FSA does not grant Complainants unfettered veto rights over the points of delivery specified by Tucson. Tucson alleges that Complainants seek to impose a greater obligation than that set forth in the 1992 FSA by demanding that

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<sup>7</sup> *Id.* at 16 (citing Ex. 3 (Mirich Aff.) ¶ 8).

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

Tucson deliver energy to one or more locations that are “commercially feasible,” “commercially reasonable,” or “reasonably acceptable” to Complainants. Tucson notes that the complaint uses the three terms interchangeably together with “reasonable approval,” which is the actual term reflected in section 5.1 of the 1992 FSA. Thus, Tucson states that the 1992 FSA only provides for Complainants “reasonable approval” of the points of delivery specified.

16. Tucson further argues that the complaint inappropriately relies on the 1982 Revenue Ruling and other contemporaneous documents. Tucson asserts that these documents are irrelevant parol evidence because the terms of the 1992 FSA are clear and unambiguous.<sup>9</sup> Tucson argues that, even if the Commission were to conclude that this extrinsic evidence should be considered here, these documents have little, if any, probative value. Further, Tucson states that there is no evidence that the parties relied upon, or even considered, these documents when entering into the 1992 FSA. Tucson contends that: (1) although the term “commercially feasible” appears in the 1982 Revenue Ruling, the 1982 Revenue Ruling is a specific ruling by the IRS for other unrelated parties and circumstances and is not embodied in either the 1992 FSA or 1986 FSA; (2) all of these documents date from 1986, six years before the 1992 FSA was executed; and (3) the original 1986 FSA did not impose on Tucson any post-lease transmission obligations.

17. Tucson states that, even if the Commission were to find that the term “reasonable approval” under section 5.1 of the 1992 FSA equates to “commercially feasible,” or one of the other terms used by Complainants, San Juan and Four Corners are both commercially feasible points of delivery because both are liquid locations and the prices at Four Corners for spot market transactions are similar to prices for energy traded at Palo Verde.<sup>10</sup>

### **c. Commission Determination**

18. We will deny the complaint on the basis that Complainants have not shown that section 5.1 of the 1992 FSA requires Tucson to provide firm transmission service to Palo

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<sup>9</sup> Tucson Answer at 5 (citing *Duquesne Light Co. et al.*, 138 FERC ¶ 61,111, at P 25 (2012) (“[T]he Commission [has] found that, when the terms of a contract are clear and unambiguous, the terms of the contract control and the Commission is not to consider parol evidence to interpret the contract’s intention.”); *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154, at P 19 (2004) (“[W]hen the language of a contract is explicit and clear . . . then the court may ascertain the intent from the written terms and not go further.”); *Mid-Continent Area Power Pool*, 92 FERC ¶ 61,229, at 61,755 (2000)).

<sup>10</sup> *Id.* at 9 (citing Att. 1 (Bowling Aff.) at 4).

Verde, the point of interconnection requested by Complainants.<sup>11</sup> Section 5.1 of the 1992 FSA provides that Tucson shall provide firm transmission service over Tucson's transmission facilities from Springerville Unit 1 "to a point or points of interconnection specified from time to time by Tucson subject to [Complainants'] reasonable approval . . . ." <sup>12</sup> We find that Tucson may fulfill its obligation under section 5.1 by offering delivery points at Four Corners and San Juan.

19. With regard to Complainants' claim that Tucson is obligated to offer Palo Verde as the delivery point, we find that the language in FSA section 5.1 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. Nowhere in the 1992 FSA (where the parties first expressed a post-lease firm transmission service obligation) does the term "commercially feasible" appear. To support their assertion that they are entitled to a "commercially feasible" point of delivery, Complainants submitted an affidavit to support their argument that, in setting up the sale-and-leaseback transaction, the parties relied on the 1982 Revenue Ruling and other contemporaneous documents. However, 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). Because the language of the FSA is unambiguous, it is not appropriate for the Commission to consider extrinsic evidence in interpreting the contract.<sup>13</sup>

20. Furthermore, even if the Commission were to consider the extrinsic evidence proffered by Complainants, we agree with Tucson that such evidence has little, if any, probative value. We find 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). It 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

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<sup>11</sup> Given this determination, we dismiss as moot Complainants' motion for partial summary disposition.

<sup>12</sup> 1992 FSA § 5.1.

<sup>13</sup> See, e.g., *Duquesne Light Co. et al.*, 138 FERC ¶ 61,111 at P 25; *Pac. Gas & Elec. Co.*, 107 FERC ¶ 61,154 at P 19; *Mid-Continent Area Power Pool*, 92 FERC at 61,755.

“commercially feasible.” Likewise, the 1992 FSA does not reflect any such specific obligation.

21. Additionally, we find that Complainants have not provided 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.” Rather, Complainants simply state that the addition of their 195 MW of capacity “would likely cause then preexisting prices at that location to plummet.”<sup>14</sup>

## 2. Allegations of OATT Violations

### a. Complaint

22. Complainants allege that Tucson has violated its OATT by failing to set aside transmission for Complainants’ energy entitlements, as required by Tucson’s OATT Attachment C (Available Transfer Capability Calculation Methodology). Specifically, Complainants argue that, had Tucson set aside Complainants’ existing firm transmission capacity, consistent with set-asides for grandfathered agreements that pre-date Tucson’s OATT, there would be sufficient available transfer capability beginning on January 1, 2015 to transmit Complainants’ energy entitlement in Springerville 1 to Palo Verde, which is Complainants’ preferred delivery point.<sup>15</sup>

23. Complainants also argue that Complainants’ contractual rights to firm transmission service reflected in the 1992 FSA are grandfathered by Order No. 888<sup>16</sup> and that Complainants therefore hold a right of first refusal to continue transmission service for the capacity entitlement in Springerville Unit 1, upon expiration of the Lease Agreements.<sup>17</sup> They state that the Commission has previously found that: (1) a utility

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<sup>14</sup> Complaint, Ex. 3 (Mirich Aff.) ¶ 8b.

<sup>15</sup> *Id.* at 21.

<sup>16</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, 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).

<sup>17</sup> As noted above, upon expiration of the Lease Agreements, the capacity entitlements for Springerville Unit 1 transferred from Tucson back to Complainants.

may not preempt pre-existing contractual obligations to existing customers by accepting subsequent obligations;<sup>18</sup> and (2) transmitting utilities are required to honor pre-existing firm transmission service agreements, such that the pre-existing contract holder would have a right of first refusal, even where continuation of such service might conflict with the public utility's desire to use the transmission capacity to serve its native load. Complainants further state that their right of first refusal is not diminished by the fact that the Tucson may want to "recall" existing capacity to meet anticipated growth in native load.<sup>19</sup>

24. Notwithstanding this policy, Complainants explain that Tucson is planning to use capacity on the 345 kV transmission path from Springerville to Vail to transmit energy from Gila River to the Tucson system beginning January 1, 2015. Complainants argue that, by failing to set aside transmission capacity needed for Complainants' transmission service under the 1992 FSA, and instead using that capacity to serve native load, Tucson is violating its OATT.<sup>20</sup>

**b. Answer**

25. Tucson argues that Complainants are incorrect that OATT Attachment C requires Tucson to "set aside" transmission capacity for the 1992 FSA which Complainants assert is a grandfathered agreement.<sup>21</sup> Tucson disputes Complainants' assertion that they hold a right of first refusal for transmission capacity by virtue of section 5.1 of the 1992 FSA, because Complainants are not an existing transmission customer and have never taken transmission service from Tucson. Tucson additionally notes that the discussion in Order No. 888 that Complainants reference was in the context of *bundled* service customers that presumably have load obligations, not merchant generators seeking to transmit power. Tucson argues that, even if Complainants qualify as existing customers of Tucson by virtue of the 1992 FSA's provision for future transmission service, a right of first refusal

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<sup>18</sup> Complaint at 21 (citing *Tucson Elec. Power Co.*, 60 FERC ¶ 61,236, at 61,791 (1992)).

<sup>19</sup> *Id.* at 22 (quoting Order No. 888-A, FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,048 at 31,198 ("recalling" existing capacity to meet native load growth that was anticipated at the time existing third-party [] contracts were executed can be addressed in the context of a specific filing by a utility demonstrating that it had no reasonable expectation of continuing to provide transmission service to the wholesale transmission customer at the end of its contract.")).

<sup>20</sup> *Id.* at 21-23.

<sup>21</sup> Tucson Answer at 20.

may be circumscribed by the needs of its existing native load, and does not extend to any path that the customer desires; rather, Commission policy dictates that the right of first refusal is limited to the path over which the customer is already taking service. Tucson contends that, because the 1992 FSA is not a transmission service agreement and thus does not specify a point of delivery,<sup>22</sup> a right of first refusal does not attach. Tucson notes that it has offered Complainants firm transmission service for Complainants' energy entitlement to San Juan or Four Corners.<sup>23</sup> Tucson argues that Complainants essentially assert that Tucson should have set aside transmission capacity throughout Tucson's entire system on all possible paths, which would be contrary to the Commission's goal of promoting open access and run afoul of Commission policy against transmission hoarding.<sup>24</sup>

**c. Commission Determination**

26. We find that Tucson has not violated its OATT by not setting aside transfer capability for Complainants. Importantly, Complainants do not hold a right of first refusal for transmission from Springerville Unit 1 to Palo Verde because Complainants are not a transmission customer of Tucson. The 1992 FSA only requires payments to Tucson for transmission service and only addresses transmission service "[f]rom and after the Lease Termination Date."<sup>25</sup> Complainants have not explained how, at the time prior to the lease termination, they qualified as a transmission customer of Tucson. Instead, it appears that, prior to the lease termination date, Tucson purchased Complainants' generation entitlement from Springerville Unit 1, which was designated as

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<sup>22</sup> Specifically, section 5.1 of the 1992 FSA states that Tucson will transmit Complainants' energy "to a point or points of interconnection specified from time to time by Tucson subject to [Complainants'] reasonable approval (each, a 'Point of Interconnection') with transmission facilities owned by another utility . . . ." 1992 FSA § 5.1.

<sup>23</sup> Tucson Answer at 20-21.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> Section 5.1 of the FSA states that, "[f]rom and after the Lease Termination Date with respect to [Complainants], Tucson shall wheel [Complainants'] Entitlement Share of all Energy generated by [Springerville] Unit 1" and section 5.3 states that, "[f]rom and after the Lease Termination Date in respect of [Complainant], Tucson shall be entitled to payment from [Complainant] . . . ." 1992 FSA §§ 5.1, 5.3. Accordingly, under the 1992 FSA (and from statements in Tucson's Answer), it appears that Complainants are only obligated to pay for transmission service after the termination of the lease termination date (i.e., January 1, 2015).

a network resource, and used its transmission system to serve its native load. Thus, any argument by Complainants that Commission policy requires Tucson to honor pre-existing firm transmission service ahead of transmission service used to serve Tucson's native load is undermined by the fact that Complainants do not have pre-existing transmission service. Therefore, Complainants do not possess a right of first refusal, or any type of rollover rights, for firm transmission service.

27. Moreover, assuming *arguendo*, that Complainants hold a right of first refusal for transmission service under the 1992 FSA, the right of first refusal would be from Springerville Unit 1 to the points of delivery stated in the agreement, which is essentially "to a point or points of interconnection . . . with transmission facilities owned by another utility . . . ." <sup>26</sup> As Tucson points out, it would be illogical to expect Tucson to set aside available transfer capability throughout Tucson's entire system on all possible paths. Moreover, as discussed above, there is no condition stated in the 1992 FSA that the point of delivery must be "commercially feasible." Therefore, a right of first refusal held by Complainants would not be limited to the Springerville Unit 1 to Palo Verde path, as claimed by Complainants. Instead, Complainants would hold a right of first refusal to the point of delivery stated in the 1992 FSA—any point of interconnection with transmission facilities owned by another utility—which Tucson has offered to Complainants.

### **3. Allegations of Undue Discrimination and Preference**

#### **a. Complaint**

28. Complainants allege that Tucson, in using transmission capacity needed by Complainants for other purposes, has violated sections 2.1, 5.1, and 5.4 of the FSA and is engaging in undue discrimination and preference. Complainants state that Tucson has filed a series of transmission service agreements with Salt River Project (the TSAs) for provision of up to 623 MW of firm point-to-point bi-directional transmission service over facilities that constitute a portion of the San Juan-Springerville-Vail Transmission System (i.e., the Springerville to Coronado Line). <sup>27</sup> Complainants point out that this transmission service was arranged more than 10 years after Tucson agreed to provide transmission service to Complainants in accordance with section 5.1 of the 1992 FSA.

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<sup>26</sup> 1992 FSA § 5.1.

<sup>27</sup> The San Juan-Springerville-Vail Transmission System is a network of transmission facilities jointly owned by Tucson and PNM running from the San Juan Generating Station in northwestern New Mexico to the Vail Substation in southeastern Arizona. The Springerville to Coronado, which is part of the transmission system, is a radial line off of the main line of the San Juan-Springerville-Vail transmission system and runs from San Juan to Springerville.

29. Complainants also state that Tucson is planning to use capacity in the 345 kV transmission path from Springerville Unit 1 to Vail to transmit power from Gila River to the Tucson system beginning January 1, 2015. Complainants assert that use of the transmission path from Springerville to Vail for that purpose will have an adverse effect on Complainants because Tucson has stated that there is no additional transmission capacity available with which to transmit Complainants' energy entitlement from Springerville Unit 1 to Palo Verde.

30. Complainants also argue that Tucson is violating its fiduciary duty under section 2.1 of the 1992 FSA by providing transmission service to Salt River Project. Complainants argue that, under section 2.1 (Maintenance of Project Documents; Alternate Operating Agreement) of the 1992 FSA, Tucson has a fiduciary duty to Complainants and may not do anything that would have an adverse effect on them. Complainants assert that use of the transmission capacity on the transmission path from Springerville to Vail for Salt River Project will have an adverse effect on Complainants because Tucson has stated that there is no additional firm transmission capacity available to transmit Complainants' energy entitlements from Springerville to Palo Verde. Complainants argue that by using transmission capacity in a way that has an adverse effect on Complainants, Tucson is violating its fiduciary duty to Complainants under section 2.1.

31. Complainants allege that, by denying Complainants firm transmission service from Springerville Unit 1 to Palo Verde beginning on January 1, 2015, while at the same time transmitting energy supplied by its own generation resources (including both its own energy entitlement from Springerville Unit 1 and Gila River) over this same path, Tucson is violating its obligation under section 5.1 to provide transmission service on a non-discriminatory basis. Complainants further contend that section 5.4 (Service Continuity) of the 1992 FSA also affirms that the non-discrimination provisions of the agreement are intended to preclude Tucson from favoring its own energy entitlement from Springerville Unit 1 or any other generating facility over Complainants' energy entitlements in its allocation of transmission capacity.

32. Complainants next argue that the 1992 FSA provides for Complainants to pay for transmission service provided by Tucson at rates that are "equal to . . . FERC-approved rates."<sup>28</sup> Complainants state that Tucson has offered to provide transmission service to Complainants at rates identical to those in its OATT; however, the transmission service rates proposed in non-conforming TSAs with Salt River Project recently filed by Tucson

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<sup>28</sup> Complaint at 19 (citing 1992 FSA § 5.3).

are “materially less than the rates in Tucson Electric’s OATT.”<sup>29</sup> Complainants argue that it is unreasonable and unduly discriminatory for Tucson to offer firm transmission service to Salt River Project over the same portion of its transmission system as that which would be used to deliver energy on behalf of Complainants at substantially lower rates. Complainants contend that Tucson should be required to provide transmission service to Palo Verde at discounted rates that are commensurate with rates charged to Salt River Project.

**b. Answer**

33. Tucson notes that it and Salt River Project entered into certain TSAs as a “stopgap” measure so that Salt River Project could transmit power to serve its load pending the consummation of a transaction pursuant to which Tucson will sell an undivided interest in the Springerville-Coronado Line to Salt River Project. Tucson states that the rates under the TSAs reflect the costs that Salt River Project would incur as a partial owner of the Springerville-Coronado Line and are part and parcel of that larger transaction. Therefore, Tucson contends that no undue discrimination has occurred. Moreover, Tucson notes that the points of receipt and delivery under the TSAs are not the same as those sought by Complainants, and so, even were it not for the TSAs being unique, Complainants would not be entitled to a similar rate.

34. Specifically, Tucson asserts that transmission service on the Springerville-Coronado Line over which Salt River Project takes service is a separate transmission path from the transmission path from Springerville to Palo Verde over which Complainants seek transmission service. Tucson states that it is factually incorrect to state that Salt River Project is taking service over “the same portion of [the Tucson Electric] transmission system” as that over which Complainants seek service. Moreover, Tucson contends that it has not otherwise acted improperly in granting transmission service to Salt River Project. Tucson states that Commission policy expressly permits discounting of transmission service, and, consistent with this policy, Tucson agreed to provide service to Salt River Project over the Springerville-Coronado Line at a rate based on Salt River Project’s intent to become a partial owner of the line, and only over that discrete transmission line. Thus, Tucson claims that, notwithstanding any discount offered or provided by Tucson on the Springerville-Coronado Line, it is not required to offer or provide that same discount (or even any similar discount) on the transmission path sought by Complainants.

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<sup>29</sup> *Id.* at 20 (citing Tucson Transmittal, Docket No. ER15-124-000, at 7-8 (filed Oct. 7, 2014)).

35. Further, Tucson disputes the allegation that Tucson has unduly discriminated against Complainants, or violated section 2.1 of the 1992 FSA, by granting firm transmission service to Salt River Project.<sup>30</sup> Tucson explains that the path to Coronado (Salt River Project path) and the path to Palo Verde (Complainants' requested path) radiate out in separate directions from Springerville (the former to the Northwest and the latter to the South).<sup>31</sup> Moreover, Tucson explains that the transmission rights awarded to Salt River Project over the Springerville-Coronado Line had (and continue to have) no bearing on the calculation of available transfer capability between Springerville and Palo Verde because the Springerville-Coronado Line is essentially a radial line off of the "trunk" that runs from San Juan to Springerville and then through Vail to Palo Verde.<sup>32</sup> Tucson states that, even if Salt River Project had no transmission rights over the Springerville-Coronado Line, there would still be no available transfer capability for firm transmission from Springerville to Vail.

36. Tucson also disputes Complainants' claim that Tucson has unduly discriminated against Complainants in favor of Tucson's own generation. Tucson states that it requires continued use of the Springerville to Vail portion of the Springerville to Palo Verde path to serve its native load obligations, just as it has used that path since before it established its OATT.

37. Tucson states that, in order to compensate for the loss of generating capacity at Springerville Unit 1 (upon expiration of the Lease Agreements), it will acquire an interest in Gila River located in Gila Bend, Arizona. This power, together with Tucson's ownership share of Springerville Unit 1, will utilize transmission capacity that has historically been set aside for Tucson to move Springerville Unit 1 power to its service territory in order to serve its native load and will necessarily use segments of the transmission line that interconnects Springerville and Palo Verde—the same transmission line over which Complainants seek transmission service.

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<sup>30</sup> Section 2.1 of the 1992 FSA states in pertinent part that "Tucson hereby covenants and agrees . . . not to take any action, including any modification or amendment to or waiver of the Project Documents, thereunder or permit any action to be taken thereunder which would have any adverse effect on [Complainants] or on [their] respective Undivided Interest." 1992 FSA § 2.1.

<sup>31</sup> Tucson Answer at 10 (citing map appended as Att. 2 (Aff. of Ed Beck), Ex. A).

<sup>32</sup> *Id.* at 11 & Att. 2 (Aff. of Ed Beck) at 3-4.

38. Tucson notes that this line has had zero available transfer capability since Tucson first adopted an OATT in 1996, and therefore, Tucson has not “take[n] . . . transmission capacity”<sup>33</sup> on the Springerville to Palo Verde path in order transmit power from Gila River to load. Rather, Tucson states that it has substituted certain of its Springerville Unit 1 rights as a network resource with resources from Gila River in order to continue to serve this same load. Tucson argues that its use of this transmission capacity is consistent with the Commission’s recognition of the rights of load-serving entities to use transmission to serve native load.<sup>34</sup>

**c. Commission Determination**

39. We find that Tucson has not engaged in undue discrimination or preference in providing transmission service to Salt River Project because the transmission path utilized by Salt River Project has no impact on available transfer capability over the transmission path requested by Complainants. While transmission service from Springerville-Coronado (the service provided to Salt River Project) and Springerville-Palo Verde (the service requested by Complainants) share the same point of receipt, these requests do not create competing transmission service because they require separate paths. In fact, as Tucson explains, 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 Complainants’ transmission service request. Accordingly, we find that Tucson’s actions in providing transmission service to Salt River Project over a separate path did not have an adverse effect on Complainants and did not constitute a violation of Tucson’s obligation to provide transmission service on a non-discriminatory basis. Therefore, we find that Tucson did not violate sections 2.1, 5.1, or 5.4 of the 1992 FSA.

40. We also find 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. As discussed above, prior to the lease termination date, Tucson was purchasing Complainants’ generation from Springerville Unit 1 and using its transmission system to serve its native load. Upon expiration of the Lease Agreements, Tucson continues to transmit generation over its system from a new network resource (i.e., Gila River) to serve its native load. Therefore, since it is permissible for Tucson to designate network resources and use its transmission system to serve native load in this manner, and since Complainants do not possess a right of first

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<sup>33</sup> *Id.* at 18 (quoting Complaint at 3-4).

<sup>34</sup> *Id.* at 18-19.

refusal, or any type of rollover rights, for firm transmission service, we find that Tucson has not violated sections 2.1, 5.1, or 5.4 of the 1992 FSA.

41. In addition, we will deny 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.<sup>35</sup> Tucson's OATT only requires Tucson to offer the same discounted rate to customers on unconstrained transmission paths with the same point of delivery, which is not the case here.

The Commission orders:

(A) The complaint is hereby denied, as discussed in the body of this order.

(B) Complainants' motion for partial summary disposition is hereby dismissed as moot, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>35</sup> We note that this order is not intended to prejudice any of the issues pending in Docket No. ER15-124-000.