

155 FERC ¶ 61,070
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 Nos. ER15-1861-001
ER15-1862-001

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR
REHEARING AND ORDER ON REFUND REPORT

(Issued April 21, 2016)

1. On July 30, 2015, the Commission issued separate Letter Orders denying waiver of the Commission's prior notice requirement, accepting certain agreements for filing and directing Tucson Electric Power Company (Tucson) to make time value refunds of monies collected under the agreements for the time period during which the rates were charged without Commission authorization.¹ Subsequently, Tucson requested rehearing of the two Letter Orders arguing that time value refunds are not warranted, and separately filed a refund report. For the reasons discussed below, we will grant in part and deny in part Tucson's rehearing request, and direct Tucson to submit a revised refund report within 30 days of the date of this order.

I. Background

2. On June 5, 2015, in Docket No. ER15-1861-000, Tucson filed a letter agreement dated December 6, 2010 that revises a 2003 Interconnection and Operating Agreement with Tri-State Generation & Transmission Association, Inc. (Tri-State) (2010 Letter Agreement) and 10 non-conforming point-to-point transmission service agreements (TSAs) with Tri-State under Tucson's Open Access Transmission Tariff (OATT), with service commencing on July 28, 2006, September 1, 2011, and October 1, 2014. On the same date, in Docket No. ER15-1862-000, Tucson filed 12 non-conforming point-to-point and network TSAs with several customers, entered into on various dates between

¹ *Tucson Elec. Power Co.*, Docket No. ER15-1861-000 (July 30, 2015) (delegated letter order) and *Tucson Elec. Power Co.*, Docket No. ER15-1862-000 (July 30, 2015) (delegated letter order) (Letter Orders).

2004 and 2015.² Tucson stated that the agreements were identified as a result of a comprehensive review of unfiled agreements in accordance with a self-report made to the Office of Enforcement on March 2, 2015.³ Tucson filed the TSAs as non-conforming agreements because they included provisions that: (1) waived the applicable deposit requirement; (2) did not require customers to pay for Schedule 1 and/or Schedule 2 ancillary services; (3) waived charges for real power losses; and/or (4) assessed direct assignment facilities charges.

3. On July 30, 2015, the Commission issued separate Letter Orders denying waiver of the 60-day prior notice requirement, accepting the 2010 Letter Agreement and the 22 TSAs, effective August 5, 2015, and directing Tucson to refund the time value of monies actually collected for the time period during which the rates were charged without Commission authorization consistent with section 35.19(a) of the Commission's regulations, with the refunds limited so as not to cause Tucson to suffer a loss.⁴ The Commission directed Tucson to make the time value refunds within 30 days for all but two of the agreements,⁵ and to file a refund report within 30 days thereafter, and make a showing in the refund report, to the extent that time value refunds would result in a loss.

4. On August 31, 2015, Tucson requested rehearing, arguing that the time value refunds, which it claimed would amount to approximately \$12.8 million, would cause it to operate at a loss.

² The customers included Public Service Company of New Mexico, Navajo Tribal Utility Authority, Trico Electric Cooperative (Trico), Arizona Electric Power Cooperative, UNS Electric, Inc., and Tucson Wholesale Marketing.

³ Prior to its filing of these agreements, the Commission had referred issues related to the other late-filed agreements to the Office of Enforcement "for further examination and inquiry as may be appropriate." *See Tucson Elec. Power Co.*, 151 FERC ¶ 61,088, at n.43 (2015).

⁴ *Tucson Elec. Power Co.*, Docket No. ER15-1861-000, at 2 (July 30, 2015) (delegated letter order) and *Tucson Elec. Power Co.*, Docket No. ER15-1862-000, at 2 (July 30, 2015) (delegated letter order) (both citing *So. Cal. Edison Co.*, 98 FERC ¶ 61,304 (2002)); *Fla. Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083 (1999).

⁵ The 2010 Letter Agreement changed terms and conditions with no rate impact. Service Agreement No. 225 with Tri-State provides for a point-to-point transmission stated rate and Schedule 1 rate below the rates reflected in the OATT because service was for a limited distance across a substation. Thus, no refunds were directed for these agreements.

5. On September 29, 2015, Tucson submitted a refund report in response to the Letter Orders which detailed a refund to Trico for amounts paid for a direct assignment charge collected under a single TSA. Specifically, Tucson made time value refunds of \$1,832 on the \$13,340 per year direct assignment facilities charge set forth in Service Agreement No. 324, its network integration TSA with Trico. Tucson stated that time value refunds under all the other TSAs would either be unwarranted or would cause Tucson to suffer economic harm.

6. On November 19, 2015, Commission staff issued a deficiency letter seeking details supporting Tucson's calculation of \$12.8 million in time value refunds and its claim that paying the time value refund would cause it to operate at a loss. On November 23, 2015, Tucson requested an extension of time to January 19, 2016 for filing its response to the deficiency letter. On January 19, 2016, Tucson submitted a response.

II. Request for Rehearing

A. Tucson's Request for Rehearing

7. Tucson states that three of the TSAs were entered into with Tucson's marketing function and its public utility affiliate, UNS Electric, Inc., and argues that time value refunds should not apply to these TSAs.⁶ Tucson asserts that the Commission has not required the payment of time value refunds from "one affiliated traditional public utility to another" and thus any requirement for Tucson to pay time value refunds under these TSAs should be waived.⁷

8. As to the TSAs with non-affiliates, Tucson claims that it should not have to make refunds because the non-conforming provisions in those agreements benefitted each customer and did not result in any non-conforming cost-based charge being collected by Tucson.⁸ Therefore, because Tucson's customers never paid more than the OATT rates,

⁶ These TSAs include Service Agreement No. 322 with Tucson's wholesale marketing affiliate and Service Agreement Nos. 336 and 353 with UNS Electric, Inc., filed in Docket No. ER15-1862-000.

⁷ Tucson Rehearing Request at 8 (citing *TransCanada Power LLC*, 111 FERC ¶ 61,264, at P 28 (2005)).

⁸ Tucson notes that it does not seek rehearing of the requirement to pay time value refunds on the direct assignment charge set forth in Service Agreement No. 324 with Trico which was not reflected in its Electric Quarterly Reports (EQR).

Tucson argues, the consumer protection interests that motivated the Commission's decision in *Prior Notice* are not implicated here.⁹

9. Tucson argues that the rates for point-to-point transmission, network transmission, and ancillary services under these TSAs conform to the cost-based rates in Tucson's OATT and, thus, were *per se* just and reasonable.¹⁰ Tucson contends that, with the exception of one TSA in which direct assignment facility charges were collected, there were no rates charged without Commission authorization because the rates charged conformed to those in Tucson's OATT and, thus, were fully authorized.¹¹ Tucson argues that the customers taking service under each of the TSAs were not harmed in any manner as a result of Tucson untimely filing the TSAs and, thus, a stated rationale for the Commission's time value refund policy, protecting consumers from excessive rates, is inapplicable here.¹²

10. Tucson argues that all but one of the TSAs at issue had previously been reported on Tucson's EQRs, and thus, should be considered timely-filed given that the rates under these TSAs were "on file" with the Commission in satisfaction of section 205 of the Federal Power Act (FPA).¹³ Tucson notes that one TSA was reported one year out of time, but contends that the limited delay in filing should not give rise to the need for time value refunds.¹⁴

11. Tucson also argues that the time value refunds for TSAs with non-affiliated customers would total approximately \$12.8 million, and would result in "harsh effects" that the Commission was expressly trying to avoid when it revised its refund policy in *Prior Notice*.¹⁵ Tucson states that, in *Central Maine Power Company*, the Commission

⁹ *Id.* at 6-7 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993) (*Prior Notice*)).

¹⁰ Tucson Rehearing Request at 7.

¹¹ *Id.* at 7-8.

¹² *Id.* at 8.

¹³ *Id.* at 7 and n.11. Tucson also notes that although refunds were directed for Service Agreement No. 358, a point-to-point TSA with Arizona Electric Power Cooperative, service has not yet begun and thus the TSA has not yet been reported in the EQR.

¹⁴ *Id.* at 7. The TSA was Service Agreement No. 303 for network service with Navajo Tribal Utility Authority.

¹⁵ *Id.* at 8-9.

established a policy of permitting utilities to recover only variable operation and maintenance (O&M) costs under agreements prior to the time they were filed and accepted by the Commission.¹⁶ Tucson states that, in *Prior Notice*, the Commission held that this remedy “should be modified [as it] can have harsh effects, amounting in some cases to millions of dollars, as to rates to which customers have consented and which we may have found to be just and reasonable had they been filed timely.”¹⁷ Tucson argues that the time value refunds directed here would have “harsh effects” given that the customers consented to the rates by executing the TSAs and the rates charged are on file in Tucson’s OATT and, thus, have already been found to be just and reasonable, and that the customers to which time value refunds would be paid would enjoy a windfall.¹⁸

12. Tucson states that the loss would be particularly acute for Service Agreement Nos. 223 and 224 with Tri-State, estimating that time value refunds for these two TSAs would amount to \$10.3 million on revenues of approximately \$43 million, or nearly one-quarter of the total revenues collected. Tucson argues that this would cause it to suffer a loss.¹⁹

B. Tucson’s Refund Report, Deficiency Letter and Tucson’s Response

13. Commission staff issued a deficiency letter seeking additional information to support Tucson’s refund report. Specifically, the deficiency letter directed Tucson to, among other things, file documentation to support its assertion that time value refunds for the TSAs with its non-affiliated customers would total \$12.8 million. Tucson was directed to include a breakdown of costs and revenues for each TSA and to reflect, on a monthly basis, the revenues received and the costs of providing service under each TSA separately, in order to support its assertion that requiring time value refunds would result in Tucson operating at a loss.²⁰ Likewise, Tucson was directed to quantify, on a monthly basis, for each of the TSAs at issue, the benefits that accrued to each customer as a result of Tucson: (1) waiving the application deposits; (2) waiving Schedule 1 and/or Schedule 2 ancillary services; and/or (3) waiving real power losses. Also, Tucson was directed to describe and quantify any other benefit to customers under each of the TSAs.

¹⁶ *Id.* at 9 (citing *Cent. Maine Power Co.*, 56 FERC ¶ 61,200, *reh’g denied*, 57 FERC ¶ 61,083 (1991)).

¹⁷ *Id.* (citing *Prior Notice*, 64 FERC at 61,979).

¹⁸ *Id.*

¹⁹ *Id.* at 9-11.

²⁰ *Tucson Elec. Power Co.*, Docket Nos. ER15-1861-000 and ER15-1862-000 (Nov. 19, 2015) (deficiency letter).

14. In its response, Tucson repeats its rehearing arguments that: (1) three of the TSAs are with Tucson affiliates; (2) the time value refunds ordered do not implicate the consumer protection public policy considerations behind the Commission's time value refund policy; (3) the non-affiliate TSAs were reported through the Commission's EQRs; (4) such refunds would result in harsh effects; and (5) paying the refunds would cause Tucson to suffer an economic loss. Tucson also adjusted its total time value refund calculation to approximately \$13.3 million.²¹ Tucson submitted a spreadsheet which calculates time value refunds under each TSA based upon the full revenues collected using the interest rates set forth in section 35.19a of the Commission's regulations. However, Tucson states that its OATT rates were established by a black box settlement following its initial OATT rate filing in July 1996, so Tucson asserts that its current OATT rates are its "best representation of cost of service under the TSAs, and absent a full rate case type submittal, it cannot calculate any other costs to provide service."²²

15. Tucson also requests privileged treatment of Exhibits A through E pursuant to 18 C.F.R. § 388.112.²³ Tucson represents that good cause exists for granting its request because these exhibits "contain detailed transmission use information, which is commercially sensitive and not publicly available, that constitutes '[t]rade secrets and commercial or financial information obtained from a person [that are] privileged or confidential.'"²⁴ Tucson included public and non-public versions and a proposed protective order based on the Commission's model protective order.

III. Notices and Interventions

16. On September 9, 2015, Tri-State filed a motion for leave to intervene out-of-time and an answer to Tucson's Rehearing Request. On September 24, 2015, Tri-State withdrew its answer.

17. Notice of Tucson's September 29, 2015 refund report was published in the *Federal Register*, 80 Fed. Reg. 60,889 (2015) with responses due by October 20, 2015. None were filed. Notice of Tucson's response to the Deficiency Letter was published in the *Federal Register*, 81 Fed. Reg. 4284 (2016) with responses due by February 9, 2016. None were filed.

²¹ In the exhibits included with its response, Tucson calculates the total time value refunds to be approximately \$13.3 million on total revenues of approximately \$77.5 million.

²² Tucson Response to Deficiency Letter at 4.

²³ *Id.* at 5-6 (citing 18 C.F.R. § 388.112 (2015)).

²⁴ *Id.* (citing 18 C.F.R. §§ 388.107 (d) and 388.107(f) (2015)).

IV. Discussion

A. Procedural Matters

18. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Tri-State has not met this higher burden of justifying its late intervention.²⁵

B. Commission Determination

1. Request for Rehearing

19. We will grant rehearing with respect to Tucson's claim that Commission policy does not require Tucson to pay time value refunds to its affiliates under Service Agreement Nos. 322, 336 and 353, as doing so would only transfer monies from one affiliated traditional public utility to another.²⁶ Similarly, no time value refunds are due under Service Agreement No. 358, because service had not yet commenced at the time of Tucson's filings.

20. We will deny rehearing as to the other late-filed TSAs with non-affiliated customers. The Commission has directed public utilities to pay time value refunds for the late filing of non-conforming TSAs, even when those TSAs reflected non-discounted OATT rates.²⁷ Tucson does not present any facts or legal arguments to distinguish this case from those precedents. Tucson argues that its counterparty customers may not have been injured by the late-filing of these TSAs, because they generally conformed to Tucson's OATT, and were, therefore, *per se* just and reasonable.²⁸ However, the time value refund policy articulated by *Prior Notice* protects more than just counterparties.²⁹

²⁵ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

²⁶ See *TransCanada Power (Castleton) LLC*, 111 FERC ¶ 61,264, at P 28 (2005); *Wisconsin Pub. Serv. Corp.*, 87 FERC ¶ 61,151, at 61,621 n.7 (1999).

²⁷ See, e.g., *El Paso*, 105 FERC ¶ 61,131; *Arizona Pub. Serv. Co.*, Docket Nos. ER12-109-000 and ER12-110-000 (November 23, 2011) (delegated letter order); *NewCorp Res. Elec. Coop., Inc.* 109 FERC ¶ 61,103 (2004); *PacifiCorp*, 125 FERC ¶ 61,034, at P 24 (2008) (*PacifiCorp*).

²⁸ Tucson Rehearing Request at 6.

²⁹ E.g., *El Paso*, 105 FERC ¶ 61,131 at PP 4, 32.

It also was designed to ensure compliance with the companies' "statutory obligation to timely file and the Commission's statutory obligation, under section 205, to examine the reasonableness of proposed rates, terms, and conditions of jurisdictional service *before* service commences."³⁰ Accordingly, the harm here is not to counterparties but to the Commission's ability to perform its statutory mission and to prevent preferential treatment through the disclosure of non-conforming provisions in TSAs with various customers.

21. Tucson next argues that the agreements were not late-filed with the Commission because the agreements were disclosed in Tucson's EQRs.³¹ We find this argument ignores precedent. In *El Paso*, the Commission expressly rejected the argument that reflecting an agreement in an EQR constitutes a rate on file for the purposes of *Prior Notice*, finding that, despite the implementation of the Commission's EQR policy, the obligation to file non-conforming service agreements for Commission review remained.³² In order for the Commission to carry out its statutory obligations of ensuring just and reasonable rates, and ensuring non-discriminatory treatment, it is essential for companies to file the complete agreements for Commission review and approval of non-conforming terms and conditions.³³

³⁰ *Id.* P 32 (emphasis in original).

³¹ Tucson Rehearing Request at 7 and n.11 (citing *PacifiCorp*, 125 FERC ¶ 61,034 at P 24). Tucson's reliance on *PacifiCorp* is in error because the Commission in that case did not conclude that time value refunds were not required because agreements were reported in EQRs.

³² *El Paso*, 105 FERC ¶ 61,131 at n.38 (explaining that "[i]n any event, Order No. 2001 still requires the filing of actual service agreements if they are 'non-conforming' agreements.") (citing Revised Public Utility Filing Requirements, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, at P 196 (2002), *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074 (2002), *reconsideration denied*, Order No. 2001-B, 100 FERC ¶ 61,342 (2002)). *See also id.* PP 29-30 (stating that the creation of the EQR process was a change in the format by which parties satisfy their FPA Section 205(c) reporting requirement).

³³ Section 205 of the FPA and part 35 of the Commission's regulations require companies to file *and* receive Commission approval for non-conforming agreements; simply listing agreements in EQRs cannot satisfy this obligation. 16 U.S.C. §§ 824d (c), (d) (2012); 18 C.F.R. §§ 35.3, 35.11 (2015); *accord ITC*, 152 FERC ¶ 61,043 at P 30. *See also Xcel Energy Services v. FERC*, 510 F.3d 314 (D.C. Cir. 2007).

22. Tucson avers that rehearing is warranted, because requiring it to make refunds in excess of \$13 million would have the “harsh effects” that the Commission aimed to avoid in *Prior Notice*.³⁴ However, the fact that the time value refund may exceed \$13 million does not by itself make the refund inappropriate or “harsh.” Rather, the size of a time value refund relates solely to the magnitude and length of the violation, which is a function of the length of time the agreements were in effect, but not filed with the Commission.³⁵ Timely filing of agreements is the responsibility of the public utility and, as such, is directly within Tucson’s control.³⁶ Also, it is noteworthy that Tucson has been able to earn a return on the monies collected prior to receiving Commission authorization for those TSAs. The Commission has concluded that time value refunds are the appropriate remedy for the failure to timely file jurisdictional service agreements.³⁷ The size of the refund is not a persuasive ground for granting rehearing; thus rehearing is denied.

2. Refund Report

23. Tucson’s response to the Commission staff’s deficiency letter calculates time value refunds based upon total revenues on a contract-by-contract basis. However, Tucson did not attempt to provide evidence of operating at a loss on a contract-by-contract basis in a method consistent with Commission precedent.

³⁴ Tucson Rehearing Request at 8-9.

³⁵ See *Carolina Power & Light*, 87 FERC ¶ 61,083 at 61,355 (stating that the “fact that the refund is large does not necessarily make it excessive. The primary reason for the dollar amount of the refund in this case was the sizeable revenues collected and the extended period over which they were collected ... a period throughout which CP&L remained in violation of the FPA.”) Accord *El Paso*, 105 FERC ¶ 61,131 at P 35 (finding that the time value refund is an appropriate remedy as it reflects both the severity and the duration of the violation and is the fairest method of treating similarly situated entities alike.).

³⁶ See *Consumers Energy Co.*, 148 FERC ¶ 63,012, at P 106 (2014), *order on initial decision*, Opinion No. 540, 153 FERC ¶ 61,185 (2015).

³⁷ See, e.g., *El Paso*, 105 FERC ¶ 61,131 at PP 37, 41 (rejecting El Paso’s request to limit its time value refund obligation when those time value refunds only decreased (but did not eliminate) the profits made possible by El Paso’s 12 percent return on equity). See also *PacifiCorp*, 136 FERC ¶ 61,233 (2011), *Order on Rehearing and Refund Report*, 141 FERC ¶ 61,114 (2012).

24. Simply put, Tucson has not supported its claim that making any time value refunds would result in it operating at a loss. The OATT rates charged under the relevant agreements (which were accepted via a 1997 black box settlement) appear to be based upon the fixed, sunk costs of its transmission system and its generalized expenses to operate that network (such as system-wide administrative and operations and maintenance costs). Commission precedent does not limit the time value refund obligations so as to establish a floor guaranteeing recovery of such sunk costs and generalized expenses. Nor does it limit that obligation to guarantee recovery of a profit margin. Accordingly, Tucson's repeated claims that it would collect less than OATT rates are insufficient to demonstrate that it would be forced to operate at a loss,³⁸ as such rates almost certainly include some profit, sunk costs, and generalized expenses.³⁹

25. The Commission has not previously addressed how a utility demonstrates that time value refunds will cause it to "operate at a loss" in the context of transmission rates accepted under a black box settlement. However, consistent with Commission precedent, Tucson should calculate the time value refund owed based upon the total gross revenues that it collected under each contract. It then can apply a floor on a contract-by-contract basis if the sum of (1) the time value refund amount owed for that contract plus (2) the expenses that Tucson incurred specifically to provide service under that contract (e.g. capital improvements that were required under that contract) exceed the gross revenues that it collected under that contract. Because this calculation relies solely on expenses incurred to provide service under the individual contracts, and excludes the generalized costs and sunk costs associated with running Tucson's existing transmission network, the fact that Tucson relied on a black box settlement to develop its OATT rates should not substantially change whether it would operate at a loss on a contract-by-contract basis.

26. Each year, Tucson collects a substantial amount of raw financial data concerning transmission service to prepare and submit to the Commission its annual Form 1. That financial data for each relevant year and its business files regarding the TSAs should provide a sufficient basis for calculating a floor consistent with Commission precedent. If Tucson concludes that a floor should apply, it must provide the relevant

³⁸ See *El Paso*, 105 FERC ¶ 61,131 at PP 37, 41.

³⁹ Cf. *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923) (stating "a public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public..."); accord *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (explaining that "[t]he courts thus look to whether the utility has enough revenue for operating expenses and the capital costs...and it allows a return to the equity owners.... sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital.").

data to support its claim. Additionally, Tucson may, consistent with our guidance above, demonstrate in its revised refund report that it has operated at a loss under each individual contract.

27. In its refund report, Tucson indicates that it calculated and issued time value refunds for a single TSA to refund direct assignment charges under Service Agreement No. 324. As this TSA was nonconforming and not timely filed, Tucson is directed to revise its refund report to reflect time value refunds based upon the revenues collected under this TSA, not just on the direct assignment charge.

The Commission orders:

(A) Tucson's request for rehearing is hereby granted in part and denied in part, as discussed in the body of this order.

(B) Consistent with the discussion above, Tucson must make time value refunds within 30 days of the date of this order and file a revised refund report with the Commission within 30 days thereafter.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.