

120 FERC ¶ 63,016
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

El Paso Electric Company

Docket Nos. EL06-45-003
EL06-46-003

v.

Tucson Electric Power Company

INITIAL DECISION

(Issued September 6, 2007)

APPEARANCES

Donna M. Attanasio, Esq., Ruta Kalvaitis Skucas, Esq., Jane E. Rueger, Esq., John D. Rhea, Esq. and Teri Janine Quinn, Esq., on behalf of El Paso Electric Company

James K. Mitchell, Esq. and Eric B. Bakken, Esq. on behalf of Tucson Electric Power Company

Joseph H. Long, Esq. and Lea A. Ekman, Esq. on behalf of the Federal Energy Regulatory Commission

HERBERT GROSSMAN, Presiding Administrative Law Judge

I. STATEMENT OF THE CASE

1. Tucson Electric Power Company (“TEP”) is a vertically-integrated electric utility that provides retail electric service to more than 385,000 customers in Southeastern Arizona. TEP’s service territory consists of a 1,155 square mile area and includes a population of approximately 956,000 in the greater Tucson metropolitan area of Arizona. As of December 31, 2004, TEP owned or leased approximately 2,000 MWs of net generating capability. TEP’s principal generating assets include two coal-fired generating units at the Springerville Station near Springerville, Arizona; an interest in the Navajo Station at Page, Arizona; and an interest in the Four Corners and San Juan Stations at Farmington, New Mexico. (Ex. TEP-1 at 3:14-24.)

2. El Paso Electric Company (“EPE”) is a vertically-integrated public utility engaged in the generation, transmission and distribution of electricity in west Texas and southern New Mexico. (Ex. EPE-001 at 6:1-2). Within its control area, EPE has about 800 MWs of generation and a native load requirement of more than 1,428 MWs (EPE’s 2006 native peak load) (Ex EPE-001 at 6:6-14). EPE’s generation resources external to its control area include a share of the generating capacity in the Palo Verde Nuclear Generating Station (the “Palo Verde Station”), a three-unit nuclear-fueled generating station located in Wintersburg, AZ (west of Phoenix, AZ),¹ and a 104 MW share of the generating capacity available from the Four Corners Station (Ex. EPE-001 at 6:9-16). EPE is subject to regulation as a public utility in New Mexico and Texas. In New Mexico, it is regulated by the New Mexico Public Regulation Commission (previously, the New Mexico Public Service Commission (the “NMPSC”)).

3. The TEP and EPE electric systems are directly interconnected at the Springerville substation and at the Greenlee substation. Maps showing the relative location of the principal generation facilities of TEP and EPE are included in Ex. TEP-3 and Ex. EPE-002.

4. In 1972, EPE began working to establish appropriate arrangements for transmission of capacity and energy from the Palo Verde Station (which was then under construction) across Arizona and New Mexico for delivery to its electric system in New Mexico (Ex. EPE-011 at 3:8-14). In January 1982, TEP proposed an energy exchange under which energy from certain of TEP’s generating units located in eastern Arizona and northern New Mexico would be delivered to EPE at substations near the New Mexico/Arizona border, and an equivalent amount of energy from EPE’s share of the Palo Verde Station would be delivered to TEP at substations closer to TEP’s native load and the California market (Ex. EPE-027 at 2:6-11; Tr. 179:20-180:3; Tr. 181:6 182:-1). Such an arrangement offered significant benefits to both parties. From EPE’s perspective, the proposed power exchange would facilitate delivery of energy to its system without requiring EPE to build transmission facilities across Arizona, from Palo Verde to the New Mexico border, or incur wheeling charges for transmission of power by others across Arizona (Ex. TEP-1 at 5:6-9). From TEP’s perspective, the proposed power exchange would provide TEP with a supply of electricity at the Palo Verde trading hub that could be sold directly into California. (Ex. EPE-001 at 15:7-16:4; EPE-025 at 3:2-10.)

5. At the time the power exchange was proposed, both parties also needed additional transmission capacity in the eastern Arizona/western New Mexico transmission corridor.

¹ After construction of the Palo Verde Station was completed, EPE had a total of 600 MW of generating capacity in that plant. EPE’s capacity in the Palo Verde Station has recently increased to 622 MW as a result of steam generator improvements.

As discussed above, EPE was seeking a means of transmitting power from the Palo Verde Station to the EPE electric system and thus required additional transfer capability into southern New Mexico. At the same time, TEP, which already owned a 345 kV transmission line between Springerville and Greenlee, was considering the possibility of building another 345 kV transmission line along that path (Ex. EPE-006 at 3:15-4:3; Ex. TEP-25 at 12:3-9). Construction of a new 345 kV transmission line between Springerville and Luna would both facilitate deliveries into southern New Mexico and strengthen the north-south transmission system in western New Mexico and Eastern Arizona. It also permitted TEP to defer construction of a new line between Springerville and Greenlee (Ex. EPE-006 at 3:10-14 and 5:8-19; Tr. 60:7-61:7).

6. Representatives of TEP and EPE met at TEP's offices from approximately 10:00 AM to approximately 1:30 PM on January 18, 1982, to discuss TEP's proposal (Tr. 180:12-14; Tr. 183:25). EPE was represented in that meeting by Don Isbell, Vice President of Energy Resources and Planning of EPE and Frederick Mattson, Manager of Resource Development/Contracts Department for EPE with responsibility, *inter alia*, for contracts and liaison with other utilities; TEP was represented by Einar Greve, then an Executive Vice President of TEP, and Norman Johnsen, Manager of System Planning and Power Contracts for TEP (Ex. TEP-15 at 3:5-8; Ex. EPE-011 at 1:10-11 and 2:15-3:1; Tr. 180:15-18). Insofar as relevant, discussions during that meeting focused primarily on (a) the proposed power exchange between TEP and EPE, (b) cooperation of both parties in the construction of a new 345 kV transmission line between TEP's Springerville Substation and EPE's Luna Substation, near Deming, AZ, and (c) the assignment by each party to the other party of transmission rights in transmission facilities that it owned (Tr. 181:10-183:20). By the conclusion of that meeting, the parties had agreed upon a set of principles for use in development of contract language (Tr. 183-185). An outline of the principles for the proposed TEP-EPE transmission arrangements that had been discussed during that meeting was prepared by Norman Johnsen of TEP and dated the following day (Ex. TEP-25 at 15:12-16; Ex. TEP-29).²

7. A draft of the principal features of a proposed power exchange and transmission agreement between TEP and EPE was circulated by TEP on January 27, 1982 (Ex. TEP-25 at 15:17-19). Thereafter, representatives of both parties had the opportunity to review the proposed contractual language (Ex. TEP-30). Ultimately, the parties entered into the Tucson – El Paso Power Exchange and Transmission Agreement dated as of April 19, 1982 (the "1982 Agreement") which set forth the terms of their agreement (Ex. TEP-2; Ex. EPE-003).

² The outline of the principles that were agreed to in the meeting also included a proposal for an exchange of power between M-S-R Public Power Agency in California and EPE (Ex. TEP-29), not relevant to the issue in this proceeding.

8. Pursuant to Article 5—Exchange of Capacity and Energy of the 1982 Agreement, EPE agreed to deliver up to 300 MW of capacity and energy from the Palo Verde Station to TEP at either the Palo Verde Switchyard or the Westwing Switchyard (at TEP's option), and TEP agreed to deliver a corresponding amount of capacity and energy to EPE at either Greenlee, Springerville, Coronado, San Juan, or Four Corners (at EPE's option) (Ex. EPE-001 at 10:8-14; TEP-1 at 4:22-5:3). There are no charges, costs or losses associated with the exchange of capacity and energy.

9. Article 7—Springerville-Luna 345 kV Circuit of the 1982 Agreement provided for TEP and EPE to cooperate in the construction of a new 345 kV transmission line between TEP's Springerville Substation and EPE's Luna Substation (Ex. TEP-1 at 5:11-13; EPE-003 at Sec. 7.1). Specifically, EPE agreed to build a single-circuit 210 mile line from the Luna Substation to a point approximately 12 miles east of the Springerville switchyard at its sole cost (Ex. EPE-003 at Sec. 7.1). TEP agreed to build double circuit towers over the remaining 12 miles to the Springerville switchyard, one-half of which was to be dedicated to the Luna-Springerville line and strung with conductors and the remaining half of which would be reserved by TEP for its future use (Ex. EPE-003 at Sec. 7.2.1). EPE agreed to reimburse TEP for one-half of its costs of such construction (Ex. EPE-003 at Sec. 7.3). In addition TEP agreed to construct necessary facilities in its Springerville switchyard to interconnect the new line, subject to reimbursement by EPE (Ex. EPE-003 at Sec. 7.2.2 and 7.3).

10. Finally, each of the parties agreed in Article 6—Assignment of Transmission Rights of the 1982 Agreement, to assign certain transmission rights in facilities that it owned to the other party. The following assignment of transmission rights by EPE to TEP is at the heart of this proceeding:

6.3 EPE hereby assigns to TEP 200 megawatts of transmission rights in the Springerville-Luna 345 kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee.

6.4 This assignment of transmission rights from EPE to TEP in the Springerville-Luna-Greenlee circuits shall begin with the commercial operating date of the Springerville-Luna circuit and shall continue for a term of 40 years from that date.

11. Section 6.5 included three subsections pursuant to which TEP assigned EPE rights in its system. Sections 6.5.1 and 6.5.2 expired on the commercial operating date of the Springerville-Luna 345kV line. Section 6.5.3 sets forth transmission rights that became effective on the commercial operating date of the Springerville-Luna 345kV line and remain in effect today:

6.5.3 Beginning with the commercial operating date of the Springerville-Luna 345 kV circuit, TEP hereby assigns to EPE 150 megawatts of transmission rights in TEP's 345 kV system between Springerville and either of Four Corners, San Juan, or Coronado. Such rights [sic] may be utilized by EPE at its option in whole or in part to either of these delivery points. This assignment of rights shall include transmission in both directions and shall be for a term of forty (40) years.

12. Section 6.6 of the 1982 Agreement further provided that "Transmission losses over assigned and owned rights shall be shared in proportion to scheduled use." Mr. Whitacre stated that when TEP uses its transmission rights on EPE's system, the total losses are divided between TEP and EPE, and TEP pays its proportional share relative to its use versus EPE's use of EPE's system (Tr. 279:13-280:21).

13. The 1982 Agreement was filed at the FERC on February 7, 1983 in Docket No. ER83-311-000 (Ex. EPE-003 at 1). The 1982 Agreement was accepted for filing in a letter order dated March 11, 1983, and remains on file as a filed rate schedule of each party.

14. Transmission capacity over four lines that terminate in southern New Mexico, including the Springerville-Luna 345 kV circuit and the Greenlee-Hidalgo 345 kV circuit, was designated in 1995 as Western Electricity Coordinating Council ("WECC") Path 47 for transmission into southern New Mexico (from Arizona and/or northern New Mexico) (Ex. EPE-001 at 7:1-7; EPE-022). Although the amount of transmission capacity available to EPE over what is now designated as WECC Path 47 has varied over the years, EPE currently has approximately 645 MW of transmission import capacity on this path (Ex. EPE-022; EPE-001 at 7:16). EPE currently utilizes all of its allocated transmission capacity in WECC Path 47 to deliver power into southern New Mexico, primarily from the Palo Verde Station and the Four Corners Station, to its electric system. (Ex. EPE-001 at 7:16-8:2). Although there is not a WECC Path for the same lines defined in the direction out of southern New Mexico (into Arizona and/or northern New Mexico), EPE generally has capacity available to deliver power out of southern New Mexico, on a firm basis to Springerville, on a non-firm basis to Greenlee and less frequently to West Mesa, over the facilities that comprise (in part) WECC Path 47 (Ex. EPE-001 at 7:7-8, 8:6-10).

15. The Springerville-Luna 345 kV transmission line was part of a larger project known as the Arizona Interconnection Project ("AIP") (Tr. 46:21-47:3). Before the AIP could be constructed, it was necessary for EPE to obtain a certificate of convenience and necessity (a "CCN") from the NMPSC (Ex. TEP-1 at 11:27-29). An evidentiary hearing on EPE's application for a CCN was held by the NMPSC in August 1987 (the "1987 NMPSC Hearing") (see, Ex. EPE-012; Ex. EPE-013).

16. During the hearing, an intervenor who opposed the construction of the Arizona Interconnection Project (“AIP”) raised the concern that the rights granted to TEP under the 1982 Agreement “might impair EPE’s ability to import power into southern New Mexico by using the transmission rights that had been assigned to it in the 1982 Agreement for delivery of power to Hidalgo or Luna, each of which is located in southern New Mexico”³ On Friday, August 21, the parties to the NMPSC Hearing reached agreement to provide clarification of TEP’s rights and on Sunday, August 23, EPE drafted a clarification letter,⁴ which was dated August 24 and provided to TEP in draft form; TEP received the letter on August 24, 1987.⁵

17. On August 24, 1987, Mr. Mattson, a witness for EPE, testified during the 1987 NMPSC Hearing that the 1982 Agreement provided TEP with rights needed by TEP to defer construction of its own north-to-south transmission line.⁶ He also testified: “So the intent of the parties – and I understand the clear interpretation of the language was for Tucson to send the 200 megawatts from Springerville down through Luna, back via Hidalgo to Greenlee, and then down through [V]ail and south into the Tucson area.”⁷

18. On August 25, 1987, Thomas A. Delawder, a Vice President of TEP, also testified during the hearing. Upon direct examination, Mr. Alder, attorney for EPE, asked Mr. Delawder to read Sections 6.3 and 6.4 of the 1982 Agreement into the record, which Mr. Delawder did.⁸ Then with Mr. Alder posing the questions and Mr. Delawder responding, the following exchange occurred:⁹

Q. Now, sir, finally, may I ask what is your interpretation or Tucson’s interpretation of those paragraphs?

A. This 200 megawatts of rights that was granted to us by El Paso is intended for Tucson to be able to schedule power from Springerville to Greenlee on the El Paso system.

³ EPE-027 at 6:1-6:15; Tr. 190:24-191:11.

⁴ Tr. 191:4-23.

⁵ EPE-014 at TEP0169-TEP0170.

⁶ EPE-012 at pages marked “161-162.”

⁷ EPE-012 at page marked “162.”

⁸ EPE-013 at 5-6.

⁹ EPE-013 at 6-7.

- Q. How would Tucson intend to use its 200 megawatt right?
 A. Whenever we have insufficient capacity south of Springerville, we will use those rights.

19. Under cross-examination by a representative of the New Mexico Attorney General's office, Mr. Delawder also testified:¹⁰

- Q. Under [the 1982 Agreement], it's my understanding that Tucson will not be permitted to take delivery of that 200 megawatts at either Hidalgo or Luna.
 Is that your understanding of the agreement?
 A. If we do, it will be with an agreement with El Paso.
- Q. Subject to an additional agreement?
 A. That's correct.
- Q. And you'd also be willing to clarify that in a letter?
 A. Yes, we would.

20. During and after the 1987 NMPSC Hearing, representatives of TEP and EPE exchanged draft letters which addressed, among other things, TEP's rights under the 1982 Agreement to deliver power to Luna or Hidalgo (Ex. TEP-5; Ex. EPE-31). EPE's draft letter dated August 24, 1987, had stated that TEP could only schedule transmission of power from Springerville to Greenlee with no intermediate points of delivery. Alternatively, TEP proposed to state that it could deliver power to intermediate points under the 1982 Agreement whenever transmission capacity on the relevant paths was not being fully utilized by EPE.¹¹ Ultimately, EPE and TEP failed to articulate a common understanding of the conditions under which TEP might deliver power to Luna or Hidalgo (Ex. TEP-15 at 10:18-19; Ex. EPE-011 at 8:20-22). Whether such letters were intended to establish a limit on TEP's use of its existing rights in the 1982 Agreement or to define additional rights for TEP that were not included in the 1982 Agreement is one of the factual issues in dispute in this proceeding.

21. The Springerville-Luna 345 kV circuit began commercial operation in April 1990, and TEP's transmission rights in the Springerville-Luna 345 kV circuit and the Luna via Hidalgo to Greenlee 345 kV circuit became effective at that time (Ex. EPE-30). TEP has

¹⁰ EPE-013 at 8-9.

¹¹ Ex. TEP-5, draft letter dated August 24, 1987 from Thomas A. Delawder to James P. Maloney with notes signed "Fred 8-23-87;" draft letter from Thomas A. Delawder to James P. Maloney dated Sept. 9, 1987.

used these rights on various occasions in order to schedule the transmission of power from Springerville to Greenlee whenever its own transmission facilities were unable to accommodate TEP's needs for transmission over that path (Ex. TEP-1 at 8:7-12; Ex. TEP-8 at 3:11-4:2).

22. In 1996, the FERC adopted its Order No. 888, which required all transmission owners to provide open access transmission service to all eligible transmission customers on a non-discriminatory basis.¹² Order No. 888 included a *pro forma* Open Access Transmission Tariff (an "OATT") which established uniform non-price terms and conditions of transmission service under which each transmission owning utility was required to make open access transmission service available to all eligible customers, and prescribed procedures under which transmission service might be reserved, used, curtailed and changed. The services available under the OATT include long-term and short-term firm point-to-point transmission service, non-firm point-to-point transmission service, network integration transmission service and ancillary services.

23. Pursuant to Order No. 888, EPE filed an OATT on July 9, 1996 in FERC Docket No. OA96-200-000 (the "EPE OATT"). The EPE OATT, which established rates and charges for transmission services being offered by EPE, became effective on July 9, 1996. See, Long Sault, Inc. et al., 76 FERC ¶ 61,313 (1996). Although all transmission service beginning on the EPE system after that time is required to be provided pursuant to the EPE OATT, Order No. 888 permits pre-existing transmission contracts to remain intact (Order No. 888 at 31,664-31,665).

24. In conjunction with Order No. 888, the FERC issued Order No. 889, in which it required each transmission provider to establish an Open Access Same-time Information System ("OASIS"), on which certain information regarding the availability of transmission capacity is to be posted.¹³ (See, Ex. EPE-016 at 6:10-13). Information on pre-existing uses of transmission capacity on the EPE system is also set forth in a document prepared by the EPE System Planning Section entitled *Principles, Practices and Methods for Determination of Available Transmission Capacity for El Paso Electric Company* ("Principles").

¹² 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. And Regs. ¶ 31,036, clarified, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), 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).

¹³ *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), on rehearing, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), reh'g denied, Order No. 889-B, 81 FERC ¶ 61,253 (1997).

25. The current version of *Principles* shows that of the total amount of transmission capacity on EPE's system, 200 MW of firm transmission rights from Springerville to Luna, from Luna to Hidalgo, and from Hidalgo to Greenlee, have been assigned to TEP pursuant to the 1982 Agreement (Ex. EPE-016 at 10:18-11:4; Ex. EPE-017). Such capacity is deducted from the amount of transmission capacity that is available for firm transmission service under the EPE OATT. Because EPE's total transmission capacity in the Hidalgo-to-Greenlee transmission segment is limited by contract to 200 MW, and EPE has assigned 200 MW of firm transmission rights in this segment to TEP pursuant to the 1982 Agreement, the only transmission service that can be reserved on this line under the EPE OATT is non-firm transmission service (*id.*).

26. In 2005, TEP acquired a one-third ownership interest in the Luna Station, a 570 MW combined-cycle electric generating facility near Deming, NM that was then under construction (Ex. TEP-1 at 3:24-4:4). The Luna Station is connected to the Luna Substation, which is jointly owned by EPE and Public Service Company of New Mexico ("PNM") (Ex. S-1 at 9:18-19; EPE-001 at 8:13-14). TEP desires to use the transmission rights in the Springerville-Luna 345 kV circuit and the Luna via Hidalgo to Greenlee 345 kV circuit that were assigned to it in the 1982 Agreement in order to deliver its power from the Luna Station to either Greenlee or Springerville and asserts it is permitted to do so (Ex. TEP-8 at 2:6-15, 4:6-8). EPE does not agree that TEP may use such rights for this purpose (Ex. TEP-8 at 4:13-15). If TEP does not have the rights it claims under the 1982 Agreement, then its alternative is to purchase transmission capacity from either EPE (for transmission from Luna to Springerville or Luna to Greenlee) or from PNM (for transmission from Luna to Greenlee) pursuant to either EPE or PNM's OATT, respectively (Ex. EPE-001 at 8:13-9:2).

27. By October of 2005, as construction of the Luna Station was nearing completion, TEP had not requested transmission service pursuant to EPE's OATT (Ex. TEP-10). EPE advised TEP, by letter dated Oct. 6, 2005, that EPE understood that TEP believed the 1982 Agreement provided sufficient rights for TEP to transmit power from Luna to TEP's system and notified TEP that it disagreed with TEP's interpretation (*id.*). EPE further stated that if TEP desired to use the EPE transmission facilities for delivery of power from the Luna Station to the TEP system it would be necessary for TEP to request transmission service for this purpose on the EPE OASIS (*id.*). EPE subsequently offered to sell TEP either firm or non-firm point-to-point transmission service under the EPE OATT for delivery of power from Luna to Springerville and/or non-firm transmission service for delivery of power from Luna to Greenlee (Ex. TEP-10, letter dated Nov. 28, 2005). Based on currently-effective transmission rates, the charge for reserving 190 MW of either firm or non-firm point-to-point transmission service for 12 months under the EPE OATT would be approximately \$5.2 million (Ex. S-1 at 10).¹⁴

¹⁴ Ex. TEP-32, which is a copy of EPE's complaint, establishes the cost at \$5.5

28. Following unsuccessful efforts to resolve this dispute informally, EPE filed a complaint against TEP on January 10, 2006 in Docket No. EL06-45-000 (the “EPE Complaint”). EPE asked in the EPE Complaint for a Commission order finding that TEP was required to obtain and pay for transmission service under the EPE OATT before it could utilize EPE’s transmission system for transmitting the output of the Luna Station. The next day, TEP filed a counter complaint against EPE in Docket No. EL06-46-000, in which it asked for a Commission order requiring EPE to permit TEP to use the transmission rights that it acquired in the 1982 Agreement for the purpose of delivering capacity and energy from its share of the Luna Station to the TEP system (the “TEP Complaint”). Each party filed a timely response to the complaint that had been filed by the other party.

29. On April 24, 2006, the Commission issued an Order on Complaints in these proceedings in which it granted the EPE Complaint and denied the TEP Complaint. El Paso Electric Company v. Tucson Electric Power Company, 115 FERC ¶ 61,101 (2006). The Commission found in the Order on Complaints that the language of Sections 6.3 and 6.4 of the 1982 Agreement was ambiguous (Order on Complaints at ¶ 32), and that it was therefore appropriate for the Commission to consider extrinsic evidence in order to resolve the matters at issue. The Commission further concluded that (Order on Complaints at ¶ 40):

...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.

million (TEP-32 at 42, n.81), (a number referenced several times during the hearing). The difference is the cost of mandatory ancillary services that must be purchased in conjunction with the purchase of transmission service. Pursuant to the OATT, each transmission customer must have certain ancillary services to support its transmission of power. Two of these, Schedule 1 and Schedule 2 services, must be purchased from the transmission provider that is providing the transmission service and other may be self-supplied or purchased. Staff witness, Mr. Deters, correctly states the cost of 190 MWs of transmission service *without* any ancillary services as \$5.2 million. With the two mandatory ancillary services, 190 MWs of transmission service for one year would be \$5.5 million.

30. On May 24, 2006, TEP filed a timely request for rehearing of the Order on Complaints. TEP asserted in its request for rehearing, *inter alia*, that the complaints presented disputed issues of material facts, and that it was therefore erroneous for the Commission to act on the complaints without first conducting an evidentiary hearing. In an Order on Rehearing and Establishing Hearing and Settlement Judge Procedures issued October 4, 2006 (the “Rehearing Order”), the Commission granted in part and denied in part TEP’s request for rehearing. El Paso Electric Company v. Tucson Electric Power Company, 117 FERC ¶ 61,017 (2006). Specifically, the Commission reiterated its earlier determination that the language of Sections 6.3 and 6.4 of the 1982 Agreement was ambiguous (Order on Rehearing at ¶ 13). However, the Commission further found that evidence submitted by TEP “raised issues of material fact concerning the proper interpretation of sections 6.3 and 6.4 of the 1982 Agreement that should be set for hearing” (Order on Rehearing at ¶ 18). The issues for which an evidentiary hearing was prescribed include (*id.*):¹⁵

- (1) whether or not the transmission rights given to Tucson in sections 6.3 and 6.4 of the 1982 Agreement may only be used for transmission of power from Springerville as the receipt point to Greenlee as the delivery point.
- (2) whether or not Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna Station to either Springerville or Greenlee.

31. Pursuant to the Order on Rehearing, the evidentiary hearing established by the Commission was held in abeyance in order to allow the parties to engage in efforts to settle the dispute through use of the Commission’s alternative dispute resolution procedures. Administrative Law Judge Judith Dowd was appointed as a Settlement Judge to assist the parties during settlement negotiations. However, the parties were unable to achieve a mutually-acceptable basis for settling the dispute, and the settlement judge procedures were terminated.

32. Following termination of the settlement judge procedures, I was appointed to conduct the evidentiary hearing in these proceedings. In accordance with the procedural schedule established for the conduct of the evidentiary hearing, EPE and TEP each

¹⁵ The Commission also provided for consideration during the evidentiary hearing of whether or not TEP is being deprived of its transmission rights without being relieved from its transmission burdens as set forth in the 1982 Agreement. However, the Commission subsequently determined that this issue was outside the scope of this proceeding. *El Paso Electric Company v. Tucson Electric Power Company*, 118 FERC ¶ 61,247 (2007).

submitted direct testimony and exhibits on March 12, 2007, the FERC Trial Staff submitted its prepared testimony and exhibits on April 23, 2007, and EPE and TEP each submitted prepared rebuttal testimony and exhibits on May 7, 2007.

33. The evidentiary hearing was held on May 22, May 23, and May 24, 2007. During that hearing, I asked for additional evidence from EPE regarding the manner in which the transmission rights that had been assigned to TEP in the 1982 Agreement were reflected in the calculation of transmission rates set forth in the EPE OATT. Such evidence was submitted on June 5, 2007, and a further hearing relating to such evidence was held on June 20, 2007. At the June 20, 2007 hearing, I requested that EPE file a verification affirming the correct application of its OATT rate, which EPE filed on June 22, 2007. The following witnesses testified during the evidentiary hearing:

For TEP:

Thomas A. Delawder, a retired TEP employee who had served as Vice President of Power Supply and System Control of TEP

Edmond A. Beck, Superintendent of Planning and Contracts of TEP

For EPE:

John A. Whitacre, Vice President of System Operations and Planning of EPE

Frederic E. Mattson, a retired EPE employee who had served as Manager of the Resource Development/Contracts department of EPE and as Vice President, Power Supply prior to his retirement.

Dennis A. Malone, Manager of System Planning

Dr. Roy J. Shanker, an outside consultant retained by EPE to testify in this proceeding

Jose F. Provencio, Manager of Economic and Rate Research Department

David G. Carpenter, Vice President Corporate Planning and Controller

For the FERC Trial Staff:

Craig E. Deters, an Energy Industry Analyst Subject Matter Expert within the Office of Administrative Litigation of the Commission

II. POSITIONS OF THE PARTIES

34. EPE takes the position that the 1982 Agreement permits only the transmission of up to 200 MW in a complete path from the receipt point of Springerville to the delivery point of Greenlee, with no intermediate receipt or delivery points. It would answer the Commission's questions as not allowing transmissions under the Agreement from any receipt point other than Springerville (for delivery only to Greenlee), thereby not permitting deliveries from Luna as a receipt point.

35. TEP is not clear as to the limits of what it would be permitted under the Agreement. At their most expansive, its claims appear to allow for all points on the Springerville-Luna-Greenlee circuits to be used for delivery or receipt, with transmissions in both directions and with a 200 MW limitation imposed only on each transaction, even when it is simultaneous with any other transaction in the same direction, for a total of 400 MW in either direction. Tr. 44-46. However, it would limit its use of these rights so as not to deliver to Luna, except with EPE's permission, in accordance with its voluntary commitment at the NMPSC hearing, which it renewed at this hearing. Whatever the full extent of its claims, they would include answering the Commission's questions as the Agreement's allowing transmissions other than from Springerville as a receipt point and Greenlee as a delivery point, and permitting transmissions from Luna as a receipt point to both Greenlee and Springerville as delivery points.

36. Commission Staff supports TEP's interpretation of the Agreement as long as it is applied in conjunction with TEP's commitment not to deliver towards New Mexico without the permission of EPE and, accordingly, would answer the Commission's questions as does TEP, as the Agreement's allowing Luna as a receipt point for deliveries to Greenlee and Springerville.

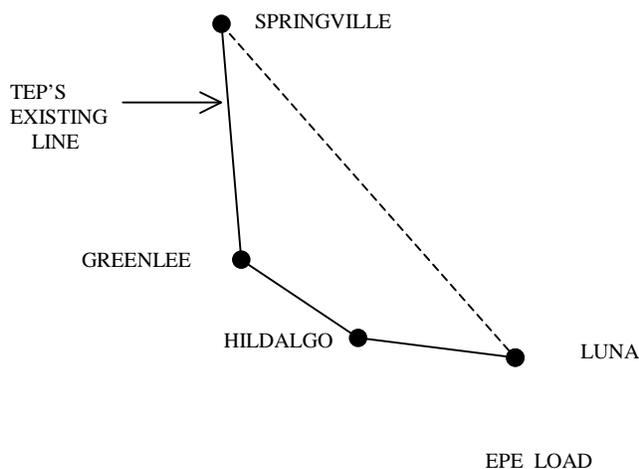
37. As discussed, below, I would also answer the Commission's questions, as did TEP and Staff, as the Agreement's allowing Luna as a receipt point for deliveries to Greenlee and Springerville, but I do not read the Agreement as broadly as they do. In particular, I read it as not allowing transmissions eastward on the Greenlee-Hidalgo-Luna circuit, as limiting transmissions to 200 MW on any segment of the entire circuit (thereby relegating westward Luna-to-Greenlee transmissions to the category of non-firm), and as not allowing deliveries at intermediate points, even in the absence of TEP's post-Agreement commitments.

III. DISCUSSION

38. In 1982, at the time EPE and TEP entered into the Agreement both parties were in an accommodating mood. They were eager to secure their own rights on the other's transmission system in order to be able to serve their loads situated on the other's system and were willing to give whatever capacity was needed by the other party, within reason,

as long as that did not detrimentally affect its own needs. And, since this was a beneficial exchange for both parties, it was to be without charge to either party.

39. The following schematic diagram shows, roughly, the paths of the transmission lines in issue: TEP's existing line between Springerville and Greenlee; EPE's existing lines between Greenlee, Hidalgo and Luna; and, EPE's prospective (at the time of the 1982 Agreement) line, on which construction was completed in 1990, between Springerville and Luna.



40. Sections 6.3 and 6.4 of the Agreement covered the rights granted by EPE to accommodate the needs of TEP to serve its load on the EPE system. If TEP had owned generation at the time at Luna and had wanted rights to transmit the power to Springerville and Greenlee as it currently desires, in all likelihood they would have been granted as part of the free exchange, as even EPE's witness John A. Whitacre admitted. Tr. 275-76.

41. But, TEP had no such generation at Luna or at any of the intermediate points between Springerville and Greenlee, and the agreement was written with the then-current situation in mind. TEP's needs at that time concerned its transmission from Springerville to Greenlee. It had a line on its own transmission system between those two points, but needed a back-up for when that line was out of service, and was contemplating building a parallel line. Receiving free capacity rights on the EPE system to go from Springerville to Greenlee using EPE's proposed line from Springerville to Luna, together with rights on EPE's existing line from Luna to Hidalgo to Greenlee, would satisfy TEP's needs and relieve it of the expense of building its own transmission line. In addition, it would provide greater reliability because it would be on rights of way that were separate from

its other lines (the one between Springerville and Greenlee, and another between Springerville and Vail), where TEP's contemplated line would also have been built.

42. At the time the agreement was proposed, TEP's only need on EPE's system on the Springerville-Greenlee circuits, consisting of the built and proposed segments, was for a back-up for TEP's existing Springerville to Greenlee circuit. That was all that was discussed with regard to those circuits at the three-and-a-half-hour conference called by TEP and held in its offices to discuss its proposed agreement.

43. At the hearing in this proceeding, there was a lot of after-the fact testimony and the introduction of many after-the-fact documents, all to little effect. Only one witness who had been present at the 1982 negotiations, Frederic E. Mattson of EPE, testified and, while his testimony as to what transpired at the meeting was credible and not contradicted, it did not fully illuminate the thought processes of either TEP, the side drafting the agreement (of which he was not part) or EPE, the side acquiescing to that language after three months of review before final adoption.

44. I fully accept his emphatic assertions (Tr. 185, 194-95) that only a transaction involving a back-up of transmission over the complete circuit(s) from Springerville to Greenlee was discussed at the three-and-a-half-hour conference called by TEP and held in its offices to discuss its proposed agreement. But this is not dispositive of the issue. The key to the construction is in the actual language that was adopted and the motivations of the parties at that time, as reflected in that language. It is not necessarily in the recitation of the single scenario discussed at the negotiation, and not in the ambiguous and opinionated declarations of the respective companies' employees, most, self-serving and years after the fact.

45. Although TEP contends that it was conducting transactions at the time other than transmission over its own line from Springerville to Greenlee and had still others in mind for which it could utilize those circuits, its assertions could not withstand cross-examination and I do not find them credible. See, Tr. 49-50, 66-71. As the evidence suggests, the Springerville to Greenlee back-up was the only *specific* use of those circuits that both parties had in mind. And, if EPE had insisted on language specifically limiting TEP to the use of its system only for a back-up for deliveries from Springerville to Greenlee, TEP, undoubtedly, would have acquiesced.

46. I do not find TEP's arguments persuasive that it would only have agreed to rights in EPE's transmission lines that were equivalent to the rights that it would have had in its own line if it had constructed one from Springerville to Greenlee, as it had considered before EPE offered rights in EPE's lines. It would have defied logic for TEP to have built its own additional line at great expense to itself, rather than accept free capacity on EPE's line for the needed back-up to its Springerville to Greenlee transmissions.

47. Nonetheless, even though only the back-up of deliveries from Springerville all the way to Greenlee had been discussed and would have been agreeable to TEP, TEP drafted the Agreement and, unsurprisingly, gave itself rights that were as extensive as it believed would be acceptable to EPE. The Agreement was to have a 40 year life, to begin after the construction of the Springerville-Luna segment was completed some time in the future, and it would be expected that TEP would give itself as broad rights as possible for future use, even if any specific other needs were not currently foreseen.

48. The basic question before us is: Considering the language of the Agreement and the circumstances of the parties, what rights, if any, did TEP receive under the Agreement that exceeded the specific use that was discussed? And, it should be noted that, although TEP drafted the Agreement, EPE reviewed the document over a three-month period and made extensive corrections to other sections, while maintaining Sections 6.3 and 6.4 in their original wording, presumably after considerable study, and can be considered as having acquiesced to any such broadened rights implicit in the language.

49. To answer that question, we must focus on the specific language of Sections 6.3 and 6.4, *supra*, which state, as follows:

6.3 EPE hereby assigns to TEP 200 megawatts of transmission rights in the Springerville-Luna 345 kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee

6.4 This assignment of transmission rights from EPE to TEP in the Springerville-Luna-Greenlee circuits shall begin with the commercial operating date of the Springerville-Luna circuit and shall continue for a term of 40 years from that date.

50. One departure from what was negotiated is readily admitted by EPE. Although TEP needed rights at the time from Springerville to Luna only as a parallel path and back-up to its existing line, it did not limit those rights to a back-up situation. It obviously knew that this would be acceptable to EPE because even an extensive use of EPE's system to transmit power from Springerville that delivered all the way to Greenlee would not have interfered with EPE's only significant need, to utilize the circuits to go in the direction of, and exit at, Luna, subsequently characterized as Path 47 (to EPE's load). Moreover, because TEP would have to share losses in proportion to its use of EPE's system, it would be inclined to use its *own* system when feasible, a self-limiting feature, and would resort to using the EPE system *only* as a back-up.

51. Similarly, although its use of EPE's system was motivated by its need for transmitting power from Springerville to Greenlee, TEP did not specifically limit its use to that transaction. Unlike other sections of the Agreement, such as Sections 6.1 and 6.5,

surrounding the sections in issue, which assign firm transmission rights “for deliveries” from specified receipt points to specified delivery points, Sections 6.3 and 6.4 did not limit the transmission to “deliveries” from Springerville to Greenlee.

52. Implicit in the Agreement, however, must have been the understanding that there could be no deliveries at intermediate points between Springerville and Greenlee, because that would have directly interfered with EPE’s need for maximum capacity for deliveries in the direction of New Mexico, between those two end points. This was so obvious and extremely unlikely, since TEP had no load at any of the intermediate points, that it was not even written into the Agreement, except, partially, by implication.

53. By wording the existing 345 kV circuit, in Section 6.3, as “from Luna via Hidalgo to Greenlee,” thereby connoting directionality towards Greenlee (especially since the predominant flow on that circuit is in the other direction and would be the customary order in which the circuit would be named), TEP further assured EPE that there would be no deliveries from Greenlee or Hidalgo to Hidalgo or Luna. The Greenville to Luna segment was most critical to EPE’s own needs, being the direct path from the Palo Verde generation to EPE’s load, and on which EPE owned the least available capacity (at least on the portion between Hidalgo and Greenlee). While there was some dispute as to the specific amount of available capacity going eastward towards Luna, it is beyond question that EPE’s ability to transmit its own power from Palo Verde towards Luna was limited and that it would not have assigned away any of that capacity. In fact, EPE could have brought in 150 more MW from Palo Verde to New Mexico if it had had more transmission capacity. Tr. 163-64.

54. The not-yet-constructed circuit, by contrast, was referred to in Section 6.3 as “the Springerville-Luna 345 kV circuit,” without conferring directionality, because restricting its use in the direction of Luna, while it would have insured that there would be no deliveries at Luna, would also have prevented deliveries to Greenlee, the specific motivation for granting TEP its rights in Sections 6.3 and 6.4 of the Agreement. And, there was no reason to restrict the use in the other direction, from Luna to Springerville, because EPE would have extensive capacity in the line, and this use, towards Springerville, would be opposite the general flow of power and would actually enhance operations on this line by reducing power flows and losses (Tr.186-87).

55. Because EPE owned only 200 MW of available capacity between Hidalgo and Greenlee (Tr. 183, 290, 380), the Agreement assigned TEP only 200 MW of transmission rights, even though EPE had much greater capacity available on other segments, obviously on the assumption that TEP intended to use the system for the transmission of power from Springerville all the way to Greenlee.

56. Therefore, keeping the circumstances of the parties at the time of the Agreement in mind, including the implicit, unstated, assumption that there would be no intermediate

delivery points between Springerville and Greenlee, the most natural reading is that there was to be only unidirectional service on the existing circuit, from Luna via Hidalgo to Greenlee, and that bi-directional service would be permitted on the to-be-constructed circuit between Springerville and Luna, although no specific use of that circuit in the direction of Springerville was then foreseen.

57. As follows from this reading, each segment can be utilized independently of the other, even though the main impetus for the provisions was the need to back up TEP's existing service over its own line for a complete Springerville to Greenlee transmission. And, as also follows, TEP can now utilize Luna as a receipt point for delivery of its power from the newly constructed Luna facility to Springerville or Greenlee.

58. But, of course, the amount of firm transmission on either segment is limited. If we were to ignore the circumstances, a natural reading of Section 6.3 would suggest that the total of the transmission use at any one time is 200 MW, as the agreement assigned 200 MW to the two circuits as a whole, not 200 MW to one circuit and 200 MW (or "an additional" 200 MW, which would be an even stronger case) to the other circuit. TEP, in contrast, has asked for an interpretation giving it up to 400 MW in either direction.

59. But a natural reading, out of context, does not take into account the reason for the 200 MW amount. As noted above, it reflected EPE's limited ownership of that amount of capacity in the Hidalgo-Greenlee segment, projected over the entire system, rather than, as is the usual case of an assignment of capacity, the quantitative measure of what was bargained for, with any additional assignment of capacity calling for additional consideration. This, after all, was a free exchange of rights, in the amount needed by the other party, to the extent that it did not impinge on the assignor's needs. Had EPE possessed a greater amount of capacity in the Hidalgo-Greenlee segment, undoubtedly the amount it assigned to TEP in the circuits would have been greater, with no additional consideration requested. And, similarly, if the parties had consciously considered the use of the two circuits for anything but a complete transmission from Springerville to Greenlee, they might have assigned a greater amount of capacity on the proposed Springerville-Luna line, where it was expected to be available, than what they assigned TEP on the existing circuit, where it was not.

60. But we are not re-writing the Agreement to reflect current circumstances and merely interpreting it as written, to reflect its application to unanticipated, but not excluded, uses. Consequently, there is no justification for raising the 200 MW limit to 400 MW, as TEP and Staff suggest, even on the Springerville-Luna circuit, which could easily accommodate it. But, similarly, there is no reason to consider the 200 MW as a quantitative measure of what was conveyed rather than merely a limitation on the amount that can be transmitted on any segment of the complete circuit(s) from Springerville to Greenlee, as was intended.

61. Accordingly, TEP should be permitted to transmit up to 200 MW on any segment on which it engages in a permissible transaction, notwithstanding any simultaneous transmission on any other segment. For example, it should be able to schedule service under the Agreement for 200 MW from Luna to Greenlee, and another 200 MW from Luna to Springerville. But it should not be able to schedule 200 MW from Luna to Greenlee at the same time it schedules 200 MW from Springerville to Greenlee, which would raise the transmission level to 400 MW on the Luna to Greenlee segment.

62. There is also an ethical problem that must be considered. If, in fact, TEP had actually had other specific transactions in mind when it negotiated the 1982 Agreement with EPE, would it have been proper for it to have worded the Agreement to cover those transactions without informing EPE? I would think not, and the FERC should not give its imprimatur to a construction based on improper behavior. If that were the case, it should not further the deception by interpreting the Agreement as covering any transaction other than the discussed transmission, from Springerville all the way to Greenlee, much less consider that there had been a meeting of the minds on covering such other transactions.

63. But, notwithstanding TEP's position, for what it mistakenly believes to be in its legal self-interest, that there had been such actual transactions and/or they were specifically contemplated for the future, the evidence proffered in support of that position was not credible. I find that no such transactions had taken place and that TEP had none specifically in mind when it drafted and then executed the Agreement. TEP merely indulged in the normal practice of writing the Agreement in general terms that were most favorable to itself and which it considered acceptable to EPE, in language whose breadth should have been apparent to EPE, which reviewed it over a three-month period.

64. It is difficult to construct a conversation in which TEP could have verbally informed EPE of its having given itself broader rights than were actually needed at the time, in that it had no specific other transactions in mind. It informed EPE of these rights by merely wording the proposed agreement in the manner it did. That this broad language can now cover transactions that were not specifically contemplated at the time (but which would have been acceptable to EPE), may now be an unanticipated benefit to TEP, but TEP's drafting this language was not duplicitous or unethical, and transactions with a receipt point at Luna for delivery at Greenlee or Springerville fall within the terms of the Agreement.

65. EPE claims that allowing only transmission over the entire circuit(s) from Springerville to Greenlee is a natural reading of the Agreement. But it falls short in two respects. It does not take into account the difference, in Section 6.3, between the apparent directionality in the wording of the "345 kV circuit from Luna via Hidalgo to Greenlee," and the apparent lack of directionality in the wording of the "Springerville-Luna 345 kV circuit." And, it does not account for the assignment of rights in Sections 6.1 and 6.5 only "for deliveries" to specific delivery points, and the contrasting absence

of such language in Section 6.3, which EPE claims also permits only a specific delivery, from Springerville all the way to Greenlee.

66. The incongruity between the descriptions of the existing and proposed circuits is only reinforced by a document on which EPE relies heavily (see, EPE I.B. 8, 15, 23-24, 87), an outline prepared by Norman Johnsen, a TEP negotiator, the day after the negotiators first met. In this document, Johnsen states that “EPE assigns 200 MWs of rights in the circuit from Springerville to Luna, and from Luna to Greenlee.” Ex. EPE-28 at Exhibit 4.

67. Unless we ignore the comma, Johnsen refers, on the one hand, to the proposed “circuit” from Springerville to Luna” and, on the other, to a directional transmission from one point, Luna, to another, Greenlee, on what was the existing circuit, of Greenlee-Hidalgo-Luna. Had he omitted the comma; used the plural, “circuits”; referred to each set of points as a “circuit”; or omitted the word “circuit” entirely, EPE would have a stronger case for directionality over the entire Springerville to Greenlee path, for conjunctive use of the circuits or, at least, for consistent treatment of each of the circuits. Instead, the Johnsen memo only reinforces the Agreement’s apparent intention of giving disparate treatments to transmissions on the proposed circuit, between Springerville and Luna, as bi-directional, and to the existing segment, between Springerville and Greenlee, as unidirectional. However, not too much should be read into Johnsen’s short summary, and I do not rely on it for my determination.

68. Moreover, while EPE claims that Section 6.3 does not confer bi-directionality on TEP’s rights on the Springerville-Luna circuit because other sections of the Agreement refer to “transmission in both directions” where bi-directionality is conferred, the difference is easily explained by the fact that the parties had no specific transactions in mind at the time that were to go from Luna towards Springerville, but merely adopted language that would permit them. In the other sections, they did have specific transactions in mind that went in both directions, and they tailored the language to specifically embrace those transactions.

69. This is a decision that will make neither party happy: EPE, because it cannot charge TEP for service from Luna that is now found to be within the terms of the Agreement; and, TEP, because the service from Luna to Greenlee would have to be characterized as non-firm under WECC rules, as it could not be accomplished simultaneously with the transmission of the 200 MW from Springerville to Luna (TEP I.B. 37-38; Tr. 301). But we are here to interpret the Agreement as written, not to revise it in accordance with the parties’ present needs.

70. Moreover, TEP’s rights with regard to the non-firm that it would have under the Agreement, from Luna to Greenlee, would not seem to add anything to the rights it would

have, in any event, under Section 22.1 of the current pro-forma OATT, which states, as follows:

22.1 Modifications On a Non-Firm Basis:

The Transmission Customer taking Firm Point-To-Point Transmission Service may request the Transmission Provider to provide transmission service on a non-firm basis over Receipt and Delivery Points other than those specified in the Service Agreement (“Secondary Receipt and Delivery Points”), in amounts not to exceed its firm capacity reservation, without incurring an additional Non-Firm Point-To-Point Transmission Service charge or executing a new Service Agreement, subject to the following conditions.

- (a) Service provided over Secondary Receipt and Delivery Points will be non-firm only, on an as-available basis and will not displace any non-firm service reserved or scheduled by third-parties under the Tariff or by the Transmission Provider on behalf of its Native Load Customers.
- (b) The sum of all Firm and non-firm Point-To-Point Transmission Service provided to the Transmission Customer at any time pursuant to this section shall not exceed the Reserved Capacity in the relevant Service Agreement under which such services are provided.
- (c) The Transmission Customer shall retain its right to schedule firm Point-To-Point Transmission Service at the Receipt and Delivery Points specified in the relevant Service Agreement in the amount of its original capacity reservation.
- (d) Service over Secondary Receipt and Delivery Points on a non-firm basis shall not require the filing of an Application for Non-Firm Point-To-Point Transmission Service under the Tariff. However, all other requirements of Part II of the Tariff (except as to transmission rates) shall apply to transmission service on a non-firm basis over Secondary Receipt and Delivery Points.

71. This section would permit a customer taking firm point-to-point transmission service to receive non-firm service over other receipt and delivery points, not to exceed its firm reservation capacity to the extent it is not using it, without incurring an additional charge. Nothing in this section appears to require that the original reservation of capacity be under the OATT, rather than under a grandfathered agreement, although that issue is debatable. It seems to require only that the customer be taking firm point-to-point service and that the *re-directed* service be charged under the OATT, which is how EPE has

charged, and would continue to charge, TEP, absent this decision, for service from Luna to Greenlee. But this is not a matter before me.

72. In contrast to considering the Luna to Hidalgo to Greenville transmission as non-firm, there would appear to be no impediment to considering the Luna-to-Springerville transmission as firm. A simultaneous Luna-to-Greenlee transmission would not impact it, and a simultaneous Springerville to Greenlee transmission would merely cancel out the transmissions both ways between Springerville and Luna, resulting in both transactions' being re-cast as a single Luna to Greenlee transmission.

73. In the Commission's opinions, a great deal of consideration was given to the testimony of TEP's Thomas Delawder before the NMPSC in 1987. Delawder's testimony was accurate as to the intention of the Agreement to assign TEP transmission from Springerville all the way to Greenlee, whenever TEP had insufficient capacity south of Springerville on its own lines, but it said nothing about the Agreement's *limiting* the transmission to that scenario, which the discussion, above, indicates was not the case. But Delawder clearly represented that deliveries to Luna would not be permitted absent a further agreement with EPE, which everyone at the hearing assumed he represented and which was indisputably the basis for the NMPSC's dismissing the intervenor's objections. He did not merely represent that TEP would enter into a further agreement to *limit* a right that it possessed to deliver to Luna, as TEP represents, here.

74. His testimony before the NMPSC, however, is not at variance with the findings here, that precluding deliveries to intermediate points between Springerville and Greenlee was implicit, even if unstated, in the Agreement. Moreover, his testimony, given to support the construction of the Springerville-Luna line, was not necessarily a correct interpretation of the Agreement or representation of what was in the minds of those drafting and executing the agreement, of which he was not one. Although that testimony is not a judicial admission that conclusively binds TEP in this proceeding, it would be strong evidence against TEP if it directly contradicted my findings in favor of TEP, here, but I find that not to be the case.

75. Of course, TEP's commitment to the NMPSC that it would not take delivery of the 200 MW at either Luna or Hidalgo, without an additional agreement with EPE, has no bearing on the interpretation of the 1982 Agreement, even if considered binding, which it should be if it were needed, as also should be TEP's continued commitment to that position in this proceeding.

76. In summary, TEP drafted the Agreement in language giving it rights on EPE's transmission system that were broader than needed for the transaction discussed and were not objectionable to EPE, which accepted the language after extensive review. Now the situation has changed so that TEP can use those broadened rights for transactions that were not specifically contemplated at the time of the Agreement. And, although those

other transactions are not detrimental to EPE's use of its own system, would not even add to its costs, and might even facilitate EPE's operations, it could now charge for those transactions if they are not covered by the Agreement. But a careful reading of the Agreement finds that they are covered, although not to the extent that TEP claims, and that EPE's interpretation to the contrary is somewhat at variance with the language it adopted. The lack of negative, and only positive, effects that transmissions in the direction of Springerville on the Springerville-Luna circuit and in the direction of Greenlee on the Luna-Greenlee circuit, which exit only at the endpoints, have on the EPE system are no different from what EPE could have anticipated when it extensively reviewed and approved the expansive language of Sections 6.3 and 6.4 drafted by TEP in 1982.

77. Accordingly, I answer the specific questions directed towards me by the Commission, as follows:

(1) whether or not the transmission rights given to Tucson in sections 6.3 and 6.4 of the 1982 Agreement may only be used for transmission of power from Springerville as the receipt point to Greenlee as the delivery point.

No.

(2) whether or not Tucson can use its transmission rights granted under the 1982 Agreement to transmit power from the Luna Station to either Springerville or Greenlee.

Yes, but limited to a total transmission of 200 MW on any segment of the circuits between Springerville and Greenlee from all transactions scheduled at any one time under the Agreement.

The full extent of TEP's rights under the Agreement is set forth in the discussion, above.

78. There is one other matter of note, although not strictly within the scope of the matters before me. In seeking to determine the amount, 200 MW or 400 MW, that EPE had considered as assigned to EPE, I asked for information concerning the amount included in the denominator of EPE's rate calculation. The answer was that EPE had included nothing, indicating that it had assigned all of the costs attributable to TEP's firm capacity on its system to its other customers. Ex. EPE-39 at 9; Tr.407-15.

79. Obviously, EPE and TEP had entered into the free exchange for the benefit of each company's generation, and it is the unregulated generation that should foot the bill, not the companies' regulated transmission customers, who received no benefits. This

matter has no direct bearing on the issues between TEP and EPE, especially in that TEP appears to have treated transmission exchanged on its own lines the same way in its own ratemaking (see, EPE R.B. 25). But, given the propensity of utilities to charge all of their costs to customers, even when not justified, the Commission's auditing staff and customers, in general, should be alerted that free exchanges between utilities require close monitoring to assure that they are at the companies', not customers', expense.

80. The intervenor in the 1987 proceeding before the NMPSC was prescient in challenging the construction of the Springville-Luna line at a projected cost of \$60 million to EPE's customers, who, he claimed, would receive no benefits from the capacity assigned to TEP. But it was the allocation of the costs to EPE's customers, rather than the decision to construct the line, that was questionable, and the proper forum to present his grievance should have been at the FERC, at EPE's next rate filing.

81. Both parties have referred to numerous documents and statements, only a few of which are contemporaneous with the 1982 Agreement, that they claim are consistent only with their respective interpretations. For the most part, these claimed consistencies are the product of wishful thinking and vivid imaginations. And, of course, all of the documents were written in the context of the transactions that were the main focus of the Agreement and were later conducted, the transmission of power from Springerville to Greenlee as a backup to transmission over TEP's own line. I have addressed only the documents, statements and arguments that I believe to be significant or otherwise worthy of comment, although I have considered them all. To the extent that I might have erred, it is in my evaluation, not in neglect of any party's evidence or argument.

FINDINGS AND CONCLUSIONS

On the basis of the foregoing discussion, I make the following Findings and Conclusions:

82. TEP and EPE are parties to the Tucson-El Paso Power Exchange and Transmission Agreement dated as of April 19, 1982.

83. TEP and EPE agreed in the 1982 Agreement to engage in an exchange of power under which EPE would supply energy from the Palo Verde Station to TEP, in return for which TEP would provide an equivalent amount of energy to EPE from generating stations owned by TEP in eastern Arizona and northern New Mexico. In addition, TEP and EPE each agreed to assign transmission rights to the other party in transmission facilities that it owned.

84. TEP drafted the Agreement and EPE carefully scrutinized drafts of the 1982 Agreement during the negotiation process. Although EPE proposed several modifications to various drafts of the 1982 Agreement as they were circulated, they did

not propose any material modification to Sections 6.3 and 6.4 of the draft 1982 Agreement, in which the transmission rights being assigned to TEP were specified.

85. Article 7 of the Agreement provided for TEP and EPE to cooperate in the construction of a new 345 kV transmission line on EPE's transmission system between TEP's Springerville Substation and EPE's Luna Substation at EPE's cost.

86. Section 6.3 of the 1982 Agreement states in pertinent part that "EPE hereby assigns to TEP 200 megawatts of transmission rights in the Springerville-Luna 345 kV circuit and in the existing 345 kV circuit from Luna via Hidalgo to Greenlee." Such rights will remain in effect until 2030. The 1982 Agreement contains no additional language that requires TEP to use those rights in any specified manner.

87. At a meeting to negotiate the 1982 Agreement held on January 18, 1982, Mr. Einar Greve of TEP had asked EPE to grant it rights to transmit power from Springerville to Greenlee on EPE's system using the proposed circuit from Springerville to Luna and an existing circuit from Luna via Hidalgo to Greenlee, as a back-up to its own, existing line from Springerville to Luna. The Luna via Hidalgo to Greenlee 345 kv circuit is a transmission line connecting the Luna Substation to TEP's Greenlee Substation.

88. TEP expressly told EPE that it required use of transmission rights from Springerville to Greenlee via Luna on EPE's system to back up its transfer capability from Springerville to Greenlee and thereby defer construction of its own costly back-up line from Springerville to Greenlee.

89. EPE's lines would also have had the added advantage of greater reliability from not being located in the same right-of-way as TEP's existing lines, where any new TEP line would also be constructed.

90. EPE agreed to provide TEP the transmission rights TEP requested from Springerville to Greenlee via Luna, but required that the rights be limited to 200 MW, its ownership rights on the Hidalgo-Greenlee segment. Section 6.3 of the 1982 Agreement, accordingly, states that TEP's rights are limited to 200 MWs.

91. Construction of the Springerville-Luna 345 kV circuit was completed in 1990. Since that time, TEP has generally used its transmission rights in the Springerville-Luna 345 kV circuit and in the Luna via Hidalgo to Greenlee 345 kV circuit for back-up transmission service needed to transmit power from Springerville to Greenlee when its own transmission line between Springerville and Greenlee is out of service.

92. TEP acquired a joint ownership interest in the Luna Station, near Deming, NM, in 2005. The Luna Station is interconnected to the EPE transmission system at the Luna Substation.

93. TEP desires to use the transmission rights that were assigned to it by EPE in the 1982 Agreement for delivery of power from the Luna Station to either Springerville or Greenlee.

94. The reason TEP expressed to EPE in 1982 for seeking the rights set forth in Section 6.3 and 6.4 of the 1982 Agreement (deferral of its own line) would have been fully satisfied by grant of a single, continuous path from Springerville to Greenlee, without any additional rights to use Luna or Hidalgo as points of receipt or delivery.

95. No evidence has been presented in this proceeding that demonstrates that in 1982 TEP expressly asked EPE to grant it transmission rights for any purpose other than to allow TEP to schedule power from Springerville to Greenlee when its own system had inadequate capacity.

96. TEP has proffered no credible evidence that its negotiators had any specific transactions in mind for the use of EPE's transmission rights other than as a back-up to its own transmissions from Springerville to Greenlee.

97. It is undisputed that EPE required use of the eastbound rights on Path 47 in order to transfer power from Palo Verde eastward to its load center.

98. EPE was not in a position to give up 200 or 400 MW of its eastbound rights in Path 47 to allow TEP to transmit power from either Springerville or Greenlee for delivery to Luna.

99. EPE anticipated building the new circuit with over 600 MW capacity, with the flow south towards its load, from Springerville to Luna. In all likelihood, it would have had no objection to granting TEP firm transmission in the opposite direction, from Luna to Springerville, as part of the free exchange, had it been requested.

100. There is no record evidence that in 1982 EPE expressed any intent to relinquish 200 MWs or 400 MWs of its rights in Path 47 to TEP.

101. The credible record evidence demonstrates that TEP had neither loads nor generation at either Hidalgo or Luna until the Luna Station began generating power, and thus had no specific foreseeable need for intermediate points of delivery or receipt at the time of the execution of the 1982 Agreement.

102. Even though only a back-up need for a complete transmission from Springerville as a receipt point and Greenlee as a delivery point had been discussed, TEP drafted the Agreement and gave itself rights on EPE's system that were broader than needed for that transaction.

103. One such right, which EPE admits was broader than discussed, was the right to transmit power from Springerville to Greenlee at TEP's discretion, even when its own line was fully functional.

104. Moreover, unlike other sections of the Agreement which limited rights on a party's lines "for deliveries" from one point to another, there was no such limitation specified for TEP's rights between Springerville and Greenlee, suggesting that those rights could be used for transactions other than what had been discussed.

105. Although there was no specific prohibition on deliveries by TEP to points between Springerville and Greenlee, such a prohibition was fundamental and implicit in the Agreement as such use of the system would severely interfere with EPE's bringing power to its load in southern New Mexico.

106. There was no such concern with TEP's using intermediate points as points of receipt, as long as the power exited at Springerville or Greenlee, which would not interfere with EPE's needs on the system.

107. Although, at the time of the Agreement, TEP had no specific transactions in mind that would use Luna as a receipt point and had none until it acquired an interest in the Luna Station some years later, if it had requested rights to use Luna as a receipt point for deliveries to Springerville or Greenlee, in all likelihood EPE would have granted those rights as part of the free exchange.

108. TEP's use or projected use of Luna as a receipt point for deliveries to Springerville or Greenlee would have no negative effect on EPE's operations, as the transmissions would be counter to the general flow of power on its system, towards Luna, and would have the positive effect of reducing power flows and line losses.

109. In apparent recognition of the fact that transmissions eastward from Greenlee or Hidalgo that exited at Hidalgo or Luna would interfere with EPE's needs, Section 6.3 used the words "from Luna to Greenlee via Hidalgo" to indicate directionality on that existing circuit, only westward, towards Greenlee.

110. In sharp contrast, it omitted any indication of directionality in the description of the projected line, which it referred to as the "Springerville-Luna 345 kV circuit."

111. Restricting deliveries to one direction on the prospective Springerville-Luna circuit would have been counterproductive, because a prohibition on transmitting southward towards Luna would have eliminated the back-up transmission from Springerville to Greenlee, the provision's *raison d'être*, while a prohibition in the other direction, on transmitting northward towards Springerville, would have eliminated transmissions that could only benefit EPE by reducing power flows and losses.

112. EPE reviewed the draft of the Agreement over a three-month period, in which it made extensive corrections to other provisions, but adopted Sections 6.3 and 6.4 in the broad language drafted by TEP, signifying its informed approval.

113. Considering the circumstances and interests of the parties at the time, a natural reading of Section 6.3 is that it provided TEP rights not only to transmit power from Springerville as a receipt point to Greenlee as a delivery point, but also to transmit power separately on the existing and proposed lines -- only westward on the existing line, but in both directions on the proposed one.

114. Because EPE's rights on the Greenlee-Hidalgo segment were limited to 200 MW and the only specific transaction that the parties had in mind at the time they adopted the Agreement was the delivery of power from Springerville to Greenlee over the complete circuit, the parties imposed a 200 MW limit to TEP's rights without differentiating between segments.

115. EPE's interpretation of Section 6.3 as providing only for the transmission over the complete path from Springerville to Greenlee fails to account for the apparent differences between directionality and bi-directionality in the descriptions of the circuits and for the absence of any language limiting the transmissions to deliveries to a specific delivery point, in this case Greenlee, in contrast to other provisions of the Agreement.

116. TEP's claim that it had bi-directional rights in each of the Springerville to Luna and Luna to Greenlee circuits but had adopted a voluntary policy of not using them unless EPE permitted it to do so is not credible. Moreover it is not believable that either EPE or the New Mexico Public Service Commission would have found this ostensible policy, not yet binding or committed to paper, to be a reasonable protection of EPE's ability to import power to its load, the purpose for the construction of the Springerville-Luna line.

117. TEP's witness Delawder testified under oath in the 1987 NMPSC hearing that Sections 6.3 and 6.4 of the 1982 Agreement permit TEP to transmit power from Springerville to Greenlee whenever it had insufficient capacity in its own system south of Springerville. He also testified, in response to a question of whether TEP "would be permitted to take delivery of that 200 megawatts at either Hidalgo or Luna" under the 1982 Agreement, that "if we do" it will be with an "additional agreement." Considering

the circumstances, the only rational interpretation of his statement is that TEP did not have such rights under the 1982 Agreement and would only gain such rights with an “additional agreement,” that is, an agreement other than the 1982 Agreement.

118. Mr. Delawder’s current interpretation of his 1987 testimony regarding the “additional agreement” to mean that TEP had the right to use intermediate points of delivery under the 1982 Agreement but would not use them unless EPE agreed is contrary to what he led all the participants in that hearing to believe and is not credible.

119. The parties’ history of three separate, failed attempts to amend the 1982 Agreement to provide TEP the rights it now claims it always possessed is not evidence that supports either party’s interpretation of the Agreement

120. None of the four memoranda prepared by TEP personnel and introduced in this proceeding, the 1982 TEP Memo, the Delawder Memo, the Bankruptcy Memo and the Hutchens Memo, while they are reflective of the authors’ opinions, shed any light on the meaning of the Agreement.

121. The issues set for hearing by the Commission relate solely to the interpretation of Sections 6.3 and 6.4 of the 1982 Agreement.

122. TEP’s arguments relating to harm or fairness based on its views of what it desires today are irrelevant to what the parties intended at the time the 1982 Agreement was negotiated.

123. Based on the foregoing:

(a) The transmission rights given to TEP in Sections 6.3 and 6.4 of the 1982 Agreement do not limit its use to the transmission of power from Springerville, as the receipt point, to Greenlee, as the delivery point.

(b) TEP may use its transmission rights granted under the 1982 Agreement to transmit power from the Luna Station to both Springerville and Greenlee, as long as transmissions at any one time under the Agreement do not exceed 200 MW on any segment of the circuit.

Herbert Grossman
Presiding Administrative Law Judge