

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Electric Company

Docket Nos. ER06-557-000
ER06-557-001
ER06-557-002

ORDER ON SWAP AND PURCHASE AGREEMENT

(Issued June 15, 2006)

1. In this order, the Commission accepts El Paso Electric Company's (El Paso) proposal for the parties to the Power Purchase and Sale Agreement (Swap and Purchase Agreement) to report the Swap and Purchase Agreement and the transactions thereunder on their Electric Quarterly Reports (EQR) pursuant to their market-based rate tariffs.

Background

2. On January 27, 2006, El Paso submitted, pursuant to section 205 of the Federal Power Act,¹ a Swap and Purchase Agreement between El Paso's merchant function and Phelps Dodge Energy Services, LLC (Phelps Dodge). On January 31, 2006, Phelps Dodge filed a certificate of concurrence.

3. El Paso states that it is an investor-owned electric utility company engaged in the generation, transmission, sale for resale, retail sale and local distribution of electric energy in the states of Texas and New Mexico and further serves native load primarily located in south-central New Mexico and west Texas. El Paso states that it has market-based rate authority outside of its home control area and the southern New Mexico area.² El Paso states that it owns generation in and near its load center but its most economical owned generation is from its share of the Four Corners plant in northwest New Mexico and the Palo Verde nuclear plant in central Arizona.

¹ 16 U.S.C. § 824d (2000).

² *El Paso Electric Co.*, 109 FERC ¶ 61,280 (2004); *El Paso Electric Co.*, 87 FERC ¶ 61,219 (1999).

4. El Paso states that Phelps Dodge is a wholly-owned subsidiary of Phelps Dodge Corporation, which also owns two electric utility companies, Phelps-Dodge Morenci, Inc. and Ajo Improvement Company, both of whom are exclusively engaged in retail electric service in Arizona. El Paso states that Phelps Dodge provides power to wholesale customers in Arizona and New Mexico. El Paso states that Phelps Dodge is an exempt wholesale generator³ and has market-based rate authority.⁴ El Paso explains that Phelps Dodge owns a one-third undivided interest in a 570 MW combined-cycle power plant located in Deming, New Mexico (Luna Facility), which is currently under construction and is expected to be in commercial operation by June 2006. El Paso states that once the Luna Facility is completed, Phelps Dodge will have the rights to approximately 190 MW of capacity generated at the Luna Facility.

5. El Paso states that the Luna Facility is jointly owned by Phelps Dodge, Tucson Electric Power Company (Tucson) and Public Service Company of New Mexico (PNM) and is operated by PNM. El Paso states that the Luna substation is jointly owned by El Paso, PNM, and Texas-New Mexico Power Company (TNP). El Paso states that the Greenlee substation in Arizona is owned and operated by Tucson. El Paso states that through the Southwest New Mexico Transmission Project Participation Agreement, the ownership of the transmission lines between the Luna substation and the Greenlee substation are jointly owned between El Paso (owning between 40 and 57 percent), PNM (owning between 20 and 30 percent), Tucson (owning approximately 20 percent), and TNP (owning approximately 30 percent).

6. El Paso states that the Swap and Purchase Agreement, the initial term of which is to commence on the date the Luna Facility becomes operational and terminate on December 31, 2021, provides that Phelps Dodge will sell and deliver 100 MW of its 190 MW share of the output of the Luna Facility to El Paso at the Luna substation. El Paso states that through May 31, 2008, this obligation is subject to an 80 MW prior commitment and El Paso's rights attach to the next 100 MW of output from the Luna Facility. El Paso states that in exchange it agrees to sell and deliver an equal quantity of power to Phelps Dodge at the Greenlee substation. El Paso states that under the "swap" provisions of the Swap and Purchase Agreement, the amount of power exchanged between the parties must be in balance. El Paso states that the Swap and Purchase Agreement provides that Phelps Dodge will pay El Paso a negotiated exchange fee of

³ *Phelps Dodge Energy Services, LLC*, 88 FERC ¶ 61,052 (1999); *Phelps Dodge Energy Services, LLC*, 110 FERC ¶ 62,233 (2005).

⁴ *Green Power Partners I LLC*, 88 FERC ¶ 61,005 (1999); *Phelps Dodge Energy Services, LLC*, Docket No. ER02-1026-001 (April 15, 2002) (unpublished letter order); *Phelps Dodge Energy Services, LLC*, Docket No. ER03-568-000 (June 6, 2003) (unpublished letter order).

\$2.05/MWh on the first 700,000 MWh per calendar year. El Paso states that in the event it is not receiving exchange power but the Luna Facility is otherwise operational, El Paso may dispatch the Luna Facility and receive up to 100 MW of firm energy at a price to be established prior to dispatch. Therefore, El Paso states that under the “purchase” portion of the Swap and Purchase Agreement, El Paso has purchase and dispatch rights that assure that it can utilize output from the Luna Facility for its native load, even when the parties are not exchanging power and further states that based on this dispatch right it will report its “acquisition” (which equals 100 MW) in a change of status notice within 30 days of the time such power becomes available to it.

7. El Paso states that the exchange provides benefits to each party and increases the efficiency by which each party meets its load needs. El Paso states that the Swap and Purchase Agreement is a market-based rate negotiated pursuant to the market-based tariffs of El Paso and Phelps Dodge. El Paso requests that the parties may report the Swap and Purchase Agreement and the transactions thereunder on their EQRs. Alternatively, El Paso requests that the Commission accept the Swap and Purchase Agreement for filing as a wholesale power transaction effective sixty days after its filing.

8. On March 23, 2006, the Director, Division of Tariffs and Market Development – West, acting pursuant to delegated authority, issued a data request seeking information to identify the transmission service agreements under which El Paso has transmission rights; identify who, if anyone, pays a transmission rate and reserves transmission on the Open Access Same-Time Information System (OASIS) to move El Paso’s power from the Four Corners plant and Palo Verde nuclear plant to its load; provide an analysis of how the results under the Swap and Purchase Agreement would differ if Phelps Dodge instead entered into a transmission agreement; and state the impact on Available Transfer Capacity (ATC) of the Swap and Purchase Agreement.⁵

9. On April 20, 2006 and April 21, 2006, El Paso filed its response to the March 23, 2006 data request. In El Paso’s response, El Paso lists the various transmission agreements that are currently in place to allow El Paso to deliver the necessary generation to Phelps Dodge at the Greenlee substation, including grandfathered agreements in addition to PNM’s OATT. Furthermore, El Paso states its merchant function has all of El Paso’s pre-Order No. 888 rights related to El Paso’s generation, including the swap rights that were acquired in order to make power available at locations in which El Paso does not own generation, including at the Greenlee substation. El Paso states that the Swap and Purchase Agreement does not require the power to be delivered at Greenlee to

⁵ *El Paso Electric Co.*, Docket No. ER06-557-000 (March 23, 2006) (unpublished letter order).

originate at any specific location. El Paso asserts that the transaction is solely an exchange of power and no party pays a transmission rate or reserves transmission for this limited purpose.

10. With regard to the benefits of entering into the Swap and Purchase Agreement, El Paso states that Phelps Dodge had the option of obtaining transmission service from El Paso or PNM for service from Luna to Greenlee instead of entering the Swap and Purchase Agreement and Phelps Dodge would have paid the prevailing OATT rate for such service, which in either case is higher than the \$2.05 sale and exchange fee paid under the Swap and Purchase Agreement. Furthermore, El Paso states that Phelps Dodge could have alternatively entered into a swap agreement with another party. El Paso states that it entered into the Swap and Purchase Agreement to increase the total resources available to it within the Path 47 constraint, determining that it was more desirable and economic with respect to timing than building new generation or new transmission.

11. With regard to ATC, El Paso lays out two scenarios. Under Scenario 1, the swap power is a *substitute* for power flowing at the time the swap begins such that the total flow into the El Paso load center remains the same. The Luna Facility increases its output by 100 MW to begin the swap. This means that instead of importing 100 MW over path 47, El Paso uses the swap to replace those 100 MW, increasing the ATC on Path 47 by 100 MW. El Paso states that this 100 MW of ATC will either be utilized by El Paso for delivery of its additional external resources or be posted on OASIS as non-firm capacity. Under Scenario 2, the swap power is an *additional* amount flowing into El Paso (El Paso states that its load has increased by 95 MW). El Paso needs to schedule 95 MW from Palo Verde. This additional 95 MW is scheduled for delivery at Springerville, then to El Paso, and uses ATC on Path 47 and the 345/115 kV interface (between Luna substation and Hidalgo substation and El Paso's system load). This reduces ATC on the 345/115 kV interface to zero and leaves 5 MW of ATC on Path 47, which El Paso states will either be utilized by El Paso for external resources or posted on OASIS. El Paso states that under both scenarios, the ATC for other systems will not change.

Notice of Filing and Responsive Pleadings

12. Notice of El Paso's January 27, 2006 filing was published in the *Federal Register*⁶ with interventions and protests due on or before February 17, 2006. Tucson filed a timely motion to intervene raising no issues.

⁶ 71 Fed. Reg. 6,468 (2006).

13. Notice of El Paso's April 20, 2006 filing was published in the *Federal Register*⁷ with interventions and protests due on or before May 11, 2006. None was filed.

14. Notice of El Paso's April 21, 2006 filing was published in the *Federal Register*⁸ with interventions and protests due on or before May 12, 2006. None was filed.

Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), Tucson's timely, unopposed motion to intervene serves to make it a party to this proceeding.

B. Swap and Purchase Agreement

16. The Commission accepts El Paso's proposal to report the Swap and Purchase Agreement and the transactions thereunder on its EQRs pursuant to its market-based rate tariff.

17. In Order No. 888,⁹ the Commission was concerned that certain buy/sell arrangements can be used to obfuscate the true transaction taking place, thereby allowing parties to circumvent transmission regulation.¹⁰ The Commission also expressed concern with retail buy/sell arrangements that in practical effect provided for jurisdictional transmission service.¹¹ The Commission found that with regard to such agreements, it

⁷ 71 Fed. Reg. 27,489 (2006).

⁸ 71 Fed. Reg. 26,950 (2006).

⁹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (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), *aff'd in relevant part sub nom.*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.*, *New York v. FERC*, 535 U.S. 1 (2002).

¹⁰ Order No. 888 at 31,785.

¹¹ *Id.*

had jurisdiction over the interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third party.¹² In addition, in *Utah Associated Municipal Power System v. PacifiCorp*,¹³ the Commission found that a transaction requiring the redispatch of PacifiCorp's generation resources resulted in transmission by PacifiCorp to UAMPS of a UAMPS resource from a receipt point on PacifiCorp's system to a delivery point on PacifiCorp's system.¹⁴ Therefore, the redispatch transaction was deemed transmission service.¹⁵

18. The circumstances here, however, are distinguishable from *UAMPS* in several regards. First, the transaction does not require the use of El Paso's transmission system (as was the case in *UAMPS*) as neither of the substations at which the sales occur (Luna and Greenlee), nor the lines interconnecting the substations, are wholly owned by El Paso. Thus, Phelps Dodge had the option to obtain open access transmission service from either El Paso or PNM.

19. Second, Phelps Dodge did not request El Paso's transmission function to redispatch El Paso's system to effectuate the transaction as occurred in *UAMPS*. Indeed, El Paso points out that it does not reduce generation in one point of its system to absorb Phelps Dodge power while simultaneously increasing generation elsewhere to "deliver" power.

20. Third, there is no evidence that Phelps Dodge, who is not an existing El Paso transmission customer and is not "paying twice" for the service, requested or was denied transmission service as occurred in *UAMPS*.

21. Finally, a swap could have been entered into with another power marketer instead of El Paso's merchant function. Accordingly, we find the circumstances here to be distinguishable from the concerns raised in Order No. 888 and *UAMPS*, *i.e.*, the Swap and Purchase Agreement is not an attempt to obfuscate a transmission transaction.

22. With regard to the instant filing and consistent with the requirements of Order No. 888, to the extent that additional transmission capacity is made available on El Paso's system as a result of the Swap and Purchase Agreement with Phelps Dodge, and such capacity is neither associated with a designated network resource nor needed for existing

¹² *Id.*; Order No. 888-A at 30,344.

¹³ 83 FERC ¶ 61,337 (1998) (*UAMPS*), *reh'g denied*, 87 FERC ¶ 61,044 (1999).

¹⁴ *UAMPS*, 83 FERC ¶ 61,337 at 62,367.

¹⁵ *Id.*

native load, then El Paso must post such ATC on OASIS on a firm basis.¹⁶ Moreover, if El Paso requires the use of such additional transmission capacity for existing native load requirements, it must designate network resources sufficient to support that use, and if such capacity is not utilized in a given hour by El Paso, it should be posted on OASIS and made available to third parties on a non-firm basis.

C. Filing Requirement

23. Consistent with the procedures the Commission adopted in Order No. 2001,¹⁷ El Paso must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.¹⁸ Electric Quarterly Reports must be

¹⁶ In Order No. 888, the Commission stated that public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current planning horizon. However, any capacity that a public utility reserves for future growth, but is not currently needed, must be posted on the OASIS and made available to others, until such time as it is actually needed and used. Order No. 888 at 31,694. *See also Nevada Power Co.*, 97 FERC ¶ 61,324 at 62,492 (2001); *Arizona Public Service Co. v. Idaho Power Co.*, 89 FERC ¶ 61,061 at 61,202 (1999); *Wisconsin Public Power Inc. SYSTEM v. Wisconsin Public Service Corp.*, 84 FERC ¶ 61,120 at 61,659 (1998).

¹⁷ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Order No. 2001, which implemented 18 C.F.R § 35.1(g) (2005), obviates the need to file with the Commission service agreements under market-based power sales tariffs, and requires, among other things, that public utilities electronically file Electric Quarterly Reports which include a summary of the contractual terms and conditions in every effective service agreement for market-based power sales.

¹⁸ Required data sets for contractual and transaction information to be reported in Electric Quarterly Reports are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

filed quarterly no later than 30 days after the end of the reporting quarter.¹⁹ We expect Phelps Dodge to report the Swap and Purchase Agreement and the transactions thereunder in its EQRs as well. We will direct Phelps Dodge to notify the Commission within fifteen days of the date of this order as to whether it commits to the reporting.²⁰

The Commission orders:

(A) El Paso's proposal to report the Swap and Purchase Agreement and the transactions thereunder on its EQRs pursuant to its market-based rate tariff is accepted, as discussed herein.

(B) Phelps Dodge is directed to file a notification with the Commission within fifteen (15) days of the date of this order as discussed herein.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁹ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2005). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁰ We note that Phelps Dodge filed comments supporting El Paso's proposal to report the Swap and Purchase Agreement and the transactions thereunder in their EQRs.