



same Power Sale Agreement for which El Paso has filed a notice of cancellation in the instant proceeding;<sup>2</sup> (2) determine that TNMP properly exercised its rollover rights under the Power Sale Agreement by providing timely notice and a request for network service under El Paso's Open Access Transmission Tariff (OATT); and (3) direct El Paso to allow TNMP to exercise its rollover rights under the Power Sale Agreement by providing TNMP with network transmission service pursuant to El Paso's OATT.

3. El Paso filed an answer to TNMP's complaint. It argued that TNMP's complaint should be denied because its rollover request seeks new service (i.e., network transmission service as opposed to point-to-point service, which El Paso claims TNMP had under the Power Sale Agreement) from different points of receipt and delivery that it did not receive under the Power Sale Agreement and that the capacity for new service is not available.

4. On February 18, 2004, the Commission issued an order in Docket No. EL04-15-000 setting the complaint for hearing under section 206 of the Federal Power Act (FPA).<sup>3</sup> Subsequently, on March 16, 2004, El Paso filed a motion to dismiss TNMP's November 3, 2003 complaint and a request for rehearing of the February 18 Order.<sup>4</sup>

5. On April 27, 2004, El Paso filed a notice of cancellation of the Power Sale Agreement. El Paso argues that this agreement terminated by its own terms on December 31, 2002<sup>5</sup> and that an administrative oversight caused El Paso's failure to file the cancellation with the Commission as required by section 35.15 of the Commission's regulations.<sup>6</sup> El Paso seeks an effective date of December 31, 2002 for the cancellation.

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<sup>2</sup> The Power Sale Agreement is on file with the Commission as El Paso Rate Schedule No. 57. According to the parties to this proceeding, the Power Sale Agreement expired on December 31, 2002.

<sup>3</sup> Texas-New Mexico Power Company v. El Paso Electric Company, 106 FERC ¶ 61,169 (2003) (February 18 Order), order on reh'g, 107 FERC ¶ 61,309 (2004).

<sup>4</sup> Concurrent with the issuance of this order, the Commission is issuing an order addressing El Paso's March 16, 2004 filings.

<sup>5</sup> El Paso further states that the termination of the Power Sales Agreement by its own terms is confirmed by section 5.2 of the contract and by the fact that TNMP sent El Paso a notice of termination on November 27, 2001, which indicated that TNMP intended to cancel the power sales agreement "effective 11:59 PM December 31, 2002" pursuant to the terms of the contract.

<sup>6</sup> 18 C.F.R. § 35.15 (2003).

### **Notice of Filing and Protest**

6. Notice of El Paso's filing was published in the Federal Register, 69 Fed. Reg. 26,583 (2004), with interventions, protests and comments due on or before May 18, 2004. TNMP filed a timely motion to intervene and protest. El Paso filed an answer to TNMP's protest.

7. TNMP argues that El Paso has failed to demonstrate or establish that the cancellation of the Power Sale Agreement is not unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Also, TNMP argues that El Paso has failed either to request waiver of the Commission's prior notice requirements, or demonstrate the requisite extraordinary circumstances to explain its 18-month delay in providing the required notice to justify El Paso's request for a retroactive effective date. TNMP asserts that El Paso's effective date request of December 31, 2002 should be rejected.

8. In the alternative, if the Commission does not reject El Paso's filing outright, TNMP requests that the Commission suspend the filing for the maximum period allowed and make the outcome of this proceeding contingent upon the outcome of the pending complaint proceeding in Docket No. EL04-15-000.

### **Discussion**

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

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), TNMP's timely, unopposed motion to intervene serves to make it a party to this proceeding.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept El Paso's answer and will, therefore, reject it.

#### **B. Analysis**

11. El Paso's notice of cancellation raises issues of material fact that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing ordered below. Our preliminary analysis indicates that the notice of cancellation has not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept the notice of cancellation for filing, suspend it for five months, make it effective

November 27, 2004, subject to refund, and set it for hearing. Because there are common issues of law and fact, we will consolidate the instant docket with Docket No. EL04-15-000 which is currently before a hearing judge, for purposes of hearing and decision.

The Commission orders:

(A) El Paso's notice of cancellation is hereby accepted for filing and suspended for five months to become effective November 27, 2004, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER04-768-000, concerning the justness and reasonableness of the cancellation of the Power Sale Agreement, as discussed in the body of this order.

(C) Docket No. ER04-768-000 is hereby consolidated with Docket No. EL04-15-000 for purposes of hearing and decision.

(D) The hearing judge in Docket No. EL04-15-000 shall determine the procedures best suited to accommodate consolidation of Docket No. ER04-768-000 with Docket No. EL04-15-000.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.