

157 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tucson Electric Power Company

Docket Nos. ER15-1861-000
ER15-1862-000

ORDER REJECTING REFUND REPORT

(Issued October 20, 2016)

1. On July 8, 2016, Tucson Electric Power Company (Tucson) filed a refund report in response to the Commission's April 21, 2016 order on rehearing and refund report.¹ The Commission partially granted Tucson's request for rehearing, finding that Tucson did not need to pay time value refunds for certain late-filed non-conforming Transmission Service Agreements (TSA),² but that Tucson must pay time value refunds for the remaining non-conforming TSAs. The Commission also ordered Tucson to file a revised refund report. In this order, we find that the refund report does not comply with the April Order, and, therefore, we reject it and direct Tucson to recalculate the refund amounts, make time value refunds within 30 days of the date of this order, and file a revised refund report with the Commission within 30 days thereafter.

I. Background

2. On June 5, 2015, in Docket Nos. ER15-1861-000 and ER15-1862-000, Tucson filed a letter agreement and 22 non-conforming point-to-point and network transmission service agreements under Tucson's Open Access Transmission Tariff (OATT), with service commencing on various dates from 2006 to 2014.³ Tucson stated that these

¹ *Tucson Elec. Power Co.*, 155 FERC ¶ 61,070 (2016) (April Order).

² The Commission determined that Tucson was not required to refund time value refunds under two TSAs where the counterparties of the agreements were affiliates of Tucson, nor under an additional TSA where service had not yet commenced at the time of Tucson's original filing.

³ The customers included Tri-State Generation & Transmission Association, Inc. (Tri-State), Public Service Company of New Mexico, Navajo Tribal Utility Authority, Trico Electric Cooperative (Trico), Arizona Electric Power Cooperative, UNS Electric, Inc., and Tucson Wholesale Marketing.

agreements were identified as a result of a comprehensive review of unfiled agreements in accordance with a self-report made to the Office of Enforcement on March 2, 2015.⁴ Tucson filed the TSAs as non-conforming agreements because the agreements included provisions that: (1) waived the applicable deposit requirement; (2) did not require customers to pay for Schedule 1 and/or Schedule 2 ancillary services; (3) waived charges for real power losses; and/or (4) assessed direct assignment facilities charges.

3. On July 30, 2015, the Commission issued separate orders denying waiver of the 60-day prior notice requirement, accepting the letter agreement and the 22 TSAs, effective August 5, 2015, and directing Tucson to refund the time value of monies actually collected for the time period during which the rates were charged without Commission authorization, consistent with section 35.19(a) of the Commission's regulations,⁵ with the refunds limited so as not to cause Tucson to operate at a loss.⁶ The Commission directed Tucson to make the time value refunds within 30 days for all but two of the TSAs,⁷ and to file a refund report within 30 days thereafter, and permitted Tucson, to the extent that time value refunds would result in a loss, to make such a showing in the refund report.

4. On August 31, 2015, Tucson requested rehearing, arguing, among other things, that it should not be required to pay time value revenues because: (1) some of the TSAs were with affiliates and service under one TSA had not yet commenced; (2) the non-conforming provisions in the TSAs benefitted the customers; (3) the rates for point-to-point transmission, network transmission, and ancillary services under these TSAs conformed to the cost-based rates in Tucson's OATT and, thus, were *per se* just and

⁴ Prior to Tucson filing the TSAs, the Commission had referred issues related to the other late-filed agreements to the Office of Enforcement "for further examination and inquiry as may be appropriate." *See Tucson Elec. Power Co.*, 151 FERC ¶ 61,088, at n.43 (2015).

⁵ 18 C.F.R. § 35.19(a) (2016).

⁶ *Tucson Elec. Power Co.*, Docket No. ER15-1861-000, at 2 (July 30, 2015) (delegated letter order) and *Tucson Elec. Power Co.*, Docket No. ER15-1862-000, at 2 (July 30, 2015) (delegated letter order) (both citing *So. Cal. Edison Co.*, 98 FERC ¶ 61,304 (2002) (*SoCal Edison*); *Fla. Power & Light Co.*, 98 FERC ¶ 61,276, *reh'g denied*, 99 FERC ¶ 61,320 (2002) (*FP&L*); *Carolina Power & Light Co.*, 87 FERC ¶ 61,083 (1999) (*CP&L*)).

⁷ The 2010 Letter Agreement changed terms and conditions with no rate impact. Service Agreement No. 225 with Tri-State provides for a point-to-point transmission stated rate and Schedule 1 rate below the rates reflected in the OATT because service was for a limited distance across a substation. Thus, no refunds were directed for these TSAs.

reasonable; and (4) the TSAs had previously been reported on Tucson's Electric Quarterly Reports (EQR), and thus, should be considered timely filed.⁸

5. Tucson also argued that paying the time value refunds owed would result in "harsh effects" that the Commission was expressly trying to avoid when it revised its refund policy in *Prior Notice*,⁹ given that the customers consented to the rates by executing the TSAs, and that the rates charged are on file in Tucson's OATT and, thus, have already been found to be just and reasonable. Tucson argued that, in this regard, the customers that received time value refunds would therefore enjoy a windfall, even though they were not harmed in any way.¹⁰ Finally, Tucson argued that the time value refunds, that Tucson claimed would amount to approximately \$12.8 million, would cause it to operate at a loss.¹¹

6. On September 29, 2015, Tucson submitted a refund report that detailed a refund for amounts paid for a direct assignment charge collected under a single TSA.¹² Tucson stated that time value refunds under all the other TSAs would either be unwarranted or would cause Tucson to suffer economic harm.

7. On November 19, 2015, Commission staff issued a deficiency letter seeking additional information from Tucson to support its calculation of \$12.8 million in time value refunds and to support its claim that paying the time value refunds would cause it to operate at a loss. On November 23, 2015, Tucson requested an extension of time for filing its response to the deficiency letter, which the Commission granted. On January 19, 2016, Tucson submitted its response. Tucson provided a spreadsheet which calculated time value refunds on the revenues collected under each TSA using the interest rates set forth in section 35.19a of the Commission's regulations. Tucson also adjusted its total time value refund amount to approximately \$13.3 million.¹³ Tucson also stated

⁸ Tucson Rehearing Request at 3, 6-7.

⁹ *Id.* at 8-9 (citing *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 (1993) (*Prior Notice*)).

¹⁰ *Id.*

¹¹ *Id.* at 9-11.

¹² Specifically, Tucson indicated that it made time value refunds of \$1,832 on the \$13,340 per year direct assignment facilities charge set forth in Service Agreement No. 324, its network integration TSA with Trico.

¹³ Tucson explains that the difference in the total refund amount results from Tucson having used estimated revenue data in its original calculations and actual revenue data in the present, revised calculations. Tucson Response to Deficiency Letter at n.10.

that its OATT rates were established by a black box settlement following its initial OATT rate filing in July 1996, and noted that its current OATT rates are the “best representation of cost of service under the TSAs, and absent a full rate case type submittal, it [could not] calculate any other costs to provide service.”¹⁴

8. In the April Order, the Commission granted rehearing on two issues, finding that Tucson did not need to issue time value refunds for the TSAs with affiliates, or under the TSA where service had not yet commenced.¹⁵ The Commission denied rehearing on the remaining issues. The Commission found that, although the late-filed TSAs did not harm counterparties, *Prior Notice* protects more than just counterparties, as late filing harms the Commission’s ability to perform its statutory mission and to prevent preferential treatment through the disclosure of non-conforming provisions in TSAs.¹⁶ The Commission also found that precedent did not support Tucson’s argument that reflecting an agreement in an EQR constitutes a rate on file for the purposes of *Prior Notice*.¹⁷ In addition, the Commission acknowledged that the time value refund may exceed \$13 million, but stated that does not, by itself, make the refund inappropriate or “harsh” because the size of a time value refund relates solely to the magnitude and length of the violation, which is a function of the length of time the agreements were in effect, but not filed with the Commission.¹⁸ Moreover, the Commission noted that Tucson earned a return on the monies collected before receiving Commission authorization for the TSAs.¹⁹

9. The Commission also addressed Tucson’s refund report, finding that Tucson had not supported its claim that making any time value refunds would result in it operating at a loss.²⁰ However, because the Commission had not previously addressed how a utility demonstrates that time value refunds will cause it to “operate at a loss” in the context of transmission rates accepted under a black box settlement, the Commission provided Tucson with a final opportunity to demonstrate that it “operated at a loss” in its refund

¹⁴ Tucson Response to Deficiency Letter at 4.

¹⁵ April Order, 155 FERC ¶ 61,070 at P 19.

¹⁶ *Id.* P 20.

¹⁷ *Id.* P 21.

¹⁸ *Id.* P 22.

¹⁹ *Id.*

²⁰ *Id.* P 24.

report.²¹ Specifically, the Commission stated that, consistent with Commission precedent, Tucson should calculate its time value refunds based upon the total gross revenues that it collected under each contract. The Commission explained that Tucson can then apply a “floor” – on a contract-by-contract basis – if the sum of (1) the time value refund amount owed for that contract plus (2) the expenses that Tucson incurred specifically to provide service under that contract (e.g. capital improvements that were required under that contract) exceed the gross revenues that it collected under that contract.²² Finally, Tucson was directed to revise its refund report to reflect time value refunds based upon the revenues collected under Service Agreement No. 324.²³

10. On June 17, 2016, Tucson petitioned the U.S. Court of Appeals for the D.C. Circuit for review of the April Order.²⁴ On July 11, 2016, Tucson filed a motion with the court to hold its petition in abeyance until after the Commission issues a ruling on Tucson’s refund report.

11. On July 8, 2016, Tucson filed the instant refund report. Tucson states that, on June 20, 2016, it paid a total of \$3,228,201 in time value refunds to the relevant TSA customers. Tucson states that it includes detailed calculations of the time value refunds for each TSA, but requests privileged treatment for such calculations, stating that the information reveals customer-specific billing information that Tucson does not make publicly available.

II. Notices and Interventions

12. Notice of Tucson’s refund report was published in the *Federal Register*, 81 Fed. Reg. 45,468 (2016), with protests or interventions due on or before July 29, 2016. None was filed.

III. Discussion

13. Pursuant to the Commission’s refund policy set forth in *Prior Notice*, if a utility files an otherwise just and reasonable cost-based rate after new service has commenced,

²¹ *Id.* PP 25-26.

²² *Id.* P 25.

²³ *Id.* P 27. On May 13, 2016, Tucson filed a motion requesting a 30-day extension to issue the refunds required in the April Order. On May 19, 2016, the Commission granted that motion. On June 10, 2016, Tucson filed a motion requesting an additional 30-day extension. On June 16, 2016, the Commission granted that motion.

²⁴ Pet. for Rev., *Tucson Elec. Power Co. v. FERC*, No. 16-1194 (D.C. Cir. June 17, 2016).

or if waiver is denied and the proposed rate goes into effect after service has commenced, the utility is required to refund to its customers the time value of the revenues collected, calculated pursuant to section 35.19a,²⁵ for the entire period that the rate was collected without Commission authorization. Commission policy also limits time value refunds so as not to cause the utility to operate at a loss.²⁶

14. Tucson's refund report does not include a narrative description of its calculation methodology; rather, its refund report includes only the calculations Tucson undertook. Based on our review, Tucson has not calculated a "floor" on a contract-to-contract basis to demonstrate that it operated at a loss.

15. In its refund report, Tucson states that it paid a total of \$3,228,201 in time value refunds to the relevant TSA customers. However, as noted above, in its January 19, 2016 deficiency letter response, Tucson estimated its total time value refund calculation to be approximately \$13.3 million. Included with that response, Tucson submitted a spreadsheet which calculates time value refunds on the revenues collected under each TSA using the interest rates set forth in section 35.19a of the Commission's regulations. Thus, Tucson's calculations in its current refund report reduce the time value refunds it previously calculated by over \$10 million.

16. Tucson has not explained why its estimated total time value refunds changed from approximately \$13.3 million to \$3,228,201. Based on our review, however, it appears that Tucson has made two adjustments, neither of which were permitted under the April Order nor consistent with Commission precedent. Specifically, our review indicates that Tucson calculated interest on the total revenues collected from the customer under the unfiled TSAs from the commencement of service until such time as each relevant TSA terminated, or the August 5, 2015 effective date assigned by the Commission, whichever occurred first. Thereafter, for each TSA, Tucson calculated interest only on the outstanding interest that had accumulated (i.e., excluding interest on total revenues received), until such time as the refund was paid. Tucson also reduced the time-value

²⁵ Section 35.19a of the Commission's regulations provides that:

The public utility whose proposed increased rates or charges were suspended shall refund at such time in such amounts . . . the portion of any increased rates or charges found by the Commission in that suspension proceeding. . . . Interest shall be computed from the date of collection until the date refunds are made . . . [a]t an average prime rate for each calendar quarter on all excessive rates or charges held.

²⁶ See *SoCal Edison*, 98 FERC ¶ 61,304; *FP&L*, 98 FERC ¶ 61,276; *CP&L*, 87 FERC ¶ 61,083.

refunds calculated for each TSA by the amount of revenues it forewent as a result of not charging for real power losses and Schedule 1 or Schedule 2 charges under various TSAs, plus the interest associated with the forgone revenue.

17. Tucson's methodology of calculating the time-value refunds is inconsistent with the plain language of the Commission's regulations, precedent, and practice. In *Prior Notice*,²⁷ the Commission required that time-value payments be calculated pursuant to section 35.19a, without exception for whether the entity has ceased collecting unauthorized revenues. Section 35.19a(a)(2) of the Commission's regulations specifically states that "[i]nterest shall be computed from the date of collection until the date refunds are made." Moreover, the total revenues received (or collected) are not affected by the fact that a TSA has expired or terminated and Tucson has not provided any explanation, rationale or discussion of applicable precedent why it has chosen to stop calculating the time-value interest on the total revenues after the expiration/termination of the agreements. The Commission uses the same methodology under section 35.19a to calculate refunds owed in other contexts under section 205 of the Federal Power Act,²⁸ such as late market-based rate authorizations²⁹ and failure to comply with the requirement to certify as a qualifying facility.³⁰ Tucson has provided no justification supporting a deviation from our precedent here. Indeed, to allow an entity to pay interest (time-value) only on the accumulated interest, and not on the total revenues received would reward that entity with a lower refund obligation.

18. Additionally, the Commission requires time value refunds to be calculated based on the total revenues of the contract.³¹ Tucson has not done so, and instead used a new methodology to calculate its time value refunds, namely Tucson reduces the total refund

²⁷ *Prior Notice*, 64 FERC 61,979-80.

²⁸ 16 U.S.C. § 824d (2012).

²⁹ See *CP&L*, 87 FERC ¶ 61,083. See also *FC Landfill Energy, LLC*, 133 FERC ¶ 61,041 (2010).

³⁰ See, e.g., *Minwind I, LLC*, 149 FERC ¶ 61,109, at PP 23-24 (2014) (citing *Prior Notice* and section 35.19a and directing that "Petitioners must refund the time value of the monies actually collected for the time period during which the rates were charged without Commission authorization"). See also *OREG I, Inc.*, 135 FERC ¶ 61,150 (2011), *order denying reh'g*, 138 FERC ¶ 61,110 (2012); *Granite State Elec. Co.*, 113 FERC ¶ 61,289, at P 16 (2005) (requiring Granite State to make time-value refunds, calculated according to section 35.19a, for revenues collected without Commission authorization).

³¹ See, e.g., *SoCal Edison*, 98 FERC ¶ 61,304; *FP&L*, 98 FERC ¶ 61,276; *CP&L*, 87 FERC ¶ 61,083.

due under each TSA by an amount equal to the “benefits” it provided to each customer under each TSA (e.g., because Tucson did not charge for real power losses and Schedule 1 or Schedule 2 charges under various TSAs, it subtracted from the time value refund those amounts that it would have collected, plus interest on those amounts). Tucson provides no justification or explanation for deviating from clear Commission precedent. Tucson’s choice to offer certain discounts or economic benefits to a select group of customers is not a valid or rational basis for reducing Tucson’s refunds by the amounts of those benefits. Moreover, submitting such new methodology for these calculations is inconsistent with the directives of the April Order,³² and Tucson does not explain why its methodology is not an impermissible collateral attack on the April Order. Accordingly, we will reject the adjustment as inconsistent with our precedent. Tucson must calculate time value refunds based on the *total* amount of revenue it collected without Commission authorization, without adjustment or reduction. Accordingly, we will direct Tucson to recalculate the refund amounts, make time value refunds within 30 days of the date of this order, and file a revised refund report with the Commission within 30 days thereafter.

The Commission orders:

(A) Tucson’s refund report is hereby rejected, as discussed in the body of this order.

(B) Tucson is hereby directed to make time value refunds within 30 days of the date of this order and file a revised refund report with the Commission within 30 days thereafter, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³² See April Order, 155 FERC ¶ 61,070 at P 25 (“consistent with Commission precedent, Tucson should calculate the time value refund owed based upon the total gross revenues that it collected under each contract. It then can apply a floor on a contract-by-contract basis”).