111 FERC ¶ 61,161
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company Docket No. ER02-1913-005

ORDER ON REMAND

(Issued May 6, 2005)

1. In this order, the Commission addressees the remand by the United States Court of Appeals for the District of Columbia Circuit, *Entergy Services, Inc. v. FERC*.[1] The Commission explains why our policy that network upgrades include all facilities "at" or beyond the point where the generator connects to the grid is reasonable. This order benefits customers by further clarifying the Commission's interconnection pricing policy.

I. Prior Commission Orders

2. In *Nevada Power I*, the Commission accepted for filing, as modified, an unexecuted Interconnection and Operation Agreement (Interconnection Agreement) between Nevada Power Company (Nevada Power) and GenWest, LLC (GenWest).[2] As relevant here, the Interconnection Agreement requires GenWest to pay Nevada Power up front for costs that Nevada Power incurs in constructing certain transmission upgrades. However, GenWest is to receive credits, including interest, against its transmission bills when it takes the delivery component of transmission service to repay this upfront payment.[3] Thus, these upgrade costs are not ultimately "directly assigned" to GenWest.

[1] 391 F.3d 1240 (D.C. Cir. 2004) (Remand Order), *reh'g and reh'g en banc denied*, No. 02-1199 (D.C. Cir. February 11, 2005).

[2] *Nevada Power Company*, 100 FERC ¶ 61,077 (2002) (*Nevada Power I*).

[3] *Id.* at P 4.

3. In contrast, the Interconnection Agreement directly assigned to GenWest (without credits) a radial 500 kV line from GenWest's generating facility to an interconnection with Nevada Power's transmission system at Nevada Power's Harry Allen 500 kV Switchyard. It also directly assigned to GenWest the cost of a one line terminal installed to upgrade the switchyard, along with certain related equipment.[4]

4. In *Nevada Power I*, the Commission found that GenWest could not be directly assigned the costs of the one line terminal. The Commission based its decision on *Entergy Gulf States*[5] and *Tampa Electric Company*,[6] which held that upgrades "at or beyond" the point where a customer connects to the grid benefit all users of that grid, and thus cannot be directly assigned to interconnecting generators.[7] The Commission found that the one line terminal was a modification to an existing Nevada Power switchyard and, like the facilities at issue in *Entergy Gulf States*, the switchyard "is a network facility today, and the fact that it is being reconfigured or upgraded does not somehow transform it into a non-network facility."[8] Therefore, the Commission agreed with GenWest that it should receive transmission service credits once it takes the delivery component of transmission service.[9]

5. On rehearing, Nevada Power asked the Commission to reconsider the holding that the one line terminal is a network upgrade. Nevada Power argued that this ruling was erroneous because under Commission pricing policies, the one line terminal is not a network upgrade, since it provides no benefit to customers other than GenWest or to the transmission system as a whole. Nevada Power stated that the "at or beyond the point of interconnection" test applied by the Commission was an unjustified deviation from past Commission practice.

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[4] *Id*. at P 9. Nevada Power estimated the costs of these directly assigned facilities to be approximately $6.57 million.

[5] 98 FERC 61,014 at 61,023, *reh'g denied*, 99 FERC 61,095 (2002) (*Entergy Gulf States*).

[6] 99 FERC 61,192 (2002) (*Tampa*).

[7] *Id*. at 61,796.

[8] *Nevada Power I* at P 13.

[9] *Id*. at P 14.

6. In response, in *Nevada Power II*,[10] the Commission denied Nevada Power's request for rehearing. The Commission pointed to its decision in *Tampa*, where it had held that:

> our policy that all facilities at or beyond the point where the generator connects to the grid are network facilities is not a new policy. Rather, it is an application of the Commission's long-standing holding, explained in *PSCO*[11] almost a decade ago, that the network cannot be dismembered or directly assigned and that, even if the customer causes the addition of a grid facility (that is, the facility would not be needed "but for" the customer's request for service), the addition is a system expansion that benefits all users. As we further explained in [*Entergy Gulf States*], our use of the phrase "at or beyond" is simply another way of describing our standard in *PSCO*, not a departure from it.[12]

7. The Commission explained that the facilities at issue are "at or beyond the point of interconnection and are therefore network facilities."[13]

II. Court Remand

8. Nevada Power sought judicial review, contending that (1) what Nevada Power characterizes as the Commission's determination that the facilities at issue benefit the entire network was not supported by substantial evidence, and (2) the Commission's "at or beyond the point of interconnection" rule is an unjustified departure from precedent.[14]

9. The court remanded the order to the Commission for further explanation. First, it noted that it had already, in the *Entergy*[15] case, recognized that "system expansion is a

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[10] *Nevada Power Company*, 101 FERC ¶ 61,036 (2002) (*Nevada Power II*).

[11] *Public Service Company of Colorado*, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993) (*PSCO*).

[12] *Tampa*, 99 FERC at 61,797.

[13] *Nevada Power II* at P 9.

[14] Remand Order, 391 F.3d at 1247.

[15] *Entergy Services, Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003) (*Entergy*).

'benefit' sufficient to support the Commission's pricing policy."[16] The court explained that Nevada Power's view of "benefit" was too narrow and reflected "a cramped view of what constitutes a 'benefit.'"[17] The court had no objection to the fact that the Commission in *Consumers Energy*[18] did not make a case-specific analysis of benefit to other users of the transmission grid; it endorsed the Commission's use of a purely locational test. It said that *Consumers Energy* "set forth an overarching defense of at least a 'From' test" (*i.e.*, all facilities *from* the point where the generator connects to the grid).[19] Further, the court pointed out that, in *Entergy*, it had found that "the Commission had reasonably explained its crediting pricing policy," as spelled out in *Consumers Energy*, generally.[20]

10. The court stated that its only difficulty in this case was whether "from" means "at or beyond," or merely "beyond." It asserted that either is a natural reading of "from."[21]

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[16] Remand Order, 391 F.3d at 1248 (*citing Entergy*, 319 F.3d at 544).

[17] *Id*. at 1247 (*citing Entergy*, 319 F.3d at 543). Nevada Power argued that GenWest was the sole beneficiary of the facilities at issue, and that geographic location of the additions to the Harry Allen Switchyard was not itself sufficient justification for a finding to the contrary.

[18] *Consumers Energy Co*., 95 FERC ¶ 61,233 (*Consumers Energy*), *reh'g denied*, 96 FERC ¶ 61,132 (2001).

[19] Remand Order, 391 F.3d at 1248 (*citing Consumers Energy*, 95 FERC at 61,804).

[20] *Id*. (*citing Entergy*, 319 F.3d at 543).

[21] Remand Order, 391 F.3d at 1249. For example, the court stated that

> when a bridal couple declares their fealty "from this day forward," we would not likely interpret this as a declaration of faithfulness to begin the next day. The Commission's "at or beyond" test is consistent with such an immediate beginning inclusive of everything from the point of commencement including that point. On the other hand, if a travel guide tells us that it is "one hundred miles from City A to City B," we would not necessarily assume that any distance within the city of commencement is included within that one hundred miles. Neither construction would be unreasonable. *Id*.

The court stated that "the difficulty is that the Commission's explanation in *Consumers Energy*, at least on its face, is not consistent with the Commission's application of the test to the facts before us" because *Consumers Energy* referred only to facilities "from" the point of interconnection, not "at or beyond" that point.[22] The court explained that Nevada Power's petition did not depend on any inherent flaw in the "from" test as applied to improvements beyond the point of interconnection, but only as to those precisely "at" the interconnection. Thus, although the court would normally defer to the Commission's interpretation of its own prior rule, it found that the Commission appeared to have expanded on its "from" precedent without explanation. The court explained that it was not suggesting that the Commission could not directly assign the costs at issue, because substantial evidence appeared to support either an "at" test or a more limited "beyond" test, "but if the Commission does so, it must provide further explanation."[23]

11. The court noted that the Commission equates the *Consumers Energy's* "from" the point of interconnection language with an "at or beyond" rule.[24] However, it stated that the Commission did not take account of *Consumers Energy's* discussion of facilities *at* the point of interconnection. Thus, the court concluded that the "at or beyond" test appeared to be a departure from the *Consumers Energy* "from" test.[25]

III. Discussion

12. In response to the Remand Order, we explain why it is reasonable to treat facilities "at" the point of interconnection as network facilities. First, we note that there is an important distinction between "interconnection facilities" and "network upgrades" in that the former are sole use facilities (*e.g.*, a radial line that extends from the generating facility to the point of interconnection with the grid) that benefit only the interconnection customer, while the latter are part of the integrated grid and, therefore, benefit all users of the transmission system. Because interconnection facilities benefit only the interconnection customer, Commission policy has long held that the cost of such facilities

[22] *Id*.

[23] *Id*. at 1251.

[24] *Id*.

[25] *Id*. The court found also that the Commission may change its practices, but it must do so with "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id*. (*citing Entergy*, 319 F.3d at 541).

should be directly assigned to the interconnection customer.[26] The interconnection customer thus is not entitled to transmission credits for such costs. On the other hand, Commission policy has also long held that the cost of network upgrades may not be directly assigned to the interconnection customer because network upgrades provide a benefit to all transmission system users; this policy was upheld in *Entergy*.[27] (Commission policy does require the interconnection customer to pay up front for the network upgrades, but the transmission provider must reimburse the customer by providing credits when the customer takes transmission (delivery) service.)

13. The point of interconnection is typically an electrical substation or a tap point into an existing transmission line. Rarely is the point of interconnection located at the generating facility itself; in virtually all cases, interconnection facilities (*e.g.*, a radial line, poles, supports, switches, meters) must be constructed to provide an electrical connection between the generating facility and the transmission system at the point of interconnection. Thus, when we refer to "interconnection facilities," we are not referring to facilities "at" the point of interconnection. Rather, "interconnection facilities" refer to all facilities and equipment from the generating facility up to (but not including) the point of interconnection.

14. The court in this case expressed confusion about this terminology when it discussed the Commission's *Consumers Energy* precedent. In *Consumers Energy*, the Commission determined that the total cost to interconnect the generating facility was $13.2 million, of which $3 million was for the construction of directly assigned interconnection facilities and $10.2 million was for the construction of network upgrades.[28] Because the court in this case presumed that interconnection facilities must be located "at" the point of interconnection, it concluded that *Consumers Energy* allowed direct assignment of facilities located "at" the point of interconnection.[29] As we have

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[26] *PSCO*, 62 FERC at 61,061; *Tampa*, 99 FERC at 61,797; *American Electric Power Service Corporation*, 101 FERC ¶ 61,194 at P 10 (2002); *Southern Company Services, Inc.*, 101 FERC ¶ 61,309 at P 8 (2002).

[27] 319 F.3d at 544.

[28] *Consumers Energy*, 95 FERC at 61,802 and 61,804.

[29] *See* Remand Order, 391 F.3d at 1249 ("If the Commission had intended 'from' to mean 'at or beyond' rather than simply 'beyond,' then it is not at all clear what accounts for the $3 million in direct assignment as the interconnection is presumably 'at' the determinative point.").

explained, however, the term "interconnection facilities" refers to facilities and equipment from the generating facility up to (but not including) the point of interconnection. Thus, the $3 million in direct assignment interconnection costs at issue in *Consumers* were not costs for facilities "at" the point of interconnection. *Consumers Energy*, therefore, is consistent with the policy applied to Nevada Power in this case. The cost of the interconnection facilities is directly assigned to the interconnection customer, but the cost of the network upgrades are not directly assigned; instead, the cost of the network upgrades is paid up front by the interconnection customer and later credited back to the customer once delivery service begins.

15. In addition, because the Commission characterized the network upgrades there as "all facilities from [not "at or beyond"] the point where the generator connects to the grid,"[30] the court in the Remand Order apparently believed that the Commission had allowed direct assignment of some network facilities.

16. When the Commission first articulated the locational test for determining whether a facility is a network facility, we used the vague term "from" the point of interconnection instead of the more precise "at or beyond" the point of interconnection. Our adoption of the clearer terminology was not a change in policy.[31] We did not allow direct assignment of facilities *at* the point of interconnection in *Consumers Energy*. The network begins *at* the point where the interconnection facilities connect to the transmission system, not somewhere *beyond* that point.[32]

17. For example, the upgrades at issue here are modifications to a part of a substation that was a network facility before the interconnection of the new generator; upgrading that part of the substation did not somehow transform it into a non-network facility.[33] It

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[30] *Consumers Energy*, 95 FERC at 61,804.

[31] *See, e.g., Entergy Gulf States*, 99 FERC at 61,399-400.

[32] *Id*. *See also Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 at P 65 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004) (Order No. 2003-B); *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004). While Order No. 2003 does not apply to this case, the terminology it uses was not new.

[33] *Tampa*, 99 FERC at 61,796-97.

would be irrational to treat a facility that is "from" the point of interconnection (that is, further *into* the network) as a network facility but not to so treat an upgrade that is "at" the point of interconnection, and thus squarely *on* the network. As the court pointed out, "the same substantial evidence appears to support either test."[34]

18. Finally, we also clarify that the presumption that a facility at the point of interconnection to the grid is part of the grid is rebuttable. For example, in *Tampa,* the Commission allowed the transmitting utility to rebut the presumption regarding metering equipment located inside the substation fence.[35]

The Commission orders:

Nevada Power I and *Nevada Power II* are hereby affirmed, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

[34] Remand Order, 391 F.3d at 1251.

[35] *Tampa*, 99 FERC at 61,796-97. The Commission found that, to the extent that such metering equipment was installed to measure the output of the generation facility, it should be booked to a generation account, and not to a transmission account. If, however, the metering equipment measured load on the transmission system, it should booked to a transmission account, and was a network facility.