UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Tenaska Alabama II Partners, L.P.

v. Docket No. EL05-25-000

Alabama Power Company and Southern Company Services, Inc.

Tenaska Alabama Partners, L.P.

v. Docket No. EL05-26-000

Alabama Power Company and Southern Company Services, Inc.

Tenaska Georgia Partners, L.P.

v. Docket No. EL05-27-000

Georgia Power Company and Southern Company Services, Inc.

ORDER GRANTING COMPLAINTS

(Issued January 19, 2007)

1. On November 22, 2004, Tenaska Alabama II Partners, L.P. (Tenaska Alabama II) and Tenaska Alabama Partners, L.P. (Tenaska Alabama) each filed a complaint against Alabama Power Company and Southern Company Services, Inc. (collectively Southern/Alabama) requesting that the Commission reclassify certain facilities and order Southern/Alabama to provide transmission credits for the costs of the facilities. Also on November 22, 2004, Tenaska Georgia Partners, L.P. (Tenaska Georgia) filed a complaint against Georgia Power Company and Southern Company Services, Inc. (collectively

Southern/Georgia) requesting that the Commission reclassify certain facilities and order Southern/Georgia to provide transmission credits for the costs of the facilities.

2. For the reasons discussed below, we grant the Tenaska Companies'[1] complaints.

I. Background

3. Tenaska Alabama II, Tenaska Alabama, and Tenaska Georgia are each a party to an interconnection agreement (IA) with the Southern Companies[2] accepted pursuant to delegated authority.[3] Each IA identifies certain facilities as interconnection facilities and directly assigns the cost of the facilities to the Tenaska Companies without requiring the Southern Companies to provide transmission credits. Each IA provides for unilateral challenges by the parties under the just and reasonable standard of review.[4]

II. Complaints

4. The Tenaska Companies claim that facilities at issue in these complaints are located beyond the point of interconnection with the Southern Companies and should therefore be classified as Network Upgrades. Therefore, they claim that, under the Commission's interconnection policy,[5] the Southern Companies should provide

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[1] In this order, we refer to Tenaska Alabama II, Tenaska Alabama, and Tenaska Georgia collectively as Tenaska Companies.

[2] In this order, we refer to Southern/Alabama and Southern/Georgia collectively as Southern Companies.

[3] *Southern Company Services, Inc.*, Docket No. ER01-1805-000 (May 14, 2001) (unpublished letter order); *Alabama Power Company*, Docket No, ER00-1608-000 (March 15, 2000) (unpublished letter order); and *Georgia Power Company*, Docket No. ER00-682-000 (Jan. 6, 2000) (unpublished letter order).

[4] *See* section 12.3 of each IA.

[5] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 at P 746 (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, 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g*, 111 FERC ¶ 61,401 (2005) (Order No. 2003-C), *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *appeal docketed sub nom. National*

(continued)

transmission credits, and interest, to the Tenaska Companies for the cost of the directly-assigned facilities. Therefore, they ask the Commission to modify the IAs to reclassify these facilities as Network Upgrades. In addition, once the facilities are reclassified as Network Facilities, the Tenaska Companies state that the Southern Companies can no longer collect a monthly operations and management (O&M) charge for these facilities and ask that the Commission require the IAs to be modified accordingly.

5. The Tenaska Companies maintain that, under the Commission's interconnection policy, a transmission provider may require an interconnection customer to pay the upfront costs of Network Upgrades, but it must then provide the customer with transmission credits equal to the upfront amounts paid for the Network Upgrades, plus interest. They assert that paying an incremental charge for the Network Upgrades and also paying an embedded rate for use of the transmission system results in prohibited "and" pricing. The Tenaska Companies cite *Duke Hinds II*, in which the Commission found that, under the "just and reasonable" standard of review, previously-approved interconnection agreements could be modified to reclassify certain existing facilities as Network Upgrades and required the transmission owner to provide transmission credits, with interest, on those facilities. [6]

6. The Tenaska Companies assert that Commission policy states that the Southern Companies may not collect monthly O&M charges on Network Upgrades. Therefore, once the facilities are properly reclassified as Network Upgrades, the Southern Companies should not be permitted to continue to collect the monthly O&M charge or force the Tenaska Companies to pay repair costs for the Network Upgrade facilities. Therefore, the Tenaska Companies ask the Commission to direct the Southern Companies to delete this provision from each of the IAs.

III. Notice of Filings and Responsive Pleadings

7. Notice of Tenaska Alabama II's, Tenaska Alabama's, and Tenaska Georgia's filings were published in the Federal Register, 69 Fed. Reg. 70,139 (2004), with interventions, answers and protests due on or before December 14, 2004. Southern/Alabama filed timely answers to Tenaska Alabama II's and Tenaska Alabama's

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Association of Regulatory Commissioners v. FERC, Nos. 04-1148, *et al*. (D.C. Cir. argued Oct. 13, 2006).

[6] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 at P 21 (2003) (*Duke Hinds II*), *order on reh'g*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

complaints. Southern/Georgia filed a timely answer to Tenaska Georgia's complaint.[7] The Alabama Public Service Commission separately filed notices of intervention in Docket Nos. EL05-25-000, EL05-26-000 and EL05-27-000. Dalton Utilities filed a motion to intervene in Docket No. EL05-27-000. MEAG Power filed a timely motion to intervene and protest in Docket No. EL05-27-000. Calpine filed a timely motion to intervene in Docket Nos. EL05-25-000, EL05-26-000 and EL05-27-000. Constellation Energy Commodities Group, Inc. and Constellation Generation Group, LLC filed a motion to intervene out of time in Docket Nos. EL05-25-000, EL05-26-000 and EL05-27-000. On December 28, 2005, Tenaska Alabama II, Tenaska Alabama, and Tenaska Georgia filed a joint response to the Southern Companies' answers in Docket Nos. EL05-25-000, EL05-26-000 and EL05-27-000. On January 12, 2006, the Southern Companies filed an answer to the Tenaska Companies' response.

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers and will, therefore, reject them.

9. The Southern Companies argue that, at the time it entered into the IAs with the Tenaska Companies, the Commission's policy was to directly assign all interconnection costs to generators without credits using a test based on whether the facilities provided system-wide benefits.[8] Further, the Southern Companies assert that prior to 2002, almost all Commission-filed interconnection agreements directly assigned the cost of interconnection facilities to the generators.

10. The Southern Companies assert that the Tenaska Companies cannot base their complaints on the Commission's "at or beyond" rule because that rule has been vacated and remanded by the U.S. Court of Appeals for the District of Columbia Circuit in

[7] Southern/Georgia filed an errata to their answer on December 17, 2004.

[8] Southern Companies Answers at 9-11 (EL05-25), 10-12 (EL05-26) and 11-13 (EL05-27), citing *Public Serv. Electric and Gas Co.*, 62 FERC ¶ 61,014(1993) (*PSE&G*); *Public Serv. Co. of Colorado*, 62 FERC ¶ 61,013 (1993); and *Penn. Elec. Co.*, 60 FERC ¶ 61,034 (1992).

Entergy v. FERC.[9] Even if this were not the case, the Southern Companies assert that the Commission has acknowledged that the "at or beyond" policy was a departure from previous Commission policy and should not be retroactively applied.[10] The Southern Companies also state that the Commission should abandon the "at or beyond" rule and return to its previous policies.

11. The Southern Companies also assert that, even if the Commission does not abandon the "at or beyond" policy, the Commission's new policy cannot be retroactively applied to the IA. According to the Southern Companies, Order No. 2003 determined that preexisting interconnection agreements would not be modified to reflect new policies, including the "at or beyond" rule.[11] Further, they argue that, because the policy not to modify pre-existing IAs was established through a formal rulemaking, the Commission cannot change the policy through case-by-case adjudications.

12. Additionally, the Southern Companies assert that, under basic principles of administrative law, the Commission cannot retroactively apply the "at or beyond" rule because it does not meet the five factor test in *NLRB*.[12] First, they state that it was not a case of first impression because the Commission had a well-established policy of directly assigning costs and was therefore also an abrupt departure from the Commission's policy. Further, the Southern Companies assert that they relied on the Commission's previous interconnection policy and revising the IA would impose an unreasonable burden on the Southern Companies and their retail customers. Finally, the Southern Companies

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[9] Southern Companies Answers at 8 (EL05-25), 8-9 (EL05-26) and 10 (EL05-27), citing *Entergy Services Inc. v. FERC*, 391 F.3d 1,240 (D.C. Cir. 2004).

[10] Southern Companies Answers at 12-13 (EL05-25), 13-14 (EL05-26) and 14-15 (EL05-27), citing *Entergy Services Inc.*, 98 FERC ¶ 61,290 (2002).

[11] Southern Companies Answers at 18 (EL05-25 and EL05-26) and 19 (EL05-27), citing Order No. 2003 at P 746.

[12] The five factors are "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *Retail, Wholesale & Dept Store Union v. NLRB*, 466 F2d 380, 390 (D.C. Cir. 1972) (*NLRB*).

maintain that there is no statutory interest in retroactively applying the "at or beyond" rule to the IA.

13. The Southern Companies further contend that the direct assignment of costs under the IAs does not constitute "and" pricing because the facilities under the IAs do not qualify as Network Upgrades and are therefore not subject to the prohibition on "and" pricing. Moreover, they claim that the Commission's previous decisions do not contend that "and" pricing has occurred where a generator must bear the cost of interconnection facilities similar to those built for the Tenaska Companies.

14. Further, the Southern Companies allege that the IAs do not constitute "and" pricing because the Tenaska Companies do not take transmission service and therefore do not pay an embedded rate to use the transmission system. Thus, the Southern Companies argue, even if the interconnection facilities were properly classified as Network Upgrades, the Tenaska Companies would not be subject to a charge for interconnection costs and transmission delivery service.

15. The Southern Companies also state that granting the Tenaska Companies' complaints would violate the filed rate doctrine because the rates that were filed with and accepted by the Commission require the Tenaska Companies to bear the costs of the facilities at issue. Further, they maintain, granting the Tenaska Companies' complaints would require the Southern Companies to reduce retroactively the interconnection rate paid by Tenaska under the IA. The Southern Companies point out that, when the Commission accepted the rates at issue in the IAs, those became the filed rates and are binding on the parties.

16. The Southern Companies also assert that the Commission determination in *Duke Hinds II* regarding the filed rate doctrine and the prohibition on retroactive ratemaking is erroneous and does not apply in this case because the Tenaska Companies do not take, or pay a rate for, transmission delivery service for their generators' output and thus, granting the complaints would require the Southern Companies to give the Tenaska Companies large monetary refunds of amounts already paid under the IAs and a "double recovery" of their interconnection costs under the IAs. The Southern Companies argue that, in this case, unlike in *Duke Hinds II*, transmission delivery service would not be implicated or affected.

17. The Southern Companies also argue that the Tenaska Companies should not be relieved of paying O&M expenses associated with its facilities as provided for in the IAs, as this request is based on the inapplicable "at or beyond" rule and would be retroactive ratemaking. In the alternative, the Southern Companies ask that, if the Commission grants the Tenaska Companies' request, the Commission should still require the Tenaska Companies to bear those expenses until the costs of those facilities are included in the

Southern Companies' transmission rates. According to the Southern Companies, even under the Commission's current policy, a generator receives reimbursement for the associated costs only as transmission delivery service is taken from the generator.

18. The Southern Companies maintain that the IAs do not provide for interest on credits. According to the Southern Companies, requiring interest to be paid on refunds would also result in an illegal subsidization of interconnection costs by the Southern Companies' other customers. In the present case, because the Tenaska Companies built the interconnection facilities under the IAs and paid for those facilities, the Southern Companies never received monies from the Tenaska Companies on which they could earn interest. Therefore, they argue, requiring the Southern Companies to pay interest to the Tenaska Companies on those amounts would be inequitable.

19. In addition, the Southern Companies assert that cost causation principles require that those who cause costs to be incurred and benefit from them should be the ones who bear those costs. Requiring the Southern Companies to pay the Tenaska Companies interest would require all customers to bear the cost of interest payments on costs that result solely from the Tenaska Companies' interconnection. Therefore, the Southern Companies maintain that the Commission's requirement for all transmission customers to subsidize generators in this manner must be reversed as contrary to cost causation principles and as an unexplained departure from Commission policy.

20. Finally, with respect to Tenaska Georgia's complaint in Docket No. EL05-27-000, Southern/Georgia asserts that some of the facilities referenced in the IA are located prior to the interconnection point and do not conduct network flows. According to Southern/Georgia, these facilities include the three 500 kV disconnect devices for the generator's high side step-up transformers. Southern/Georgia asserts that, even under the Commission's "at or beyond" policy, these facilities would not be eligible for credits.

IV. Discussion

21. On November 17, 2006, the Commission issued an order on rehearing of *Duke Hinds II*.[13] As that order disposes of many of the substantive arguments the Southern Companies raise in the instant proceeding, we find that order to be controlling and will not discuss these issue further herein.[14] The Southern Companies' concern that the

[13] *Duke Hinds III*, 117 FERC ¶ 61,210 (2006).

[14] *Id*. at P 21-40.

Tenaska Companies do not take transmission service was not addressed in *Duke Hinds III* and is discussed below.

22. In accordance with our determination in *Duke Hinds III*, we will grant the Tenaska Companies' complaints and order the Southern Companies to revise the IAs to reclassify the facilities at issue as Network Upgrade facilities and to provide for the payment of credits for the Network Upgrades. Further, the Southern Companies are directed to describe how they will provide the Tenaska Companies credits in their compliance filings. Specifically, the Southern Companies shall describe how they will credit the Tenaska Companies, during the appropriate refund periods, the amounts the Southern Companies collected and will collect for transmission service provided to transmission customers with Tenaska Companies' generators as the receipt point. The Southern Companies are directed to file revisions to the IAs reflecting these revisions within 30 days of the date of this order.

23. In cases where, as here, the Commission institutes an investigation on a complaint under section 206 of the FPA, section 206(b), as it was in effect at the time that the Tenaska Companies filed their complaints, requires that the Commission establish a refund effective date that is no earlier than 60 days after the date a complaint was filed, but no later than five months after the expiration of such 60-day period.[15] Consistent with our general policy of providing maximum protection to customers, we will set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of the Tenaska Companies' complaints, which is January 21, 2005.

24. Section 206 of the FPA, states that the Commission may order refunds of any amounts paid, for the period after the refund effective date through a date fifteen months after such refund effective date.[16] Therefore, the Southern Companies are directed to provide the Tenaska Companies any credits that would have been accrued from the refund effective date, January 21, 2005, through April 21, 2006, which is fifteen months after the refund effective date, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii). Further, the Southern Companies are required to provide the Tenaska Companies credits on a prospective basis from the date of this order and to revise the IAs

[15] Section 206(b) of the FPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, § 1285, 119 Stat. 594, 980-81 (2005), to require that in the case of a proceeding instituted on a complaint, the refund effective date shall not be earlier than the date of the filing of such complaint or later than five months after the filing of such complaint.

[16] 16 U.S.C. § 824e (b).

accordingly. The Southern Companies must each file a compliance report, within fifteen (15) days after making the required credits.

25. Pursuant to Article 11.4.1 of the Large Generator Interconnection Agreement, which provides for a maximum 20-year refund period, credits for the four distinct periods at issue are to be calculated as follows: Credits accrue over a 20-year period commencing from commercial operation of the generator. For the period from commercial operation until January 21, 2005, any credits that would have been earned[17] are not recoverable, and interest on those credits will not be paid.[18] From January 21, 2005 through and including April 21, 2006, the credits earned are recoverable, and the Southern Companies must pay the Tenaska Companies credits for this period with interest, as discussed above. From the end of the 15-month refund effective period until the date of the Commission order, any credits that would have been earned are not recoverable, and interest on those credits would also not be paid. Finally, to the extent that transmission service has not previously been taken for which credits either did accrue or would have accrued, the Southern Companies must provide the Tenaska Companies credits with interest on a prospective basis from the date of this order.

26. The Commission rejects the Southern Companies' contention that the Tenaska Companies should not receive credits because they do not take transmission delivery service for their generators' output. The Commission has made clear that the interconnection customer is entitled to credits even if its customer is taking network service.[19] In *Consumers*, we rejected the argument that the direct assignment of certain

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[17] In this case, because the Tenaska Companies are not the transmission customers, the credits accrue based on the transmission service taken by the transmission customer with the Tenaska Companies' generator as the receipt point during the appropriate refund periods.

[18] In *Duke Hinds III*, we provided an example of how the dollar amount of the credits was to be reduced to account for transmission service payments made before the refund effective date. *Duke Hinds III* at P 34. In this case, this example would also apply to the period from the end of the 15-month refund effective period until the date of the Commission order.

[19] Order No. 2003-C at P 19 ("As long as the Interconnection Customer [here, the Tenaska Companies] *or another entity* is taking transmission service that identifies the Generating Facility as the point of receipt for that service in the original firm point-to-point transmission service request, the Interconnection Customer is entitled to a credit toward the cost of that service." (emphasis added)). *See also Consumers Energy*

(continued)

facilities was not "and" pricing because the interconnection customer takes delivery service. Although *Consumers* concerns an interconnection for the purpose of stability and preventing short-circuits, its finding with regard to whether an interconnection customer is entitled to credits even if its customer is taking network service was not limited. Therefore, consistent with Commission policy, we find that it is not necessary for the Tenaska Companies to also be the transmission delivery customers in order to receive credits for network upgrade costs.

27. We also direct the Southern Companies to revise the IAs to eliminate the assessment of O&M charges against the Tenaska Companies. The Commission has previously found that, upon a determination that facilities are Network Upgrades, direct assignment of O&M charges is improper.[20] Our review of the description of facilities in question in each of the complaints indicates that all the facilities are Network Upgrades, for which O&M charges are inappropriate. We therefore direct the Southern Companies to delete section 5.4 from the IAs. In addition, in response to the Southern Companies' request that the Tenaska Companies continue to pay O&M charges until such time as the Southern Companies include them in transmission rates, we refer to our comment in Order No. 2003-B, where, in response to a similar argument, the Commission stated that a transmission provider could present its case in a transmission rate filing.[21] We reiterate that the Southern Companies may avail themselves of this process.

Company, 95 FERC ¶ 61,233 at 61,804 (2001) (*Consumers*), citing *Duke Energy Corp.*, 94 FERC ¶ 61,187 at 61,659 (2001).

[20] *Southern Co. Servs., Inc.*, 108 FERC ¶ 61,229 (2004) (denying rehearing of order prohibiting assessment of O&M charges for Network Upgrades which provide a system-wide benefit).

[21] Order No. 2003-B at P 56: "If a Transmission Provider (or an existing Transmission Customer) believes that, for an actual interconnection, it faces circumstances where native load and other customers are not held harmless, it should make that demonstration in an actual transmission rate filing. The Transmission Provider must explain the facts of the case and the assumptions on which its calculation is based and provide evidentiary support. While we cannot envision any circumstances where our existing pricing policy will not fully protect native load and other Transmission Customers, we are willing to consider alternative pricing proposals under the facts of a specific case. We emphasize that the Transmission Provider bears the full burden of showing that any such proposal is just and reasonable and not unduly discriminatory or preferential, and is appropriate under the circumstances."

28. Finally, the Southern Companies and Tenaska Georgia described the nature of the interconnection facilities when the Southern Companies first submitted the IA in Docket No. ER00-682-000. An appendix to the IA containing the interconnection specifications indicates that the point of interconnection is "[t]he point at which the conductors from Generator's high side step-up transformers connect to Company's 500 kV generator disconnect devices."[22] Thus, contrary to the Southern Companies' post hoc contention, the IA itself indicates that the disconnect devices lie on Southern/Georgia's side of the interconnection point and thus, are beyond Tenaska Georgia's high side step-up transformers. Accordingly, they are at or beyond the point of interconnection.[23]

The Commission orders:

(A) The Tenaska Companies' complaints are hereby granted.

(B) The Southern Companies are hereby directed to file, within 30 days of this order, revised IAs reflecting the provision of credits as discussed in the body of this order and deleting section 5.4 from the IAs.

(C) Within 30 days of this order, the Southern Companies are hereby directed to provide the Tenaska Companies any credits that would have accrued from the refund effective date, January 21, 2005, through April 21, 2006, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii). Further, the Southern Companies are required to provide the Tenaska Companies credits on a prospective basis from the date of this order, as discussed in the body of this order.

[22] Appendix B Specifications to Interconnection Agreement Between Tenaska and Georgia Power Company.

[23] We also reject the Southern Companies' contention that *Entergy v. FERC* overturned the "at or beyond" rule. In fact, the court remanded the case for further discussion of Commission policy "*precisely at* the point of interconnection." 391 F.3d 1251 (emphasis added). The court did not reject the principle that credits are due for facilities *beyond* the point of interconnection.

(D) The Southern Companies are each hereby directed to file a compliance report, within fifteen (15) days after providing credits.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.