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.

Mirant Las Vegas, LLC

v. Docket No. EL03-229-000

Nevada Power Company

ORDER GRANTING COMPLAINT

(Issued January 19, 2007)

1. In this order, the Commission grants the complaint filed by Mirant Las Vegas, LLC (Mirant) against Nevada Power Company (Nevada Power) alleging that Nevada Power has violated the Commission's transmission service pricing policy and precedent by unjustly and unreasonably failing to provide Mirant with transmission credits, plus interest, for network upgrades financed by Mirant, needed to interconnect with Nevada Power's transmission system.

I. Background

2. Mirant's complaint, filed on September 15, 2003, concerns an Interconnection and Operating Agreement (IA) between Mirant and Nevada Power. The IA governs the interconnection of Mirant's 550 MW, combined cycle electric generating facility (Mirant's facility) in Clark County, Nevada with Nevada Power's transmission system.[1] Mirant states that in order to connect its facility to Nevada Power's transmission system, Mirant advanced funds for the design and construction of Nevada Power's Harry Allen 500 kV substation (Harry Allen Terminal).

[1] The IA was accepted by the Commission in *Nevada Power Company*, 97 FERC ¶ 61,227 (2001), *order on reh'g*, 99 FERC ¶ 61,347 (2002).

3. As discussed more fully below, Mirant argues that the Harry Allen Terminal is improperly classified in the IA as an Interconnection Facility – *i.e.*, a direct assignment facility (and, therefore, not eligible for transmission credits) rather than a network facility. Mirant alleges that Nevada Power has violated the Commission's interconnection pricing policy by failing to return, through transmission credits, the funds advanced by Mirant for the upgrades to the Harry Allen Terminal.

4. Mirant states that it currently takes point-to-point transmission service from Nevada Power under the Sierra Pacific Resources Open Access Transmission Tariff.

II. Notice of Filing and Responsive Pleadings

5. Notice of Mirant's complaint was published in the *Federal Register*, 69 Fed. Reg. 22,497 (2004), with interventions or protests due on or before May 6, 2004. The Office of the Attorney General for the State of Nevada, by and through its Bureau of Consumer Protection; Calpine Corporation; Duke Energy Moapa, LLC; and Duke Energy North America, LLC filed timely motions to intervene with no substantive comments. On September 30, 2003, Nevada Power filed a motion for extension of time to file an answer. On October 15, 2003, Nevada Power filed its answer to the complaint.

6. In its answer, Nevada Power argues that the Commission should deny Mirant's complaint and leave intact the IA negotiated by and between Mirant and Nevada Power, as previously accepted by the Commission. It submits that the Commission has no legal authority to change filed rates retroactively and that transmission service credits would result in a retroactive reduction in the filed transmission rate. Nevada Power contends that, if the Commission grants the complaint, the cost of the credit may result in an increase in Mirant's own transmission rates, other transmission customers' rates, the rates of native load customers, or may result in uncompensated costs to Nevada Power. At the very least, it argues that the question of whether the Harry Allen Terminal should be classified as a direct assignment facility is a factual issue and, therefore, the Commission should hold a hearing to decide this issue.

III. Discussion

A. Procedural Matters

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 18 C.F.R. § 385.214 (2006), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

B. Analysis

1. Classification of the Harry Allen Terminal

a. Argument

8. Mirant argues that the Harry Allen Terminal was wrongly classified in the IA as a direct assignment facility, for which transmission credits are not required, rather than a network facility, for which the transmission provider must reimburse the generator with transmission credits and interest. It states that the bright-line test for distinguishing network upgrades from direct assignment facilities, as the Commission announced in Order No. 2003[2] and numerous orders prior to the issuance of Order No. 2003, is that network upgrades are those facilities "at or beyond" the point where the generator's facility interconnects to the transmission provider's transmission system. Mirant argues that the Harry Allen Terminal is at the point of interconnection between Mirant's and Nevada Power's systems and that, under the Commission's test, the Harry Allen Terminal is a network upgrade, not a direct assignment facility.

9. Moreover, Mirant argues that the Commission has already found that the Harry Allen Terminal is a network upgrade facility. It states that, in *Nevada Power Company*,[3] the Commission directed Nevada Power to amend an IA with GenWest, LLC, another generator, to treat a one-line terminal at the Harry Allen Terminal, which interconnects Genwest's facility to the Nevada Power system, as a network upgrade (for which GenWest should receive transmission credits), and not a direct assignment facility. Mirant argues that GenWest's facility and the Mirant facility interconnect with the Harry Allen substation using exactly the same configuration and should be treated the same.

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[2] *See Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 FR 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 FR 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 Association of Regulatory Commissioners v. FERC*, (D. C. Cir. No. 04-1148, *et al*.).

[3] 100 FERC ¶ 61,077, *order on reh'g*, 101 FERC ¶ 61,036 (2002) (*Nevada Power/GenWest*).

10. Nevada Power responds that, in the *GenWest* proceedings, Nevada Power argued that the Harry Allen Terminal lies on the "generator" side of the interconnection and asked the Commission to hold a hearing on that issue. In this case, Nevada Power also argues that fundamental fairness requires that the issue of classification of the Harry Allen Terminal should be resolved in a hearing, and states that, unlike short circuit and reliability upgrades (which the Commission considers network facilities), the Harry Allen Terminal serves a more limited function.

11. Further, Nevada Power asserts that Mirant cannot rely on the Commission's decision in *Nevada Power/GenWest*, which classified the Harry Allen Terminal as a network facility, because the Commission issued that order eight months after accepting the IA. It explains that, in *Nevada Power/GenWest*, the Commission granted a credit on initial review of an unexecuted contract, but that Nevada Power had not made the interconnection and the generator had not yet paid for it. In contrast, Nevada Power asserts, the Commission accepted the Mirant contract, with its direct assignment of the costs of the substation, after Nevada Power had already built the facilities that Mirant needed, which Mirant had already paid for in full by August 2002.

b. Commission Determination

12. We agree with Mirant that the Harry Allen Terminal is a network facility. This is consistent with the Commission's policy that network facilities include all facilities at or beyond the point where the customer or generator connects to the grid.[4] The Commission's long-standing policy prohibits the direct assignment of network facilities. This prohibition is without distinction or regard as to the purpose of the upgrade (*e.g.*, to relieve overloads, to remedy stability and short circuit problems, to maintain reliability, or to provide protection and service restoration). The facilities at issue are all facilities at or beyond the point where the customer connects to the grid. The fact that the existing Nevada Power switchyard was reconfigured or upgraded does not transform it from a network facility into a non-network facility. Further, the fact that this facility was classified as an Interconnection Facility in the IA does not transform it into a non-network facility.[5] Accordingly, we direct Nevada Power to file a revised IA, within 30 days of the date of this order, reclassifying the Harry Allen Terminal as a network upgrade.

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

[5] *See Nevada Power/GenWest*, 100 FERC ¶ 61,077 at P 13.

2. Commission Pricing Policy

a. Argument

13. Mirant asserts that Nevada Power violated the Commission's well-settled interconnection pricing policy by failing to return, through transmission credits, the costs it advanced to fund the construction of the Harry Allen Terminal, which is a network upgrade. It explains that the Commission's interconnection pricing policy, upheld by the District of Columbia Circuit Court, is that transmission providers must provide transmission credits, plus interest, to interconnecting generators for their up-front financing of network upgrades.[6] Mirant points to numerous Commission decisions explaining this policy which, it notes, was also upheld in Order No. 2003. Therefore, Mirant maintains that, consistent with Commission policy and precedent, including the *Nevada Power/GenWest* decision, it is entitled to be reimbursed through transmission credits for the total amount of funds, plus interest, that it advanced for the construction of the upgrades to the Harry Allen Terminal.

14. Nevada Power responds that if the Commission grants Mirant's complaint, it would effectively change filed rates in violation of the FPA and the rule prohibiting retroactive ratemaking. Nevada Power reasons that Mirant has already paid in full for interconnection service and, therefore, granting its complaint and requiring the facility at issue to be treated as a network upgrade will alter the amounts already paid for by Mirant for interconnection service. Moreover, Nevada Power argues that Mirant cannot rely on Commission policies announced in Order No. 2003, which was adopted after the IA was filed with and approved by the Commission. It asserts that the Commission decided to make Order No. 2003 prospective only and not applicable to contracts such as the one at issue here. Nevada Power argues that even if the Commission considers the credit as applying to transmission service, the Commission would still violate the rule against retroactive ratemaking since transmission service from Mirant's facility began in July 2003.

15. Finally, Nevada Power explains that the complaint asks the Commission to revise a single component of the interconnection rate; one involving Mirant's cost determination of the Harry Allen Substation. However, it argues that the law requires the Commission to find the entire filed rate unjust and unreasonable before substituting a new one.[7]

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[6] *Entergy Services, Inc. v. FERC*, 319 F.3d 536 (D.C. Cir. 2003); *American Electric Power Service Corporation*, 97 FERC ¶ 61,098 (2001).

[7] *Arkansas Public Service Commission* v. *Entergy Services, Inc.*, 76 FERC ¶ 61,040 (1996) (*Arkansas Commission*).

Nevada Power requests that the Commission review the "entire rate" because Mirant makes no claim that the IA, as a whole, was unjust and unreasonable and in violation of the FPA.

b. Commission Determination

16. On November 17, 2006, the Commission issued *Duke Hinds III*,[8] which denied in part and granted in part rehearing of *Duke Hinds II*.[9] As *Duke Hinds III* disposes of the substantive arguments raised in the instant proceeding, we find that order to be controlling and will not discuss these issues further herein.[10]

17. Consistent with the Commission's decision in *Duke Hinds III*, we will grant Mirant's complaint and order Nevada Power to revise the IA to provide for the payment of credits, plus interest, for Mirant's network upgrades to the Harry Allen Terminal. Nevada Power is directed to file a revised IA reflecting these revisions within 30 days of the date of this order.

18. 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 Mirant filed its complaint, 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.[11] Consistent with our general policy of

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[8] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

[9] *Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 102 FERC ¶ 61,068 (2003) (*Duke Hinds II*).

[10] Unlike in *Arkansas Commission*, which dealt with increases to nuclear plant decommissioning costs, the instant case, like the *Duke Hinds* case, deals with the inappropriate inclusion of network upgrades which we have found to be *per se* entitled to transmission credits.

[11] 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.

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 Mirant's complaint, which is November 14, 2003.

19. 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.[12] Therefore, the Nevada Power is directed to provide Mirant any credits that would have been accrued from the refund effective date, November 14, 2003, through February 14, 2005, 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, Nevada Power is required to provide Mirant credits on a prospective basis from the date of this order and to revise the IA accordingly. Nevada Power must file a compliance report, within fifteen (15) days after making the required credits.

20. 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 November 14, 2003, any credits that would have been earned are not recoverable, and interest on those credits will not be paid.[13] From November 14, 2003 through and including February 14, 2005, the credits earned are recoverable, and Nevada Power must pay Mirant 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 Mirant has not previously taken service for which credits either did accrue or would have accrued, Nevada Power must provide Mirant credits with interest on a prospective basis from the date of this order.

The Commission orders:

(A) Mirant's complaint is hereby granted.

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[12] 16 U.S.C. § 824e(b).

[13] 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.

(B) Nevada Power is hereby directed to file, within 30 days of the date of this order, a revised IA reflecting the modifications discussed in the body of this order.

(C) Within 30 days of the date of this order, Nevada Power is hereby directed to provide Mirant any credits that would have accrued from the refund effective date, November 14, 2003, through February 14, 2005, with interest calculated in accordance with 18 C.F.R. § 35.19(a)(2)(ii). Further, Nevada Power is required to provide Mirant credits on a prospective basis from the date of this order, as discussed in the body of this order.

(D) Nevada Power is 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.