

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 02-1199

(Consolidated with Nos. 02-1336, 02-1375, and 03-1023)

**ENERGY SERVICES, INC., *ET AL.*
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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COMMISSION
WASHINGTON, D.C. 20426**

APRIL 2, 2004

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Entergy Gulf States, Inc.*, "Order Accepting Interconnection Agreement Subject to Conditions," 98 FERC ¶ 61,014 (January 11, 2002);
2. *Entergy Gulf States, Inc.*, "Order Denying Rehearing and Accepting Compliance Filing," 99 FERC ¶ 61,095 (April 25, 2002);
3. *Southern Company Services, Inc.*, "Letter Order" (January 25, 2002);
4. *Southern Company Services, Inc.*, "Order Denying Rehearing, Denying Leave to Intervene Out of Time, Dismissing Request for Rehearing and Accepting Compliance Filing," 100 FERC ¶ 61,246 (September 4, 2002);
5. *Nevada Power Company*, "Order Accepting Interconnection and Operation Agreement for Filing, as Modified," 100 FERC ¶ 61,077 (July 19, 2002);
6. *Nevada Power Company*, "Order Denying Rehearing," 101 FERC ¶ 61,036 (October 10, 2002);
7. *Southern Company Services, Inc.*, "Letter Order" (July 30, 2002);
8. *Southern Company Services, Inc.*, "Order Denying Rehearing," 101 FERC ¶ 61,309 (December 19, 2002).

C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this or any other court.

Dennis Lane
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April 2, 2004

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GLOSSARY

“Commission” or “FERC”	Respondent Federal Energy Regulatory Commission
“Connection Facilities”	A term drafted by Petitioners to describe the facilities they believe should be directly assigned, sole use facilities
Entergy	Petitioner Entergy Services, Inc.
“Grid” or “Network”	The Utility’s Transmission Grid
Southern	Petitioner Southern Company Services, Inc.
IA	Interconnection Agreement
Network Upgrade Costs	The cost of all facilities at or beyond the point where a generator connects to an existing grid.
Nevada Power	Petitioner Nevada Power Company
OATT	Open Access Transmission Tariff
Sole Use Facilities	“Non-Grid” Interconnection Facilities

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RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY
REGULATORY COMMISSION**

STATEMENT OF ISSUES

1. Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably found that Petitioners’ proposals to “directly assign” certain interconnection costs to be unjust and unreasonable and inconsistent with established Commission policy and Court precedent?
2. Whether the Commission reasonably rejected Petitioners’ argument that short circuit and stability upgrades should not be considered Network Upgrades because they have not been shown to provide system-wide benefits to all system users?
3. Whether the Commission reasonably rejected Petitioners’ argument that facilities “at” the point of interconnection should not be considered Network Upgrades?

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act and the Commission's regulations are set out in the addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(b), which requires a party seeking judicial review to demonstrate that it is "aggrieved" by the Commission's orders. In addition, Petitioners must satisfy the requirements of Article III of the United States Constitution which limits the Court's jurisdiction to actual, ongoing controversies. Petitioners Southern and Entergy do not satisfy either requirement, because they no longer suffer an actual injury, if ever they did, that may be redressed by a favorable decision of this Court in light of the parties' voluntary termination of the interconnection agreements at issue.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case involves four consolidated appeals, two of which raise the question of whether all, rather than some, transmission customers should pay the cost of facilities constructed "at" the point of interconnection to a utility's

transmission grid. The two other appeals question who should pay the cost of upgrades on the grid that may be required when a new generator interconnects, to relieve short circuit and stability problems on the network. In all cases, Petitioners argued that the costs of both types of facilities should be directly assigned to the new generator being interconnected to the grid. The Commission found, however, such direct assignment to be inconsistent with its policy that allocates the cost of these upgrades to all customers (including generators) on the basis that expansion, as fostered by network upgrades, benefits all grid users.

Petitioners requested rehearing, which was denied on grounds that “the transmission grid is a single piece of equipment whose use . . . may not be priced by way of direct assignment” and that the upgrades at issue constitute a “system expansion used by and benefiting all users due to the integrated nature of the grid.” *Southern Co. Services, Inc.*, 101 FERC ¶ 61,309 at 62,234 (2002) (JA 928).

Moreover, the Commission clarified that network upgrades include not only facilities beyond the point of interconnection, but also facilities *at* the point of interconnection, and that it had “never directly assigned the cost of the network at its borders.” *Entergy Services, Inc.*, 99 FERC ¶ 61,095 at 61,399 (2001), JA 293. In response to Petitioners’ erroneous claim that this was inconsistent with prior

rulings, the Commission indicated that it would consistently adopt the “at or beyond” language in future orders to eliminate any confusion. *Id.*

This petition for review followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

1. The Foundation for Competitive Markets

The electric power industry has changed from one in which large, vertically integrated utilities made bundled sales of power at cost-based rates to one in which companies sell unbundled power and services at rates set by competitive markets. Significant technological advances and changes in the law resulted in increased entry into the wholesale power generation markets, which, in turn, increased pressure for greater access to transmission service. FERC found, however, that public utilities were using their monopoly control over interstate transmission facilities to gain advantage over potential competitors.

The Commission has encouraged a fully competitive and seamless bulk power market that will provide customers with reasonably priced and reliable service through two major rulemakings. First, responding to discriminatory interstate transmission service, Order No. 888¹ required public utilities to file a non-discriminatory OATT containing, at a minimum, the *pro forma* tariff's non-price terms and conditions. Order No. 888 at 31,635-36. Next, Order No. 2000² concluded that regional institutions would be better able to address the operational and reliability issues confronting the industry and to eliminate undue discrimination in transmission services that can occur when the operator of the transmission system remains in control of one or more vertically integrated utilities, and encouraged the formation of such entities. Order No. 2000 at 30,993; 31,014-17.

¹Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities. Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. and Regs. **&** 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. **&** 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC **&** 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC **&** 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S. Ct. 1212 (2002).

²Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. **&** 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. **&** 31,092 (2000), *aff'd sub nom. Pub Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)

2. The Commission's Interconnection Pricing Policy

Independent generators responding to these policies have sought to interconnect new generating facilities with existing transmission networks. The instant case involves such interconnections, and, more specifically, how to assign costs related to interconnections. Two different pricing methodologies are relevant to any discussion of cost recovery for a utility's expansion in general, and for interconnection, in particular.³ Pricing for non-network facilities is done by "direct assignment," which assigns the cost of those facilities directly to, in these cases, the utility's new generation customer. Here, direct assignment is used to assign the costs of facilities leading up to the network that connects a customer to the grid. Existing customers are not assigned any of these costs because the facilities involved are considered "sole use" facilities.

Pricing for facilities located on the transmission grid is done on a "rolled-in" basis, that is, they are shared among all transmission customers. Unit rates under

³ In addition to these costs, a generator will pay a transmission rate when it begins to take transmission service. Petitioners propose to directly assign the entire cost of these network costs, while also charging a rolled-in network transmission rate. This practice, also known as "and" pricing, is prohibited by the Commission on the basis that it allows the transmission provider to charge twice for the same service. *See Pennsylvania Electric Co.*, 58 FERC ¶ 61,278, *reh'g denied*, 60 FERC ¶ 61,034 at 61,127 (1992).

this methodology reflect, in effect, the average costs of the entire transmission grid, including the new network upgrade costs from interconnections.⁴ In interconnection cases, FERC policy allows a transmission provider to choose the higher of the rolled-in rate or the incremental rate for a new interconnecting customer. Under "incremental cost" pricing, the cost of the network expansion divided by the new interconnection customer's load becomes the transmission rate applied to the new customer. Under rolled-in pricing, the new customer pays the same rate as other transmission customers.

"Direct assignment" can only be applied to sole use facilities, and thus, they must be distinguished from network facilities. Conversely, network facilities can never be "sole use" facilities. As *Public Service Company of Colorado*, 59 FERC ¶61,311 (1992), *reh'g denied*, 62 FERC ¶61,013 (1993) ("*PSCO*"), made clear, because network facilities operate as part of the entire grid, they benefit all transmission customers:

⁴ In actuality, the generator initially finances all costs related to an interconnection. After the costs of the network upgrades are identified, the generator at the time it begins to take transmission service will receive a credit for those costs in its transmission rates. The transmission provider then rolls these costs into its rate base. The costs associated with the increased rate base are spread among all transmission customers (including the new generator). *See generally, e.g., Duke Energy Co.*, 95 FERC ¶ 61,279 at 61,980 (2001) (discussing rate treatment).

The Commission has long held that an integrated transmission grid is a cohesive network moving energy in bulk. Because the grid operates as a single piece of equipment, the Commission has consistently priced transmission service based on the cost of the grid as a whole.

62 FERC at 61,061 (footnotes omitted).

The integrated nature of the transmission grid obviates use of a "but for" theory as determinative of how costs are properly assigned:

The Commission has rejected the direct cost assignment of grid facilities even if the grid facilities would not be installed but for a particular customer's service. The Commission has reasoned that, even if a customer can be said to have caused the addition of the grid facility, the addition represents a *system* expansion used by and benefiting *all* users due to the integrated nature of the grid. Recognizing that the grid is a cohesive network in a dynamic state of development, the Commission has even included remote facilities in the grid on the ground that they were merely the first segment of what would eventually become a network loop. The Commission has reserved direct assignments for only those transmission facilities which fall into what we have referred to as an "exceptional category" consisting of radials that are so isolated from the grid that they are and will remain non-integrated.

* * *

There continues to be only one service **B**service over the entire grid **B**nd both native load and third party customers "use" the entire grid, including any expansion. Similarly, both native load and third party customers benefit from integrated system upgrades.

Id. (footnotes omitted) (emphasis in original). *See also Western Massachusetts Electric Co.*, 66 FERC **&** 61,167 at 61,336 (1994), *aff'd Western Massachusetts Electric Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999) (declining to depart from FERC policy prohibiting direct assignment of grid facilities that benefit all customers); *Niagara Mohawk Power Corporation*, Opinion No. 296, 42 FERC **&** 61,143 at 61,531, 61,536 n. 28-29 (1988) (recognizing direct assignment to be appropriate only in "special circumstances" such as where there is no fully integrated system). As these cases made clear, how costs are assigned depends on the classification of facilities as either "network upgrade" or "sole use."

3. Unbundling: Interconnection and Transmission

Order No. 888 did not directly address generator interconnection. Subsequently, *Tennessee Power Co.*, 90 FERC **&** 61,238 (2000) ("*Tennessee*"), clarified that interconnection is an element of transmission service and must be offered under the terms of Order No. 888's *pro forma* OATT. Although the *pro forma* tariff generally envisioned that both the delivery and interconnection components of transmission service would be requested at the same time, *Tennessee* determined that "customers also have the right under the *pro forma* tariff to request the interconnection component of transmission service separately from the delivery component, and when this occurs, the *pro forma* tariff

procedures continue to apply." 90 FERC at 61,761. The Commission encouraged, but did not require, transmission providers to revise their OATTs to include interconnection procedures, including standard interconnection agreements and specific criteria, procedures, milestones, and a time line for evaluating interconnection agreements.

Merchant generators (generators who did not yet have customers to purchase the output of the generating unit) who sought interconnection before they sought transmission service agreed to finance all necessary interconnection costs. Concurrently, transmission providers sought to treat all costs of facilities needed to connect a generator to the grid as "sole use" facilities directly assigned to the generator.⁵ The Commission declined these proposals, and continued to differentiate between sole use facilities and network upgrades. *See El Paso Electric Company*, 77 FERC ¶61,174 (1996) (setting for hearing the question of whether facilities should be considered "sole use" or network upgrades); *Northeast Texas Electric Cooperative, Inc, et al*, 96 FERC ¶61,278 at 62,060 (2001) (same). Generators had to finance the costs of a network upgrade at the time of

⁵While prohibiting direct assignment of network costs, a new transmission customer can be charged at the higher of the rolled-in (or "embedded") rate including the expansion costs or at an incremental rate (expansion cost revenue requirement divided by the new customer's units of service). *See PSCO*, 62 FERC at 61,062.

interconnection, but received credits for those costs upon taking transmission service on the grid. The Commission's "crediting" policy prevents customers from being double billed.⁶ See discussion in *Standardization of Generator Interconnection Agreements and Procedures*, 99 FERC ¶61,086 (2002), 18 C.F.R. Part 35, Docket No. RM02-1-000, FERC Stats. & Regs. ¶32,560 at 34,181-82, Final Rule (Order No. 2003), *Standardization of Generator Interconnection Agreements and Procedures*, 68 FR 49845 (August 19, 2003), FERC Stats. & Regs. ¶31,146 (2003).

B. The AEP and Consumers Energy Orders

American Electric Power Service Corporation, 91 FERC ¶61,308 (2000), *reh'g denied*, 94 FERC ¶61,166 (2001) ("AEP"), prescribed the procedures that required a customer to finance network upgrade costs related to an interconnection request, but provided for a credit back once that customer takes transmission service. AEP's language arguably could be read to apply to some system upgrades (those that increased transfer capability), but not to those that remedy short-circuit and stability problems.

Consumers Energy Company, a transmission provider, followed that reading, and filed an unexecuted generator interconnection agreement that gave no

⁶This would occur if a customer pays initially for use of the grid at its incremental expansion cost and is later also charged for use of the grid at its average cost.

credits for stability and short circuit upgrades. *Consumers Energy Company*, 95 FERC ¶ 61,223 at 61,802-03 (May 17, 2001) ("*Consumers Energy*"). In addressing the issue, FERC observed that because the *AEP* orders contained "language that is subject to differing interpretations [it would] take this opportunity to clarify [the language]." 95 FERC at 61,804. It did so by reiterating that its policy "has been, and continues to be, that *all network upgrade costs* (the cost of all facilities from the point where the generator connects to the grid), including those necessary to remedy short circuit and stability problems, should be credited back to the customer that funded the upgrades once delivery service begins." *Id.* (emphasis added). Crediting is necessary to avoid having customers pay twice for such upgrades. *Id.* The proposed crediting provision was revised to include crediting for costs of network upgrades necessary to remedy short-circuit and stability problems. *Id.* at 61,804-05.

C. The Orders Under Review

1. The Entergy/Calpine IA

On November 14, 2001, as amended on November 20, 2001, Entergy submitted for filing an unexecuted interconnection agreement ("IA") for the interconnection of Amelia Entergy Center's ("Calpine") 750 MW electric generating facility to Entergy's transmission grid at the Amelia Bulk switchyard in

Jefferson County, Texas. RE 1, JA 18. The IA was unexecuted because Calpine objected to Entergy's direct assignment of the vast bulk of the related costs. *See* Calpine's Protest; RE 4, JA 110. Specifically, Entergy proposed that \$8.2 million would be directly assigned, while \$171,000 would be eligible for network upgrade crediting. *See* Exhibit 1; RE 3, JA 108.

Calpine protested on the basis that the facilities at or beyond the Amelia Bulk Switchyard were network upgrades:

As currently configured, Entergy's Amelia Bulk Switchyard serves as a transfer point for three 230kV transmission lines (China, Helbig and Cypress). Clearly, these transmission lines and substations are part of the Entergy transmission system, used to serve customers under Entergy's OATT. The upgrades at issue in this proceeding will completely redesign and rebuild the substation, replacing current equipment with newer, more reliable equipment and adding two additional breaker-and-a-half bays and seven new breakers to serve Entergy's Cypress, China and Helbig 230kV transmission lines and the two Calpine Interconnection lines. The redesigned and rebuilt substation will significantly improve system reliability by providing an alternate path between the substation buses, providing greater operational flexibility when isolating lines and operating the transmission system.

Calpine Protest at 6. RE 4-6, JA 115.

The Commission accepted Entergy's answer, RE 5, *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 at 61,022 (January 11, 2002) ("Entergy Initial Order"), JA 151, in which Entergy argued that the facilities at issue did not constitute network

upgrades because they were not “beyond the point of interconnection” and did not “address short circuit and stability problems that may arise in a local area due to the interconnection of new generation.” Entergy Answer at 6. RE 5-6, JA 128.

The Commission found the facilities at issue to be integrated transmission facilities, that is, network facilities under existing precedent:

The Commission’s long-standing policy prohibits the direct assignment of network facilities. Network facilities include all facilities at or beyond the point where the customer or generator connects to the grid. 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).

Entergy Initial Order, 98 FERC at 61,023 (footnote omitted), JA 153, citing *PSCO* and *Consumers*.

As the facilities at issue were all at or beyond the point where Calpine connects to the grid, and the existing facilities were all integrated in the grid, their replacement or upgrade to accommodate the interconnection did not transform them into non-network facilities, as Petitioners claim. Entergy Initial Order, 98 FERC at 61,024, JA 153. The logical extension of Entergy’s claim would be that any time a piece of equipment (*e.g.*, a breaker) on the network is replaced or upgraded, it is no longer part of the network. That position is untenable. Those

replacements or upgrades are no different from the instant ones in terms of being and remaining part of an integrated network. Accordingly, as these were network upgrades, the Commission ordered Entergy to provide transmission credits with interest for their costs. *Id.*

Entergy sought rehearing, RE 7, JA 155, which was denied in an order issued April 25, 2002. *Entergy Gulf States, Inc.*, 99 FERC ¶ 61,095 (2002) (“Entergy Rehearing Order”), JA 291. The Commission rejected Entergy’s argument that facilities “at” the point of interconnection to the grid have always been directly assigned, while only those “beyond” that point could be considered network facilities. *Id.* at 61,399-400, JA 293-94. This follows long-standing policy, which treats the transmission grid as a single piece of equipment and does not allow for direct assignment of network facilities--even if the facilities would not be needed “but for” a new customer’s interconnection--because those facilities expand the system. Entergy Rehearing Order, 99 FERC at 61,399, JA 293. “[A]ll costs incurred on the network (e.g., to relieve overloads, to remedy stability and short-circuit problems, to maintain reliability, to provide protection and service violation, or to reconfigure or relocate existing facilities) are subject to the prohibition on direct assignment.” *Id.*

Facilities “at” the point of interconnection (as well as those “beyond” the point) fit within the network facilities classification. Entergy Rehearing Order, 99 FERC at 61,399, JA 293. The Commission explained:

Our standard in *PSCO* is quite clear on the fundamental point that the network cannot be dismembered or directly assigned, and our use of the phrase “at or beyond” is simply another way of describing that standard, not a departure from it. The network begins at the point where the customer connects to the grid, not somewhere beyond that point. It is illogical to contend that the network somehow begins beyond where the customer connects to that very network. Entergy makes much of the fact that we referred to network facilities as all those “from” the point where a customer connects to the grid in *Consumers*, while referring to them, for the first time, as facilities “at or beyond” that point in *Entergy*. While we fail to see a meaningful distinction between these phrases, we cannot construe either of them to indicate that we have, through the choice of one prepositional phrase over another, overturned 30 years of precedent and are now or have ever directly assigned the costs of the network at its borders.

Id. Despite its consistent application, the policy had “used various words and phrases interchangeably over time.” *Id.* at 61,400, JA 294. To eliminate confusion, the Commission clarified that it would consistently adopt the “at or beyond” language from then on. *Id.*

Accordingly, the Commission denied rehearing. Entergy’s petition for review in Case No. 02-1199 followed.

2. The Nevada Power/GenWest IA

On May 29, 2002, Nevada Power filed an unexecuted interconnection agreement between itself and GenWest to interconnect a 580 MW gas-fueled generation facility. RE 1, JA 507. The IA was filed in unexecuted form because GenWest objected to directly assigning the cost of adding a one-line terminal at an existing switchyard. *See* GenWest Protest. RE 5, JA 598. The one line terminal would modify an existing Nevada Power switchyard at an estimated cost of \$3.42 million. GenPower argued that this was not a sole use facility:

[The facility] is, in actuality, a network facility since this facility is located in [Nevada Power's] Harry Allen Substation. As is evident from the one-line diagram [provided], this facility is clearly located "at or beyond" the true point of interconnection between the Silverhawk Facility and Nevada Power's transmission system.

GenWest Protest at 5. RE 5-5, JA 602. The Commission agreed that the one-line terminal at issue was a network facility:

Like the facilities at issue in *Entergy*, 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. Therefore, we agree with GenWest that the one line terminal is a network facility for which GenWest should receive transmission credits, with interest, once it takes the delivery component of transmission service. We note that the point of interconnection is the point where the Nevada Power Generator Lead connects to the Switchyard (between the two new circuit breakers).

Nevada Power Company, 100 FERC ¶ 61,077 at 61,302 (July 19, 2002) (“Nevada Power Initial Order”), JA 630. The integrated nature of the transmission grid means that upgrades at or beyond the point where a customer connects to the grid benefit all users of the grid. *Id.* Accordingly, the Commission directed Nevada Power to amend the interconnection agreement to treat this as a network facility and to provide transmission credits for it. *Id.*

Nevada Power sought rehearing, which was rejected in *Nevada Power Company*, 101 FERC ¶ 61,036 (October 10, 2002) (“Nevada Power Rehearing Order”), JA 845. Nevada Power argued that: (1) the Initial Order is flawed because the one-line terminal provides no benefit to customers other than GenWest or to the transmission system as a whole; and (2) that classifying facilities at or beyond the point of interconnection as network upgrades deviates from Commission practice. *See Nevada Power Rehearing Request 5-12*. RE 8, pgs 5-12, JA 724-31.

Ruling “that all facilities at or beyond the point where the generator connects to the grid are network facilities,” was not applying a new policy:

the Commission’s long standing holding, explained in *PSCO* 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*, our use of the phrase “at or beyond” is simply another way of describing our standard in *PSCO*, not a departure from it.

Nevada Power Rehearing Order at 61,145, JA 846. The one line terminal facility includes a substation bay position, circuit breakers, and relays that are beyond the point of interconnection and are therefore network facilities. *Id.* Accordingly, the Commission denied rehearing.

Nevada Power’s petition for review in Case No. 02-1375 followed.

3. The Southern/Blount County IA

On November 30, 2001, Southern (as an agent for Alabama Power Company) filed an interconnection agreement (IA) providing for the interconnection of Blount County’s 924 MW Combined Cycle facility. RE 1, Appendix B, JA 311. The Director of the Commission’s Office of Markets, Tariffs, and Rates-East directed Southern to modify the IA to include transmission service credits for the cost of constructing network upgrades consistent with Commission precedent. *See* January 25, 2002 Letter Order at 1-2, JA 357-58. “Network facilities include all facilities at or beyond the point where the customer or generator connects to the grid. This policy 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).” *Id.*

Southern sought rehearing, which was denied. *See Southern Company Services, Inc.*, 100 FERC ¶ 61,246 (September 4, 2002) (“Southern/Blount County Rehearing Order”), JA 493. Southern argued that the “replacement breaker” at the substation “will be installed solely to maintain the reliability and safety of the transmission system for the benefit of Blount [County]” and that it “would not increase the capability, reliability, or safety of the transmission system for other customers.” Southern Request for Rehearing at 1. RE 6-1, JA 462. In addition, Southern argued that the Commission’s decision would result in subsidization. *Id.*

The arguments raised by Southern had been raised, and found lacking, in other proceedings. For example, the same arguments were addressed in the *Entergy* Rehearing Order. For the reasons stated in *Entergy*, the Commission denied rehearing here. In addition, as explained by Southern, the replacement breakers served to prevent short circuit and stability problems on the grid, which the Commission found in *Consumers* to be the type of facilities whose costs are properly assigned to all customers.

Finally, the Commission disagreed that the pricing policy would cause subsidization of interconnection costs by captive ratepayers:

Network facilities, which are facilities at or beyond the point of interconnection, are by definition beneficial to the system as a whole. The facilities in question need not be shown to have a direct benefit to the customer bearing the costs of those facilities. If this were the case, there would be no rolled-in rates on any transmission system. As the Commission stated in the *Entergy* rehearing order, citing [*PSCO*], the transmission grid is a single piece of equipment, and additions at or beyond the point of interconnection are system upgrades used by and benefiting all users, including captive customers of the system, due to the integrated nature of the grid.

Southern/Blount Rehearing Order at 61,873, JA 495. This policy was affirmed by *Entergy Services, Inc.*, 319 F.3d at 544 (finding “adequate support for the Commission’s determination that short circuit and stability network upgrades are enhancements that benefit all users”).

Accordingly, the Commission denied rehearing. Southern’s petition for review followed.

4. The Southern/Athens IA

On June 5, 2002, Southern filed an IA providing for the interconnection of Athens Development’s 564 MW Combined Cycle generating facility. RE 1, JA 852. The Director required Southern to modify the IA to include transmission service credits for the cost of constructing network upgrades. *See* July 30, 2002 Letter Order from the Director of the Office of Markets, Tariffs and Rates-East at 1-2, JA 857-58. Because the facilities at issue were network facilities at or beyond

the point where the customer connects to the grid, direct assignment of the cost of the facilities was inappropriate. *Id.* at 2, JA 858.

Southern sought rehearing, which was denied in the second Southern/Athens order for which review is sought. *See Southern Company Services, Inc.*, 101 FERC ¶ 61,309 (December 19, 2002) (“Southern/Athens Rehearing Order”), JA 920. Southern argued that short circuit and stability upgrades (such as replacement breakers) do not benefit the system because they “do not enhance the capability of the system and do not increase reliability above that existing prior to the interconnection of the generator,” despite recognizing that breakers “are necessary in order to maintain the continued safety and reliability of the system upon acceptance of the generator’s power.” Southern Request for Rehearing at 12. RE 6, pg. 12, JA 880. In addition, Southern claimed crediting subsidization, inefficient siting, and violation of the Energy Policy Act of 1992. *Id.*

The Commission followed its earlier ruling in *Consumers* that the cost of short-circuit and stability upgrades should be spread among all transmission customers:

Having a standard policy that requires credits for customer-funded network upgrades minimizes the incentive for utilities to “gold plate” their systems at customers’ expense, and thereby reduces the potential for disputes (and consequently, litigation costs), over what constitutes a necessary upgrade.

Moreover, . . . reducing the costs of interconnection . . . may expedite the interconnection of generation which is sorely needed in various regions of the country. Finally, our policy places new generators on an equal footing with pre-existing, utility-owned generators whose transmission costs generally were rolled into transmission rate base. Our policy levels the playing field because it does not require new generators to recover in their generation rates transmission costs not incurred by incumbent generators.

* * *

The Commission has long held that the integrated grid is a cohesive network whose expansion benefits all users of the grid, and rejected the direct assignment of integrated grid facilities even if those facilities would not have been installed but for a particular request for service. In short, an increase in network capacity is not necessary to find that short-circuit and stability-related upgrades benefit the network as a whole.

Southern/Athens Rehearing Order at 62,233-34, JA 927-28. This is the policy affirmed in *Entergy Services, Inc.*, 319 F.3d at 544.

Next, with respect to Southern's argument that clarification of network facilities as those at or beyond the interconnection point announced a new policy, the Commission explained that the "use of the phrase 'at or beyond' is simply another way of describing our standard in *PSCO*, not a departure from it." Southern/Athens Rehearing Order at 62,234, JA 928. Accordingly, the Commission denied rehearing, and also rejected the arguments that the

Commission's policy hurts captive ratepayers, results in inefficient siting, and violates the Energy Policy Act of 1992 (EPA). *Id.*

Southern's petition for review followed.

D. Events Following The Commission's Orders

1. This Court's Decision in *Entergy Services, Inc. v. FERC*

After the orders on appeal in the instant case issued, this Court affirmed the Commission's interconnection pricing policy to provide credits to interconnecting generators for the cost of short-circuit and stability network upgrades in *Entergy Services, Inc.* Arguments raised in the instant matters that were also rejected in *Entergy Services* include: (1) the "but for" argument, 319 F.3d at 542; (2) the subsidization argument, *id.* at 541; (3) the departure from prior FERC policy argument, *id.* at 541-42; (4) the lack of benefit to all users argument, *id.* at 544.

The Court upheld the clarification of policy regarding credits for short-circuit and stability network upgrades, as an appropriate step to correct the unclear language. *Entergy Services*, 319 F.3d 541-42. Moreover, even if this was a change in, and not a clarification of, policy, it was reasonably explained. FERC has a "long standing policy prohibiting direct assignment of network facilities, [such that] failure to provide credits for network upgrades made to remedy short-circuit and stability problems would violate that precedent." *Id.* at 541-42.

Next, the court rejected Entergy's claim that upgrades that maintain, rather than increase or enhance, system reliability do not "benefit" the grid as overlooking the Commission's long held view that expansion benefits all system customers, and that network system upgrades play a role in promoting that goal. *Entergy Services*, 319 F.3d at 543-44. Crediting system upgrades furthers that goal by "avoid[ing] both gold plating and less favorable price signals such that the enlarged transmission system, which it views as a public good, can function reliably and continue to expand." *Id.*⁷

2. Termination of Southern's IAs and the Commission's Motion to Dismiss the Southern Appeals as Moot

On January 24, 2003, FERC accepted Southern's December 20, 2002, request to terminate of its Blount County IA. In view of this, the Commission moved to dismiss Southern's Blount County (02-1336) appeal because the IA is no longer in effect, thus mooting any claim regarding it. On June 9, 2003, the Court referred the motion to the merits panel and directed the parties to address the issues in their briefs.

⁷ The Court dismissed as moot Entergy's challenge regarding the specific IA because the agreement had been terminated. The remainder of the appeal was not moot, however, because the Commission had required Entergy to modify its *pro forma* IA.

On August 9, 2002, Southern filed a "Notice of Cancellation of the Interconnection and Operating Agreement," terminating the Southern/Athens IA, JA 860. Southern then filed a new IA with Athens, which is currently the subject of an ongoing proceeding in FERC Docket No. ER03-386. Accordingly, the Commission moved to dismiss Southern's appeal in No. 03-1023 as moot. On June 9, 2003, the Court referred that motion to the merits panel and directed the parties to address the issues in their briefs.

3. Termination of the Entergy IA and the Commission's Motion to Dismiss the Appeal as Moot

On May 15, 2002, Entergy sought termination of its IA, which was accepted by FERC on June 14, 2002. In view of this, the Commission moved to dismiss Entergy's appeal as moot. On June 9, 2003, the Court referred the motion to the merits panel and directed the parties to address the issue in their briefs.

SUMMARY OF ARGUMENT

Federal courts are constitutionally prevented from issuing advisory opinions, as their jurisdiction is limited to “actual, ongoing controversies.” There is no ongoing controversy with respect to Entergy and Southern, both of whom have terminated the IAs at issue. For this reason, the Entergy and Southern appeals are moot and should be dismissed for lack of jurisdiction.

Assuming jurisdiction, FERC’s orders should be summarily affirmed because the ruling in *Entergy Services* upholding FERC’s policy of providing credits for network upgrades controls the resolution of the instant appeals. At issue there, as here, was whether upgrades must be shown to result in quantifiable benefits to all users of the grid before they are eligible for rate crediting. The Court rejected claims that such an evidentiary showing was needed, and, instead, accepted FERC’s “less cramped” definition of system-wide benefits, and recognized the Commission’s “long-held view of the benefits of expansion and the role of network system upgrades” as sufficient to justify crediting those upgrades.

Contrary to Petitioners’ claim, the Commission did not deviate from established policy, but instead, reasonably clarified that network facilities whose costs are eligible for crediting include those facilities “at” the point of

interconnection to the transmission grid. The Commission found this was consistent with its long-held and fundamental principle that the network operates as a single piece of equipment, the costs of which should be spread among all users.

Petitioners contend that the instant decision departs from what they view as a “systemwide benefit” test to determine whether to classify facilities as network upgrades. First, this argument is not before the Court in three of the four appeals as it was not raised on rehearing by Entergy or Southern. In any event, this type of evidentiary showing is not needed. Under FERC’s policy determination, the upgrades produce public interest benefits by allowing for network expansion through reduced barriers to entry, which enhances competition. *Entergy* rejected a virtually identical claim on grounds that the claim overlooked this view of the benefits of expansion and the role of network system upgrades.

In addition, even if a showing of system benefits is required to support a finding that a facility is located on the network, the instant facilities provide system benefits: (1) the Nevada Power and Entergy interconnection facilities modify and upgrade existing network switchyard facilities and; (2) the Southern interconnection facilities involve short circuit and stability

upgrades which provide system benefits. Further, Petitioners' claim that a subsidy occurs when a generator receives credits for the costs of network upgrades should be rejected as it based on the faulty premise that transmission customers receive no benefit from the upgrades.

Finally, Petitioners allege that transmission credits will result in inefficient siting. This allegation ignores the fact that a generator taking credits is also a transmission customer whose transmission rates will be equally affected by siting decisions, and overlooks the range of variables, besides upgrade costs, that impact a siting decision. In any event, state commissions, not FERC, have authority to approve or reject new siting of new generation facilities.

ARGUMENT**I. ENTERGY'S AND SOUTHERN'S CHALLENGE SHOULD BE DISMISSED FOR LACK OF JURISDICTION**

Southern terminated the Blount County IA (No. 02-1336) and its Athens IA (No. 03-1023), JA 860.⁸ Similarly, Entergy's termination of the GenPower IA was accepted by FERC on June 14, 2002. Termination mooted the continued viability of any issues related to FERC's orders concerning those IAs. Southern and Entergy ("Opposing Parties") are no longer aggrieved by this aspect of the challenged orders, if they ever were, and their petitions should be dismissed for lack of jurisdiction.

Mootness is the "doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue through its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 22 (1997)(citation omitted). This doctrine prevents federal courts from issuing advisory opinions or "decid[ing] questions that cannot affect the rights of litigants in the case before them." *Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 76 (D.C. Cir. 1988) (quoting *Better Govt. Ass'n v. Department of State*, 780 F.2d 86, 90-91 (D.C. Cir. 1986)). The Opposing Parties' challenge to

⁸ In addition, Southern's new IA with Athens is the subject of an ongoing proceeding in FERC Docket No. ER 03-386.

FERC's modification of since-terminated IAs involves matters in which the Opposing Parties no longer have the necessary personal stake to justify going forward with these appeals.

Article III, Section 2 of the Constitution limits federal courts to resolving "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). To "satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983). Entergy and Southern can receive no meaningful relief for IAs that have terminated because the challenged orders no longer have any effect. *See PUC of California v. FERC*, 236 F.3d 708 (2001) (petition for review dismissed as moot because contracts terminated). The only possible "relief" here would be "sending a message" to the Commission, but, "message-sending is not among [this Court's] powers under Article III." *Western Power Trading Forum v. FERC*, 245 F.3d 798, 803 (2001).

The Opposing Parties will likely argue that their petitions fit into the narrow "capable of repetition, yet evading review" exception to the mootness doctrine. To qualify, the Parties have the burden to demonstrate that (1) the challenged action lasts too briefly to be fully litigated prior to its cessation, and (2) there is a reasonable expectation that they will be subject to the same action again. *U.S. v.*

Weston, 194 F.3d 145, 148 (D.C. Cir. 1999) (citing *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). The exception applies only "in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will be again subject to the alleged illegality." *Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 77 (D.C. Cir. 1988) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)). This narrow exception to mootness cannot be met here.

Even if the issues disputed here were to be repeated in future IAs filed with FERC, those issue could be reviewed in the context of future IAs. In its prior pleadings, Southern claimed inadequate time because the underlying contract in this case expired less than one year after FERC issued its initial order. Southern Opposition to Motion to Dismiss at 8,7 (Case No. 03-1023). But whether the instant contract will evade review is not at issue, for that will always be the case when a mootness challenge is presented. Instead, the relevant inquiry is whether a *future contract* subject to a later FERC order "lasts for so short a time that it inevitably expires before review is possible." *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343 (5th Cir. 1981). Opposing Parties have not shown that the contract period for IAs is necessarily so short as to preclude judicial review. Quite the opposite, the

type of IAs at issue here are not generally subject to any temporal limitation.⁹ While parties may, as happened here, terminate an IA quickly, Opposing Parties have not demonstrated that future IAs will always follow that course. Consequently, it has not been shown that "a further dispute over [the] issue will evade review," *U.S. v. Weston*, 194 F.3d at 148, so that the exception to the mootness doctrine comes into play.

Southern claims that the issue will evade review because the case involves a policy that FERC "will continue to apply." Southern Opp. 9 (Case No. 03-1023). To the contrary, FERC's policy has already been subject to judicial review. *See Entergy Services, Inc.*, 319 F.3d 536. Another potential claim to avoid dismissal would have this Court "retain jurisdiction due to the ripeness of Southern's [facial] challenge to the 'at or beyond' test." Southern Opp. 10 (Case No. 03-1023). Opposing Parties, however, presented no facial challenge in the rehearing relief sought. Rather, the relief sought was specific to the IAs at issue. Southern's rehearing was limited to reconsideration of "the directives in the . . . Order to

⁹ Opposing parties cited cases where subsequent agreements will terminate within "eighteen months or "two years" as establishing the duration that would normally evade review. *See* Southern Opp. at 7 (Case No. 03-1023). But IAs are not limited to those time periods. In fact, given that IAs cover construction of interconnection facilities plus rate crediting, they could be expected to last for several years.

modify the interconnection agreement between [Southern] and Athens . . ." Southern Rehearing Request at 1 (Case No. 03-1023), JA 869.

Even if the Opposing Parties' appeals could be transformed in to requests for "declaratory relief forbidding an agency from imposing a disputed policy in the future," to avoid being dismissed as moot, the Parties must possess "standing to bring such a forward-looking challenge and [show] the request for declaratory relief is ripe." *See City of Houston, Texas v. HUD*, 24 F.3d 1421, 1429-30 (D.C. Cir. 1994). The Parties' claims fails on both counts.

Southern claims that "FERC has repeatedly relied upon the 'at or beyond' test in the determination of all cases before it." Southern Opp. 12. None of the cases referenced, however, *see id.*, Ex. F, involve Southern, but instead, address IAs involving other companies on entirely different transmission systems. As Southern is not a party to those agreements, it is not aggrieved by those orders, and thus lacks standing to challenge them. Because Southern "lacks standing to attack future application of [FERC's] policy, then the mooting of the [specific claim obviously leaves the court unable to award relief." *City of Houston*, 24 F.3d at 1430. In any event, this Court has already affirmed the application of the Commission's interconnection policy, finding the assertion "that the Commission impermissibly departed from its precedent" in that case to be "without merit."

Entergy Services, Inc., 319 F.3d 536. Consequently, even if Southern's claim was a properly preserved facial attack, the instant appeal is not needed to provide certainty on an uncertain issue.

Prudential concerns also counsel for dismissal here based on "the court's interest in avoiding unnecessary adjudication and in deciding issues in a concrete setting." *City of Houston*, 24 F.3d at 430-31 (citing *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 915 (D.C. Cir. 1985)). The Opposing Parties' attempt to challenge the instant ruling ignores Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, 68 FR 49845 (August 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), which addresses generically a number of IA issues, including who should pay for the costs of system upgrades associated with interconnection. Order 2003 has been the subject of rehearing requests. Thus, the FERC IA "policy" is still being formulated, and Opposing Parties are simply attempting to circumvent the process related to the issuance of a final rule on the subject. Until a final rulemaking order issues, the shape of FERC policy will not be certain. Judicial review of challenges to a policy should be deferred at least until that time. *Compare Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986) (finding policy final for purposes of review based on no indication that agency "intends to take steps to adopt revised or different regulations.").

Moreover, Opposing Parties will suffer no hardship if review is deferred, as the IAs at issue have already been terminated. Thus, deferring Court review of their challenges until they are presented in an actual case or controversy in a later FERC docket or after the Commission's Order 2003 rulemaking proceeding has concluded is appropriate.

II. THE COMMISSION REASONABLY REJECTED THE PROPOSAL FOR DIRECT ASSIGNMENT OF THESE NETWORK UPGRADE COSTS.

A. Standard of Review

Commission orders are reviewed under the Administrative Procedure Act's ("APA") arbitrary and capricious standard. 5 U.S.C. § 706(2)(A). The court will "uphold FERC's factual findings if supported by substantial evidence and . . . endorse its orders so long as they are based on reasoned decisionmaking." *Process Gas Consumers Group v. FERC*, 292 F.3d 831, 836 (D.C. Cir. 2002) (citing *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1988)).

Moreover, "[b]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, [the court's] review of whether a particular rate design is just and reasonable is highly deferential." *Sithe/Independence Power Partnership v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (citations and internal quotations

omitted). In addition, an agency's interpretation of its own precedent is entitled to deference. *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998) (citing *Inland Lakes Management v. NLRB*, 987 F.2d 799, 805 (D.C. Cir. 1993)).

B. The Commission's Orders Finding System Benefits Should Be Summarily Affirmed

The ruling in *Entergy Services* upholding FERC's policy of providing credits for network upgrades controls the resolution of the instant appeals. Accordingly, the challenged orders should be summarily affirmed. At issue there, as here, was whether upgrades must be shown to result in quantifiable benefits to all uses of the grid. The Court rejected claims that such an evidentiary showing was needed, and, instead, accepted FERC's "less cramped" definition of system-wide benefits, and recognized the Commission's "long-held view of the benefits of expansion and the role of network system upgrades" as sufficient to justify crediting those upgrades. *Entergy Services*, 319 F.3d 543-44.

This ruling accepted the Commission's "policy determination that a competitive transmission system, with barriers to entry removed or reduced, is in the public interest." *Id.* This determination removes the need for an ad hoc evidentiary hearing regarding whether specific upgrades increase reliability and base the value of interconnection upgrades on the benefits of "having a standard

policy that requires credits for customer-funded network upgrades [because it] minimizes the incentive for utilities to ‘gold plate’ their systems at customers’ expense and thereby reduces the potential for disputes . . . over what constitutes a necessary upgrade.” *Id.* at 543 (citing *Consumers Energy*). In addition, the Court recognized that the crediting policy “creates more accurate price signals by placing ‘new generators on an equal footing with pre-existing, utility-owned generators whose transmission costs generally were rolled into [the] transmission rate base.’” *Id.*

Petitioners’ claim that this case “differs significantly” from *Entergy Services* in that it does not involve short circuit and stability upgrades, should be rejected. Pet. Br. 30. As an initial matter, *Entergy Services*’ finding regarding system benefits is not limited to only those upgrades designed to relieve short circuit and stability problems, but applies generally to any upgrade as a means of reducing barriers to entry. In any event, contrary to Petitioners’ claim, short circuit and stability upgrades are the only upgrades at issue in both the Southern/Blount County and Southern/Athens IAs. Thus, even if Petitioners’ narrow reading were applied, *Entergy Services* would still control here.

But *Entergy Services* went beyond the narrow question of short term and stability upgrades to look at the broader issue of FERC’s “standard policy that

requires credits for customer-funded network upgrades.” 319 F.3d at 543. The analysis was not restricted to the narrow question of whether specific “evidence that the[] reliability upgrades are crucial to protect generation and other equipment,” *id.*, had been found, but took a broader view that benefits from all network upgrades would enhance network expansion and encourage competition by reducing barriers to entry. *Id.* at 543-44. Thus, *Entergy Services* is controlling as to whether the crediting policy is appropriate for the upgrades at issue here. The Commission’s decision should be affirmed on this basis. Moreover, even if the decision in *Entergy Services* could be read as limited to short-circuit and stability upgrades, it would still control the two Southern appeals.

Southern’s rehearing arguments were the same as arguments rejected in *Entergy Services*. For example, in Blount County, Southern argued the “replacement breaker” at the Miller Steam Plant substation “will be installed solely to maintain the reliability and safety of the transmission system for the benefit of” the generator and “would not increase the capability, reliability, or safety of the transmission system for other customers.” Southern/Bount County Request for Rehearing at 1. RE 6-1, JA 462. Compare *Entergy Services*, 319 F.3d at 542 (“Entergy maintains that instead of benefiting the entire system, these short circuit and stability upgrades benefit only the generators.”)

Similarly, in the Athens proceeding, Southern argued that short circuit and stability upgrades (such as replacement breakers) do not benefit the system because they “do not enhance the capability of the system and do not increase reliability above that existing prior to the interconnection of the generator.” Nevertheless, Southern agreed that the replacement breakers “are necessary in order to maintain the continued safety and reliability of the system upon acceptance of the generator’s power.” Southern Request for Rehearing at 12.¹⁰ RE 6-12, JA 880. Compare *Entergy Services*, 319 F.3d at 542 (“Absent expansion of the capacity or enhancement of the reliability of the system beyond that which existed prior to the new interconnection, there is, in Entergy’s view, no benefit to all system users.”)

Accordingly, as *Entergy Services* controls the resolution of this case, the Commission’s orders should be summarily affirmed. Alternatively, even if *Entergy Services* is read as narrowly as Petitioners suggest, FERC’s orders in the Southern proceedings should be summarily affirmed.

¹⁰ This dichotomy exposes the hollowness of Petitioners’ position. Networks are dynamic; as they grow it will be necessary to replace (or to upgrade) existing breakers to handle the heavier energy flows moving through the system. Just as the original breakers were an integral part of the network system then, so, too, replacement or upgraded breakers are an integral part of the network system now.

C. The Commission Reasonably Clarified That Network Facilities Are Those Located At or Beyond The Point of Interconnection.

Contrary to Petitioners' claim, the Commission did not deviate from established policy, but instead, reasonably clarified that network facilities whose costs are eligible for crediting include those facilities "at" the point of interconnection to the transmission grid. The Commission has long held that "all costs on the network (*e.g.*, to relieve overloads, to remedy stability and short-circuit problems, to maintain reliability, to provide protection and service violation, or to reconfigure or relocate existing facilities) are subject to the prohibition on direct assignment." *See* Entergy Rehearing Order, 99 FERC at 61,399 ¶ 13 (citing *PSCO* and *Consumers*), JA 293, (emphasis in original). As discussed above, this policy was affirmed in *Entergy Services, Inc.*, 319 F.3d at 544.

To avoid the effects of this crediting policy, Petitioners argued that the definition of network upgrade "facilities" does not include facilities "at" the point of interconnection to the grid. Pet. Br. 17-27. The Commission reasonably rejected this interpretation as "specious," stating:

The network begins at the point where the customer connects to the grid, not somewhere beyond that point. It is illogical to contend that the network somehow begins beyond where the customer connects to that very network.

Entergy Rehearing Order at 61,399, ¶¶ 15-16, JA 293. Nor did the Commission see any “meaningful distinction” between the prior phrasing – “from” the point of interconnection – and the current “at or beyond” phrasing, such that “the choice of one prepositional phrase over another overturned 30 years of precedent.” *Id.*

Petitioners claim that the change is inconsistent with precedent because the Commission previously held that “at” facilities should be directly assigned. Pet. Br. at 19. This argument is wrong, and begs the question. FERC directly ruled that it has not “now [n]or ha[s it] ever directly assigned the costs of the network at its borders.” Entergy Rehearing Order a 61,399, ¶ 16, JA 293. Notwithstanding that the policy allows for direct assignment (no crediting) of the cost of “sole use” facilities a generator must build between its generator and the grid, the facilities at issue were not sole use facilities. Petitioners attempt to confuse the issue by referring to all “facilities that must be constructed and/or installed in order to physically connect or tie a generator to the transmission system” as “Connection Facilities,” whose costs are directly assigned (*see, e.g.*, Pet. Br. 17). But this begs the question, as self-styling all facilities as “Connection

Facilities” does not make them so. Petitioners’ definition essentially revives the “but for” definition that has been long rejected. *E.g.*, *PSCO*, 62 FERC at 61,061 (“even if the customer can be said to have caused the addition of a grid facility, the addition represents a *system* expansion”)(emphasis in original).

The Commission has never found the “but for” test compelling. Rather, it has refused to differentiate between network upgrades built as part of an interconnection and other network upgrades. The cost of all network upgrades are rolled-in. The line of demarcation for this analysis begins from “the fundamental point that the network cannot be dismembered, or directly assigned.” 99 FERC at 61,399, ¶16, JA 293; see *Nevada Power*, 101 FERC at 61, 145, ¶ 8 (same), JA 846. As the network already exists “at” the point of interconnection, “[i]t is illogical to contend that the network somehow begins beyond where the customer connects to that network.” 99 FERC at 61,399, ¶ 16, JA 293. Facilities built “at” the point thus become part of the network, and their benefit insures to all system customers. Viewed in this light, as FERC did, “the phrase ‘at or beyond’ is simply another way of prescribing that standard.” *Id.* As an agency’s interpretation of its precedent is entitled to deference, the Commission’s ruling should be upheld as

reasonable.

Although the Commission recognized references to network facilities were previously identified as those “from” the point where the customer connects to the grid, it failed to see a meaningful distinction between that phrasing and the “at or beyond” phrasing. *Id.* Nonetheless, to avoid future confusion, the Commission indicated it would consistently adopt the “at or beyond” language. *Id.*, JA 294. This clarification reasonably resolved any confusion regarding use of the two phrases.

D. Petitioners’ Claim That Prior Policy Classified Network Upgrades Based on Benefits To The System Was Not Raised on Rehearing by Entergy or Southern, And, In Any Event, Is Incorrect.

Petitioners argue that the Commission has traditionally used a “systemwide benefit” test to determine whether to classify facilities as network upgrades, and that the instant decisions depart from that precedent. *See* Pet. Br. 17, 17-29. This argument is not before the Court in three of the four appeals as it was not raised on rehearing by Entergy or Southern.¹¹ *See*

¹¹ On rehearing and in the proceedings before the Commission, Southern and Entergy argued that network facilities did not include facilities “at” the point of interconnection. *See e.g.*, Entergy Rehearing Request at 10. RE 7, pg. 10, JA 164. As discussed, the Commission provided a reasoned answer to this concern in explaining that its policy included facilities at the point of interconnection.

FPA § 313(b), 16 U.S.C. 825l(b); *Entergy Services, Inc.*, 319 F.3d at 545; *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996); *Platte River Whooping Crane Trust v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989).¹²

Thus, this argument only survives for Nevada Power's appeal.

Nevada Power claims that the order deviated from "established practice that required some showing that facilities actually provide a benefit to the system or to the other users of the system before those facilities could be classified as network upgrades." See Nevada Power Rehearing Request at 9. RE 9-9, JA 728. See Pet. Br. 17-29. Nevada Power mischaracterizes the Commission's policy.¹³ As also discussed, *supra*, this type of evidentiary showing is not needed. Under FERC's policy determination, the

¹² The Court is also without jurisdiction to consider Petitioner's argument regarding "prevailing industry practice," see Pet. Br. 25-27, as it was not raised on rehearing. See FPA § 313(b), 16 U.S.C. 825l(b); *Entergy Services, Inc.*, 319 F.3d at 545; *United Distrib. Cos. v. FERC*, 88 F.3d at 1170; *Platte River Whooping Crane Trust v. FERC*, 876 F.2d at 113. Moreover, an unlawful tariff provision will not be approved simply because it is unopposed. The Commission has an independent responsibility to determine whether rates, terms, conditions are just and reasonable.

¹³ In addition, there is no jurisdiction to consider APSC's argument that the Commission's decision is inconsistent with subsequent "agency pronouncements," (APSC Br. 9-11) because it was not raised on rehearing. Moreover, the statements at issues are taken out of context and do not represent current policy, as set out in Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, 68 FR 49845 (August 19, 2003), FERC Stats. & Regs ¶ 31,146 (2003).

upgrades produce public interest benefits by allowing for network expansion through reduced barriers to entry, which enhances competition. *Entergy Services*, 319 F.3d at 542-44. As part of its ruling, this Court rejected a virtually identical claim¹⁴ on grounds it “overlooks the Commission’s long-held view of the benefits of expansion and the role of network system upgrades.” 319 F.3d at 544. Thus, Nevada Power’s deviation-from-prior-policy claim is invalid.¹⁵

E. The Upgrades Provide System Benefits

Even if a showing of system benefits is required to support a finding that a facility is located on the network, the instant facilities provide system benefits. The Nevada Power facilities “include a substation bar position, circuit breakers and relays” at the Harry Allen Switchyard. *See Nevada Power Rehearing Order* at 61,145, ¶ 9, JA 846. The parties do not dispute that the existing Harry Allen Switchyard facilities provide benefits to the system. *See e.g., Duke Energy Co.*, 95

¹⁴ *See* 319 F.3d at 544 (“Entergy would confine ‘benefits’ to increases in capacity of the transmission system or to enhancements other than maintained stability in an expanded system.”)

¹⁵ Even if the Commission has previously considered specific system benefits to justify crediting, it has never held that a system benefits’ inquiry is *the only way* to determine whether a facility is located on the network.

FERC ¶ 61,279 at 61,980 (2001) (noting that switchyard facilities “will allow future interconnections” and “integrate the interconnection facilities” into existing networks). The Commission’s determination was also supported by the fact that the existing Nevada Power switchyard operated as part of the transmission network, just as the integrated facilities will for the expanded energy flow. “Like the facilities at issue in *Entergy*, 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.” Nevada Power Initial Order, 100 FERC at 61,302, JA 630. Thus, even under Nevada Power’s “benefit” test, the facilities would be considered upgrades to the network.¹⁶

¹⁶ The other parties’ facilities also provide system benefits. Like the Nevada Power upgrades, Entergy’s facilities are improvements to an existing network switchyard. *See* Entergy Rehearing Order at 61,397-98, JA 291-92; Nevada Power Rehearing Order at 61,302, JA 630. The Southern facilities involve the same short circuit and stability upgrades found to be network facilities in *Entergy Services*. Additionally, Entergy’s IA included a provision that allowed it to seek reliability must run (“RMR”) service from the generator (or from FERC, if no agreement could be reached). Entergy Initial Order, 98 FERC at 61,022, JA 151. RMR availability from the interconnecting generator “will provide the parties with a reasonable means to ensure the reliable operation, protection and integrity of the transmission system.” *Id.* at 61,024, JA 153. *See also Pub. Util. Comm. v. FERC*, 254 F.3d 250, 252 (D.C. Cir. 2001) (noting “RMR contracts [help] to ensure ancillary services, voltage support, and energy to support the reliability of the ISO-controlled grid.”) (footnote omitted).

III. IT IS REASONABLE TO REQUIRE TRANSMISSION PROVIDERS TO PAY INTEREST ON THE MONEY PAID UPFRONT FOR NETWORK UPGRADES

Petitioners erroneously contend that “FERC has failed to provide a rational explanation” for interest related to a generator’s initial financing of the cost of network upgrades. Pet. Br. at 45; APSC Br. 22-23; Ga. Br. 7-8. The Commission explained “its policy requires transmission providers to provide interest on credits for system upgrades.” Southern/Athens Rehearing Order, 101 FERC at 62,231. The underlying rationale was set out in *AEP*, 97 FERC ¶ 61,098 at 61,530 (2001):

We [find] that until the conclusion of the generic proceeding ..., the addition of interest in connection with system upgrades on an interim basis is appropriate, for the following reasons. First, failure to adjust credits to reflect interest would impose on generators the financing costs, which may be significant, depending on the amount of system upgrade costs and the length of time between the date on which the generator pays for the facilities and the date when it depletes the credits. This additional cost for new or expanding generators may unduly impede capacity additions. More importantly, if interest is due, that cost should be borne by its ratepayers (rolled-in) for the same reason the ratepayers pay for the underlying construction costs, *i.e.*, they all benefit from the upgrade.

Contrary to Petitioners’ claim, the Commission provided a reasoned explanation for its interest on credits policy.

IV. THE COMMISSION'S POLICY DOES NOT RESULT IN SUBSIDIZATION

Petitioners' claim that transmission credits result in cross subsidization (Pet. Br. 34-36; APSC Br. 7-13; Ga Br. 9-10;) was rejected in *Entergy Services, Inc.*, 319 F.3d at 544-45. The subsidization "argument is based on the faulty premise that native load customers receive no benefit for the upgrade; no subsidization occurs except where customers pay for other customers' sole use facilities." *Id.* (citing *PSCO*, 62 FERC at 61,062). As customers benefit from "a competitive" and "expan[ded]" grid, transmission customers are not subsidizing other customers.¹⁷ *Id.*

Despite the impression that Petitioners seek to create (Br. 9-10),¹⁸ when a generator proposes to interconnect new generation facilities to an existing transmission system, the generator initially finances (pays for) construction of all facilities that are constructed. Only after a generator (or its customer) begins to take transmission service, and thus increases the units over which the transmission provider's cost of service will be spread, will the generator recover (in the form of a transmission credit) the share of financed costs related to network upgrades.

¹⁷ For the same reason, there is no concern that the Commission's orders violate the Energy Policy Act of 1992, §§ 721,722, 16 U.S.C. §§ 824j, 824k ("EP Act"), prohibition on subsidization. *See* Pet. Br. 36-40; APSC Br. 14-17.

¹⁸ *See also* APSC Br. 7-8; Fla. Br. 10; Ga.Br. 2-3 (same).

Because a transmission system is allowed rate base treatment for only the amount of credits that have actually been applied to generators, the rate impact, if any, will not be realized until some time in the future even though all users benefit immediately from the expansion and upgrade to the network system.

The Commission requires generators to finance initially all costs incurred as a result of its interconnection. “Until either the generator or a third party contract for transmission service to allow the generator’s power to actually flow on the grid, it is appropriate for the interconnection customer to pay the full cost of these upgrades which would not have been needed but for the customer’s request for interconnection.” *American Elec. Power Services Corp.*, 91 FERC ¶ 61,308 at p. 62,051 (2000); *see also, e.g., Southern Co. Services*, 98 FERC ¶ 61,328 ¶ 28 (2002)(“current Commission policy requires interconnecting operators to finance the costs of upgrades and to be reimbursed, with interest, as transmission services are provided”). The “up front payment by the generator followed by crediting is a financing/timing issue.” *GridSouth Transco LLC*, 96 FERC ¶ 61,067 at p. 61,295 (2001).

As the generator initially bears the entire cost of constructing all facilities related to its interconnection, it is obvious that the transmission provider, who has not borne any interconnection costs at that time, cannot include such costs in its

rates. Only after, and to the extent that, a provider begins to credit the generator's transmission service, can the credit be included in the rate base. "[U]ntil Southern [the transmission provider] has provided credits to generators, it should not include interconnecting generators' system upgrade costs in its formula rates." *Southern*, 98 FERC at 62,386 ¶ 28 (footnote omitted). This result is required by FERC's uniform system of accounts, which treats the generators' financing as a customer advance for construction, and requires that, until the amounts are credited to the generator, they be "excluded from rate base." *Id.* n. 27.¹⁹

When the generator begins transmission service on the grid, the generator is charged the same transmission rate as similarly situated customers, including any costs that the transmission provider flows through from the credits. Without analysis, which was not presented in the record below, it is difficult to know whether unit rates will rise when a generator begins to take service. On one hand, as transmission credits are given to the generator, they are added to the rate base, which, all other things being equal, would tend to increase costs. On the other

¹⁹ The controlling account, 18 C.F.R. Part 101, Account 252 (2003) states: "This account shall include advances by customers for construction which are to be refunded either wholly or in part. When a customer is refunded the entire amount to which he is entitled, according to the agreement or rule under which this advance is made, the balance, if any, remaining in the account shall be credited to the respective plant account."

hand, when a generator begins to take transmission service, the increased volumes will tend to decrease the per unit rate for each customer. How those two factors interact in specific circumstances will determine whether the unit rates increase, decrease, or remain the same. But, in any event, the mere fact that a generator interconnects on a grid does not either automatically or immediately translate to a rate increase for the transmission provider's other customers.

Under FERC policy, a provider has the option to charge a generator an incremental, rather than a rolled-in, rate for service. “[B]y requiring that the new transmission customer pay a rate which is the higher of embedded cost (*i.e.*, a rolled-in rate including the expansion cost) or incremental cost (*i.e.*, expansion cost revenue requirement divided by the new customer's units of service), the new transmission customer is paying an amount that is *at least* equivalent to a pro rata share of the sum of the cost of the existing grid and the cost of expansion facilities.” *Pub. Service Co. of Colorado*, 62 FERC ¶ 61,013 at 61,062 (1993)(emphasis in original). Charging an incremental rate, if it were higher than rolled-in, in these cases would assure the unit rates of other customers do not increase due to the interconnection. It also obviates the possibility of subsidy²⁰ (Br.

²⁰ The Commission denies that a subsidy occurs when a generator receives credits for the costs of system upgrades “as based on the faulty premise that native

34-36) because the generator's rates would be based entirely on the costs and volumes associated with its generation service. 62 FERC at 61,062.

V. SOUTHERN'S OTHER ARGUMENTS SHOULD BE REJECTED

Petitioners allege that transmission credits will result in inefficient siting because generators will lose their incentive to “take into account the extent of the ... facilities required for a particular site. *See* Pet. Br. at 41; APSC Br. 20-33; Fla. Br. 5; Ga. Br. 2-3 (same). Petitioners argue that this results because “all other transmission customers would bear the ...[f]acilities costs.” *Id.* But this argument ignores the fact that a generator taking credits is also a transmission customer whose transmission rates will be equally affected by siting decisions. Moreover, Petitioners overlook both the range of variables, besides upgrade costs, that impact a siting decision, and the state commission's, not FERC's, authority to approve or reject new siting.²¹ In addition, siting must factor in both the interconnection costs for which a generator is solely responsible and the generator's transmission

load customers receive no benefit from the upgrades.” *Entergy Services*, 319 F.3d at 541.

²¹ *See* FPA 201(b)(1), 16 U.S.C. § 824(b)(1). Thus, when a specific interconnection proposal is presented to FERC, siting of the new generation facilities has already been approved by a state authority.

rates. Finally, Petitioners' solipsistic argument overlooks that the crediting policy reduces inefficiencies such as "the incentive for utilities to 'gold plate' their systems at customers' expense"²² that might result if a transmission provider can charge a generator for all costs associated with interconnection. *Entergy Services*, 319 F.3d at 543.

In addition, this Court has found this line of "perverse incentive" argument lacking for practical reasons. In *Western Mass. Elec. Co. v. FERC*, 165 F.3d 922, 928 (D.C. Cir. 1999), which challenged the credits for system upgrade costs financed by a cogenerator qualifying facility, the claim was made that FERC's "decision creates a perverse incentive for qualifying facilities to ignore economic efficiency in locating their plants because they know that the grid customers will foot the bill." That claim was rejected on grounds that a cogenerator "would not have much of a choice about where to

²² In addition, Petitioners' argument that the Commission's policy of excepting independent transmission providers (ISOs and RTOs) from the Commission's crediting policy is discriminatory, (Pet. Br. 43-44; APSC Br. 23-25), should be rejected as it was not raised on rehearing. *See* FPA § 313(b), 16 U.S.C. 825l(b); *Entergy Services, Inc.*, 319 F.3d at 545; *United Distrib. Cos. v. FERC*, 88 F.3d at 1170; *Platte River Whooping Crane Trust v. FERC*, 876 F.2d at 113. In any event, the exception to the policy is reasonable as there is a valid basis for the difference in treatment. Because ISOs and RTOs are independent, and neither own nor have affiliates that own generating facilities, there is less concern that existing generators owned by the utilities will be favored over new generators or that utilities will "gold plate" their system at the generators' expense.

locate its facilities because cogenerators need to be near their hosts anyway.”

Id. See also *Entergy Services*, 319 F.3d at 543 (“Entergy’s own experience indicates that generation occurs without subsidization as the location for new generation is often dictated by the proximity of natural gas pipelines and the ability to sell power beyond Entergy’s service area.”). Thus, practical considerations, not perverse incentives created by FERC’s orders under review, are more likely to control where a generator chooses to build its generation.

CONCLUSION

For the foregoing reasons, the Entergy and Southern petitions for review should be dismissed. In addition, the Commission's orders should be upheld in all respects.

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