

147 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Newmont Nevada Energy Investment LLC

Docket No. EL14-16-000

v.

Sierra Pacific Power Company

ORDER ON COMPLAINT

(Issued April 9, 2014)

1. On December 23, 2013, as amended on December 26, 2013, Newmont Nevada Energy Investment LLC (Newmont) filed a complaint seeking a Commission order requesting that the Commission require Sierra Pacific Power Company (Sierra Pacific)¹ to pay costs for measures Newmont is undertaking to mitigate adverse effects on its generator from certain transmission network additions and upgrades on the Sierra Pacific system (Complaint). In this order, we grant the Complaint and find that Sierra Pacific bears the responsibility for the mitigation costs, as discussed below.

I. Background

2. Newmont is a wholly-owned subsidiary of Newmont USA, Limited (Newmont USA), which owns and operates gold mining and processing facilities in northern Nevada. Newmont USA is a bundled retail customer of Sierra Pacific. Newmont is the owner and operator of the 203 MW coal-fired power plant (the TS Power Plant) located

¹ Sierra Pacific and Nevada Power Company (Nevada Power) are public utilities operating in the State of Nevada and are both wholly-owned subsidiaries of NV Energy, Inc.

in Eureka County, Nevada.² The TS Power Plant is interconnected to the Sierra Pacific transmission system, near Sierra Pacific's Falcon substation, pursuant to a jurisdictional Interconnection and Operating Agreement, as amended, between Newmont and Sierra Pacific (Amended Interconnection Agreement).³ The TS Power Plant commenced commercial operation on May 31, 2008.

3. In August 2007, and in accordance with an order from the Public Utilities Commission of Nevada (Nevada Commission), Sierra Pacific and Newmont entered into the Western Systems Power Pool Confirmation (WSPP Confirmation). The WSPP Confirmation provides for (a) Sierra Pacific to dispatch and purchase the output of the TS Power Plant, generally at negotiated prices roughly equal to Newmont's cost of fuel and variable operation and maintenance; (b) a portion of the dispatched output to provide for continued retail service to Newmont USA's mining facilities; and (c) the remainder of the output to be available to Sierra Pacific for service to the utility's other customers. At the same time the WSPP Confirmation was executed, Sierra Pacific and Newmont USA also entered into a retail electric service agreement, whereby Newmont USA agreed to purchase power from Sierra Pacific for its mining operations at a rate tied to the wholesale power purchase rate under the WSPP Confirmation. According to Newmont, the effect of the wholesale WSPP Confirmation and retail service agreement together is to allow Newmont USA to receive the economic benefits of purchasing power and energy at Newmont's low cost of production while also providing similar benefits to Sierra Pacific's other retail customers.

² Newmont was formed by Newmont USA for the purpose of owning and operating the TS Power Plant and selling the output of the plant to Sierra Pacific. Newmont is an Exempt Wholesale Generator and has a wholesale tariff with market-based rate authority on file with the Commission.

³ The original interconnection agreement was filed with the Commission in Docket No. ER04-305-000 on December 18, 2003 and accepted by delegated letter order on February 10, 2004. *Sierra Pacific Power Co.*, Docket No. ER04-305-000 (Feb. 10, 2004) (delegated letter order). Newmont USA assigned its rights under the interconnection agreement to Newmont, and, in March 2006, Newmont and Sierra Pacific executed an agreement amending the original agreement to reflect changes in the specifications of the TS Power Plant (First Amendment to Interconnection and Operation Agreement). For the purposes of this order, the original agreement as amended is referred to as the "Amended Interconnection Agreement."

II. The Complaint

A. Origin of the Dispute

4. According to Newmont, beginning in approximately 2008, in connection with the development of the Ely Energy Center generation and transmission project,⁴ Sierra Pacific engaged the expert services of Teshmont Consultants, LP (Teshmont) to conduct a frequency scan for potential sub-synchronous resonance⁵ at interconnected generators due to compensating the 345 kV Falcon-Robinson Summit Line at 70 percent series compensation.⁶ Teshmont's April 11, 2008 report revealed a likelihood that adverse torsional interaction⁷ could occur at Sierra Pacific's Valmy Power Plant Unit 2

⁴ The Ely Energy Center project was ultimately replaced by the One Nevada Transmission Line (ON Line) project. The ON Line consists of a 235-mile 500 kV transmission line providing a direct interconnection between the Nevada Power and the Sierra Pacific transmission systems. The project is jointly owned by Sierra Pacific and Great Basin Transmission, LLC. Ownership and capacity rights to the ON Line have been established through a Transmission Use and Capacity Exchange Agreement between Great Basin Transmission, LLC and NV Energy, which has been accepted by the Commission. The Transmission Use and Capacity Exchange Agreement governs rights to, but not service over, the ON Line, with service governed by the NV Energy Open Access Transmission Tariff (OATT). The ON Line was placed into service on December 31, 2013 and became commercial as of January 1, 2014.

⁵ Sub-synchronous resonance is a resonance phenomenon involving the alternating-current transmission line and turbine-generator interacting at a frequency that is less than the normal 60 Hertz line frequency. It results from the insertion of series capacitors to cancel out part of the line and system inductive reactance. Sub-synchronous resonance can result in physical damage to turbine-generator systems if the naturally occurring resonance in the turbine-generator is at the same frequency as a source of energy. Installation of series capacitors can change the frequency of energy sources and can result in sub-synchronous resonance that can damage the turbine generator systems.

⁶ Compensation is a measure of the amount of reduction in impedance a series capacitor will produce, and the effect of this reduction is to increase capacity (or transfer capability) on the transmission line.

⁷ An adverse torsional interaction can increase the mechanical stress on the turbine-generator shaft system as well as the turbine blades. These increased mechanical stresses have caused both shafts and turbine blades to fail catastrophically and destroy portions of the turbine-generator or turbine blade systems. Prior events and analysis of

(continued...)

(Valmy Plant) and Newmont's TS Power Plant, among others. On August 14, 2009, Sierra Pacific sent a letter to Newmont advising that, under certain conditions, the 345 kV series compensation equipment that Sierra Pacific planned to install could cause "catastrophic generator failure" at the TS Power Plant. Newmont states that the letter indicated that Sierra Pacific would accept Newmont's reasonable engineering costs required to provide data regarding the TS Power Plant to Sierra Pacific, and that Sierra Pacific would bear the reasonable equipment and mitigation costs associated with the installation of the series compensation equipment. Subsequently, on October 15, 2009, Sierra Pacific notified Newmont that Newmont, not Sierra Pacific, must bear the responsibility and cost for mitigating sub-synchronous resonance effects on the TS Power Plant.

5. In a draft 2010 report, Teshmont advised Sierra Pacific that sub-synchronous resonance mitigation measures would have to be implemented to protect both the Valmy Plant and the TS Power Plant and provided Sierra Pacific with options for both global and local sub-synchronous resonance mitigation.⁸ Newmont states that through October 2011, Sierra Pacific continued to indicate that it was pursuing a cooperative and comprehensive sub-synchronous resonance mitigation approach, but Newmont later learned that Sierra Power had purchased the series compensation equipment in September 2011. According to Newmont, after the 2010 draft Teshmont report, Sierra Pacific did not share any subsequent Teshmont reports or memoranda with Newmont, except for a table of frequency data which was taken from the final Teshmont report that

those events have proven that adverse torsional interactions due to series capacitors can result in the catastrophic failure of turbine-generators.

⁸ Global sub-synchronous resonance mitigation is implemented on a system-wide basis and is designed to mitigate the effects of sub-synchronous resonance on multiple generators interconnected to the system. Examples of global mitigation include: (1) installing thyristor controlled series capacitors that can vary the level of compensation on a transmission line; (2) installing passive filters located at the substations where the capacitors are located; or (3) reducing the level of compensation on a transmission line. Local sub-synchronous resonance mitigation is designed to mitigate the effects of sub-synchronous resonance on a specific generator. Examples of local mitigation include installing blocking filters at the affected generator or implementing a remedial action scheme that trips the local generator during system or generator conditions that would otherwise result in damaging sub-synchronous resonance effects on a particular generator. Blocking filters are designed to divert the energy from the system away from the generator so that there is not any resonance or damage.

was issued at the end of November 2011 that showed a summary of test results at both the Valmy Plant and the TS Power Plant.

6. Newmont states that on January 12, 2012, it requested that Sierra Pacific reduce the compensation on the Falcon-Robinson Summit Line to 60 percent or less. However, in March 2012, Sierra Pacific informed Newmont that reducing the series compensation to 60 percent or less was not an option. As a result, Newmont's consultant, General Electric, informed Newmont that its only remaining sub-synchronous resonance mitigation option was the installation of blocking filters at the TS Power Plant.⁹

B. Nevada State Court Proceedings

7. After Newmont and Sierra Pacific's attempts to resolve the issue failed, Newmont filed a breach of contract action in the Second Judicial District Court of Nevada.¹⁰ Newmont also filed a motion for a preliminary injunction to require Sierra Pacific to operate the Falcon-Robinson Summit Line at not more than 60 percent compensation until a decision could be rendered on the merits of its claim. On March 22, 2013, the court denied Sierra Pacific's motion to dismiss, ruling that the Amended Interconnection Agreement permits recourse to the courts for equitable relief in order to preserve the status quo or prevent irreparable injury. However, the court found that resolution of Newmont's underlying contract claim and any assessment of damages were subject to the exclusive dispute resolution procedures set forth in the Amended Interconnection Agreement: either arbitration by mutual agreement or proceeding at the Commission. On December 17, 2013, the court granted the preliminary injunction, prohibiting the operation of series capacitors at the Falcon and Robinson Summit substations from using more than 35 percent compensation until Newmont has installed, tested and commissioned blocking filters for the TS Power Plant, which is anticipated to be complete by June 30, 2014.¹¹

⁹ Complaint at ¶ 72.

¹⁰ Sierra Pacific removed Newmont's action to federal district court, which ultimately remanded the case back to state court, holding that Newmont's claim raised a routine matter of contract interpretation that, under federal judicial and Commission precedent, was not within the exclusive jurisdiction of the Commission or the federal courts.

¹¹ Newmont also intervened in the Nevada Commission proceeding addressing NV Energy's application to consolidate its Sierra Pacific and Nevada Power operating subsidiaries. In an order issued on December 3, 2013, the Nevada Commission issued an order requiring NV Energy to limit compensation on the Falcon-Robinson Summit Line

(continued...)

C. Argument

8. Newmont argues that under the Commission's traditional "cost-causers pay" rule, Sierra Pacific should pay for the costs that were imposed on Newmont to study and mitigate the sub-synchronous resonance that Sierra Pacific will cause by the installation and operation of 70 percent compensation on the Falcon-Robinson Summit Line.¹² Newmont asserts that no such mitigation has been needed to protect the TS Power Plant since it commenced commercial operations and none would be required now but for Sierra Pacific's unilateral decision to increase the capacity of the transmission line for its own commercial purposes. Newmont adds that Sierra Pacific argued in the state court proceeding that the "cost-causer pays" rule does not apply to the allocation of interconnection costs, citing cases, which according to Newmont articulate the Commission's bright-line "at or beyond" rule as applied to the interconnection of new generators.¹³ According to Newmont, based on these cases, Sierra Pacific contends that because the sub-synchronous resonance mitigation facilities will physically be on Newmont's side of the point of interconnection, the costs of studying and mitigating the sub-synchronous resonance effects that Sierra Pacific is causing are Newmont's responsibility, regardless of which party caused the need for the studies to be undertaken and mitigation to be implemented. Newmont also argues that all of the cases that Sierra Pacific cited, and all other cases Newmont has found applying the bright-line "at or beyond" rule, were decided in the context of new interconnections and new generators.

9. In addition, Newmont argues that it is one thing to allocate costs based on a bright line test that ignores causation when the generator can factor the costs allocated to it into its economic decision of where or even whether to construct its generator and interconnect with a particular transmission system. However, according to Newmont, it is very different where, as here, the generator is and has been successfully, reliably, and safely interconnected to a transmission system on which the transmission owner elects to make changes to its system for its own purposes, and where those changes, absent

to 35 percent, pending installation and commissioning of blocking filters at the TS Power Plant.

¹² Complaint at ¶ 114. The Complaint uses both paragraph numbers and page numbers. For the purposes of this order, we will refer to paragraph (¶) numbers in instances where they have been provided in the Complaint.

¹³ *Id.* ¶ 115 (citing *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208 (D.C. Cir. 2009); *Old Dominion Elec. Co-Op., Inc. v. FERC*, 518 F.3d 43 (D.C. Cir. 2008); *Nat'l Ass'n of Regulatory Utilities v. FERC*, 475 F.3d 1277, 1284 (D.C. Cir. 2007) (*NARUC v. FERC*); *Entergy Services, Inc. v. FERC*, 391 F.3d 1240 (D.C. Cir. 2005)).

mitigation, will cause destruction of the generator. Furthermore, Newmont asserts, Sierra Pacific's argument that the bright line "at or beyond" rule applies to situations like the one at hand has been expressly rejected by the Commission.¹⁴

10. Next, Newmont contends that Sierra Pacific's actions constitute undue discrimination against Newmont's generator and preferential treatment of Sierra Pacific's Valmy Plant. Newmont bases this assertion on the fact that Sierra Pacific's transmission function contracted and paid for consulting services to study sub-synchronous resonance and mitigation for the Valmy Plant but it required Newmont to procure and pay for its own consulting services. Moreover, Newmont cites as another example of discriminatory treatment the fact that Sierra Pacific developed a remedial action scheme for the Valmy Plant but did not attempt to do so for the TS Power Plant.¹⁵

11. Newmont also argues that Sierra Pacific breached the Amended Interconnection Agreement by refusing to take reasonable steps to avoid harm to Newmont. According to Newmont, multiple provisions of the Amended Interconnection Agreement require each party to operate its respective facilities in a reasonable manner, according to Good Utility Practice,¹⁶ and to take reasonable steps to avoid or minimize harm to the other party. In particular, Newmont references section 3.12.1, which it argues is directed at problems

¹⁴ *Id.* ¶ 119 (citing *Entergy Services, Inc.*, 99 FERC ¶ 61,127 (2002)).

¹⁵ *See id.* ¶ 129.

¹⁶ Section 1.22 of the Amended Interconnection Agreement defines "Good Utility Practice(s)" as follows:

any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be acceptable practices, methods or acts generally accepted in the region. Good Utility Practice shall include compliance with Applicable Laws and Regulations, Applicable Reliability Criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended from time to time, including the criteria, rules and Standards of any successor organizations.

that arise during the course of modifying either party's system.¹⁷ Similarly, Newmont states that "[s]ection 4.1.2 of the Amended Interconnection Agreement requires each party to 'design, install, maintain and operate their respective interconnection facilities . . . so as to reasonably minimize the likelihood that a disturbance originating on its facilities would affect or impair the Transmission System or the [TS Power Plant],' " which Sierra Pacific has refused to do.¹⁸ Newmont argues that Sierra Pacific's intent to operate the ON Line at 70 percent compensation, which it knows could cause "catastrophic" damage to Newmont's generator, is not in accordance with Good Utility Practice, is not prudent, is a refusal to cooperate, does not reflect Due Diligence, and is not within the standard of commercial reasonableness the provisions collectively reflect.¹⁹

12. Newmont adds that sections 5.3.1 and 4.1.3 of the Amended Interconnection Agreement affirmatively demonstrate that Sierra Pacific is obligated to pay for the post-interconnection mitigation costs associated with Newmont's plant resulting from modifications made by Sierra Pacific to its transmission system. Under Newmont's

¹⁷ Section 3.12.1, which is contained in section 3.12 (Modification of Facilities) provides:

Each Party shall use Due Diligence to minimize any adverse impact on the other Party, including, in the case of Company, any action necessary to promptly reestablish the connection of the Facility to the Transmission System or to secure such services necessary to deliver the Electricity to the Transmission System in accordance with Good Utility Practice, and shall, subject to Article 8, be responsible for the costs of mitigation of any such adverse impact during the course of installing any additions, modifications or replacements to its facilities. To the extent any additions, modifications or replacements to a Party's facilities are reasonably expected to affect the other Party's facilities, such additions, modifications or replacements must be constructed and operated in accordance with Good Utility Practice.

¹⁸ See Complaint at ¶ 136.

¹⁹ *Id.* ¶ 133.

reading of section 5.3.1,²⁰ Newmont is responsible only for the costs of system changes that must be made to Sierra Pacific's transmission system resulting from changes to the TS Power Plant, which Newmont argues is not the case here.

13. With regard to section 4.1.3,²¹ Newmont argues that Sierra Pacific may cause Newmont to modify its facilities without reimbursement only when (1) the modification is not required to facilitate the connection of a third party or the provision of transmission service under the OATT and (2) the change is required by either changes to Newmont's generator, a change in the law, or a change on the Transmission System that is required by Good Utility Practice. Newmont asserts that, "[I]n all other cases, [Sierra Pacific] may not take any action to cause Newmont to modify its facilities without

²⁰ Section 5.3.1 provides:

Unless required by Applicable Laws and Regulations and Applicable Reliability Criteria, Generator shall not be responsible for the costs of any additions, modifications or replacements made to the Company Interconnection Facilities, System Upgrades or the Transmission System by Company. Generator shall, however, be responsible for the costs of any additions, modifications or replacements made to the Company Interconnection Facilities, System Upgrades or the Transmission System which are required as a result of any additions, modifications, or replacements made by Generator to the Facility.

²¹ Section 4.1.3, which is contained in section 4 (System Operation) under section 4.1 (Requirements for Operation), provides:

Except for changes necessary to ensure the protection and safety of the Parties' personnel and property, Generator shall not be required to make any modifications to the Generator Interconnection Facilities unless such change is required due to (i) a change in the Facility, (ii) a change in Applicable Laws and Regulations that requires a change in the Interconnection Facilities, or (iii) a change on the Transmission System which is required by Good Utility Practice. If a modification to the Interconnection Facilities is required by the foregoing but is not required to facilitate the connection of a third party or the provision of transmission service under the OATT, Company shall inform Generator of the need for such modification and Generator shall be responsible for the costs of such modification, as provided for [sic] Article 5.

reimbursement.”²² Here, Newmont argues, the modifications to Sierra Pacific’s transmission system are being made to support additional transmission service under the OATT—i.e., the transmission of renewable wholesale power by Nevada Power over the ON Line. Thus, Newmont concludes that section 4.1.3 does not support Sierra Pacific’s assertion that Newmont must modify its facilities without compensation.

14. Newmont also argues that Sierra Pacific’s actions constitute a breach of the implied covenant of good faith and fair dealing under the Amended Interconnection Agreement and the WSPP Confirmation. Newmont argues that Sierra Pacific is altering its transmission system in a way that will preventing Newmont from using the connection it bargained for, unless Newmont performs all necessary studies and installs equipment that, in Newmont’s view Sierra Pacific should pay for as the cost causer.²³

15. With regard to its expectations under the WSPP Confirmation, Newmont contends that Sierra Pacific’s refusal to implement or assume responsibility for any mitigation measures to protect the TS Power Plant would likely put Newmont in default of several provisions of the WSPP Confirmation.²⁴

16. Newmont concludes that the estimated cost it will bear as a result of the sub-synchronous resonance mitigation is approximately \$11.2 million. Newmont asks that the Commission find that: (1) Sierra Pacific’s decision to install series capacitors providing 70 percent compensation on the Falcon-Robinson Summit Line caused costs for sub-synchronous resonance studies and sub-synchronous resonance mitigation to be incurred at the TS Power Plant that should be borne by Sierra Pacific as the causer of those costs; (2) Sierra Pacific’s transmission function unduly discriminated against Newmont in resolving the sub-synchronous resonance issues for the Sierra Pacific Valmy generating station while declining to do so for the TS Power Plant; (3) Sierra Pacific breached the Amended Interconnection Agreement by not using Due Diligence or Good Utility Practice or exercising prudence or reasonable cooperation in the planned construction and operation of the series capacitors providing 70 percent compensation on the Falcon-Robinson Summit Line and not taking reasonable steps to minimize the adverse impact of the sub-synchronous resonance; and (4) Sierra Pacific violated its implied covenant of good faith and fair dealing under the Amended Interconnection

²² Complaint at ¶ 141.

²³ *Id.* ¶ 145.

²⁴ *Id.* ¶¶ 146-147 (citing Exh. No. Newmont-8, WSPP Confirmation at §§ 21-23, 34(c)(iv)).

Agreement and the WSPP Confirmation.²⁵ Newmont requests that the Commission order Sierra Pacific to pay Newmont, with interest and appropriate attorney's fees, for all sub-synchronous resonance study and mitigation costs incurred by Newmont to protect and permit the continued operation of the TS Power Plant.

III. Notice of Filing and Responsive Pleadings

17. Notice of the Complaint was published in the *Federal Register*, 78 Fed. Reg. 79,688 (2013), with interventions and protests due on or before January 13, 2014.

18. A notice of intervention was filed by the Nevada Commission. On January 13, 2014, the respondent, Sierra Pacific, filed an answer to the Complaint. On February 3, 2014, Newmont filed a motion for leave and reply to Sierra Pacific's answer. On February 18, 2014, Sierra Pacific filed a motion for leave to answer and answer to Newmont's reply. On March 5, 2014, Newmont filed an opposition to Sierra Pacific's motion for leave to answer and answer.

Sierra Pacific's Answer

19. Sierra Pacific first asserts that the Commission should exercise primary jurisdiction over this "contract interpretation dispute" because the Nevada state court deferred the question of contractual liability to the Commission or an arbitrator. With regard to the merits of the Complaint, Sierra Pacific argues that under the plain meaning of the Amended Interconnection Agreement Newmont is responsible for taking necessary action to protect Newmont's generator and equipment on the interconnection customer's side of the interconnection.²⁶ Sierra Pacific argues that various sections of the Amended Interconnection Agreement require the standard industry practice—i.e., that each party is responsible for protecting the equipment on its own side of the interconnection facilities from the risks of interconnected grid operations.

20. Sierra Pacific states that under the Amended Interconnection Agreement, each party is responsible for operating its respective side of the interconnection facilities to ensure reliability (section 3.1.2) and is responsible for "reasonably minimizing" the impact on the other party and its facilities (section 4.1.2). Sierra Pacific adds that Newmont is responsible for installing the generator interconnection facilities (section 3.4) and Sierra Pacific is responsible for installing the company interconnection facilities (section 3.5).

²⁵ *Id.* ¶¶ 60-61.

²⁶ Sierra Pacific Answer at 4.

21. Sierra Pacific also points to sections 4.1.3, 8.1.6,²⁷ and 8.3.1²⁸ of the Amended Interconnection Agreement, which it argues contain the key terms of the agreement with respect to the dispute. Specifically, Sierra Pacific asserts that the plain language of section 4.1.3 must be read in the broader context of Amended Interconnection Agreement section 4 (System Operation), which addresses how each party is to operate its respective portion of the interconnection facilities. Sierra Pacific posits that because of its construction, section 4.1.3 requires a reader to parse its meaning, but because a provision requires such close analysis does not mean it is ambiguous.²⁹ Sierra Pacific states that even before parsing this provision, a reader need only look at the plain wording of the prefatory clause of section 4.1.3 (“Except for changes necessary to ensure the protection and safety of the Parties’ personnel and property....”). Sierra Pacific argues that in accordance with this “protection and safety exception,” Newmont is responsible for making modifications to the generator interconnection facilities where conditions require that such changes to the facilities are necessary “to ensure the protection and safety” of

²⁷ Section 8.1.6 provides: “It is Generator’s responsibility to protect the Facility and Generator Interconnection Facilities from any and all disturbances on the Company Interconnection Facilities, System Upgrades or Transmission System. Generator shall indemnify Company against all claims arising out of damage to Facility or Generator Interconnection Facilities.”

²⁸ Section 8.3.1 provides:

Except as otherwise provided herein or to the extent of the other Party’s negligence or willful misconduct, each Party shall be responsible for all physical damage to or destruction of the property, equipment and/or facilities owned by it and its Affiliates and any physical injury or death to natural persons resulting therefrom, regardless of who brings the claim and regardless of who caused the damage, and shall not seek recovery or reimbursement from the other Party for such damage; provided, that in any such case the Parties shall exercise Due Diligence to remove the cause of any disability at the earliest practicable time.

²⁹ Sierra Pacific Answer at 19 & n.53 (citing *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985) (stating that an agreement is only considered ambiguous when it is “reasonably susceptible to different constructions or interpretations.”); *Hunt Ltd. v. Lifschultz Fast Freight, Inc.*, 889 F.2d 1274, 1277 (2d Cir. 1989) (“Language whose meaning is otherwise plain does not become ambiguous merely because the parties urge different interpretations in litigation.”)).

its own personnel and property. Sierra Pacific contends that this is why Newmont is required by the Amended Interconnection Agreement (as well as by reliability requirements and Good Utility Practice) to take the necessary measures to protect its own generating equipment, and install the blocking filters. Sierra Pacific argues that the protection and safety exception is plainly set apart as an important, special circumstance, under the sentence's general rule (i.e., that the generator shall not be required to make any modifications to the generator interconnection facilities...).³⁰

22. Sierra Pacific argues that Newmont's reading of the Amended Interconnection Agreement does not recognize the generator's obligation under the protection and safety exception; rather, Newmont relies on the second sentence in section 4.1.3, which provides that the generator is not responsible for modifications to the generator interconnection facilities when such modifications are required to "facilitate the connection of a third party or the provision of transmission service under the OATT."³¹

23. Sierra Pacific argues that its interpretation of section 4.1.3 of the Amended Interconnection Agreement is consistent with Commission precedent because the Commission has consistently found that generators are responsible for the protection of their facilities. Sierra Pacific states that the *pro forma* Large Generator Interconnection Agreement defines "System Protection Facilities" as "the equipment, including necessary protection signal communications equipment, required to protect (1) the Transmission Provider's transmission system from faults or other electrical disturbances occurring at the generating facility and (2) the generating facility from faults or other electrical system disturbances occurring on the Transmission Provider's transmission system or on other delivery systems or other generating systems to which the Transmission Provider's transmission system is directly connected."³²

³⁰ *Id.* at 19.

³¹ *Id.* at 20.

³² *Id.* at 28 (citing *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 374 U.S. App. D.C. 406 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230, 128 S. Ct. 1468, 170 L. Ed. 2d 275 (2008)).

24. Additionally, Sierra Pacific states that section 9.7.4.1 of the *pro forma* Large Generator Interconnection Agreement provides that the “Interconnection Customer shall, at its expense, install, operate and maintain System Protection Facilities as a part of the Large Generating Facility or Interconnection Customer’s Interconnection Facilities...”. Sierra Pacific adds that the Large Generator Interconnection Agreement also includes section 9.7.4.3 which provides that: “Each Party shall be responsible for protection of its facilities consistent with Good Utility Practice.” Acknowledging that the Amended Interconnection Agreement is not a *pro forma* agreement, Sierra Pacific argues that the principles that are used to determine which party is responsible for the installation of protection equipment and the costs of such equipment are the same. Sierra Pacific further argues that the Commission’s long-standing cost responsibility policy relies on the distinction between network additions (paid for by transmission customers through higher transmission rates) and generator additions (paid for by the generator and not passed on to the transmission customers). Sierra Pacific argues that section 4.1.3 of the Amended Interconnection Agreement is consistent with Commission policy.³³

25. Sierra Pacific adds that section 8.1.6 echoes the generator’s obligation to protect its own generating equipment.³⁴ Similarly, Sierra Pacific argues that Newmont misapplies section 5.3.1, which Sierra Pacific posits addresses the generator’s obligation to make changes and pay for modifications on the company’s facilities. Sierra Pacific adds that this section does not apply to Newmont’s responsibility to install modifications to the generator interconnection facilities to protect its own equipment.

26. Next, Sierra Pacific argues that Newmont bases its Complaint on equitable principles, general policy considerations and other extraneous and parol evidence, rather than relying on the plain, unambiguous language of the contract. According to Sierra Pacific, Newmont argues that ON Line OATT service caused the need for the blocking filters and therefore, the blocking filters constitute OATT-required modifications to the interconnection facilities which must be funded by Sierra Pacific. However, Sierra Pacific’s position is that the development and construction of the ON Line necessitated a modification to the generator interconnection facilities under the protection and safety exception. According to Sierra Pacific, such a modification is a completely separate category of necessary facility changes that are separate from anything having to do with OATT-required modifications.

³³ See *id.* at 29-30 (citing *Entergy Services, Inc. v. FERC*, 391 F.3d 1240; *Southern California Edison Co.*, 135 FERC ¶ 61,093 (2011); *Consumers Energy Co.*, 96 FERC ¶ 61,132 (2001)).

³⁴ *Id.* at 19 n.54. See *supra* n.26 for the language of section 8.1.6.

27. Sierra Pacific further argues that, contrary to Newmont's claims, Sierra Pacific followed Good Utility Practice in designing the ON Line. Sierra Pacific states that the designs for the ON Line were prepared in accordance with standard industry methods and using reliability criteria developed by Western Electricity Coordinating Council and Commission-approved reliability standards. Sierra Pacific argues that it followed Western Electricity Coordinating Council's guidelines for the installation of series capacitors, including providing Newmont with six years notice, which is considerably more than the four years recommended by the Western Electricity Coordinating Council.

28. Sierra Pacific adds that the series compensation equipment, which permits economical loading of long transmission lines, is necessary to achieve the planned transfer capability or capacity of the ON Line and that their use is common industry practice. Sierra Pacific states that once it identified potential sub-synchronous resonance effects in April of 2008, it contacted Newmont and requested certain data from Newmont to further study the potential sub-synchronous resonance effects. Sierra Pacific states that after additional study it informed Newmont that certain protective equipment needed to be installed on the generator side of the interconnection to operate the series capacitors and to prevent the catastrophic failure to Newmont's generating facility. Sierra Pacific states that Newmont's consultant, General Electric, ultimately concluded that the installation of blocking filters at Newmont's facility would provide sufficient sub-synchronous resonance protection. Sierra Pacific argues that Newmont did not follow the Western Electricity Coordinating Council guidelines in taking responsibility for identifying and implementing appropriate countermeasures to address Sierra Pacific's installation of series capacitors in a timely or reasonable manner and waited until February of 2013 to order the blocking filters.

29. Sierra Pacific also contends that the Complaint attempts to confuse the issue by drawing attention away from the plain meaning of the Amended Interconnection Agreement and raising policy and non-discrimination arguments that are either untrue or irrelevant. Sierra Pacific states that Newmont is suggesting that Sierra Pacific intentionally and/or recklessly planned the ON Line, and that it specifically discounted other available options, for the purpose of saddling Newmont with blocking filter costs. Sierra Pacific argues that these arguments lack merit and that Sierra Pacific has been trying to work with Newmont since 2008 when it realized that there could be a sub-synchronous resonance effect on Newmont's generator. Sierra Pacific adds that it attempted to obtain data from Newmont, but Newmont's level of responsiveness varied. Sierra Pacific argues that Newmont's request that the Commission order damages for costs is generally considered to be beyond the scope of the Commission's authority under the Federal Power Act (FPA). Similarly, Sierra Pacific argues that because the general rule is that parties appearing before the Commission will be responsible for their own

legal fees, Newmont's request for attorney's fees is beyond the scope of the Commission's FPA authority.³⁵

30. Sierra Pacific rejects Newmont's breach of implied covenant of good faith and fair dealing arguments. Sierra Pacific asserts that Newmont does not specifically rely on the terms of the Amended Interconnection Agreement to invoke the "benefit of its bargain," and thus, its argument fails. Sierra Pacific also contends that if anything, given the delay in the installation of the blocking filters, Sierra Pacific has not received the benefit of its bargain and will be forced to reduce the capacity of ON Line and the integrated transmission system.

31. Sierra Pacific concludes that the Commission should find that Newmont is responsible for the costs of installing the blocking filters under the plain meaning of the Amended Interconnection Agreement. If the Commission finds that the Amended Interconnection Agreement is ambiguous, Sierra Pacific argues that this matter should be set for hearing—otherwise, extrinsic evidence must be excluded.³⁶

IV. Discussion

A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention serves to make the entity that filed it a party to this proceeding.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Newmont's answers and Sierra Pacific's February 18, 2014 answer. Therefore, we will reject them.

B. Commission Determination

34. As explained below, we grant the Complaint and find that Sierra Pacific is responsible for the costs required to study and mitigate the sub-synchronous resonance effects on the TS Power Plant. As a threshold matter, we note that Newmont and Sierra Pacific do not dispute that compensating the 345 kV Falcon-Robinson Summit Line at 70 percent series compensation could potentially result in sub-synchronous resonance

³⁵ Sierra Pacific Answer at 26 n.71.

³⁶ *Id.* at 31.

effects on the TS Power Plant absent mitigation. Instead, the dispute centers on whether the Amended Interconnection Agreement assigns responsibility for the costs associated with studying sub-synchronous resonance effects and mitigation and the cost of installing the blocking filters for the TS Power Plant to the interconnection customer, Newmont or the transmission service provider, Sierra Pacific.

35. Both parties agree that the terms and conditions governing the interconnection of the TS Power Plant to Sierra Pacific's transmission system are specified in the Amended Interconnection Agreement. Accordingly, in the first instance, the Commission must look to the terms and conditions of the Amended Interconnection Agreement in order to resolve whether Newmont as the interconnection customer or Sierra Pacific as the transmission provider is responsible for bearing the costs to study and install sub-synchronous resonance mitigation measures at the TS Power Plant.

36. Newmont and Sierra Pacific reference several provisions of the Amended Interconnection Agreement to support their respective positions that the other party is responsible for the costs associated with mitigating potential sub-synchronous resonance effects on the TS Power Plant. While each party focuses on different provisions requiring the generator and transmission service provider to install, operate, and maintain their facilities using Due Diligence, in accordance with Good Utility Practice and to reasonably minimize impacts on the other's facilities,³⁷ both rely on section 4.1.3 as a key provision defining cost responsibility under the present circumstances. As noted above, section 4.1.3 provides:

Except for changes necessary to ensure the protection and safety of the Parties' personnel and property, Generator shall not be required to make any modifications to the Generator Interconnection Facilities unless such change is required due to (i) a change in the Facility, (ii) a change in Applicable Laws and Regulations that requires a change in the Interconnection Facilities, or (iii) a change on the Transmission System which is required by Good Utility Practice. If a modification to the Interconnection Facilities is required by the foregoing but is not required to facilitate the connection of a third party or the provision of transmission service under the OATT, Company shall inform Generator of the need for

³⁷ For example, compare section 3.1.2 cited by Sierra Pacific ("Pursuant to this Agreement, the Parties shall, during the term of this Agreement, continue operation of their respective Interconnection Facilities and other facilities to the extent required to establish and maintain a reliable Interconnection.") with section 3.12.1 cited by Newmont ("Each Party shall use Due Diligence to minimize any adverse impact on the other Party...").

such modification and Generator shall be responsible for the costs of such modification, as provided for [sic] Article 5.

37. Sierra Pacific focuses on the introductory clause of section 4.1.3, arguing that Newmont is responsible for making modifications to the generator interconnection facilities where conditions require that such changes to the facilities are necessary “to ensure the protection and safety” of its own personnel and property. Sierra Pacific views this clause (“Except for changes necessary to ensure the protection and safety of the Parties’ personnel and property...”) as an exception serving to limit the provision’s general rule prescribing when the generator will be required to make modifications to the generator interconnection facilities. Sierra Pacific argues that its reading is consistent with Commission’s precedent, because the Commission has consistently found that generators are responsible for the protection of their facilities. Sierra Pacific also argues that its reading is consistent with the Commission’s interconnection cost policy that distinguishes between network additions, which should be paid for by transmission customers, and generator additions, which should be borne by generators. Conversely, Newmont argues that under section 4.1.3 it is required to modify its facilities without reimbursement only under the enumerated circumstances, which it argues are not present here.

38. A fundamental tenet of contract interpretation is that a contract provision should be interpreted, where possible, as consistent with the contract as a whole and that the contract must be interpreted as a whole.³⁸ In accordance with these rules, provisions of a contract should normally not be interpreted as being in conflict. Pursuant to these principles, we find Sierra Pacific’s reading of section 4.1.3 to be overly broad and inconsistent with the Amended Interconnection Agreement as a whole. Such an expansive reading would render superfluous several provisions of the agreement requiring each party to install, operate, and maintain their facilities using Due Diligence, in accordance with Good Utility Practice and to reasonably minimize impacts on the other’s facilities. If Sierra Pacific’s interpretation of the generator’s responsibilities under the Amended Interconnection Agreement were allowed to stand, Newmont could be responsible for all modifications to its generation facilities “necessary to ensure the protection and safety of the Parties’ personnel and property” regardless of who caused that change to be required and under what circumstances. Such a reading would nullify

³⁸ *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 25 (2004) (citing *Clyburn v. 1411 K St. Ltd. Partnership*, 628 A.2d 1015, 1018 (D.C. 1993); *BWX Elecs., Inc. v. Control Data Corp.*, 289 U.S. App. D.C. 114, 929 F.2d 707, 711 (D.C. Cir. 1991) (“It is a fundamental tenet of contract interpretation that a contract provision should be interpreted, where possible, as consistent with the contract as a whole.”)).

the exceptions outlined in section 4.1.3. Here, but for Sierra Pacific's decision to add series capacitors to its transmission system to provide for 70 percent compensation, Newmont would not need to install blocking filters to mitigate potential sub-synchronous resonance effects on its generator.

39. We also agree with Newmont that none of the three circumstances enumerated under section 4.1.3 under which Sierra Pacific may cause Newmont to modify its facilities without reimbursement are present. Sierra Pacific did not argue, nor does the record support a finding that installation of the blocking filters arose due to: (1) a change in the generating facility; (2) a change in any applicable laws and regulations; or (3) a change on the transmission system which is required by Good Utility Practice. While Sierra Pacific argued that it designed and installed the ON Line and the series compensation in accordance with Good Utility Practice, it did not argue that the series compensation was *required* for Good Utility Practice.

40. Furthermore, Sierra Pacific's interpretation of the section 4.1.3 is inconsistent with Commission interconnection policy. The "at or beyond rule" has been held to provide that:

[t]he Interconnection Customer [is] solely responsible for the costs of Interconnection Facilities, which are defined as all facilities and equipment between the Generating Facility and the Point of Interconnection with the Transmission System. Network Upgrades, which are defined as all facilities and equipment constructed at or beyond the Point of Interconnection for the purpose of accommodating the new Generating Facility, are (ultimately) the responsibility of the Transmission Provider.³⁹

41. Here, the costs associated with mitigating potential sub-synchronous resonance effects on the TS Power Plant are not the result of interconnecting a generator to the transmission grid but stem from modifications to the transmission system itself. In *Entergy Services, Inc.*, the Commission rejected the transmission provider's proposal to include in its *pro forma* interconnection agreement a requirement for generators to make changes to their facilities when necessary because of changes made to the transmission system.⁴⁰ The Commission found unpersuasive the transmission provider's explanation that its system is not static, and that there is nothing in the *pro forma* tariff that requires transmission providers to compensate transmission customers for the costs of any changes to their facilities caused by changes in or modifications to the transmission

³⁹ *NARUC v. FERC*, 475 F.3d at 1284.

⁴⁰ *Entergy Services, Inc.*, 91 FERC ¶ 61,149, at 61,562 (2000).

provider's transmission system.⁴¹ In rejecting the transmission provider's proposal, the Commission noted that the transmission provider had asserted that "the generator should bear the risks and the costs of maintaining compatibility with an inevitably changing transmission system" and maintained that its proposed requirement would appropriately assign that risk to the generator.⁴² Sierra Pacific's expansive reading of section 4.1.3 is inconsistent with *Entergy* because it would require Newmont to "bear the risks and costs of maintaining compatibility" with Sierra Pacific's transmission system, whenever Sierra Pacific decides to modify its transmission system.

42. Accordingly, we find that Sierra Pacific is responsible for the costs for studying and mitigating the potential sub-synchronous resonance effects on the TS Power Plant under the terms of the Amended Interconnection Agreement and Commission policy. However, we will not award attorney's fees, as Newmont requested. The Commission has stated that "[a]lthough the federal courts are empowered to award attorneys' fees where a party has litigated in bad faith, as a limited exception to the general 'American Rule' that parties to litigation pay their own attorneys' fees regardless of a lawsuit's outcome, no statute confers such authority on the Commission, and the Commission has never claimed such authority."⁴³ Newmont has not persuaded us to depart from this well-established rule.

43. Having found that Sierra Pacific is responsible to bear the costs required to study and to mitigate the sub-synchronous resonance effects on the TS Power Plant under the terms of the Amended Interconnection Agreement, we make no findings with regard to Newmont's other requested demands for relief.⁴⁴

⁴¹ *Entergy Services, Inc.*, 99 FERC ¶ 61,127, at 61,544 (2002) (*Entergy*).

⁴² *Id.*

⁴³ *State of Cal., ex rel. Lockyer v. B.C. Power Exch. Corp.*, 139 FERC ¶ 61,213, at P 24 (2012).

⁴⁴ *See supra* P 16.

The Commission orders:

The Complaint is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.