

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Nevada Power Company

Docket No. EL04-90-001

ORDER DENYING REQUEST FOR REHEARING

(Issued April 20, 2005)

1. In this order, the Commission denies the request for rehearing of an order issued on November 19, 2004,¹ which granted in part and denied in part Nevada Power Company's (Nevada Power) petition for declaratory order concerning the contractual rights and obligations under Nevada Power's Transmission Service Agreements (TSAs) with Calpine Corporation (Calpine) and Reliant Energy Services, Inc. (Reliant) for service on Nevada Power's proposed expansion of its transmission system (Centennial Project).

Background

2. The Centennial Project is a 3,000 MW, \$300 million proposed expansion of Nevada Power's transmission system.² Phase I of the Centennial Project, which provides 1,600 MW of transmission capacity, was completed and placed in service in March 2003. Nevada Power's petition for declaratory order concerned the planned Phase II of the Centennial Project – the construction of the Harry Allen to Mead 500kV component (Ham line). The completion of Phase II would provide 1,400 MW of additional capacity needed to meet the requirements of Nevada Power, Calpine and Reliant.

¹ *Nevada Power Company*, 109 FERC ¶ 61,177 (2004) (November Order).

² In addition to Calpine and Reliant, the Centennial Project transmission customers are Duke Energy Trading and Marketing, L.L.C.; Mirant Las Vegas, LLC; Pinnacle West Energy Corporation and Southern Nevada Water Authority.

3. In its petition for declaratory order, Nevada Power stated that Reliant had informed Nevada Power that it planned to abandon the project that would have used the capacity under its TSA, and would therefore, like to terminate its TSA. In addition, Nevada Power stated that Calpine had indicated that it planned to terminate its TSA if certain negotiations with Nevada Power's Resource Management to enter into a power purchase agreement (PPA) were ultimately unsuccessful. Nevada Power asked the Commission to issue an order declaring that: (1) the TSAs with Calpine and Reliant may only be terminated upon mutual agreement; (2) upon the service commencement date, Calpine and Reliant must pay for firm point-to-point transmission service in accordance with Part II of Nevada Power's OATT and their TSAs; and (3) if Calpine and Reliant are permitted to unilaterally terminate or breach their TSAs, they would be obligated to pay the lesser of the total service charges payable under their TSAs or their pro rata share of the total cost of the Centennial Project.

4. In the November Order, the Commission found that the transmission customers may not unilaterally terminate their TSAs and are obligated to pay for firm point-to-point service upon the service commencement dates. The Commission also concluded that it was premature and speculative to rule on the matter of damages arising from a possible breach of the TSAs.

5. Nevada Power filed a timely request for rehearing of the November Order seeking rehearing of the Commission's finding on the question of damages. Nevada Power contends that Calpine and Reliant clearly indicated their intent to breach and the Commission should now find that Calpine and Reliant owe damages and determine the amount of damages. Nevada Power argues that the Commission should find that Calpine and Reliant are obligated to pay the lesser of the total service charges payable under their TSAs or their pro rata share of the total cost of the Centennial Project.

6. In its request for rehearing, Nevada Power offers evidence that it states was not available for the Commission's review at the time the November Order was issued. First, Nevada Power offers a November 22, 2004 letter from Calpine to the Executive Director of Transmission Policy and Operations at Nevada Power giving immediate notice that Calpine will not be performing its obligations under its TSA. Second, Nevada Power offers a November 26, 2004 news article, which has statements made by Reliant indicating that it has decided to drop plans to build the project that would have used the capacity under the TSA. Third, Nevada Power offers a draft order from the Public Utilities Commission of Nevada (Nevada Commission) concerning Nevada Power's third amendment to the action plan for its 2003 through 2022 Electric Resource Plan.

7. Calpine and Reliant filed motions for leave to file answer and answers to Nevada Power's request for rehearing.

8. On December 29, 2004, the Chairman of the Nevada Commission filed a letter attaching a final version of the Nevada Commission's order concerning Nevada Power's third amendment.

Discussion

Procedural Matters

9. Nevada Power has provided information for the first time on rehearing that it states was not available at the time the Commission issued the November Order. Specifically, Nevada Power offers a letter from Calpine giving notice that it will not be performing its obligations under the TSA, a news article with statements from Reliant and an order from the Nevada Commission. Rule 713(c)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(3) (2004), directs any party seeking rehearing to "set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order."

10. The Commission has repeatedly explained that the request for rehearing is not the time or place to introduce additional evidence, absent a compelling showing of good cause.³ By raising new arguments for the first time on rehearing, Nevada Power has effectively precluded other parties from responding, as answers to requests for rehearing generally are prohibited under Rule 713(d)(1) of the Commission's Rules of Practice and Procedure.⁴ Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. We find that no such good cause is presented here; allowing the submission of the Calpine letter would constitute precisely the moving target that we are concerned about.

11. Calpine and Reliant each filed motions for leave to answer and answer. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(2004), prohibits answers to requests for rehearing. Accordingly, we will reject Capine's and Reliant's answers.

³ See, e.g., *Northeast Utilities Service Co. v. ISO New England, Inc.*, 109 FERC ¶ 61,204 (2004).

⁴ See *Baltimore Gas and Electric Co.*, 92 FERC ¶ 61,043 at 61,114 (2000) (citations omitted).

Analysis

12. Nevada Power argues that the Commission erred in the November Order in finding that the question of damages resulting from a possible breach of their TSAs by Calpine and Reliant was premature and speculative. Nevada Power states that the pleadings of both Calpine and Reliant provided ample evidence of their breach of their TSAs. Nevada Power also offers new evidence; after the issuance of the November Order, Calpine sent a letter to Nevada Power stating that Calpine would not be performing its obligations under the TSA.

13. The Commission will deny Nevada Power's request for rehearing. As we stated in the November Order, Reliant had not, in fact, breached its agreement with Nevada Power and we continue to find that it is premature and speculative to rule on the question of any damages that might arise from a possible breach by Reliant of its TSA.

14. We will also deny Nevada Power's request for rehearing of our decision in the November Order with respect to the TSA with Calpine. At the time of issuance of the November Order, Calpine had not, in fact, breached its agreement with Nevada Power. Therefore, we found that it was premature and speculative to rule on the question of damages that might arise from a possible breach of the TSA by Calpine. On rehearing, Nevada Power seeks to introduce evidence that Calpine has submitted a letter terminating Calpine's obligations under the TSA. Even if we were to accept the documents filed by Nevada Power, which we do not, as we discuss above, we find that the dispute between Nevada Power and Calpine is effectively a contract interpretation dispute. We use a three-part test when presented with such disputes for deciding whether to assert primary jurisdiction; that test is set forth in *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC ¶ 61,175 at 61,332, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*):

- (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision;
- (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and
- (3) whether the case is important in relation to the regulatory responsibilities of the Commission.

15. Based on the application of the *Arkla* factors, we find that the contract interpretation dispute between Nevada Power and Calpine, i.e., the amount of damages arising from a breach of the TSA by Calpine, does not warrant assertion of the Commission's primary jurisdiction. We find that we do not possess special expertise beyond that of a court in this matter. Construing the contract's provisions and inquiring

into the parties' intent is a straightforward matter of contract interpretation that is better left to a court. There is also no need for uniform interpretation of the contract terms at issue here. This is merely a contract dispute between two parties over the damages resulting from termination of an agreement. Finally, while this is a matter of significance to the parties, it is not important in relation to the regulatory responsibilities of the Commission. There are no broad issues of regulatory policy or statutory interpretation involved. The interpretation required is of the parties' contract, not the Commission's governing statutes, regulations or policy.

16. We are satisfied that analysis of each *Arkla* factor leads to the conclusion that the dispute does not require assertion of the Commission's primary jurisdiction, but involves a matter of contract interpretation that is best left to a court.

The Commission orders:

Nevada Power's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.