

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Mirant Las Vegas, LLC

v.

Docket No. EL03-229-001

Nevada Power Company

ORDER DENYING REHEARING

(Issued July 2, 2007)

1. This order addresses a request for rehearing filed by Mirant Las Vegas, LLC (Mirant) of the Commission's January 19, 2007 Order,<sup>1</sup> which granted Mirant's complaint against Nevada Power Company (Nevada Power) alleging that Nevada Power violated the Commission's transmission service pricing policy by failing to provide Mirant with transmission credits, plus interest, for certain Network Upgrades to Nevada Power's transmission system. For the reasons discussed below, we will deny Mirant's request for rehearing.

**I. Background**

2. Mirant's September 15, 2003 complaint concerned an Interconnection and Operating Agreement (IA) between Mirant and Nevada Power, governing the interconnection of Mirant's Harry Allen substation (Harry Allen Terminal) with Nevada Power's transmission system.<sup>2</sup>

3. On September 15, 2003, Mirant filed a complaint, arguing that the IA improperly classified the Harry Allen Terminal as an Interconnection Facility rather than a Network

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<sup>1</sup> *Mirant Las Vegas, LLC v. Nevada Power Company*, 118 FERC ¶ 61,034 (2007) (*Mirant*).

<sup>2</sup> The IA was accepted by the Commission in *Nevada Power Company*, 97 FERC ¶ 61,227 (2001), *order on reh'g*, 99 FERC ¶ 61,347 (2002) (*Nevada Power*).

Upgrade. Mirant alleged that Nevada Power violated the Commission's interconnection pricing policy<sup>3</sup> by failing to provide Mirant with transmission credits, plus interest, for the upgrades it financed to the Harry Allen Terminal.

4. In *Mirant*, the Commission granted Mirant's complaint and ordered Nevada Power to revise the IA to reclassify the Harry Allen Terminal as a Network Upgrade facility for which Mirant should receive credits.<sup>4</sup> The Commission set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Mirant's complaint, or November 14, 2003.<sup>5</sup>

5. The Commission directed Nevada Power to provide Mirant any transmission credits that would have accrued during the 15-month refund effective period, November 14, 2003, through and including February 14, 2005, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii).<sup>6</sup> Further, the Commission required that Nevada Power revise the IA to provide that, to the extent that Mirant had not previously taken service for which credits either did accrue or would have accrued, Nevada Power must provide Mirant credits with interest on a prospective basis from the date of the order.<sup>7</sup> Nevada Power was also required to file a compliance report, within 15 days after making the required credits.<sup>8</sup>

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<sup>3</sup> *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs., ¶ 31,160 (2004) (Order No. 2003-A), *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004) (Order No. 2003-B), *order on reh'g*, 111 FERC ¶ 61,401 (2005) (Order No. 2003-C), *see also Notice Clarifying Compliance Procedures*, 106 FERC ¶ 61,009 (2004), *aff'd*, *National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

<sup>4</sup> *Mirant*, 118 FERC ¶ 61,034 at P 16 (*citing Duke Energy Hinds, LLC v. Entergy Services, Inc.*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*)).

<sup>5</sup> *Id.* at P 18; 16 U.S.C. § 824e (2000).

<sup>6</sup> *Id.* at P 19. We note that, in *Mirant*, the Commission made a typographical error and inadvertently referenced 18 C.F.R. § 35.19(a)(2)(ii).

<sup>7</sup> *Id.* P 20.

<sup>8</sup> *Id.*

6. On February 20, 2007, Mirant filed a request for rehearing of *Mirant*.

## II. Rehearing Request

7. On rehearing, Mirant states that the Commission properly granted its complaint against Nevada Power and recognized that Mirant is entitled to receive transmission credits for its upfront financing of the Harry Allen Terminal. However, it argues that the Commission erred in construing section 206(b) of the Federal Power Act (FPA) as meaning that transmission credits were “not recoverable,” and effectively forfeited, to the extent that any transmission service was taken under Nevada Power’s Open Access Transmission Tariff (OATT) prior to the refund effective date, *i.e.*, November 13, 2003, and after the refund period.<sup>9</sup> Mirant explains that, based on the amount of transmission taken by Mirant prior to the refund effective date (which, it states will likely exceed Mirant’s upfront payments for Network Upgrades), the Commission’s decision effectively nullifies its granting of Mirant’s complaint.<sup>10</sup>

8. Mirant argues that the Commission subjected it to precisely the “and” pricing that transmission credits are intended to prevent. Mirant states that the Commission’s order cannot be squared with its recognition that payments for Network Upgrades are “essentially a loan from the Interconnection Customer to the Transmission Provider”<sup>11</sup> and that “the Interconnection Customer is entitled to full reimbursement for its upfront

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<sup>9</sup> Mirant Rehearing Request at 5 (*citing Mirant*, 118 FERC ¶ 61,034 at P 20).

<sup>10</sup> We note that, in its complaint, Mirant stated that it advanced \$3,415,739 in funds for the design and construction of the Harry Allen Terminal. *See* Complaint at 2. However, in its answer to Mirant’s complaint, Nevada Power does not explicitly state that it disagrees with this figure, but notes that the complaint seeks \$3,232,570 in credits. *See* Nevada Power Answer at 5 and Attachment A. In Nevada Power’s February 20, 2007 filing to comply with *Mirant*, it explains that the Final Interconnection Audit shows that Mirant advanced \$3,294,336 for the reclassified facilities, whereas it had originally estimated the cost at \$3,415,739. Further, it states that between April 1, 2003 (the plant began commercial operation in March 2003) and November 13, 2003, Mirant paid Nevada Power \$3,818,618.74 for transmission service from the plant. Nevada Power explains that even including a credit of \$390,804.34 for other facilities, Mirant paid \$3,427,808.90 for transmission. This sum, it states “exceeds the amount Mirant advanced for the facilities at the Harry Allen Substation.” *See* Nevada Power February 20, 2007 filing, Docket No. EL03-229-002, at 3 and Attachment E (Mirant’s bills and payments).

<sup>11</sup> Mirant Rehearing Request at 6 (*citing* Order No. 2003-C at P 9 n.9).

payment.”<sup>12</sup> Mirant argues that, under Commission policy, Mirant’s payments to Nevada Power for Network Upgrades were always loans and never monies Nevada Power was entitled to retain over and above embedded cost rates for transmission from Mirant’s project. It asserts that subordinating the right to repayment of the loan to the mechanics of how that loan is repaid is unjustifiable. Mirant believes that, because an upfront payment for Network Upgrades “is *not a rate for service*, and is not the means for a transmission provider to recover its costs,”<sup>13</sup> neither the prohibition against retroactive ratemaking nor the provisions of section 206(b) designed to limit the exception to that prohibition are implicated in this case.

9. Mirant also argues that *Mirant* results in prohibited “and” pricing, rewards inefficient siting, and penalizes efficient siting,<sup>14</sup> contrary to goals of Order No. 2003, because Mirant will be denied repayment of funds it advanced for a Network Upgrade due to its producing energy prior to the refund effective date, whereas generators that sat unused will receive full repayment. Specifically, Mirant explains that the effect of “and” pricing here is unduly discriminatory because it places Mirant at a competitive disadvantage relative to another generator, GenWest, LLC, also interconnected at the Harry Allen Terminal, which received fully recoverable transmission credits for its funding of Network Upgrades.<sup>15</sup> Mirant argues that the Commission’s decision in *Mirant* is patently arbitrary because it hinges more on the timing of the complaint, which was driven by Mirant’s efforts to reach a mutually acceptable resolution with Nevada Power, or the timing of the Commission’s order, which was outside Mirant’s control, than on application of the Commission’s interconnection pricing policy.

### **III. Commission Determination**

10. We will deny rehearing. On June 6, 2007, the Commission issued *ExxonMobil Corporation v. Entergy Services, Inc.*,<sup>16</sup> which addresses many of the issues Mirant raises here. To the extent that *ExxonMobil* disposes of these arguments, we find it to be controlling and will not discuss these issues further.

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<sup>12</sup> Order No. 2003-B at P 3, 36.

<sup>13</sup> Mirant Rehearing Request at 10 (*citing InterGen Servs., Inc. v. Entergy Services, Inc.*, 107 FERC ¶ 61,143 at P 16 (2004) (emphasis added)).

<sup>14</sup> *Id.* at 12-14.

<sup>15</sup> *See Nevada Power Company*, 100 FERC ¶ 61,077, at P 13-14 (2002).

<sup>16</sup> 119 FERC ¶ 61,261 (2007) (*ExxonMobil*).

11. As we discussed in *ExxonMobil*, the upfront interconnection payment is not a loan.<sup>17</sup> In *ExxonMobil*, we also discussed the arguments Mirant raises on section 206.<sup>18</sup> In *Mirant*, we provided Mirant with the maximum refund protection permitted under section 206.<sup>19</sup>

12. Mirant is allowed to receive transmission credits for the 15-month refund effective period that section 206 prescribes, *i.e.*, November 14, 2003 through and including February 14, 2005. It cannot, however, receive transmission credits, or interest on those credits, before November 14, 2003 or from February 14, 2005 to the date of the Commission's order, January 19, 2007.<sup>20</sup> Thus, to the extent that Mirant has taken and paid for transmission service outside the refund effective period and did not receive credits for those transmission service payments, the amount of its upfront payment for the Harry Allen Terminal that is eligible for reimbursement on a prospective basis must be reduced by the total amount of those payments.<sup>21</sup> This is the maximum protection that the Commission can afford Mirant under the FPA.<sup>22</sup>

The Commission orders:

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

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>17</sup> *Id.* at P 15-19.

<sup>18</sup> *Id.* at P 20-22.

<sup>19</sup> *Mirant*, 118 FERC ¶ 61,034 at P 18.

<sup>20</sup> *See Duke Hinds III*, 117 FERC ¶ 61,210 at P 32.

<sup>21</sup> *Mirant*, 118 FERC ¶ 61,034 at P 20.

<sup>22</sup> To this same effect, see *Tenaska Alabama II Partners, LP v. Alabama Power Company and Southern Company Services, Inc.*, 118 FERC ¶ 61,037, at PP 23-25 (2007) (four distinct periods for recovery of transmission credits).