

108 FERC ¶ 61,137  
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. TX04-2-000

ORDER DENYING APPLICATION FOR TRANSMISSION SERVICE

(Issued August 4, 2004)

1. In this order, we deny the request of Nevada Power Company (Nevada Power), Pinnacle West Capital Corporation (Pinnacle West), and the City of Needles, California (Needles) (collectively, Applicants) for an order directing transmission services pursuant to sections 211 and 212 of the Federal Power Act (FPA).<sup>1</sup>

**I. Background**

2. On April 12, 2004, Nevada Power, Pinnacle West, and Needles filed an application requesting that the Commission “require Nevada Power to provide transmission service” under section 211.<sup>2</sup> They also request “the Commission to order that Nevada Power was obligated under section 211 to provide transmission service under all previously-filed [transmission service agreements or interconnection agreements (TSAs)].”<sup>3</sup> Finally, Nevada Power requests “that the Commission issue an order under section 211 obligating Nevada Power to provide transmission to all customers who in the future request short-term transmission service.”<sup>4</sup>

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<sup>1</sup> 16 U.S.C. §§ 824j and 824k (2000).

<sup>2</sup> Application at 1.

<sup>3</sup> *Id.* at 4. See Attachment A to the Application for a list of the 95 Transmission Customers and TSAs.

<sup>4</sup> Application at 5.

3. The Applicants state that this application was filed in order to preserve tax-exempt status of “local furnishing” debt issued under sections 103, 142(a)(8), and 142(f) of the Internal Revenue Code (IRS Code) to finance certain Nevada Power facilities.<sup>5</sup>

Applicants further state that section 142(f)(2)(A) of the IRS Code would preserve the tax-exempt status of interest on Nevada Power’s local furnishing bonds if the requested transmission service were provided pursuant to a Commission order issued under section 211 of the FPA (and the portion of the cost of the facilities used to provide transmission service that is financed with tax-exempt bonds is not greater than the portion of the cost of the facility which is allocable to the local furnishing of electric energy).<sup>6</sup>

4. In Order Nos. 888 and 888-A the Commission recognized that certain public utilities have financed facilities with tax-exempt local furnishing bonds, whose tax-exempt status is contingent on the facilities being used as local furnishing facilities, and that open access transmission service might jeopardize the tax-exempt status of those bonds.<sup>7</sup> Referencing the exception for transmission services ordered by the Commission under section 211 of the FPA, the Commission required any public utility subject to Order No. 888 that has financed transmission facilities with local furnishing bonds to include in its tariff a provision that it is not required to provide transmission service if it would jeopardize the tax-exempt status of any local furnishing bonds used to finance its facilities. However, the transmission provider must agree not to contest the issuance of an order under section 211 of the FPA requiring the provision of such service and will, within 10 days of receiving a written request by the applicant, file with the Commission a written waiver of its rights to a request for service from the applicant under section

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<sup>5</sup> 26 U.S.C. §§ 103, 142(a)(8), 142(f) (2000). “Local furnishing” of electric energy is defined as furnishing “solely within the area consisting of (A) a city and 1 contiguous county, or (B) 2 contiguous counties.” 26 U.S.C. § 142(f)(1).

<sup>6</sup> 26 U.S.C. § 142(f) (2000).

<sup>7</sup> Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & 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, *et al.* v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom.* New York v. FERC, 535 U.S. 1 (2002).

213(a) of the FPA and to the issuance of a proposed order under section 212(c). Although Nevada Power's Tariff contains this language, Nevada Power states that it "has not strictly followed the process specified in section 5 of its [OATT]."<sup>8</sup>

5. Applicants state that the purpose of this section 211 application is to prevent any loss of tax-exempt status on the part of Nevada Power. They further state that Nevada Power concurs in the application and waives its rights to a prior request for service and an evidentiary hearing under section 211(a) and to the issuance of a proposed order under section 212(c).

6. Notice of Nevada Power's filing was published in the *Federal Register*, 69 Fed. Reg. 218,829 (2004), with comments, protests, and interventions due on or before April 27, 2004. Duke Energy North America, LLC and Duke Energy Trading and Marketing, L.L.C. filed a timely joint motion to intervene. Southern Nevada Water Authority (Nevada Authority) and Mirant Corporation (Mirant) filed timely motions to intervene and comments. Calpine Corporation (Calpine) filed a motion to intervene out-of-time, a motion to hold in abeyance, and comments. Nevada Power and Needles filed a joint answer to Calpine's Motion to Intervene Out-of-Time.

7. Both Nevada Authority and Mirant support this application. However, Mirant states that its support should not be viewed as acquiescence to Nevada Power's statement that, if the local furnishing bonds are revoked, these higher costs should be reflected in Nevada Power's transmission rates. Calpine states that this application should be held in abeyance pending the Commission's decision in Docket No. EL04-90, where Nevada Power has requested a declaratory order concerning the contractual rights and obligations of the parties under some of the same transmission service agreements at issue in this proceeding. Mirant further contends that some of the transmission services listed in Attachment A are unlikely to be provided, regardless of whether the Commission issues an order in this proceeding. Nevada Power responds that Calpine's motion should be denied because Docket No. EL04-90 seeks the Commission's interpretation of "two of the *ninety-six* agreements listed in Attachment A."<sup>9</sup> Nevada Power contends that, in the case where a customer identified on Attachment A elects not to use its transmission service, any order issued in this proceeding would simply be inapplicable to that service.

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<sup>8</sup> Application at 4.

<sup>9</sup> Nevada Power and Needles Answer at 2 (emphasis in original). Although they here refer to 96 agreements in Attachment A, elsewhere in the Answer they state that 95 existing agreements are listed, *id.*, and 95 is correct.

## II. Discussion

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the late motion to intervene of Calpine, given its interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice and delay.

9. Applicants have not met the requirements of the FPA; therefore we deny their transmission application. In light of our decision in this proceeding, Calpine's motion to hold this proceeding in abeyance is moot and is, therefore, denied.

10. Under section 211, any "electric utility... generating electric energy for sale for resale" may request an order from the Commission "requiring a transmitting utility to provide transmission services ... to the applicant." This application does not comply with the basic requirements of section 211. In this instance, only two of the three Applicants, Pinnacle West and Needles, could be requesting an order requiring a transmitting utility, Nevada Power, the third "Applicant," to provide transmission service. Moreover, the application does not specifically state that Pinnacle West and Needles are requesting that the Commission order Nevada Power to provide transmission service to them. However, the application does state that Applicants request section 211 service "under all previously filed TSAs,"<sup>10</sup> and Pinnacle West and Needles are parties to several of these TSAs. Thus, we will assume that that Pinnacle West and Needles are requesting that the Commission order Nevada Power to provide them with transmission service under section 211. However, we cannot grant even this request.

11. Section 211(c)(2) states that the Commission may not under section 211 order transmission service if such order would require the transmitting utility to transmit an amount of electric energy required to be provided to such applicant pursuant to a rate schedule on file during such period. Applicants' (assumed) request involves ordering Nevada Power to transmit an amount of energy which is currently provided to these Applicants pursuant to rate schedules on file with the Commission. Therefore, section 211(c)(2) prohibits the Commission from ordering Nevada Power to provide transmission services to these customers.

12. Section 211(c)(2)(B) goes on to allow an exception under which an application for an order can be filed prior to termination or modification of an existing rate schedule, so long as such order does not become effective before the termination or modification. This exception does not apply here at this time because neither Nevada Power nor the customers under its TSAs has filed to terminate or modify the TSAs. Applications for

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<sup>10</sup> Application at 4.

section 211 orders requiring the service now provided under the TSAs may be reviewed if and when filings are made to terminate the TSAs, and such filings can seek an effective date concurrent with the issuance of a final order under section 211.<sup>11</sup>

13. As to the remaining TSAs listed in Attachment A, to which Pinnacle West and Needles are not parties, we must also deny the request to order transmission service. First, section 211(c)(2) would bar the Commission from ordering service, as discussed above. In addition, as also noted above, section 211 only permits the Commission to issue an order upon application by the requested recipient of the transmission service; any order issued pursuant to section 211 is only valid for the individual applicant or applicants. These Applicants cannot obtain an order for transmission service under section 211 for other entities.

14. Finally, Applicants request that the Commission issue an order under section 211 obligating Nevada Power to provide transmission to all customers who in the future request short-term transmission service. We must also deny this request. As stated above, the Commission may only order a transmitting utility, such as Nevada Power, to provide service to an actual applicant. The Commission, therefore, will not issue a blanket order requiring transmission service. We reserve judgment on whether an applicant could justify and be granted a section 211 order requiring all short-term transmission services it may need from Nevada Power in the future, *i.e.*, a blanket order valid as to that applicant.

The Commission orders:

- (A) Calpine's untimely motion to intervene is hereby granted.
- (B) Applicant's request to order transmission service is hereby denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.

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<sup>11</sup> We leave for others the determination of whether this type of procedure would satisfy the tax code restrictions on Nevada Power's local furnishing bonds, since service had already been provided outside of section 211.