

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. EL04-90-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 19, 2004)

1. On March 16, 2004, Nevada Power Company (Nevada Power) filed a petition for a 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). As discussed below, we grant in part and deny in part, Nevada Power's petition. While we find 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, we also conclude that it is premature and speculative to rule on the matter of the question of damages arising from a possible breach of the TSAs. This order benefits customers by ensuring the development of new transmission facilities and infrastructure and alleviating congestion.

Background

2. The Centennial Project is a 3,000 MW, \$300 million proposed expansion of Nevada Power's transmission system undertaken in response to requests received for long-term firm point-to-point transmission service from Independent Power Producers developing generation facilities in Nevada.¹ Phase I of the Centennial Project, which provides 1,600 MW of transmission capacity, was completed and placed in service in March 2003.

¹ In addition to Calpine and Reliant, the Centennial Project transmission customers are Duke Energy Trading and Marketing, L.L.C.; Mirant Las Vegas, LLC (Mirant); and Pinnacle West Energy Corporation (Pinnacle). Pinnacle has since assigned a portion of its TSA to the Southern Nevada Water Authority.

3. Nevada Power's petition concerns Phase II of the Centennial Project - the construction of the Harry Allen to Mead 500 kV (Ham line) component, which is scheduled for completion in January 2007. The completion of Phase II would provide 1,400 MW of additional capacity needed to meet the requirements of Nevada Power, Calpine and Reliant.² Nevada Power states that the construction of the Ham line was delayed due to permitting difficulties, which were not resolved until November 2002.

4. Nevada Power states that Reliant has informed Nevada Power that it has decided 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 states, Calpine has indicated that it will terminate its TSA if certain negotiations with Nevada Power's Resource Management to enter into a power purchase agreement (PPA) are ultimately unsuccessful.

5. According to Nevada Power, neither the provisions of the TSAs, which are based on the form Firm Point-to-Point TSA contained in the Order No. 888 pro forma tariff,³ nor the provisions of Nevada Power's Open Access Transmission Tariff (OATT), which is incorporated by reference in the TSAs, permit unilateral termination. Nevada Power believes that the TSAs may only be terminated upon mutual agreement and that, upon completion of the Centennial Project, Calpine and Reliant must pay for firm point-to-point transmission service according to the terms of their TSAs and the OATT. Moreover, Nevada Power argues, neither Calpine's nor Reliant's TSA contains a provision for early termination. Nevada Power acknowledges that, under certain circumstances, section 20 of its OATT may excuse transmission customers from their obligations to make payments under their TSAs when there is a delay in the construction of new facilities. However, Nevada Power argues, that provision does not apply here.

² Phase II would allow Nevada Power to commence service for its 650 MW reservation, Calpine's 400 MW TSA and Reliant's 350 MW TSA.

³ 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, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *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).

6. In addition, Nevada Power contends that if Calpine and Reliant are not permitted to unilaterally terminate their TSAs, they are obligated to pay for firm point-to-point service upon completion of Phase II of the Centennial Project. Nevada Power argues that under the terms of the TSA, transmission customers are obligated to “take and pay” for the firm transmission service provided for under the TSA, subject to the provisions of Part II of its OATT. Moreover, Nevada Power states that nothing in Part II of its OATT excuses a firm point-to-point transmission customer from making payments under the TSA if that customer does not take service.

7. However, Nevada Power argues, if Calpine and Reliant are permitted to unilaterally terminate or breach their TSAs, they are obligated under their TSAs to pay either the lesser of the total service charges payable under their TSAs or their pro rata share of the full cost of the Centennial Project. While Nevada Power acknowledges that it has a duty to mitigate damages in the event of a termination or breach of contract, it argues that mitigation is complicated here.

8. Nevada Power asks the Commission to issue an order holding 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.

9. Nevada Power also states that if Calpine and Reliant are permitted to unilaterally terminate their obligations, Nevada Power may have to require the remaining Centennial Project transmission customers to pay an increased share of the Centennial Project costs. Accordingly, Nevada Power asks the Commission for advice on how to adjust the costs for the remaining Centennial Project transmission customers since the agreement to price their service at a rolled-in rate was based upon the agreement of all Centennial Project transmission customers to take and pay for service in accordance with their TSAs.

Notice of Filing and Responsive Pleadings

10. Notice of Nevada Power’s filing was published in the *Federal Register*, 69 Fed. Reg. 15,827 (2004), with comments, protests or interventions due on or before April 15, 2004. Mirant and Pinnacle West Energy Corporation filed timely motions to intervene. Calpine, Duke Energy North America, LLC and Duke Energy Trading and Marketing, LLC (jointly, Duke), Reliant and the Bureau of Consumer Protection of the Office of the Nevada Attorney General (Nevada Attorney General) filed timely motions to intervene and comment. On April 30, 2004, Nevada Power filed an answer (April 30 Answer). Calpine filed a request for leave to reply and reply (May 12 Answer).

11. On June 2, 2004, Nevada Power filed a motion to file newly acquired information to support its assertion that the Centennial Project was always intended to be a single project. On June 16, 2004, Calpine filed an answer.
12. On July 8, 2004, Nevada Power filed a motion for expedited ruling seeking action by August 1, 2004. On July 16, 2004, Calpine filed an answer to Nevada Power's motion for expedited ruling.
13. On July 15, 2004, Reliant filed a motion to lodge evidence of Nevada Power's acquisition from Duke Energy of a partially-constructed generating facility in the Moapa Valley. On August 2, 2004, Nevada Power filed a response.
14. On September 24, 2004, Calpine filed a motion to lodge evidence of Nevada Power's application before the Public Utilities Commission of Nevada (Nevada Commission) for approval of the third amendment to Nevada Power's 2003-2022 resource plan. On September 27, 2004, Reliant filed an answer in support of Calpine's motion to lodge.

Calpine's Comments

15. Calpine states that the market has changed dramatically since the time it requested and entered into its TSA with Nevada Power.⁴ In 2000, Calpine began development of its Moapa Paiute Energy Center (Moapa facility), an 800 MW, high-efficiency combined cycle power plant to meet the growing needs of Southern Nevada. However, Calpine states, the current economic climate precludes construction of new assets (such as the Moapa facility) without a long-term PPA.⁵ Calpine states that it was an active participant in Nevada Power's July 2003 Request for Proposal solicitation for a long-term contract of up to 500 MW from 2004 to 2006. It states that Nevada Power selected its bid and sent

⁴ Calpine contends that because of factors such as regulatory uncertainty (*i.e.*, the failure of retail deregulation and standard market design to proceed as originally anticipated), the effects of the Western energy crisis of 2000-2001, and the financial condition of many market participants, monies that once were available for investment in new generation have gone elsewhere. Affidavit of Steven Schleimer at ¶ 2, Director, Market Policy and Regulatory Affairs of Calpine (Schleimer Affidavit), Attachment B to Calpine's April 15, 2004 Motion to Intervene.

⁵ See Schleimer Affidavit at ¶ 5. Calpine also states that because of the location of the Moapa facility and the associated transmission costs, Nevada Power is the only economical purchaser of capacity from that facility. *Id.*

Calpine a draft contract on November 13, 2003. Calpine states that it responded with comments on the draft contract but Nevada Power has not formally responded to Calpine's comments nor indicated when, or if, a PPA will be signed. Calpine states that without this signed PPA, its Moapa facility will be delayed indefinitely and it will have no choice but to terminate its TSA. However, Calpine states, if Nevada Power does go forward with the PPA, Calpine will be able to proceed with the Moapa facility.

16. Calpine states that it does not claim to have a unilateral right to terminate its TSA, and that if circumstances force it to terminate its TSA, it is ready and willing to negotiate a resolution of this matter with Nevada Power. Calpine states that the appropriate measure of damages is a pro rata allocation of the costs incurred to date on Phase II of the Centennial Project among Calpine, Reliant and Nevada Power. It argues that Nevada Power's claim for the full capacity payments for the entire term of the TSAs is really a request for specific performance, which is unreasonable and must be rejected as a matter of law. Moreover, Calpine states that Nevada Power's proposed measure of damages fails to take into account its duty to mitigate and disputes Nevada Power's claim that the Centennial Project cannot functionally be separated. Calpine contends that any alternative measure of damages other than a pro rata allocation of the costs incurred to date on the Ham line requires an in-depth examination of the facts in an evidentiary hearing.

Reliant's Comments

17. Reliant states that it has repeatedly informed Nevada Power of its decision to not construct its generation facility, the Arrow Canyon facility, which is the subject of its TSA at issue.⁶ Reliant states that, contrary to Nevada Power's assertions, it has the right to terminate the TSA under section 20.3 of Nevada Power's OATT because each of the conditions required for termination now exists. Reliant states that it has since tried to negotiate a termination of its TSA pursuant to section 20.3, but Nevada Power rejects its reading of the OATT.

⁶ In 2001, Reliant signed Service Agreement No. 101, pursuant to which it was to take service on Phase I of the Centennial Project, starting July 31, 2003. In September 2001, Reliant and Pinnacle West swapped agreements, such that Reliant stepped into Pinnacle West's place with respect to the TSA at issue to take service starting on June 30, 2004, and Pinnacle West stepped into Reliant's place with respect to Reliant's Service Agreement No. 101.

18. Reliant contends that if the Commission should determine that Reliant may not terminate its TSA pursuant to section 20.3, it would repudiate the contract. Reliant maintains that if it repudiates the contract, Nevada Power will have the legal obligation to mitigate its damages by refraining from commencing construction on Phase II. Reliant states that the only damages it would be responsible for if it repudiates the TSA would be its pro rata share of Nevada Power's reasonable out-of-pocket costs, prudently incurred, for any design work performed for Phase II. Reliant adds that Nevada Power's claim that it has spent \$4.5 million as of January 1, 2004 on Phase II appears to be a substantially inflated figure for which Nevada Power would have to provide supporting evidence.

19. Reliant further argues that Nevada Power's claim that it cannot mitigate damages by not constructing Phase II because it is integral to providing service on the already completed Phase I does not withstand scrutiny. Reliant notes that Phase I has been functioning for more than one year without the construction of Phase II. Reliant further notes that even though Nevada Power was long uncertain whether it would be able to construct Phase II (because of permitting and governmental authorization difficulties), it continued with the construction of Phase I.

Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the motions to file newly acquired information to lodge evidence. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 213(a)(2) (2004), prohibits an answer to a protest and answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Nevada Power's April 30 and Calpine's May 12 answers filed herein and will, therefore, reject them.

B. Analysis

1. Termination of the TSAs

21. Nevada Power asks the Commission to declare that Nevada Power's TSAs with Calpine and Reliant may only be terminated upon mutual agreement. Calpine states that it does not claim to have a unilateral right to terminate its TSA. In contrast, Reliant contends that under the terms of the TSA and Nevada Power's OATT, it has a right to terminate its TSA with Nevada Power.

22. Both Reliant and Nevada Power point to section 20 of the Nevada Power OATT as a provision that under certain circumstances gives a transmission customer the right to terminate the contract. Section 20 sets forth the procedures to be followed in the event the transmission provider is unable to complete new transmission facilities for firm point-to-point transmission service.⁷ However, Reliant and Nevada Power disagree as to whether section 20 applies to the TSAs at issue. Section 20 provides in relevant part:

20.1 Delays in Construction of New Facilities: If any event occurs that will materially affect the time for completion of new facilities or the ability to complete them, the Transmission Provider shall promptly notify the Transmission Customer. In such circumstances, the Transmission Provider shall ... convene a technical meeting with the Transmission Customer to evaluate the alternatives available to the Transmission Customer ...

20.2 Alternatives to the Original Facility Additions: When the review process of Section 20.1 determines that one or more alternatives exist to the originally planned construction project, the Transmission Provider shall present such alternatives for consideration by the Transmission Customer ... In the event the Transmission Provider concludes that no reasonable alternative exists and the Transmission Customer disagrees, the Transmission Customer may seek relief under the dispute resolution procedures pursuant to Section 12 or it may refer the dispute to the Commission for resolution.

⁷ See also section 7.0 of the Calpine TSA and section 8.0 of the Reliant TSA which provide that:

If any event occurs that will materially affect the time for completion of new facilities or the ability to complete them, Transmission Provider shall promptly notify the Transmission Customer. A technical meeting between the parties shall be held to evaluate the alternatives available. If the Transmission Provider and the Transmission Customer mutually agree that no other reasonable alternatives exist and the requested service cannot be provided out of existing capability under the conditions of Part II of the Tariff, the obligation to provide the requested Firm Point-to-Point Transmission Service shall terminate and any deposit made by Transmission Customer shall be returned with interest ... However, the Transmission Customer shall be responsible for all prudently incurred costs by the Transmission Provider through the time construction was suspended.

20.3 Refund Obligation for Unfinished Facility Additions: If the Transmission Provider and the Transmission Customer mutually agree that no other reasonable alternatives exist and the requested service cannot be provided out of existing capability under the conditions of Part II of the Tariff, the obligation to provide the requested Firm Point-to-Point Transmission Service shall terminate and any deposit shall be returned with interest ... However, the Transmission Customer shall be responsible for all prudently incurred costs by the Transmission Provider through the time construction was suspended.

23. Nevada Power argues that the provisions of section 20 do not apply here for two reasons. First, section 4.0 of the TSAs provides that service is to commence on the later of the requested service commencement date and the date that the necessary facilities are put in place.⁸ Thus, according to Nevada Power, the TSAs contemplate the kind of delay that has occurred, and there has been no delay beyond the contractual commencement of service date. However, Nevada Power states, even if section 20 is found to apply, its provisions do not excuse Calpine and Reliant from their TSAs. Nevada Power states that, as required by section 20, it held a technical meeting among Calpine, Reliant and Nevada Power's Resource Management, the three parties affected by the delay in the construction of Phase II. Nevada Power states that the earliest in-service date requested by any of the three customers was April 2006 (the date requested by Nevada Power's Resource Management), which translated into a January 2007 in-service date. Nevada Power argues that section 20 only applies when a transmission customer is ready to take service before transmission facilities are in place and since it expects to meet the revised in-service date, this section cannot be used by a transmission customer who is not ready to take service to avoid its obligations.

24. Reliant disputes Nevada Power's interpretation of section 20. Reliant argues that, contrary to Nevada Power's assertions, it has the right to terminate the TSA under section 20.3 because each of the conditions required under that section for termination now exists. Reliant states that at the technical meeting, neither party could offer any alternative to the originally planned project, which was to provide service to Reliant by

⁸ Section 4.0 of the TSAs provides:

Service under this agreement shall commence on the later of (1) the requested service commencement date, or (2) the date on which construction of any Direct Assignment Facilities and/or Network Upgrades are completed, or (3) such other date as it is permitted to become effective by the Commission. Service under this agreement shall terminate on the actual termination date or such date as mutually agreed upon by the parties.

June 30, 2004. Accordingly, Reliant reasons, since the parties mutually agreed that there were no reasonable alternatives to the originally planned service, under section 20.3 of the OATT, the obligation to provide the requested service terminates. Therefore, Reliant concludes, it has the right to terminate the TSA.

Commission Determination

25. We find that neither of the TSAs at issue gives the transmission customer the right to unilaterally terminate the agreement. Section 4.0 of both agreements provides that “[s]ervice under this agreement shall terminate on the actual termination date or such date as mutually agreed upon by the parties. The termination dates are May 31, 2014 for Calpine’s TSA and December 31, 2029 for Reliant’s TSA. Here, the actual termination dates have not passed and there is no mutual agreement between the parties to terminate the TSAs prior to the actual termination date.

26. We turn to section 20 of Nevada Power’s OATT. Section 20 applies when any event occurs that will materially affect the time for completion of new facilities. Under the TSAs, service was scheduled to commence by June 30, 2004 for Reliant and January 1, 2005 for Calpine. However, Nevada Power encountered permitting difficulties, which were not resolved until November 2002, and which materially affected the time for completion of Phase II of the Centennial Project. Thus, we find that section 20 applies to the situation before us.

27. As required by section 20.1, Nevada Power held a technical meeting to evaluate the alternatives available to the transmission customers because of the delayed construction. Nevada Power states that at the meeting, the earliest date requested for service by any of the parties was January 2007 (a date requested by Nevada Power’s Resource Management). According to Nevada Power, the reasonable alternative is to provide service by January 2007 since none of the transmission customers require service before that date. On the other hand, Reliant disagrees that this is a reasonable alternative since they do not want the service at all.

28. As noted by Reliant, under the terms of section 20.3, if the transmission provider and the transmission customer mutually agree that there is no reasonable alternative, then the transmission provider’s obligation to provide service terminates. Nevada Power states that there is a reasonable alternative – to provide service by January 2007. Indeed, Calpine appears to feel that there is a reasonable alternative - it has stated that it will go forward with its TSA if Nevada Power commits to a PPA. Moreover, we note that Calpine does not claim to have a unilateral right to terminate. As to Reliant and Nevada Power, we see no mutual agreement that there is no reasonable alternative to the originally planned service. Thus, we find that there is no mutual agreement between Nevada Power and Calpine or between Nevada Power and Reliant as to there being no

reasonable alternative. Accordingly, we conclude that Nevada Power's obligation to provide service does not terminate under either TSA and, therefore, the transmission customers do not have a right to unilaterally terminate the TSAs.

2. Transmission Customers' Payment Obligations Upon Commencement of Service

29. Nevada Power asks the Commission to find that, if Calpine and Reliant are not permitted to unilaterally terminate their TSAs, then upon the service commencement date, they must pay for firm point-to-point transmission service in accordance with Part II of Nevada Power's OATT and their TSAs. Nevada Power contends that under the terms of the TSAs, the transmission customers agreed to take and pay for service and therefore, upon the completion of Phase II of the Centennial Project, must pay for firm point-to-point transmission service.⁹

30. Furthermore, Nevada Power adds, the provisions in Part II of Nevada Power's OATT demonstrate a transmission customer must pay for the construction of the Centennial Project whether or not that customer takes service. Thus, Nevada Power argues, the transmission customers are responsible for their share of the costs of the Centennial Project once the construction is complete.

Commission Determination

31. We find that, upon the service commencement dates, Calpine and Reliant must pay for firm point-to-point transmission service pursuant to the terms of the TSAs and Nevada Power's OATT. Section 5.0 in Calpine's TSA and section 6.0 in Reliant's TSA state that "the Transmission Customer agrees to take and pay for Firm Point-to-Point Transmission Service in accordance with the provisions of Part II of the Tariff and this Service Agreement." There is no provision of the TSAs or of Nevada Power's OATT that contradicts this language and neither Calpine nor Reliant point us to any.¹⁰ Thus, the

⁹ See section 5.0 in Calpine's TSA, Exhibit 7 to Nevada Power's Petition for Declaratory Order and section 6.0 in Reliant's TSA, Exhibit 8 to Nevada Power's Petition for Declaratory Order.

¹⁰ We note that neither Calpine nor Reliant explicitly respond to Nevada Power's argument that if the transmission customers are not permitted to unilaterally terminate their TSAs, they are obligated to pay for firm point-to-point transmission service. Calpine does not contend that it has a unilateral right to terminate. Rather, Calpine states that if Nevada Power signs the pending PPA, it will take service under the agreement. On the other hand, Reliant argues that it has a unilateral right to terminate the agreement.

(continued)

transmission customers have agreed to take and pay for service from Nevada Power pursuant to the terms of the TSAs.¹¹ Accordingly, we conclude that Calpine and Reliant must pay for firm point-to-point transmission service upon the service commencement dates.

32. In addition, we find that pursuant to the provisions of the Nevada Power OATT, Calpine and Reliant must pay for their share of the construction of the Centennial Project regardless of whether or not they take service under the TSAs. Section 16 of the OATT outlines the responsibilities of the transmission customers and lists the conditions that transmission customers must agree to in order to obtain transmission service from a transmission provider. Section 16.1(d) of the Nevada Power OATT states that “[t]he Transmission Customer agrees to pay for any facilities constructed and chargeable to such Transmission Customer under Part II of the Tariff, whether or not the Transmission Customer takes service for the full term of its reservation.” Thus, by the terms of section 16.1(d), in order to obtain transmission service, a transmission customer agrees to pay for any facilities constructed and chargeable to that customer, whether or not that customer takes service for the full term of its reservation. Again, there is no provision of the TSAs or of Nevada Power’s OATT that contradicts this language and neither Calpine nor Reliant point us to any. Therefore, we conclude that Calpine and Reliant must pay for service whether or not they take service for the full term of their reservation.

3. Damages

33. Nevada Power also asks the Commission to find that in the event the transmission customers are permitted to unilaterally terminate or breach their TSAs, they would be obligated to pay either the lesser of the total service charges payable under their TSAs or their pro rata share of the total cost of the Centennial Project.

34. Nevada Power acknowledges that it has a duty to mitigate damages in the event of a breach of contract. However, it argues that mitigation is complicated here for several reasons. First, Nevada Power argues, the Centennial Project was designed to meet the needs of a number of different transmission customers and those transmission customers

However, as discussed below, Reliant states that if the Commission finds that it may not terminate the agreement, it will repudiate the contract and argues that Nevada Power would be required to mitigate its damages by not commencing construction on Phase II.

¹¹ See section 5.0 in Calpine’s TSA, Exhibit 7 to Nevada Power’s Petition for Declaratory Order and section 6.0 in Reliant’s TSA, Exhibit 8 to Nevada Power’s Petition for Declaratory Order.

stipulated that Nevada Power would file a resource plan with the Nevada Commission to reflect the terms of the settlement. Moreover, the Nevada Commission has approved this resource plan. In addition, Nevada Power argues, transmission projects are “lumpy” and cannot be scaled down to a smaller size at a proportionately smaller price. Furthermore, Nevada Power states, the Centennial Project was initially planned and designed as a comprehensive transmission project and it cannot functionally be separated into two independent phases. According to Nevada Power, the construction of Phase II of the project is necessary to ensure the reliability of Phase I. Without the construction of the Ham line, Nevada Power maintains, “overloads and sub synchronous resonance problems appear for single contingencies requiring remedial action schemes such as generator tripping or curtailment that are not required with the construction of the comprehensive Centennial Project.”¹²

35. Calpine counters that the appropriate measure of damages is a pro rata allocation of the costs incurred to date on Phase II of the Centennial Project among Calpine, Reliant and Nevada Power. It argues that Nevada Power’s claim for the full capacity payments for the entire term of the TSAs is really a request for specific performance, which is unreasonable and must be rejected as a matter of law. Moreover, Calpine argues, Nevada Power’s proposed measure of damages fails to take into account its duty to mitigate.

36. Calpine disputes Nevada Power’s claim that the Centennial Project cannot functionally be separated and offers evidence to show that there are less costly alternatives to the construction of the Ham line. Calpine’s proposed alternatives include: (1) using the Crystal Phase Shifting Transformers to force the majority of the incremental Harry Allen generation to the McCollough area, or (2) completing the tie between Pecos to Winterwood 230-kV line. Calpine states that these alternatives, including losses, would cost \$10 to \$16 million and \$25 to \$28 million, respectively. Calpine further notes that Phase I of the Centennial Project is already operating independently of Phase II.

37. Calpine contends that any alternative measure of damages other than a pro rata allocation of the costs incurred to date on the Ham line should be set for hearing. Calpine suggests that such a hearing could be held in abeyance, however, subject to the outcome of settlement judge procedures.

38. Reliant similarly disputes Nevada Power’s claim that it cannot mitigate damages by not constructing Phase II because it is integral to providing service on the already completed Phase I. Reliant notes that Phase I has been functioning for more than one

¹² Nevada Power Petition for Declaratory Order at 16 n.11.

year without the construction of Phase II. Reliant further notes that even though Nevada Power was long uncertain whether it would be able to construct Phase II (because of permitting and governmental authorization difficulties), it continued with the construction of Phase I.

39. Reliant states that if the Commission should determine that Reliant may not terminate its TSA pursuant to section 20.3, it would repudiate the contract. According to Reliant, if Reliant repudiates the contract, Nevada Power has the legal obligation to mitigate its damages by refraining from commencing construction on Phase II. Reliant states that the only damages it would be responsible for if it repudiates the TSA would be its pro rata share of Nevada Power's reasonable out-of-pocket costs, prudently incurred, for any design work performed for Phase II. Reliant adds that Nevada Power's claim that it has expended \$4.5 million as of January 1, 2004 on Phase II appears to be a substantially inflated figure for which Nevada Power would have to provide supporting evidence.

Commission Determination

40. We will deny Nevada Power's request for a declaration that in the event the transmission customers unilaterally terminate or breach their TSAs, they would be obligated to pay the lesser of the total service charges payable under the TSAs or their pro rata share of the total cost of the Centennial Project. As discussed above, we have found that the transmission customers may not unilaterally terminate their TSAs. Moreover, Calpine and Reliant have not breached their agreements with Nevada Power and, therefore, we find that it is premature and speculative to make a finding on the question of damages arising from breach of the TSAs at this time.

4. Adjusted Costs for Other Transmission Customers

41. Nevada Power states that if a transmission customer is permitted to unilaterally terminate its TSA, then Nevada Power needs guidance from the Commission on how to adjust the costs for other Centennial Project customers since the agreement to price their service at a rolled-in rate was based upon the agreement for all Centennial Project transmission customers to take and pay for service in accordance with their TSAs.

42. Duke and the Nevada Attorney General express concern over Nevada Power's statement that it would have to adjust the costs for other Centennial Project transmission customers if the TSAs at issue are terminated or breached. Duke states that while it does not yet understand the full scope of the statement, it believes that the adjustment would involve an incremental allocation of additional costs to the other Centennial Project transmission customers, such as itself and asks the Commission to prohibit any incremental allocation of such costs. The Nevada Attorney General states that Nevada

Power's statement appears to limit any shifting of costs to its wholesale customer and notes that Nevada Power does not identify any basis for shifting costs to its retail customers.

Commission Determination

43. As discussed above, we find that the transmission customers may not unilaterally terminate their TSAs. Accordingly, we find that this issue is moot.

The Commission orders:

The Commission hereby grants in part and denies in part Nevada Power's petition for declaratory order, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.