

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tenaska Alabama II Partners, L.P.

v.

Docket Nos. EL05-25-001
EL05-25-002
EL05-25-003

Alabama Power Company and Southern Company
Services, Inc.

Tenaska Alabama Partners, L.P.

v.

Docket Nos. EL05-26-001
EL05-26-002
EL05-26-003

Alabama Power Company and Southern Company
Services, Inc.

Tenaska Georgia Partners, L.P.

v.

Docket Nos. EL05-27-001
EL05-27-002
EL05-27-003

Georgia Power Company and Southern Company
Services, Inc.

ORDER ON REHEARING AND COMPLIANCE FILINGS

(Issued June 25, 2007)

1. This order addresses requests for rehearing filed by Tenaska Alabama II Partners, L.P., Tenaska Alabama Partners, L.P., and Tenaska Georgia Partners, L.P. (collectively, Tenaska) and Alabama Power Company, Georgia Power Company (Georgia Power) and Southern Company Services, Inc. (collectively, Southern) of the Commission's January 19 Order,¹ which granted Tenaska's complaints requesting that the Commission

¹ *Tenaska Alabama II Partners, L.P. v. Alabama Power Co. and Southern Co. Servs., Inc.*, 118 FERC ¶ 61,037 (2007) (January 19 Order).

direct Southern to reclassify certain facilities as network facilities and to provide transmission credits with interest for all network upgrades. For the reasons discussed below, we will grant in part and deny in part the requests for rehearing and grant Tenaska's request for clarification.

2. Further, on February 20, 2007, Southern filed revised interconnection agreements (IAs) in compliance with the January 19 Order. On March 5, 2007, Southern filed its Compliance Report pursuant to the requirements of the January 19 Order. In this order, we will accept in part Southern's compliance filings.

I. January 19 Order

3. Tenaska was a party to three individual IAs with Southern, accepted pursuant to delegated authority.² Each IA identified certain facilities as interconnection facilities and directly assigned the cost of the facilities to Tenaska without requiring Southern to provide transmission credits. Each IA provided for unilateral challenges by the parties under the just and reasonable standard of review.³

4. On November 22, 2004, Tenaska filed three complaints requesting that the Commission reclassify certain facilities because they are located beyond the point of interconnection with Southern and should therefore be classified as Network Upgrades. Further, Tenaska claimed that, under the Commission's interconnection policy,⁴ Southern should provide transmission credits, with interest, to Tenaska for the cost of the directly-assigned facilities. Finally, Tenaska requested that, once the facilities are reclassified as Network Facilities, the Commission require the IAs to be modified so that Southern can

² *Southern Co. Servs., Inc.*, Docket No. ER01-1805-000 (May 14, 2001) (unpublished letter order); *Alabama Power Co.*, Docket No. ER00-1608-000 (March 15, 2000) (unpublished letter order); and *Georgia Power Co.*, Docket No. ER00-682-000 (Jan. 6, 2000) (unpublished letter order).

³ See section 12.3 of each IA.

⁴ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 68 Fed. Reg. 49,845 (Aug. 19, 2003), FERC Stats. & Regs., ¶ 31,146 at P 746 (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), *appeal docketed sub nom. National Association of Regulatory Commissioners v. FERC*, Nos. 04-1148, *et al.* (D.C. Cir. argued Oct. 13, 2006).

no longer collect a monthly operations and management (O&M) charge for these facilities.

5. In the January 19 Order, the Commission granted Tenaska's complaints and ordered Southern to revise the IAs to reclassify the facilities at issue as Network Upgrade facilities and to provide for the payment of credits for the Network Upgrades based on our determinations in *Duke Hinds III*.⁵

6. The Commission set the refund effective date at the earliest date possible, *i.e.*, 60 days after the filing of Tenaska's complaints, which is January 21, 2005.⁶ The Commission explained that section 206 of the FPA allows the Commission to order refunds of any amounts paid for the period after the refund effective date through a date 15 months after such refund effective date.⁷ Therefore, the Commission directed Southern to provide Tenaska any credits that would have been accrued from the refund effective date, January 21, 2005, through and including April 21, 2006, with interest calculated in accordance with 18 C.F.R. § 35.19a(a)(2)(iii).⁸ Further, the Commission directed Southern to provide Tenaska credits on a prospective basis from the January 19 Order and to revise the IAs accordingly.

7. The Commission also directed Southern to revise the IAs to eliminate the assessment of O&M charges against Tenaska because it has previously found that, upon a determination that facilities are Network Upgrades, direct assignment of O&M charges is improper.⁹

⁵ *Duke Energy Hinds*, 117 FERC ¶ 61,210 (2006) (*Duke Hinds III*).

⁶ January 19 Order at P 23.

⁷ *Id.* at P 24; 16 U.S.C. § 824e (b).

⁸ In short, the Commission provided that for the period from commercial operation until January 21, 2005, any credits that would have been earned are not recoverable, and interest on those credits will not be paid. From January 21, 2005 through and including April 21, 2006, the credits earned are recoverable. From the end of the 15-month refund effective period until January 19, 2007, any credits that should have been earned are not recoverable, and interest on those credits would also not be paid.

⁹ January 19 Order at P 27, *citing Southern Co. Servs., Inc.*, 108 FERC ¶ 61,229 (2004) (denying rehearing of order prohibiting assessment of O&M charges for Network Upgrades which provide a system-wide benefit).

II. Requests For Rehearing

A. Southern's Request for Rehearing

8. Southern requests rehearing of the Commission's determination to direct it to reclassify certain facilities as network facilities and to provide transmission credits with interest for all network upgrades. First, it argues that this determination violates the filed rate doctrine and the prohibition against retroactive ratemaking.

9. Southern states that the prohibition against retroactive ratemaking prohibits the Commission from retroactively reducing a rate paid for transactions and conduct that has already occurred, bars utility refunds for past excessive rates and prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.¹⁰ Southern points out that, under section 206 of the FPA, the Commission may only substitute reasonable rates "to be thereafter observed and in force."¹¹ Further, Southern asserts that, when the Commission accepts an interconnection rate, it becomes the filed rate and is binding on the parties.¹² Southern contends that the Commission cannot award Tenaska cash refunds for credits for transmission delivery service as reparations for its alleged overpayment of the costs of interconnection service; Southern argues that the courts have made clear that the interest parties have in being able to rely on the approved rates outweighs the value of being able to correct past rates.¹³

10. Southern also asserts that the direct assignment of the facilities does not constitute "and" pricing because the interconnection facilities under those agreements did not qualify as network upgrades when the IAs were executed. Therefore, Southern claims that the facilities were appropriately designated as direct assignment facilities under the Commission policy existing at the time. Southern asserts that, until the

¹⁰ Southern Rehearing at 10-11, *citing City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (*City of Piqua*); *Town of Concord, Norwood, and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992); and *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140 (D.C. Cir. 1987) (*Columbia*).

¹¹ Southern Rehearing at 10, *citing City of Piqua*, 610 F.2d at 954.

¹² *See Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-53 (1951); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (once rates are accepted the parties and the Commission must adhere to those rates); *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

¹³ Southern Rehearing at 11, *citing Columbia*, 831 F.2d at 1140.

adoption of the “at or beyond” rule, directly assigning costs did not violate the “and” pricing rule.¹⁴

11. According to Southern, the policy set forth in the January 19 Order imposes an unreasonable burden on Southern and its retail customers by retroactively shifting costs. Southern asserts that this will be further compounded if other parties seek the same revisions. Further, Southern maintains that, if Tenaska is not required to pay the charges set forth in the IAs, this would violate the fundamental principle that those who cause costs should bear the costs.

12. Southern also disputes the requirement in the January 19 Order that Georgia Power reclassify facilities located prior to the interconnection point, including three 500 kV disconnect devices for the generator’s high side step-up transformers, as Network Upgrades (thus eligible for transmission credits). Southern maintains that, even though the parties originally established the point of interconnection to be the point where ownership of the facilities changed, the true point of interconnection is the point where the facilities meet the portion of the transmission system that conducts network flows. Accordingly, Southern states that these facilities should not be designated as Network Upgrades.

13. Finally, Southern requests rehearing of the Commission’s determination that Southern must delete section 5.4 of the IAs, which allows for the collection of O&M charges. According to Southern, section 5.4 only allows it to collect O&M charges for interconnection facilities, not network facilities. Therefore, section 5.4 would not apply to any facilities required to be reclassified, but only those facilities that continue to be interconnection facilities. Southern asserts that there are still facilities that would not be Network Upgrades under the “at or beyond” rule. Therefore, Southern asks that it be allowed to reinsert section 5.4 into the IAs.¹⁵

B. Tenaska’s request for rehearing

14. On rehearing, Tenaska states that the Commission properly granted its complaints against Southern and recognized that Tenaska is entitled to receive transmission credits for its upfront funding of Network Upgrades. However, it argues that the Commission erred in construing section 206(b) of the FPA as meaning that transmission credits were “not recoverable,” and effectively forfeited, to the extent that any transmission service was taken under Southern’s Open Access Transmission Tariff (OATT) during the non-

¹⁴ Southern Rehearing at 15-16, *citing Pub. Serv. Elec. & Gas Co.*, 62 FERC ¶ 61,014 at 61,063-64 (1993).

¹⁵ *See* sections 5 and 6 of the IAs.

refund periods, *i.e.*, commercial operation through January 21, 2005 and April 21, 2006 through January 19, 2007.

15. Tenaska argues that the Commission subjected it to precisely the “and” pricing that transmission credits are intended to prevent. Tenaska states that the Commission’s order cannot be squared with the Commission’s recognition in Order No. 2003 that payments for Network Upgrades are “essentially a loan from the Interconnection Customer to the Transmission Provider”¹⁶ and that “the Interconnection Customer is entitled to full reimbursement for its upfront payment.”¹⁷ Tenaska argues that, under Commission policy, Tenaska’s payments to Southern for Network Upgrades were always loans and never monies Southern were entitled to retain over and above embedded cost rates for transmission from Tenaska’s project. It asserts that subordinating the right to repayment of the loan to the mechanics of how that loan is repaid is unjustifiable. Tenaska 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,”¹⁸ 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.

16. Tenaska also argues that the Commission’s January 19 Order results in prohibited “and” pricing, rewards inefficient siting, and penalizes efficient siting.¹⁹ Moreover, Tenaska argues, the January 19 Order is patently arbitrary because it hinges more on the timing of the complaint, which was driven by Tenaska’s efforts to reach a mutually acceptable resolution with Southern, and the timing of the Commission’s order, which was obviously outside Tenaska’s control, than on application of the Commission’s interconnection pricing policy.

17. Finally, Tenaska asserts that the Commission properly ordered Southern to eliminate section 5.4 of the IAs, pursuant to which Southern imposed O&M charges for Network Upgrades. Tenaska claims that it appears that the Commission intended that

¹⁶ Tenaska Request for Rehearing at 8 (*citing* Order No. 2003-C at P 9 n.9).

¹⁷ *Id.* at 7 (*citing* Order No. 2003-B at P 3, 36).

¹⁸ Tenaska Request for Rehearing at 11 (*citing* *InterGen Servs., Inc. v. Entergy Servs. Inc.*, 107 FERC ¶ 61,143 at P 16 (2004) (emphasis added)).

¹⁹ It argues that the Commission’s decision here has the effect of rewarding inefficient siting decisions, contrary to goals of Order No. 2003, because Tenaska will be denied repayment of funds it advanced for a Network Upgrade due to its producing energy during the non-refund periods, whereas generators that sat unused will receive full repayment. *Id.* at 14-15.

this modification take effect on the same date as other modifications to the IAs, *i.e.*, on the refund effective date. However, Tenaska claims that the Commission did not expressly require that Southern refund O&M charges collected for the 15-month period commencing on the refund effective date and on and from the date of the Commission's order, *i.e.*, January 19, 2007 (the Refund Periods). Therefore, Tenaska requests clarification that Southern is required to refund O&M charges for Network Upgrades collected during the Refund Periods, with interest, to Tenaska, consistent with the reclassification of the facilities in question as Network Upgrades. In the alternative Tenaska requests rehearing.

C. Commission Determination

18. We will grant in part and deny in part rehearing. We note that many of the issues raised by Southern were raised and denied in *Duke Hinds III*.²⁰ Therefore, where applicable, the Commission incorporates and applies its findings in *Duke Hinds III* in this order.

1. Retroactive Ratemaking

19. Southern argues that the January 19 Order violates the filed rate doctrine and the rule against retroactive ratemaking by requiring Southern to make refunds.²¹ We disagree. The January 29 Order does nothing more than implement the refund provisions of section 206 of the FPA, with its strict time limitation; our rule forbidding retroactive ratemaking is therefore never triggered. The rule against retroactive ratemaking does not mean that the utility is entitled to continue charging a transmission rate that is contrary to Commission policy after the Commission order, or that it is entitled to retain amounts it overcollected during the refund effective period. Thus, we did not require that Tenaska receive refunds for excessive transmission rates it paid before the refund effective date or from the end of the refund effective period (15 months after the refund effective date) to the date of our order. Our order granted prospective rate relief only, thus ensuring that, for the refund effective period and after the date of our order, rates for transmission service under Southern's OATT are just and reasonable.²²

²⁰ 117 FERC ¶ 61,210 (2006).

²¹ See *Duke Hinds III*, 117 FERC ¶ 61,210 at P 32-36.

²² To ensure such rate relief, the crediting period should begin on the refund effective date (*i.e.*, January 21, 2005) and run through the refund effective period (ending April 21, 2006). Further, Southern should provide credits after the date of the January 19 Order. To the extent that Southern has provided transmission service with respect to the facilities at issue *prior* to this refund effective date, and Tenaska has paid the on-file

20. Accordingly, we will deny rehearing on this issue.

2. “And” Pricing

21. In the January 19 Order, the Commission applied our long-standing transmission service pricing policy in this case.²³ The transmission pricing policy provides for transmission rates to reflect the higher of: (1) an average embedded cost (rolled-in) rate *or* (2) an incremental cost rate for the network upgrades needed for the generator interconnection.²⁴ This is known as “or” pricing.²⁵ This policy bars a transmission provider from charging a transmission rate based on the full rolled-in cost of its transmission service if the customer has already paid for expansion of the grid by funding grid upgrades (*i.e.*, “and” pricing); thus, the customer is not charged twice for the same service.

22. Where a generator pays for upgrades located “at or beyond” the point of interconnection to the transmission grid, it is entitled to credits, with interest, because

transmission rates for service *prior* to the refund effective date (that is, the generator did not receive any credits for such service), no adjustments are to be made to those pre-refund effective date rates and payments. In other words, credits are only to be applied for transmission service taken on or after the refund effective date; to do otherwise would create a refund effective date earlier than that provided for by the FPA, as well as violate the filed rate doctrine and rule against retroactive ratemaking.

²³ See, e.g., *Consumers Energy Co.*, 95 FERC ¶ 61,233 (*Consumers I*), order on *reh’g*, 96 FERC ¶ 61,132 (2001) (*Consumers II*).

²⁴ An incremental rate allows the transmission provider to recover the entire cost of the network upgrades from that one customer, thereby protecting all other transmission customers from having to bear any of the costs of the network upgrades.

²⁵ See *Inquiry Concerning the Commission’s Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act*; Policy Statement, FERC Stats. & Regs., Regulations Preambles January 1991-June 1996 ¶ 31,005 (1994).

these are network upgrades.²⁶ As the Commission stated in *Consumers I*,²⁷ the policy regarding credits for network upgrades enforces the prohibition against “and” pricing.²⁸ Moreover, the Commission, in *Consumers II*, affirmed its earlier finding that credits for network upgrades were appropriate because the integrated transmission grid is a cohesive network whose expansion benefits all users of the grid, and rejected the direct assignment of integrated grid (*i.e.*, network) facilities.²⁹ These issues were also raised and rejected in *Duke Hinds III*.³⁰

23. Accordingly, we will deny rehearing on this issue.

3. Cost Causation

24. We also disagree with Southern’s argument citing alleged harm to retail customers and cost causation principles. The Commission, in *Consumers II*, affirmed its earlier finding that credits for network upgrades were appropriate because the integrated transmission grid is a cohesive network whose expansion benefits all users of the grid, and rejected the direct assignment of integrated grid (*i.e.*, network) facilities.³¹ This policy was affirmed in court. In *Entergy*,³² the court rejected many of the arguments raised here. For instance, the court rejected the argument that our pricing policy imposes

²⁶ *Consumers II*, 96 FERC at 61,560. See also *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 (2002), *reh’g denied*, 99 FERC 61,095 (2002); *Nevada Power Co.*, 111 FERC ¶ 61,161, *order on reh’g*, 113 FERC ¶ 61,007 (2005), *appeal docketed sub nom. Entergy Servs., Inc. v. FERC*, Nos. 05-1238, *et al.* (D.C. Cir. 2006).

²⁷ *Consumers I*, 95 FERC ¶ 61,233. The erroneous language in this case appeared to state that credits were not required for upgrades needed to remedy short-circuit and stability problems on the grid (*i.e.*, network facility upgrades).

²⁸ See *Consumers I*, 95 FERC at 61,804.

²⁹ See *Consumers II* at 61,561, *citing Appalachian Power Co.*, 63 FERC ¶ 61,151, at 61,978, *supplemental order*, 64 FERC ¶ 61,327 (1993). This treatment was adopted in Order No. 2003, *et al.* See Order No. 2003-A, 69 Fed. Reg. 15,932 at P 580.

³⁰ See *Duke Hinds III*, 117 FERC ¶ 61,210 at P 22-24.

³¹ See *Consumers II* at 61,561, *citing Appalachian Power Co.*, 63 FERC ¶ 61,151, at 61,978, *supplemental order*, 64 FERC ¶ 61,327 (1993). This treatment was adopted in Order No. 2003, *et al.* See Order No. 2003-A, 69 Fed. Reg. 15,932 at P 580.

³² 319 F.3d 536 (D.C. Cir. 2003).

on all users of the grid costs that benefit only the new generator; the court found reasonable the Commission's view that all customers benefit from a truly competitive market, which requires comparable access to transmission.³³ Southern is attempting to relitigate the findings in *Entergy*. Therefore we deny Southern's request for rehearing. These issues were also raised and rejected in *Duke Hinds III*.³⁴ Accordingly, we will deny rehearing on this issue.

4. Upfront Payments

25. Tenaska argues that upfront payment for Network Upgrades “is not a rate for service, and is not the means for a transmission provider to recover its costs,”³⁵ but rather is, in essence, a loan from the interconnection customer to the transmission provider for the construction of network upgrades.³⁶ Tenaska is incorrect in calling the upfront interconnection payment a loan.

26. In Order No. 2003, the Commission analogized the upfront interconnection payment to a loan to make it easier to explain the transaction involved. But the loan analogy only goes so far. Loans are commercial transactions, enforceable in a court of law.³⁷ Even though the interconnecting customer usually receives complete reimbursement of the upfront payment for the construction of network upgrades,³⁸ the

³³ 319 F.3d at 544.

³⁴ *See Duke Hinds III*, 117 FERC ¶ 61,210 at P 21-26.

³⁵ Tenaska request for Rehearing at 11 (emphasis omitted).

³⁶ *Id.* at 7-9.

³⁷ If the upfront payment were a commercial loan, the Commission would have no authority over the loan and could neither direct an interconnecting customer to make such a loan nor order a utility to repay it. The Commission can only order the repayment of unreasonable rates and charges.

³⁸ *See* Order No. 2003-A at P 616-18 (interconnection customer is entitled to reimbursement for all of the costs that it incurs in financing network upgrades, plus interest); Order No. 2003-B at P 35-36 (full reimbursement shall not extend beyond 20 years from the Commercial Operation Date). *See also* Order No. 2003-B at P 36; *Intergen Servs., Inc.*, 107 FERC ¶ 61,143 at P 16, 19 (2004) (the upfront payment for network upgrades is a source of funds for network upgrades and an incentive for interconnecting customers to make efficient siting decisions; it is not a rate for service or the means whereby a transmission provider recovers its costs).

payment is not a loan. Indeed, no repayment is required if the generator does not go into commercial operation.³⁹

27. Rather, the upfront payment is a Commission jurisdictional term or condition applicable to interconnection service. Although it is not a rate for service in the traditional sense that the customer receives a service for its payment, it is a term or condition for interconnection service that charges the customer and provides an opportunity for refund. As a charge with an opportunity for refund, the payment serves as a mechanism to encourage the customer to make efficient siting decisions.

28. Were we to take the loan analogy to its logical conclusion, we could direct Southern to return to Tenaska the monies that it collected between the end of the refund effective date and the date of the Commission's order, as Tenaska requests. But this is precisely what the Commission cannot do, because that would violate the filed rate doctrine.⁴⁰

29. We also note that the policy considerations underlying Order No. 2003 were to give generators an incentive to efficiently site on the transmission network⁴¹ and to prevent "and" pricing, so that the transmission customer does not have to pay *both* incremental costs and an average embedded cost rate for the use of the transmission system.⁴² The upfront payment, then, is a mechanism for transferring the risk of siting and construction from the transmission provider to the generator,⁴³ while at the same time preventing the transmission provider from engaging in "and" pricing. These policy considerations have nothing to do with loans, even if the Commission *could* order generators to make loans to transmission providers, which it has not the statutory authority to do.

30. Tenaska is also incorrect in its interpretation of section 206 of the FPA. Tenaska did not protest the IAs when they were first filed with the Commission under section 205

³⁹ Article 11.4.1 of the Large Generator Interconnection Agreement.

⁴⁰ Under the filed rate doctrine, the rate on file with the Commission is the only lawful rate. *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126-127 (1990); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *Kansas City Southern R. Co. v. Carl*, 227 U.S. 639, 653 (1913).

⁴¹ Order No. 2003-A, at P 613; Order No. 2003-B at P 32, 33.

⁴² Order No. 2003, at P 694; Order No. 2003-A, at P 8; Order No. 2003-B, at P 54; *Duke Hinds III*, 117 FERC ¶ 61,210 at P 22, 23.

⁴³ See *Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 at 1285-86 (2007).

of the FPA.⁴⁴ The May 14, 2000, March 15, 2000, and January 6, 2000 orders accepted the IAs for filing and allowed them to become effective; the IAs, as filed and accepted, did not provide for transmission credits. Immediately upon acceptance, the IAs became the filed rate; the Commission could only revise that rate under section 206.⁴⁵ Indeed, if section 206 of the FPA did not apply, there would be no statutory basis for directing the payment of transmission credits in this proceeding.⁴⁶

31. As the Commission noted in the January 19 Order, section 206(b) of the FPA, as it was in effect when Tenaska filed its complaints, places certain restrictions on the refund protection that the Commission can afford complainants. Under section 206(b), as it was in effect when Tenaska filed its complaints, the Commission could only set a refund effective date that was no earlier than 60 days after the complainant filed the complaint, but no later than five months after 60 days after the filing of the complaint. Here, as noted above, to afford Tenaska maximum protection, the Commission established the refund effective date as early as possible, *i.e.*, January 21, 2005. The Commission could not direct Southern to pay transmission credits *before* the commencement of the refund effective date because the rule against retroactive ratemaking and section 206(b) of the FPA did not permit it to do so.⁴⁷

32. Tenaska is thus allowed to receive transmission credits for the 15-month refund effective period that section 206 prescribes, *i.e.*, January 21, 2005 through and including April 21, 2006. It cannot, however, receive transmission credits, or interest on those credits, from April 22, 2006 to the date of the Commission's order, January 19, 2007, because the Commission would be ordering Southern to give back to a customer money that it collected after the expiration of the refund effective period and before the date of the Commission's order in violation of the filed rate doctrine.⁴⁸ However, to the extent that Tenaska has not previously taken service for which transmission credits either did

⁴⁴ 16 U.S.C. § 824d (2000).

⁴⁵ *Entergy Gulf States*, 119 FERC ¶ 61,051 at P 19 (2007).

⁴⁶ Tenaska filed each of its complaints as a "Section 206 Compliant." *See* Tenaska complaints filed November 22, 2004 in Docket Nos. EL05-25-000, EL05-26-000 and EL05-27-000.

⁴⁷ *See Duke Hinds III*, 117 FERC ¶ 61,210 at P 32.

⁴⁸ *Id.* Tenaska asks the Commission to find that article 11.4.1 of the LGIA provides for full reimbursement of its upfront payments to Entergy for Network Upgrades. We note that, although Article 11.4.1 of the LGIA requires full reimbursements with interest of amounts paid for network upgrades, that Article is subject to the requirements of section 206 and the filed rate doctrine.

accrue or would have accrued, Tenaska is entitled to receive transmission credits, with interest, on a prospective basis from the date of the Commission's order.⁴⁹ This is the maximum protection that the Commission can afford Tenaska under the FPA.⁵⁰

33. Accordingly, we will deny rehearing on this issue.

5. O&M charges

34. We will grant Southern's request for rehearing of the Commission's determination that Southern must delete section 5.4 of the IAs. We agree that section 5.4 only allows Southern to collect O&M charges for interconnection facilities, not network facilities, and would not apply to any reclassified facilities, but only those facilities that continue to be interconnection facilities. Because the IAs also concern facilities that will not be reclassified, we agree with Southern that section 5.4 should remain in the IAs.⁵¹

35. We will also grant in part Tenaska's request for clarification that the Commission intended that Southern must cease collecting O&M charges for the reclassified facilities on the same date as other modifications to the IAs are required. Southern must refund O&M charges, with interest, collected for the 15-month period commencing on the refund effective date (*i.e.* January 21, 2005, through and including April 21, 2006) and after the Commission's order, *i.e.*, January 19, 2007.

6. Designation of Facilities

36. The Commission will not now act on Southern's request for rehearing that certain facilities are located prior to the point of interconnection. We cannot make a determination as to the three facilities referenced by Southern because we do not have

⁴⁹ January 19 Order at P 24. The dollar amount of the credits, which initially is equal to Tenaska's outlay for network upgrades, is to be reduced by an amount equal to the transmission service payments made by Tenaska outside of the refund periods. Thus, as a hypothetical (which does not include interest), if Tenaska's total outlay for network facility upgrades was \$5 million, and it took \$1 million worth of transmission services prior to the refund effective date, and \$1 million worth of transmission services after the refund effective period and before the issuance of the January 19, Order, Tenaska is eligible to receive total transmission credits of \$3 million (\$5 million in network facility upgrade outlay minus \$2 million in transmission charges).

⁵⁰ To this same effect, *see Mirant Las Vegas, LLC v. Nevada Power Co.*, 118 FERC ¶ 61,034 at P 18-20 (2007) (four distinct periods for recovery of transmission credits); *ExxonMobil Corp. v. Entergy Servs., Inc.*, 118 FERC ¶ 61,032 (2007) (same).

⁵¹ *See* sections 5 and 6 of the IAs.

enough information at this time. Therefore, we will direct Southern and Tenaska to give us supplemental information, such as updated one-line diagrams, as to how the Georgia Power facilities in Docket No. EL05-27 should be classified, within 30 days of the date of this order.

III. Compliance Filing

37. On February 20, 2007, Southern submitted, in Docket Nos. EL05-25-002, EL05-26-002, and EL05-27-002, a compliance filing setting forth revisions to the IAs as required by the Commission in the January 19 Order, as well as a description of how Southern will provide credits to Tenaska.

38. The compliance filing amends the IAs such that the term “Interconnection Network Upgrades” describes equipment located at or beyond the point where the generating facilities connect to the transmission system. In addition, Southern includes in its compliance filing crediting provisions containing the Commission’s crediting principles as found in section 11.4.1 of the LGIA, including the repayment obligation, the twenty-year payment period, and the determination of interest. Further, the compliance filing deletes section 5.4 concerning payment of O&M charges as required by the January 19 Order.

39. In addition to the amendments required by the January 19 Order, Southern includes a new paragraph in subsection (5) of the IAs. This new language states that, pursuant to the January 19 Order, Southern has no remaining obligation or liability to Tenaska under subsection (5) of the IAs.

A. Procedural Matters

40. Notice of Southern’s February 20, 2007 filing was published on February 27, 2007, with comments due on or before March 13, 2007. Tenaska filed a timely protest. On March 29, 2007, Southern filed an answer to Tenaska’s protest. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. section 385.213(a)(2) (2006) prohibits an answer to an answer or to a protest unless otherwise ordered by the decisional authority. We will accept Southern’s answer because it provides information that has assisted us in our decision-making process.

B. Tenaska’s Protest

41. Tenaska protests Southern’s inclusion of proposed subsection (5) to the IA, which would state that Southern has no remaining obligation or liability to Tenaska under the crediting provisions. According to Tenaska, Southern appears to be attempting to “lock-in” contractually the benefits of the January 19 Order such that, even if Tenaska prevails on rehearing or appeal of the order, Southern could claim that Tenaska had no right to transmission credits.

42. Tenaska asserts that it is well-established that “[c]ompliance filings must be limited to the specific directives ordered by the Commission.”⁵² Such filings “are not to include new changes initiated by the filing entity, but only changes expressly directed by the Commission.”⁵³ According to Tenaska, subsection (5) of the proposed crediting provisions was not expressly directed by the Commission, and should be rejected, consistent with Commission precedent regarding the proper scope of compliance filings. Tenaska notes that the January 19 Order directed Southern to describe how it will credit Tenaska, during the appropriate refund periods, the amounts collected and will collect for transmission service provided to transmission customers with Tenaska’s generators as the receipt point. According to Tenaska, the transmittal letter and proposed subsections (1) through (4) of the Crediting Provisions provide the required description; subsection (1) expressly provides that the crediting provisions “shall be implemented consistent with the Commission's guidance” in the January 19 Order.

43. Tenaska argues that the Commission did not invite, much less expressly require, Southern to make such a revision to the IAs. While Southern characterizes the proposed crediting provisions as consistent with section 11.4.1 of the LGIA, Tenaska maintains that section 11.4.1 of the LGIA contains nothing comparable to the language Southern has proposed in subsection (5) of the crediting provisions. Therefore, Tenaska asserts that the Commission should reject that aspect of Southern’s filing and should direct Southern to make a further compliance filing deleting subsection (5) of the crediting provisions from the IAs.

C. Southern’s Response

44. Southern requests that the Commission reject the Tenaska protest. Southern maintains that the provision to which Tenaska objects is fully consistent with the Commission’s directives in the January 19 Order, and that they properly reflect the transmission crediting methodology as explained in that order. Further, Southern states that the provision correctly reflects that credits and refunds are not due to Tenaska under the IAs.

⁵² *Entergy Servs., Inc.*, 117 FERC ¶ 61,055 at P 22 (2006) (*Entergy*) (internal citations omitted). *See also, e.g., AES Huntington Beach, LLC*, 111 FERC ¶ 61,079 at P 60 (2005); *Midwest Indep. Trans. Sys. Operator, Inc.*, 99 FERC ¶ 61,302 at 62,264 (2002); *ISO New England Inc.*, 91 FERC ¶ 61,106 at 61,060 (2000); *Sierra Pacific Power Co.*, 80 FERC ¶ 61,376 at 62,271 (1997); *Delmarva Power & Light Co.*, 63 FERC ¶ 61,321 at 63,160 (1993).

⁵³ *Entergy* at P 22. *See also, e.g., Southern Co. Servs., Inc.*, 63 FERC ¶ 62,217 at 62,596 (1993).

45. Additionally, Southern argues that the new terms of subsection (5) would not “lock-in” the contractual rights of the parties if the Commission were to grant rehearing, or if the January 19 Order were overturned on appeal. Southern states that, in either event, the Commission could direct revisions to the IAs. Moreover, Tenaska could file a complaint under section 206 of the FPA to petition for changes to the IAs, including removal of the new subsection (5) language, if necessary.

D. Commission Conclusion

46. We will grant Tenaska’s protest and reject that portion of Southern’s compliance filing which adds subsections 5.6.5 and 5.7.5 to the IAs. In the January 19 Order, the Commission provided a mechanism for crediting Tenaska for its construction of the Interconnection Network Upgrades. We directed Southern to amend those agreements in accordance with the crediting methodology, and to reclassify the facilities at issue. Such revisions should be made without reference to the outcome of calculations for credits, which, per the January 19 Order, were to be presented in a compliance report. Accordingly, Southern’s additional revisions fall outside the scope of the order and should therefore be removed.⁵⁴

47. Further, given our determination above that Southern should retain the pre-existing section 5.4 of the IAs, we will reject the changes to section 5.4 of the IAs.

IV. Compliance Report

48. On March 5, 2007, Southern filed a Compliance Report, in Docket Nos. EL05-25-003, EL05-26-003, and EL05-27-003, pursuant to the Commission’s directive in the January 19 Order, detailing how the company would provide credits, with interest, that would have accrued from the refund effective date, January 21, 2005, through April 21, 2006. Southern’s Compliance Report identified Tenaska’s costs for the Network Upgrades, as well as the value of transmission service taken from Tenaska facilities from the commercial operation date of each facility through January 20, 2005. Southern concluded that, because the amounts paid for transmission service during that period exceeded the costs of the Network Upgrades, no payment was due by Southern to Tenaska as of the refund effective date.

⁵⁴ *See generally* 18 CFR § 154.203 (b) (“Filings made to comply with Commission orders must include only those changes required to comply with the order. Such compliance filings may not be combined with other rate or tariff change filings. A compliance filing that includes other changes or that does not comply with the applicable order in every respect may be rejected.”).

49. Notice of Southern's Compliance Report filing was published on March 12, 2007, with comments due on or before March 26, 2007. None was filed.

50. We will accept Southern's Compliance Report.

The Commission orders:

(A) The requests for rehearing and clarification are hereby granted in part and denied in part, as discussed in the body of this order.

(B) Southern's compliance filings are hereby accepted in part and rejected in part, as discussed in the body of this order.

(C) Southern and Tenaska are hereby directed to file supplemental information as to how the Georgia Power facilities should be classified within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.