

119 FERC ¶ 61,300
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.

Southern Companies Energy Marketing, Inc. and Southern Companies Services, Inc.	Docket Nos. ER97-4166-018 ER96-780-007 EL04-124-001 EL05-104-000 ER97-4166-021 ER96-780-010 EL04-124-003 EL05-104-001
--	--

ORDER TERMINATING SECTION 206 PROCEEDING
AND DISMISSING REHEARING

(Issued June 21, 2002)

1. In this order, we terminate the section 206¹ proceeding in Docket No. EL05-104-000 in light of the resolution of issues in Docket No. EL05-102-000 regarding the Intercompany Interchange Contract (IIC)² and Order No. 890.³ We also dismiss as moot Southern Companies'⁴ request for rehearing of the order on rehearing

¹ 16 U.S.C. § 824e (2000).

² *Southern Company Services, Inc.*, 117 FERC ¶ 61,021 (2006) (Order on Settlement).

³ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007).

⁴ Southern Companies Services, Inc. filed the request on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power

(continued)

issued on May 5, 2005 instituting a section 206 proceeding on transmission market power, barriers to entry, and affiliate abuse issues.⁵

I. Background

A. Section 206 Proceedings

2. On December 17, 2004, the Commission issued an order instituting a section 206 proceeding on generation market power after finding that Southern Companies failed the wholesale market share screen.⁶ In that order, the Commission found that Southern Companies had satisfied the Commission's concerns regarding the other three parts of the Commission's market-based rate analysis: transmission market power, barriers to entry, and affiliate abuse or reciprocal dealing, and concluded that protestors' concerns regarding those three issues would be more appropriately raised in a separate complaint proceeding.

3. The Commission subsequently granted rehearing of the December 2004 Order in part and instituted a separate section 206 proceeding regarding transmission market power, barriers to entry, and affiliate abuse.⁷ The May 2005 order on rehearing also established a refund effective date and hearing procedures. The Commission held the section 206 proceeding in abeyance pending the outcome of a separate section 206

Company, Savannah Electric and Power Company, and Southern Power (collectively Southern Companies).

⁵ *Southern Companies Energy Marketing, Inc.*, 111 FERC ¶ 61,144 (2005) (May 2005 Order).

⁶ *Southern Companies Energy Marketing, Inc.*, 109 FERC ¶ 61,275 (2004) (December 2004 Order). Southern Companies made a filing in compliance with the December 2004 Order, which included a Delivered Price Test (DPT) for the Southern control area. On June 30, 2005, the Commission established a trial-type evidentiary hearing to resolve issues of material fact regarding Southern Companies' DPT and determined that, pending the outcome of the evidentiary hearing on the DPT, Southern Companies' sales at market-based rates in the Southern control area would remain subject to refund for the statutory refund period commencing with the refund effective date established in the December 2004 Order. *Southern Company Energy Marketing, Inc.*, 112 FERC ¶ 61,054 (2005) (July 2005 Order).

⁷ May 2005 Order, 111 FERC ¶ 61,144.

investigation it initiated concurrently in Docket No. EL05-102-000 to examine affiliate abuse allegations regarding the Southern pooling agreement known as the IIC.⁸

4. On June 6, 2005, Southern Companies filed a request for rehearing of the May 2005 Order.

B. IIC Settlement

5. On October 5, 2006, the Commission issued the Order on Settlement accepting in part and rejecting in part an offer of settlement submitted by the Settling Parties⁹ in the IIC docket.¹⁰ The Order on Settlement required that Southern Operating Companies accept certain changes in order for the settlement to be approved by the Commission. Specifically, the Commission required: (1) that the Southern Operating Companies adopt a clear separation of functions restricting information sharing and separating personnel for transactions undertaken for the benefit of Southern Power's shareholders and specifying that Southern Power is to be treated as an Energy Affiliate under the Standards of Conduct and barred from receiving nonpublic transmission information; (2) that the settlement be modified to ensure Southern Power could not receive preferential access to transmission information or otherwise receive transmission service on terms not available

⁸ *Southern Company Services, Inc.*, 111 FERC ¶ 61,146, *clarified*, 112 FERC ¶ 61,015 (2005). Specifically, the issues set for hearing were: "(1) the justness and reasonableness of the [IIC], including the justness and reasonableness of Southern Power's continued inclusion in the Southern pool and whether that inclusion involves undue preference and undue discrimination that adversely affect wholesale competition and wholesale customers in the southeast; (2) whether any of the Southern Companies, including Southern Power, have violated or are violating (either on their own or through their agent, Southern Services) the standards of conduct under Part 358 of the Commission's regulations; and (3) whether the Southern code of conduct is just and reasonable and whether the code of conduct should continue to define Southern Power as a 'system company.'" *Id.* at P 1-2.

⁹ Southern Company Services, Inc. acting for itself and as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company and Southern Power Company (Southern Power) (collectively Southern Operating Companies), Calpine Corporation (Calpine), Coral Power, L.L.C., (Coral), and the board of Water, Light and Sinking Fund Commissioners of the City of Dalton (Dalton) (collectively, Settling Parties).

¹⁰ Order on Settlement, 117 FERC ¶ 61,021.

to others; and (3) that all similarly situated merchant generators have access to backup power from the Southern Operating Companies.¹¹

6. The Order on Settlement also stipulated that the Commission would conduct an audit of Southern Power and its regulated Southern Operating Companies affiliates to address compliance with the Order on Settlement and “whether the conditions imposed [t]herein are sufficient to address any remaining opportunities for affiliate abuse as it relates to Southern Power under the [IIC].”¹² The Commission kept the section 206 investigation in Docket No. EL05-102-000 open until the audit report is released, public comments are received, and the Commission can determine what further action is needed.

7. The Commission recognized in the Order on Settlement that there was an overlap of issues in the IIC docket and the instant market-based rate proceeding. The Commission determined that the IIC case “concern[ed] whether the corporate structure and affiliate transactions permitted by the IIC are just, reasonable and not unduly discriminatory,”¹³ and specified “that the issues resolved by this [IIC Settlement Order] should not be relitigated in Docket No. EL05-104 [the market-based rate proceeding at issue in the instant order].”¹⁴ However, the Commission found that “to the extent that there are affiliate issues unrelated to matters decided herein, and are relevant to the investigation commenced in Docket No. EL05-104, those claims may be addressed in Docket No. EL05-104, along with any remaining issues in that docket.”¹⁵ The Commission stated that it intended to seek comments in the instant market-based rate proceeding regarding what issues remain appropriate for investigation in light of the IIC settlement.¹⁶ The Commission issued an Order Seeking Comment in Docket

¹¹ *Id.* at P 3.

¹² *Id.* at P 4.

¹³ *Id.* at P 59.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

No. EL05-104;¹⁷ Southern Companies, the Electric Power Supply Association (EPSA), and Shell Trading Gas & Power Company (Shell Trading) filed comments in response.

C. Comments in Response to Order Seeking Comment

8. Southern Companies state that the Order on Settlement “resolves, in one way or another, all affiliate issues that could reasonably have been pursued in Docket No. EL05-104.”¹⁸ They state that the IIC case and this one include the following “similar” issues: “claims of affiliate abuse, including allegations regarding Southern Power’s status as a marketing affiliate; Southern Companies Code of Conduct; Southern Power’s participation in the Southern Pool; Southern Power’s access to non-public information; and Southern Power’s right to vote on matters relating to generation and transmission system planning and operations under the IIC.”¹⁹ According to Southern Companies, the IIC litigation considered the following claims: (1) that the IIC and Southern Companies’ structure and operations provide Southern Power with an undue preference over non-affiliate power suppliers; (2) that Southern Power should not be permitted to participate in the Southern Pool; (3) that Southern Companies’ Code of Conduct permits improper sharing of information; and (4) that Southern Companies have violated the Standards of Conduct. Southern Companies also state that the Order on Settlement considers potential affiliate abuse issues from a variety of perspectives, including Southern Power’s status as a marketing affiliate, and Southern Power’s participation in the Southern Pool and in generation and transmission system planning and operations. Southern Companies conclude that the Order on Settlement resolved all affiliate issues in the IIC docket as well as in this proceeding and ask that the Commission terminate the section 206 proceeding in this docket.

9. Shell Trading states that “significant issues of transmission market power and barriers to entry arising from Southern Power’s continued participation in the Southern Power Pool still remain to be addressed.”²⁰ Shell Trading claims that the Order on Settlement does not address “the anti-competitive discrimination inherent in permitting one power marketer – Southern Power – exclusive membership in the Southern Power

¹⁷ *Southern Companies Energy Marketing, Inc.*, 118 FERC ¶ 61,001 (2007) (Order Seeking Comment).

¹⁸ Southern Companies comments at 1.

¹⁹ *Id.* at 4.

²⁰ Shell Trading comments at 4.

Pool.”²¹ Shell Trading claims that, although the Commission tried to “ensure that Southern Power cannot receive an undue preference as it relates to transmission service”²² and ensure that “*all* transmission service to Southern Power will be provided pursuant to the [Open Access Transmission Tariff] OATT,”²³ all transmission service to Southern Power is not provided pursuant to the OATT. Specifically, section 11.1 of the IIC provides that “[s]ince the Operating Companies integrate, economically dispatch and regulate their generating resources to serve their native load pursuant to this IIC, the associated use of the transmission system *is in the nature of Network Service.*”²⁴ According to Shell Trading, the Southern Pool is not able to disaggregate from its economic dispatch function energy that is economically dispatched and transmitted to serve Southern Power’s load obligations, nor is it able to distinguish between energy that has been economically dispatched to serve a Southern Pool member’s native and non-native load obligations.²⁵

10. Shell Trading also asserts that, given Southern Power’s involvement in competitive wholesale market transactions, its access to the Southern Pool’s economic dispatch-related transmission creates transmission market power and barrier to entry concerns.²⁶ Shell Trading claims that Southern Power will be able to use Southern Pool-related, non-OATT transmission to serve its load obligations both inside and outside of the Southern control area. In addition, Shell Trading argues that Southern Power is able to obtain instantaneous transmission through its Southern Pool membership to serve non-native load from alternative generation sources. According to Shell Trading, limiting Southern Pool access to affiliates is an exercise of transmission market power, giving

²¹ *Id.* at 4-5.

²² *Id.* at 5 (quoting Order on Settlement, 117 FERC ¶ 61,021 at P 54).

²³ *Id.* (quoting Order on Settlement, 117 FERC ¶ 61,021 at P 56 (emphasis in original)).

²⁴ *Id.* at 6-7 (emphasis added by Shell Trading). Shell Trading claims that Network Service “is the highest priority firm transmission service available under the Southern OATT.” *Id.* at 6, n.9.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7.

Southern Power a competitive advantage through its access to Southern Pool-related transmission, thus creating a barrier to entry for any competing power marketer.²⁷

11. Shell Trading also urges the Commission not to wait for the audit required in the Order on Settlement, but to examine in the instant docket the issue of whether “the pooling arrangements (*e.g.*, relating to joint dispatch, opportunity sales, and reserve sharing) can operate in practice to provide an undue preference to any Operating Company, including Southern Power.”²⁸ At a minimum, Shell Trading urges the Commission to keep this docket open until it has taken action on the audit report.²⁹

12. EPSA supports Shell Trading’s comments and submits additional comments on its own behalf. EPSA states that, although this case and the IIC docket raise “virtually every issue having to do with the Southern Companies’ market power, affiliate abuse and market foreclosure,” the Order on Settlement did not address or resolve most of those issues.³⁰ Specifically, EPSA states that the IIC proceeding focused on affiliate abuse and reciprocal dealing and did not address market power and barriers to entry. According to EPSA, “the very existence of the IIC gives Southern Power an undue preference and constitutes a material market entry barrier, in that no other competitive supplier or marketer can avail itself of the benefits of such an agreement to backstop its transactions.”³¹ EPSA states that “allegations of Southern’s abuses of transmission market power that act as barriers to market entry, including allegations of transmission and generation site hoarding, and inordinately long delays in processing studies for new interconnections and services” also remain unresolved.³² EPSA points to comments Williams filed regarding the OATT NOPR³³ alleging that “Southern curtailed load in

²⁷ *Id.* at 9.

²⁸ *Id.* at 10 (quoting Order on Settlement, 117 FERC ¶ 61,021 at nn.2, 31).

²⁹ *Id.* at 11.

³⁰ EPSA comments at 1-2, 6.

³¹ *Id.* at 5.

³² *Id.* at 5-6.

³³ Docket No. RM05-17-000.

such a manner as to leave Williams no effective alternative but to purchase from Southern's affiliate [Southern Power] at substantially higher prices."³⁴

II. Discussion

A. Section 206 Proceeding on Transmission Market Power, Barriers to Entry and Affiliate Abuse

13. We find that affiliate abuse concerns relating to Southern Power's membership in the Southern Power Pool and the specific terms of the IIC (and related transmission market power and barriers to entry concerns) have been considered and addressed in the IIC Settlement Order and subsequent order accepting Southern Services' compliance filing.³⁵ The IIC Settlement Order specifically addressed the potential for affiliate abuse in the provision of transmission service and required revisions to the settlement to ensure that all transmission service to Southern Power be provided pursuant to the OATT and that Southern Power does not receive an undue preference in the provision of transmission service.³⁶ The IIC Settlement Order and subsequent order on compliance also required a number of changes to the Settlement Agreement, the IIC, and Southern's market-based rate code of conduct to protect against affiliate abuse, namely: (1) requiring that the Southern Operating Companies adopt a clear separation of functions including restrictions on information sharing and a separation of personnel for transactions undertaken for the benefit of Southern Power's shareholders; (2) requiring Southern Operating Companies to make clear that Southern Power is to be treated as an Energy Affiliate under the Standards of Conduct and cannot receive any nonpublic transmission information; and (3) requiring that all similarly situated merchant generators have access to back up power from the Southern Operating Companies.³⁷

³⁴ EPSA comments at 8.

³⁵ *Southern Company Services, Inc.*, 119 FERC ¶ 61,065 (2007) (Order Accepting Compliance Filing).

³⁶ IIC Settlement Order, 117 FERC ¶ 61,021 at P 54 (requiring "that section 11.2 [of the IIC] be modified to include a commitment ensuring that Southern Power takes all its transmission service under the OATT"), P 56.

³⁷ *Id.* at P 3; Order Accepting Compliance Filing at P 17 (separation of functions), 26 (sharing of market information), and 31 (Code of Conduct concerns).

14. In addition, the Commission directed its Office of Enforcement to conduct an audit of Southern Power and its regulated Operating Company affiliates to address whether the Southern Operating Companies are fully complying with all of the conditions set forth in the IIC Settlement Order, and to address whether these conditions are sufficient to address any remaining opportunities for affiliate abuse under the IIC as it relates to Southern Power.³⁸ After the audit report is completed and noticed for public comment, the Commission will consider any public comments and determine what further action is appropriate. If affiliate abuse concerns remain, the Commission will either set such concerns for hearing or require further changes immediately.³⁹

15. Thus, based on the Commission's findings and the audit established in the IIC Settlement Order and the subsequent Order Accepting Compliance Filing, we find that the Commission has addressed the allegations of affiliate abuse and, where indicated, directed appropriate remedies. On this basis, we find that Southern satisfies the Commission's standard for affiliate abuse for the grant of market-based rate authority.

16. Although EPSA raises some issues regarding generation market power, generation market power is not at issue in the instant proceeding as it is the subject of the earlier section 206 proceeding in Docket No. EL04-124-000.⁴⁰

17. The two remaining issues relate to transmission market power and other barriers to entry. Shell Trading contends that issues of transmission market power and barriers to entry arising from Southern Power's continued participation in the Southern Power Pool still remain to be addressed. To the extent that Shell Trading is challenging the IIC Settlement, we find such allegations to be an inappropriate collateral attack on the IIC Settlement Order.

³⁸ IIC Settlement Order at P 4, 60.

³⁹ *Id.*

⁴⁰ The Commission initiated the section 206 proceeding into Southern Companies' generation market power in the December Order, 109 FERC ¶ 61,275. After Southern Companies submitted their delivered price test, the Commission subsequently issued an order setting Southern Companies' delivered price test for an evidentiary hearing. *See* July 2005 Order, 112 FERC ¶ 61,054. In an order being issued concurrently with this order, the Commission addresses Southern Companies' request for rehearing of the July 2005 Order.

18. Another allegation is that Southern used its transmission market power to hoard transmission capacity (ostensibly for future load growth) and erected barriers to entry by hoarding prime generation sites in the name of serving future native load growth. In Order No. 890, the Commission examined and reaffirmed the policy it adopted in Order No. 888 giving public utilities the right to reserve existing transmission capacity for native load growth reasonably forecasted within the utility's current planning horizon.⁴¹ The Commission also increased consistency and transparency of available transmission capacity (ATC) calculations in order to reduce the potential for undue discrimination by reducing the opportunity for transmission providers to exercise excess discretion that could lead to undue discrimination against unaffiliated transmission customers.⁴² The Commission also amended the *pro forma* OATT to require coordinated, open, and transparent transmission planning to limit opportunities for undue discrimination and ensure that comparable transmission is provided by all public utility transmission providers.⁴³ The Commission believes that these steps are adequate to address concerns regarding transmission hoarding.

19. The remaining allegation EPSA raises is based on comments Williams (an EPSA member) filed in response to the OATT NOPR regarding curtailment of service. In the OATT NOPR proceeding, Williams stated that it submitted its OATT NOPR comments regarding Southern to show "the lack of transparency which leaves transmission customers without adequate assurance that they are not victims of undue discrimination," and specifically stated that "the examples provided . . . are not intended to malign a

⁴¹ Order No. 890 at P 107 (noting that, although some commenters urged eliminating public utility's right to reserve existing transmission capacity needed for reasonably forecasted native load growth, the Commission believed such protection for native load was appropriate.)

⁴² *Id.* at P 108, 207-12. For example, the Commission noted that the North American Electric Reliability Corp. (NERC) is developing standards for three ATC calculation methodologies through its reliability standards development process, and concludes that use of those methodologies will be acceptable. *Id.* at P 210. The Commission also directed public utilities, working through NERC to modify related ATC standards to implement certain articulated principles for firm and non-firm ATC calculations. In addition, the Commission required that each transmission provider's Attachment C include a detailed formula for both firm and non-firm ATC consistent with the modified ATC-related reliability standards. *Id.* at P 212.

⁴³ *Id.* at P 435.

specific transmission provider.”⁴⁴ Williams cited to the lack of timely disclosure of crucial operating information and verifiable operating conditions, which, according to Williams, leave customers unable to verify whether operating conditions are *bona fide* and appropriate. Williams urged the Commission to adopt the reforms proposed in the OATT NOPR along with other changes advocated in its filing that it claimed should substantially lessen the opportunities for unduly discriminatory conduct and improve efficient use of the transmission grid.⁴⁵

20. As an initial matter, we note that Williams itself did not file comments or any record evidence in the instant market-based rate proceeding. The allegation raised by EPSA in this regard in response to the Order Seeking Comment thus marks the first time such issue has been raised in the context of this proceeding. On this basis, the Commission rejects the argument as being improperly raised at this stage of the proceeding. However, as discussed below, even if these allegations were properly before the Commission in this proceeding, it is still appropriate for the Commission to find that the curtailment issue will be addressed through compliance with Order No. 890.

21. In Order No. 890, the Commission recognized the incentive for transmission providers to deny transmission or offer transmission on a basis that is inferior to that which they provide to themselves and that such incentive can lead to undue discrimination, “particularly if public utilities have unnecessarily broad discretion in the application of their tariffs.”⁴⁶ In Order No. 890, the Commission limited opportunities for undue discrimination by improving transparency, minimizing areas of discretion, addressing ambiguities, and clarifying certain aspects of the *pro forma* OATT, and by increasing the Commission’s ability to detect undue discrimination.⁴⁷ Order No. 890 has considered and adequately addressed the curtailment issue by adopting reforms to posting requirements regarding curtailment information in order to increase transparency and reduce opportunities for transmission providers to unduly discriminate in favor of their affiliates.⁴⁸

⁴⁴ Williams comments in Docket Nos. RM05-25-000, RM05-17-000, 9 (Aug. 7, 2006).

⁴⁵ *Id.* at 12.

⁴⁶ Order No. 890 at P 39.

⁴⁷ *Id.* at P 40, 51.

⁴⁸ *Id.* at P 51, 1626-27.

22. Given that the curtailment issues alleged by EPSA were not raised in a timely manner in the instant proceeding, have been considered and addressed by the Commission in Order No. 890, and should be addressed by Southern Companies' compliance with Order No. 890, we believe that these issues have been adequately addressed. Accordingly, the Commission finds that Southern Companies satisfy the Commission's transmission market power and barriers to entry standards for the grant of market-based rate authority.

B. Termination of Docket No. EL05-104-000

23. The Commission terminates the section 206 proceeding established in Docket No. EL05-104-000. That proceeding was established to investigate transmission market power, other barriers to entry and affiliate abuse issues in the Southern control area. Based on the above findings, the Commission finds that there is no further need for the proceeding in this docket.

C. Request for Rehearing

24. On rehearing, Southern Companies argue that the Commission erred in instituting a separate section 206 proceeding to investigate issues relating to transmission market power, barriers to entry and affiliate abuse. Southern Companies argue that the May 2005 Order departs, without adequate justification or explanation, from prior Commission orders pertaining to transmission market power, barriers to entry, and affiliate abuse, and applies different standards to Southern Companies than the ones that have consistently been applied to entities in prior cases. Southern Companies also allege that the Commission erred in instituting the section 206 investigation "on the basis of generalized complaints, conjecture, and unsupported speculations."⁴⁹

25. We will dismiss Southern Companies' request for rehearing as moot in light of our termination of the section 206 proceeding in Docket No. EL05-104-000.

The Commission orders:

(A) The Commission hereby terminates the section 206 investigation into transmission market power, barriers to entry and affiliate abuse issues established in Docket No. EL05-104-000.

⁴⁹ Southern Companies request for rehearing at 14.

(B) Southern Companies' request for rehearing of the May 5, 2005 Order is hereby dismissed as moot as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.