UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, and Joseph T. Kelliher.

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

ORDER ON REHEARING, INSTITUTING SECTION 206 PROCEEDING, ESTABLISHING REFUND EFFECTIVE DATE, AND ESTABLISHING HEARING PROCEDURES

(Issued May 5, 2005)

1. In this order, we grant rehearing of the order issued on December 17, 2004,[1] in which the Commission instituted a section 206 proceeding concerning the justness and reasonableness of Southern Companies'[2] market-based rates and established a refund effective date based on Southern Companies' failure of the wholesale market share screen for generation market power. In granting the rehearing request, we will institute a separate proceeding under section 206 of the Federal Power Act (FPA)[3] in Docket No. EL05-104-000 to investigate whether Southern Companies satisfies the remaining three parts of the Commission's market-based rate analysis, *i.e.*, transmission market power, barriers to entry, and affiliate abuse or reciprocal dealing, establish a refund effective date pursuant to the provisions of section 206, and establish hearing procedures. The refund effective date established here is for the purposes of the additional issues set for hearing today, including sales to customers located outside of the Southern control area. This

[1] *Southern Companies Energy Marketing, Inc. and Southern Companies Services, Inc.*, 109 FERC ¶ 61,275 (2004) (December 17 Order).

[2] Southern Companies include Southern Companies Services (SCS), Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company.

[3] 16 U.S.C. § 824e (2000).

section 206 investigation will, however, be held in abeyance pending the outcome of the section 206 investigation we are instituting in Docket No. EL05-102-000 in an order to be issued concurrently, which will examine allegations pertaining to the Intercompany Interchange Contract (IIC). We deny the request for rehearing and clarification submitted by Southern Companies.

2. This order, including the refund effective date, benefits customers by protecting them from the excessive rates and charges that may result from the exercise of market power.

Background

3. On August 9, 2004, as amended on August 27, 2004, November 19, 2004, and December 9, 2004, Southern Companies, submitted for filing revised generation market power screens in compliance with the Commission's orders issued on April 14, 2004, and July 8, 2004.[4] The filing, as amended, indicated that Southern Companies passed the pivotal supplier screen but that it failed the wholesale market share screen for each of the four seasons considered in the Southern control area.[5] As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 and establishes a rebuttable presumption of market power in the resulting section 206 proceeding. Accordingly, because Southern Companies' filing indicated that it failed the wholesale market share screen, the Commission instituted in the December 17 Order a section 206 proceeding to investigate generation market power in the Southern control area.

4. In the December 17 Order, the Commission also concluded that Southern Companies 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, therefore, did not include those issues in the section 206 proceeding instituted therein. The Commission noted that several parties had expressed concerns that Southern Companies failed to satisfy the standards for these

[4] *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

[5] Southern Companies' filing, as amended, shows that it has a market share as high as 49 percent in the Southern control area. Southern Companies' filing identifies the Southern control area as the control area operated by SCS.

three prongs, but concluded that such arguments would be more appropriately raised in a separate complaint proceeding.

Rehearing Requests

5. American Public Power Association, Electricity Consumers Resource Council, National Rural Electric Cooperative Association, Tractebel Energy Marketing, Inc., Calpine Corporation (Calpine) and Shell Trading Gas & Power Company (Shell Trading) filed a joint request for rehearing (Joint Request), and Calpine and Shell Trading filed a separate request for rehearing of the December 17 Order (collectively, petitioners). Southern Companies also filed a Request for Clarification and Rehearing of the Commission's December 17 Order.

6. Southern Companies seeks rehearing and clarification of the order on three separate grounds. First, Southern Companies argues that the Commission's finding of a rebuttable presumption of generation market power is erroneous because it is not supported by record evidence and because the Commission unlawfully shifted its statutory burden of proof under section 206 to Southern Companies by failing to consider the evidence that Southern Companies presented demonstrating the absence of generation market power. Second, Southern Companies also requests that the Commission clarify that the economic capacity prong of the delivered price test need not be submitted because the economic capacity prong erroneously takes into account generating capacity committed to satisfying its regulatory and contractual obligations, which cannot be used to exercise market power. If the Commission declines to issue such a clarification, Southern Companies states that it will request rehearing of this matter. Finally, Southern Companies argues that the Commission should have denied the motion to intervene out-of-time of PSEG Energy Resources & Trade LLC and PSEG Power (collectively, the PSEG Companies) because PSEG Companies have no legitimate interest in the outcome of this proceeding.

7. Petitioners seek rehearing of the Commission's determination in the December 17 Order that Southern Companies satisfies the Commission's market-based rate analysis regarding transmission market power, barriers to entry and affiliate abuse. Specifically, petitioners assert that, in the December 17 Order, the Commission refused to consider relevant and persuasive evidence and the actual experience of market participants that point to a failure to satisfy the other three parts of the Commission's market-based rate analysis; instead, the December 17 Order considers only Southern Companies' own

submissions.[6] Petitioners contend that, by failing to consider the substantive evidence submitted by the petitioners indicating that Southern Companies fails the other three parts of the Commission's market-based rate analysis, the Commission failed to engage in reasoned decision-making as required by the Administrative Procedures Act (APA). Petitioners, in their separate request, discuss the submissions that they have made in these proceedings over the past two years in support of their claim that Southern Companies fails the other three parts of the Commission's market-based rate analysis, which are summarized below.

A. Transmission Market Power

8. Petitioners contend that the Commission erred in accepting Southern Companies' representations that it cannot exercise transmission market power without giving full consideration to the countervailing allegations and the evidence submitted by other parties. Petitioners claim that, through the closed power pool established under the IIC (the Southern Pool) – an agreement between the five Commission-regulated Southern Operating Companies, SCS, and the unregulated operating company Southern Power Company (Southern Power) – Southern Companies' affiliates receive transmission services that are superior to and, therefore, not comparable to services offered to other unregulated, non-affiliated users under its open access transmission tariff (OATT).[7] As an example of the superior service that Southern Companies provides to its unregulated affiliate Southern Power, petitioners cite a provision of the IIC that, in case a transmission constraint prevents Southern Power from delivering contracted energy, allows Southern Power to receive immediate, at-cost support for delivery of the contracted energy from other members of the Southern Pool; non-affiliated generators, by contrast, are required to locate an alternative source of energy and to obtain available transmission capacity for the duration of the outage.[8] Second, petitioners note that a Commission investigation[9] has found evidence that utilities in the Southeast had used the ability to reserve transmission capacity in the name of serving future load growth to deter

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[6] *See, e.g.*, Affidavits of Seabron C. Adamson (Adamson Affidavit) and Richard D. Tabors (Tabors Affidavit), submitted December 7, 2004 on behalf of Calpine and Shell Trading.

[7] Tabors Affidavit at 4-5.

[8] *Id.*

[9] Commission Staff, *Investigation of Bulk Power Markets: Southeast Region* (2000).

merchants from siting plants in their service area. Because of the difficulties for third parties to quantify the extent to which such hoarding has occurred and deterred new entry in the Southern control area, petitioners urge the Commission to investigate whether such hoarding of transmission capacity is responsible for the increasing scarcity of transmission capacity in the Southeast region. According to petitioners, by placing complete reliance on the mere existence of the Southern Companies' OATT to mitigate transmission market power, without explaining how such procedural compliance negates the substantive transmission market power concerns raised by petitioners, the December 17 Order fails to engage in reasoned decision-making and commits clear error.

9. Petitioners also argue that the Commission erred in the December 17 Order by simply accepting Southern Companies' claim that it is in compliance with the Commission's standards of conduct set out in Order No. 2004, while ignoring the substantive concerns raised by protesters. Petitioners state that it is not at all clear that all Southern employees who operate and manage Southern Power are considered energy affiliate and wholesale marketing unit employees for standard of conduct purposes.[10] Petitioners contend that these employees may also have roles with the regulated operating companies and that the knowledge they gain in those positions cannot be separated from the knowledge they can use on Southern Power's behalf. Petitioners also contend that, while the standards of conduct apply to transmission information, other types of competitively-sensitive information, such as information pertaining to the timing and need for new resources, have been and could continue to be provided preferentially to Southern Power.[11]

B. Barriers to Entry

10. Petitioners further state that the Commission erred in accepting Southern Companies' representations that neither it nor its affiliates can erect barriers to entry without giving full consideration to the evidence submitted. In support of their claim that Southern Companies can erect barriers to entry, petitioners argue that Southern Companies can erect barriers to entry by reserving, or "hoarding", generation sites in the name of serving future native load growth to deter merchants from siting plants in their territory. Petitioners assert that the Commission erred by accepting Southern Companies representation that its control of undeveloped generation sites does not restrict market

[10] Adamson Affidavit at 10.

[11] *Id.*

entry due to the unavailability of other sites. Petitioners claim that it is not necessary for Southern Companies to control all available sites to erect a barrier to entry, but rather it is enough if Southern Companies controls transmission-advantaged sites where the necessary infrastructure exists that benefits from native load growth reservations. Petitioners further argue that Southern Companies has engaged in creating this type of barrier to entry by allowing only Southern Power to bid undeveloped generation sites that, at the time of competitive bidding, are still owned and controlled by its regulated utility affiliates. Petitioners also allege that Southern Companies can erect barriers to entry through its membership in the IIC, which allows it to provide Southern Power with benefits unavailable to non-affiliated competitors, and by granting Southern Power preferential access to market information and Southern Companies' system planning. This creates barriers to entry, petitioners argue, by creating an opportunity for the Southern Companies to raise the costs of its competitors or artificially lower costs of its affiliate, Southern Power.

C. Affiliate Abuse and Reciprocal Dealing

11. The petitioners also allege that the Commission erred in accepting Southern Companies' representations that it satisfies the Commission's affiliate abuse concerns without giving full consideration to the evidence submitted. First, petitioners note that there are serious allegations of affiliate abuse pending before the Commission in Docket No. ER03-713, which are discussed further below.[12] Second, petitioners also argue that Southern Companies' assertion that it does not have a marketing affiliate is simply inaccurate because Southern Power engages in power marketing, which has been demonstrated in Docket No. ER03-713 as well as in filings to the Securities and Exchange Commission. Third, petitioners assert that Southern Companies' code of conduct does not provide any protections against affiliate abuse because it does not treat affiliates such as Southern Power and SCS that engage in power marketing activities as "marketing affiliates". Fourth, the petitioners point out that Southern Power, Southern Companies' unregulated affiliate, is an Operating Company under the IIC with all the rights and privileges of the regulated utility companies under the IIC.[13] Petitioners also allege that Southern Companies extends preferences to Southern Power through its membership in the IIC by providing automatic access at cost to real-time balancing and back-up power and by providing Southern Power access to information and a right to vote on matters relating to generation and transmission system planning and operations under the IIC.

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[12] *Id.* at 8.

[13] *Id.* at 10-12.

D. Administrative Process Issues

12. Further, petitioners argue that the December 17 Order imposed an undue burden on market participants insofar as it required them to pursue their complaints regarding Southern Companies' satisfaction of the Commission's four-part market-based rate analysis, which involve interrelated and common issues of law and fact, in separate 206 proceedings. Petitioners claim that he December 17 Order created an "administrative law nightmare" for those market participants that wish to challenge, in one comprehensive docket, all issues relating to Southern Companies' fitness to hold market-based rate authority, requiring them to deploy their scarce litigation resources in multiple section 206 proceedings and to bear the burden of proof and of going forward with evidence on the other three parts of the Commission's market–based rate analysis, when they should not be required to do so.

13. Petitioners also argue that the Commission's analysis in the December 17 Order is conceptually flawed because it rests on the erroneous suppositions that the exercise of market power can be neatly segregated into four distinct conceptual "boxes" labeled "generation market power," "transmission market power," "barriers to entry," and "affiliate abuse/reciprocal dealing," and that an applicant's failure to satisfy one of the Commission's generation market power screens indicates, at most, a potential problem with only the first box. However, according to the petitioners, the four parts of the Commission's market-based rate analysis are tightly interrelated, and the failure of an indicative screen for generation market power could expose merely the "tip of the iceberg" regarding an applicant's market power. By refusing to consider evidence concerning forms of market power other than generation market power, petitioners contend that the Commission creates the potential for the Southern Companies to retain market-based rate authority, while continuing to exercise other forms of market power, in violation of the Commission's responsibility under section 205 of the FPA to ensure just and reasonable rates.

E. Proceedings in Docket No. ER03-713-000

14. As discussed above, petitioners also reference prior Commission proceedings in support of their allegations that Southern Companies does not satisfy the remaining three parts of the Commission's market-based rate analysis, namely, concerns noted in Docket No. ER03-713-000 in connection with Southern Companies' request for proposals (RFP) related to the McIntosh purchase power agreements (PPAs) and the restated IIC (which was filed in Docket No. ER00-1655-000), which, among other things, added Southern Power as an operating company under the agreement. Petitioners have specifically referenced their comments in the McIntosh PPA proceeding as applicable here and urge the Commission to investigate the considerable record in that case when determining whether Southern Companies satisfies the market-based rate standard.

15. In Docket No. ER03-713-000,[14] the parties contended that some of the affiliate abuse that had allegedly taken place during the RFP and that had resulted in the award of two PPAs was due to the undue preferences that Southern Power received through its membership in the Southern Pool. The parties to that proceeding asserted that at least some of the alleged misconduct surrounding the McIntosh PPAs is evidence that Southern Power's inclusion in the Southern Pool pursuant to the IIC adversely impacts regional competition and ratepayers and constitutes unduly preferential and unduly discriminatory practices in violation of FPA section 205. The Commission made no findings of fact or conclusions of law with respect to the allegations raised in Docket No. ER03-713-000.

Discussion

Petitioners' Requests for Rehearing

16. Petitioners have raised a number of credible concerns, in particular those pertaining to the IIC and to the unduly preferential treatment that Southern Power allegedly receives, that call into question Southern Companies' ability to satisfy the remaining three parts of the Commission's market-based rate analysis (*i.e.*, transmission market power, barriers to entry and affiliate abuse or reciprocal dealing). The order will thus grant petitioners' rehearing request and will initiate a separate section 206 proceeding in Docket No. EL05-104-000 (*i.e.*, separate from the current proceeding in Docket No. EL04-124 concerning generation market power issues) to investigate Southern Companies' ability to satisfy parts 2-4 of the Commission's market-based rate analysis. The Commission notes that the refund effective date for the section 206 proceeding instituted here in Docket No. EL05-104-000 will apply for purposes of the additional issues set for hearing today, including sales made to customers located outside of the Southern control area. The section 206 investigation in Docket No. EL05-104-000 will, however, be held in abeyance pending the outcome of the section 206 investigation we are instituting in Docket No. EL05-102-000 in an order to be issued concurrently, which will examine allegations pertaining to the IIC.

17. The issues raised by petitioner's present issues of material fact concerning disputes over past events that cannot be resolved based on the record before us or solely through written submissions. These allegations would thus be more appropriately

[14] We note that Docket No. ER03-713-000 also involved allegations that were not related to the Southern Pool or the IIC.

addressed in a trial-type evidentiary proceeding.[15] Accordingly, we will set these matters for hearing.

18. Because many of the concerns raised in the instant proceeding relate to the structure of the IIC as well as parts 2-4 of the Commission's market-based rate analysis, rather than Southern Companies' potential to exercise generation market power, we believe that separate section 206 proceedings are the appropriate fora to first address these common issues of law and fact. Furthermore, we note that these concerns are very similar to those raised in other cases (*e.g.*, Docket No. ER03-713) where intervenors have sought remedies beyond revocation of market-based rate authority.[16] The institution of a separate section 206 proceeding (which we are doing in Docket No. EL05-102-000) will facilitate the incorporation of the testimony from Docket No. ER03-713 case into the record and will allow the Commission to consider what other remedies may be appropriate, including structural remedies such as the removal of Southern Power from the IIC. The preferential treatment for Southern Power to access generation sites alleged regarding the Macintosh RFP, the unduly preferential treatment that Southern Power allegedly receives in access to reserve power and operational information through the IIC and the alleged increasing scarcity of transmission capacity in the Southeast region are the type of historical sales and transmission data we have asked for in the April 14 and July 8 Orders with respect to the issue of what competitors are really in the market and may be appropriately considered as competition in the generation dominance analyses. The institution of separate section 206 proceedings will impose no greater burden of proof on the intervenors than applies already in the existing proceeding. Finally, as

[15] *See, e.g., Exxon Company, U.S.A. v. FERC*, 182 F.3d 30, 45-46 (D.C. Cir. 1999); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997).

[16] We note that, in the notice accepting Southern Companies' withdrawal of the power purchase agreements at issue in Docket No. ER03-713, we stated that "[i]n allowing the withdrawals to be accepted and to become effective by operation of law, the Commission made no determination on what additional steps may need to be taken in light of the allegations and evidence in these dockets." Thus, in accepting the withdrawal, we did not foreclose the possibility of taking further action concerning those allegations. *Southern Power Company*, 108 FERC ¶ 61,134 (2004).

discussed above, the issues raised by petitioners are more appropriately addressed in a trial-type evidentiary hearing, rather than in the paper hearing we have instituted in Docket No. EL04-124.[17]

19. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,[18] we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL05-104-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by September 30, 2005.

Southern Companies' Request for Rehearing

20. Southern Companies' first ground for seeking rehearing of the December 17 Order is that the Commission claims to have met its statutory burden only by relying on a screening tool that is almost sure to fail larger, vertically-integrated utilities like Southern Companies that have considerable regulatory, or native, load obligations, thereby unlawfully shifting the statutory burden of proof in proceedings under section 206 of the FPA from the Commission to applicants. Southern Companies argues that the unlawfulness of the Commission's burden shifting is exacerbated by the restrictions placed on the types of evidence that Southern Companies may present to rebut the market power presumption (*i.e.*, historical sales and transmission data and an analysis using the delivered price test). Southern Companies urges the Commission to either reconsider its inappropriate burden shifting, or, alternatively, to clarify that the Commission continues to bear the burden of proof and, further, that it will not take any action unless and until it

[17] For example, notwithstanding the market-based rate issues, the Commission will consider in the new section 206 proceeding whether it is appropriate for Southern Power to be included as an Operating Company for purposes of the IIC (*i.e.*, the justness and reasonableness of the IIC).

[18] *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

carries that burden through definitive findings of market power, based on the substantial weight of all of the evidence presented in this proceeding.

21. Second, Southern Companies requests that the Commission clarify that the economic capacity prong of the delivered price test need not be submitted. Southern Companies argues that, since a considerable amount of its generating capacity is committed to meeting its regulatory load obligations and because the price received in connection with those obligations is established by regulation or by contract, Southern Companies is unable to use that generation to exercise market power. Consequently, according to Southern Companies, a failure of this portion of the delivered price test would provide no useful information concerning Southern Companies' potential to exercise market power in the Southern control area.

22. Finally, Southern Companies argues that the Commission's decision to grant the late intervention request of the PSEG Companies was unwarranted and should be reversed because PSEG Companies have no legitimate interest in the outcome of this proceeding. Southern Companies emphasizes that, in its intervention, PSEG Companies readily admitted that they do not have standing because of their assertion that Southern Companies' filing does "not appear to affect PSEG Companies" and their concession that they are "not market participants in the regions that are addressed by [Southern Companies' filing]."

23. We will deny Southern Companies' request for rehearing. Insofar as it challenges the rebuttable presumption of market power established by its screen failure and the use of the economic capacity prong of the delivered price test, it constitutes a collateral attack on the methodology of the April 14 Order and July 8 Orders, where we explicitly rejected these arguments.

24. We reject Southern Companies' contention that the Commission has unlawfully shifted its statutory burden of proof under section 206 of the FPA. In the April 14 Order, we explained that failure of one of the indicative screens provides the basis for instituting a section 206 proceeding and establishes a rebuttable presumption of market power in those proceedings.[19] Failure of an indicative screen does not, however, constitute a definitive finding of market power, nor does it satisfy the Commission's burden of proof in the resulting section 206 proceeding. Rather, screen failure satisfies the Commission's burden of going forward and shifts to the applicant the burden of presenting evidence rebutting the presumption of market power.[20] The Commission has the ultimate burden

[19] April 14 Order, 107 FERC ¶ 61,018 at P 201.

[20] July 8 Order, 108 FERC ¶ 61,026 at P 30.

of proof throughout these proceedings, and it must base any finding that the applicants' market-based rates are unjust and unreasonable or unduly preferential or discriminatory on substantial evidence.

25. We will also reject Southern Companies' request that the Commission clarify that the economic capacity prong of the delivered price test need not be submitted and its request for rehearing if clarification is not granted. Southern Companies contends that the economic capacity prong does not provide any useful information concerning Southern Companies' potential to exercise market power in the Southern control area. We disagree. As we noted in the July 8 Order, neither prong is definitive; the Commission weighs the results of both the economic capacity and available economic capacity analyses and considers arguments from both applicants and intervenors as to which measure more accurately reflects market conditions. Based on our substantial experience in applying the delivered price test over the past several years, we have found that both analyses are useful indicators of suppliers' potential to exercise market power, and we are unwilling to rely solely on one measure or the other.[21]

26. We will also deny Southern Companies' request that we reverse our decision to accept the PSEG Companies as a party to these proceedings because we find that PSEG Companies have a direct interest insofar as they would be affected by the Commission's implementation of its market-based rate analysis.

Southern Companies' Contention It Has Been Denied Due Process

27. We note that Southern Companies, in its answer to protests of its compliance filing submitted by the Petitioners and others, argued that if the Commission were to expand the section 206 proceeding to cover any of the other prongs besides generation market power, it would constitute a denial of Southern Companies' due process rights. According to Southern Companies, the April 14 Order dealt exclusively with the generation market power prong, and the Commission failed to give fair notice of its intention to address the other three parts of the Commission's market-based rate analysis.

28. We reject as without merit Southern Companies' contention that it has been denied due process. The Commission may rely upon market-based prices in lieu of cost-of-service regulation to assure a just and reasonable result,[22] provided that: the Commission

[21] *Id.* at P 26.

[22] *See, e.g., Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (*LEPA*); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir.1993) (*Elizabethtown*).

has made an initial determination that market-based rate sellers lack the ability to exercise market power; that the Commission continues to exercise sufficient oversight to ensure that rates remain within the zone of reasonableness or to check rates if it does not (in particular, through the imposition of reporting requirements); and that the Commission retains jurisdiction under section 206 to entertain complaints and to respond to specific allegations of market power on a case-by-case basis.[23]

29. To satisfy the Commission in its initial review of applications for market-based rate authority, applicants must satisfy the Commission's standards for each of the four prongs to receive market-based rate authority. After the initial grant of market-based rate authority, the Commission's policy requires public utilities with market-based rate authority to submit an updated market analysis every three years, though the Commission also reserves the right to require such an analysis at any time.[24] Given that, in each order granting Southern Companies or its affiliates market-based rate authority, we have explicitly reserved the right to require such an analysis at any time, we find that there is no basis for Southern Companies' claim that the Commission has failed to give fair notice that we reserve the right to require updated market analyses, which would examine all four prongs, at any time. Furthermore, we reject Southern Companies' contention that our silence with respect to these other prongs in the April 14 and July 8 Orders effectively renounces our well-established policy – which we have clearly articulated both with respect to Southern Companies and to market-based rate sellers on a generic basis – of reviewing all four parts of the market-based rate analysis, where we deem it appropriate to do so. In any event, the evidentiary hearing initiated herein will give Southern Companies a full opportunity to be heard before we taken any final action affecting them.

30. Our decision to examine the other three prongs in the section 206 proceeding in Docket No. EL05-104-000 is taken pursuant to our duty under the FPA to ensure that rates are just and reasonable and not unduly preferential or discriminatory, and, where necessary, to examine specific allegations of market power pursuant to our section 206 authority. Where, as here, intervenors have raised credible arguments that Southern Companies may have the ability to exercise transmission market power, to erect barriers

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[23] *See, e.g., Elizabethtown*, 10 F.3d at 870-71; *LEPA*, 141 F.3d at 370-371; *Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 34 (D.C. Cir. 2002); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013-1014 (9th Cir. 2004) (*Lockyer*).

[24] *Southern Company Energy Marketing, L.P.*, 81 FERC ¶ 61,009 at 61,045 n.11 (1997); *Southern Company Services, Inc.*, 75 FERC ¶ 61,130 at 61,411 n.14 (1996); *Southern Company Services, Inc.*, 91 FERC ¶ 61,259 at 61,905 n.12 (2000).

to entry and to engage in affiliate abuse, it is appropriate to examine these issues. Once again, we emphasize that our order today does not revoke market-based rate authority or impose mitigation or any other remedies and instead only initiates a proceeding to determine whether such actions are appropriate, after full opportunity for Southern Companies to present all relevant information it so chooses.

31. Finally, we reject Southern Companies' contention that any matters pertaining to the other three components of the market-rate authorization process should be raised in the context of the separate rulemaking proceeding in Docket No. RM04-7-000. We note that, if Southern Companies' logic were correct, the Commission would be barred from addressing the other three prongs, whether on its own motion or in response to a complaint under section 206, except in the context of the generic rulemaking proceeding we initiated in Docket No. RM04-7-000. The purpose of that rulemaking is to address a broad range of issues that are relevant to the Commission's market-based rate program on a generic basis applicable to the industry as a whole, rather than to address market power issues relevant to individual market-based rate sellers. Consequently, it would be inappropriate to address in that proceeding issues related solely to Southern Companies' market-based rate authority.

The Commission orders:

(A) Petitioners' Requests for Rehearing are hereby granted in part, as discussed in the body of this order.

(B) Southern Companies request for rehearing is hereby denied.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL05-104-000 concerning the justness and reasonableness of Southern Companies' market-based rates with respect to its satisfaction of the Commission's standard for transmission market power, ability to erect barriers to entry and its ability to engage in affiliate abuse, as discussed in the body of this order. The section 206 investigation instituted here in Docket No. EL05-104-000 will be held in abeyance pending the outcome of the section 206 investigation we are instituting in Docket No. EL05-102-000 in an order to be issued concurrently.

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL05-104-000.

(E) The refund effective date established pursuant to section 206(b) of the FPA will be 60 days following publication in the *Federal Register* of the notice discussed in Ordering Paragraph (D) above.

By the Commission. Commissioner Kelly not participating.
Commissioner Kelliher dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

(Issued May 5, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

This order grants rehearing to expand the section 206 investigation initiated in the December 17 Order, and reverses the Commission's determination that Southern Companies satisfied the Commission's market power test with respect to transmission market power, barriers to entry, and affiliate abuse. I disagree with this reversal and therefore dissent in part on this order.

The Commission adopted the current four-prong market power test over 15 years ago.[1] Since then, particularly in recent years, most orders have revolved around the first prong, generation market power. While the Commission had devoted considerable effort toward developing its current generation market power screens,[2] less attention has been paid to the other three prongs: transmission market power, barriers to entry, and affiliate abuse. It is clear that in this order the Commission significantly changes its market power test in these three areas.

To date, application of transmission market power has largely involved whether or not a public utility seeking market-based rate authorization that owns transmission has an OATT on file.[3] Generally, the inquiry ends there. The Commission has declined to investigate transmission market power issues in its market-based rate determinations when a public utility has an OATT on file, and parties have made only generalized allegations of

[1] *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,060 (1994); *Citizens Power & Light Co.*, 48 FERC ¶ 61,210 (1989).

[2] *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (2004).

[3] *Consumers Energy Co. v. FERC*, 367 F.3d 915, 917 (D.C. Cir. 2004) citing *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996).

transmission market power that do not constitute specific OATT violations.[4] The Commission has determined that such matters should be raised in section 206 complaint proceedings instead.[5] In this instance, the parties' complaints are based on Southern Companies' system agreement and amount to nothing more than general contentions that an OATT alone is not sufficient to guard against the exercise of transmission market power. Despite the absence of any alleged OATT violations, the Commission nonetheless sets the matter for investigation and hearing.

The other two prongs, barriers to entry and affiliate abuse, have not been well-defined. However, to the extent the Commission has precedent in this area, this order marks an unexplained departure from past practice. Some Commission orders contain fleeting references to ownership of generation sites as possibly constituting barriers to entry.[6] These orders typically involve recitations of assets owned by applicants who in turn are guessing at what the Commission might find to be a barrier to entry. They resort to speculation because the Commission has never clearly defined this prong. To my knowledge, there is not a single order that finds ownership of generation sites represents a barrier to entry. Yet, today the Commission finds such allegations worthy of further investigation.

The order also finds credible allegations that the affiliate abuse prong was violated. Yet, our precedent indicates that the Commission has only set affiliate abuse issues for hearing in cases where an intervenor has challenged a proposed sales agreement between affiliates.[7] But that is not the case here. Instead, the Commission expands its investigation of Southern Companies' market-based rate authority based on complaints about Southern Companies' system agreement, not on allegations of affiliate abuse in a power sales agreement.

The order's discussion on how Southern Companies fail the transmission market power, barriers to entry, and affiliate abuse prongs is cursory, based on nothing more than simply a conclusion that the Commission finds the petitioners have "raised a number of credible concerns," without any further elaboration. To the extent the parties have

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[4] *E.g.*, *Alliant Services Company*, 85 FERC ¶ 61,344 at 62,335 (1998); *Consolidated Edison Company of New York, Inc.*, 78 FERC ¶ 61,298 at 62,284-85 (1997).

[5] *E.g.*, *Plum Street Marketing, Inc.*, 76 FERC ¶ 61,319 at 62,555 (1996).

[6] *E.g.*, *Metcalf Energy Center, LLC*, 110 FERC ¶ 61,013 at 61,029 (2005); *Dayton Power & Light Company*, 109 FERC ¶ 61,268 at 62,259 (2004).

[7] *E.g.*, *Wisconsin Public Service Corp.*, 109 FERC ¶ 61,319 at 62,523 (2004).

elaborated on their complaints, they focus almost exclusively on Southern Companies' operating agreement, the IIC. Since the Commission has initiated a section 206 investigation in EL05-102-000 into the justness and reasonableness of the IIC, I believe the parties' complaints should be addressed in that proceeding, rather than through an expanded investigation of Southern Companies' market-based rate authority.

It is not my position that the current market power test adequately measures market power. In fact, for months I have discussed the need to reform our transmission market power test. The Commission has initiated a rulemaking to review the entire market power test, including the transmission market power, barriers to entry, and affiliate abuse prongs.[8] In my view, significant changes to our market power test should be made in the rulemaking where the Commission can have the benefit of notice and comment procedures, rather than in the instant proceeding.[9]

I believe the Commission got it right in the December 17 Order. Southern Companies satisfies the market power test with respect to transmission market power, barriers to entry, and affiliate abuse, based on the test as we have applied it up until now. I would continue to apply the same test in this instance, and reserve changes for the rulemaking. For that reason, I dissent in part.

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Joseph T. Kelliher

[8] *Market-Based Rates For Public Utilities*, RM04-7-000, 107 FERC ¶ 61,019 (2004).

[9] *Association of Businesses Advocating Tariff Equity v. Hanzlik*, 779 F.2d 697, 701 (D.C. Cir. 1985)(agency is empowered to "order [its] own proceedings and control [its] own docket[]").