

125 FERC ¶ 61,317  
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 Company Services, Inc.  
Alabama Power Company  
Georgia Power Company  
Gulf Power Company  
Mississippi Power Company  
Southern Power Company

Docket No. ER96-780-020

ORDER ON UPDATED MARKET POWER ANALYSIS

(Issued December 18, 2008)

1. On August 29, 2008, Southern Company Services, Inc. (Southern), acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Southern Power Company (collectively, Southern Companies), submitted for filing an updated market power analysis for the Southern Companies. The updated market power analysis covers the Southern Balancing Authority Area as well as numerous first-tier balancing authority areas. Southern Companies' analysis indicates that the companies pass the pivotal supplier screen but fail the market share screen for the Southern Balancing Authority Area in all seasons. These screen failures indicate that Southern Companies may have the potential to exercise market power in the Southern Balancing Authority Area. This order only addresses the Southern Balancing Authority Area, for which Southern Companies have submitted an auction proposal aimed at mitigating any market power.<sup>1</sup>

2. On October 17, 2008, in Docket No. ER09-88-000, Southern Companies submitted an auction proposal to mitigate "any alleged market power" in the Southern

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<sup>1</sup> The Commission is still gathering data pertaining to the Southern Companies' first-tier markets. The Commission will address those markets in a subsequent order.

Balancing Authority Area.<sup>2</sup> The Commission addresses Southern Companies' auction proposal in an order issued today in that docket (Auction Order). The instant order addresses the relationship between Southern Companies' proposal in Docket No. ER09-88-000 and Southern Companies' August 29, 2008 updated market power analysis for the Southern Balancing Authority Area.

## **I. Background**

3. As noted above, on August 29, 2008, Southern filed an updated market power analysis on behalf of the Southern Companies in accordance with the reporting schedule adopted in Order No. 697.<sup>3</sup> Southern Companies state that they are a Category 2 seller in the Southeast region under Order No. 697.<sup>4</sup> Southern Companies explain that their indicative screen analyses considered the generation capacity of all of the Southern Companies as being under common ownership and control. Southern Companies state that this approach is consistent with Commission procedures where generation capacity under common ownership and control is combined for purposes of the indicative screen computations.<sup>5</sup>

4. The updated market power analysis demonstrates that Southern Companies pass the pivotal supplier screen for the Southern Balancing Authority Area, but fail the market share screens for each of the four seasons in the Southern Balancing Authority Area for the December 1, 2005 through November 30, 2006 study period with market shares ranging from 29.8 percent to 42.9 percent.

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<sup>2</sup> Southern Company Services, Inc., Proposed Amendment to Southern Companies' Market-Based Rate Tariff at 3, Docket No. ER09-88-000 (filed October 17, 2008) (Proposed Auctions Filing). In this section 205 filing Southern Companies propose to implement Day-Ahead and Hour-Ahead auctions to mitigate concerns regarding their perceived market power (Proposed Auctions).

<sup>3</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, App. D (Order No. 697), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008).

<sup>4</sup> Updated Market Power Analysis of Southern Company Services, Inc., Docket No. ER96-780-020 (Aug. 29, 2008), Rodney Frame Affidavit (Frame Aff.) at P 4 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252, App. A).

<sup>5</sup> *Id.* P 5 (citing Order No. 697, FERC Stats. & Regs. ¶ 31,252, Appendix A).

## **II. Notice of Filing and Responsive Pleadings**

5. Notice of Southern Companies' filing was published in the *Federal Register*, 73 Fed. Reg. 53,214 (2008), with interventions and protests due on or before November 3, 2008. Shell Energy North America (US), L.P. (Shell) filed a timely motion to intervene and, subsequently, comments.<sup>6</sup>

### **A. Shell Protest and Comments**

6. In its protest of and comments on Southern Companies' updated market power analysis, Shell encourages the Commission to establish a section 206 investigation into whether Southern Companies possess the ability to exercise market power. Shell argues that since Southern Companies' own analysis demonstrates that the companies fail the indicative screens, rebuttable presumptions have been established that Southern Companies possess the ability to exercise generation market power in the Southern Balancing Authority Area during all seasons.<sup>7</sup> Shell adds that an investigation under the FPA is particularly warranted given that when the flaws in Southern Companies' market power analysis and supporting simultaneous import limit (SIL) studies are corrected, the resulting values show that Southern Companies actually fail the indicative market share screens by an even wider margin.

7. Shell claims that a section 206 investigation is necessary to conduct a more extensive market power assessment, including a reliable Delivered Price Test (DPT) analysis. Shell supports this claim by explaining that the company is unaware of any material changes in the Southern Balancing Authority Area wholesale market that would justify a different result from Southern Companies' market screen failures in 2004. Shell argues that since the Commission established a section 206 investigation in response to screen failures by Southern Companies in their August 9, 2004 market power update filing, the same result should obtain in this proceeding. Shell contends that the first-tier screen failures identified in Southern Companies' updated market power analysis, which screens Southern Companies did not fail in the previous market power update, underscore the need to examine Southern Companies' market power.

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<sup>6</sup> Protest and Comments of Shell Energy North America (US), L.P. Regarding Updated Market Power Analysis, Docket No. ER96-780-020 (Nov. 3, 2008) (Shell Protest).

<sup>7</sup> Shell's protest also addresses issues with respect to the Santee Cooper and Tallahassee Balancing Authority Areas, but those issues are not addressed in this order.

8. Finally, Shell responds to Southern Companies' argument that failure of the indicative market share screen is not surprising. According to Shell, Southern Companies' witness dismisses the results of the market share screen based on the fact that four of the Southern Companies are vertically integrated utilities that build, own or control generation. Southern Companies assert that, when combined with their vertically integrated and franchised structure, the analytical methodologies mandated by the Commission as part of the market share screen cause a material overstatement of uncommitted capacity and market share. Shell states that Southern Companies' arguments against the indicative screens have already been rejected by the Commission on numerous occasions, most recently in Order No. 697, and should again be rejected.<sup>8</sup>

9. In addition to the protest, Shell filed a motion to consolidate this proceeding with Docket No. ER09-88-000.<sup>9</sup> In that motion, Shell alleged that the Commission must evaluate the nature and extent of Southern Companies' ability to exercise generation market power prior to passing judgment on Southern Companies mitigation proposal in Docket No. ER09-88-000. According to Shell, administrative economy and efficiency would best be served by the Commission considering in one docket the problem, Southern Companies' market power, and the proposed solution, Southern Companies' mitigation proposal.

**B. Southern Companies Response to Shell Protest and Motion to Consolidate**

10. On November 17, 2008, Southern Companies filed a response to the Shell protest filed in this proceeding and to Shell's protest and motion to consolidate in Docket No. ER09-88-000.<sup>10</sup> Southern Companies urge the Commission to reject the motion to

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<sup>8</sup> Shell Protest at 11-12 (citing Order No. 697, FERC Stats & Regs. ¶ 31,252 at P 65).

<sup>9</sup> Motion to Intervene, Protest and Motion to Consolidate Proceedings of Shell Energy North America (US), L.P., Docket No. ER09-88-000 (Nov. 7, 2008). Although Shell requests that the Commission consolidate this proceeding, ER96-708-020, with Docket No. ER09-88-000, Shell did not file that motion to consolidate in this proceeding (Docket No. ER96-708-020).

<sup>10</sup> Response of Southern Company Services, Inc. to Comments and Motion to Consolidate of Shell Energy North America (US), LP, Docket No. ER96-780-020 (Nov. 17, 2008) (Southern Companies Response).

consolidate<sup>11</sup> and also correct “certain inaccuracies and misstatements” in the Shell protest.

11. According to Southern Companies, Shell has not offered any basis upon which to consolidate consideration of the updated market power analysis with any other proceeding. Southern Companies assert that consolidation would only serve to delay review of and action on those filings.

### **III. Discussion**

#### **A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2008), Shell’s timely, unopposed motion to intervene serves to make it a party to this proceeding.

#### **B. Market-Based Rate Authorization**

13. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.<sup>12</sup> As discussed below, the Commission concludes that Southern Companies may not satisfy the Commission’s standards for market-based rate authority.

##### **1. Horizontal Market Power**

14. The Commission has adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.<sup>13</sup> Southern Companies prepared the pivotal supplier and wholesale market share screens for the Southern Balancing Authority Area and the following first-tier Balancing Authority Areas: Alabama Electric Cooperative, Duke Energy, Entergy, Florida Power & Light, Jacksonville Electric Authority, Louisiana Generating LLC, Progress Energy Florida, South Carolina Electric and Gas Company, South Carolina Public Service Authority (Santee Cooper), Southeastern Power Administration-Hartwell (Hartwell),

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<sup>11</sup> Although Southern Companies assert that Shell seeks to consolidate the current proceeding with Docket Nos. ER09-88-00 and ER09-92-000, the latter which relates to another section 205 filing by Southern Companies to establish an “up to” cost-based rate for short-term wholesale power sales, in actuality Shell only proposed to consolidate Docket Nos. ER09-88-000 and ER96-780-020.

<sup>12</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

<sup>13</sup> *Id.* P 62.

Southeastern Power Administration-Thurmond (Thurmond), Southeastern Power Administration-Russell (Russell), South Mississippi Electric Power Authority, Tallahassee Municipal Utilities (Tallahassee) and the Tennessee Valley Authority (TVA).<sup>14</sup> Because this order only addresses the Southern Balancing Authority Area, the Commission will address issues relating to the first-tier balancing authority areas in a subsequent order.

15. Although Southern Companies pass the pivotal supplier screen for the Southern Balancing Authority Area, they fail the market share screen for each of the four seasons for the Southern Balancing Authority Area with market shares ranging from 29.8 percent during the summer to 42.9 percent in the fall.<sup>15</sup>

16. Southern Companies assert that their failures of the market share screen in the Southern Balancing Authority Area are not indicative of the potential for the companies to exercise market power in that market. Southern Companies explain that their four franchised public utilities are required to maintain adequate resources to serve their retail native loads in a reliable manner, and thus must own and/or control sufficient generation to meet annual system peak, plus a reserve margin. Southern Companies advanced similar arguments in the rulemaking on market-based rate authority which yielded Order No. 697 and proposed alternatives to the indicative screens in that proceeding. In Order No. 697, the Commission rejected these arguments and affirmed use of the indicative market power screens. The Commission preferred to adopt conservative criteria to protect customers and to rely on more than one screen in order to assess the nature of a particular applicant's potential market power.<sup>16</sup> Accordingly, the Commission rejects Southern Companies' arguments challenging the use of the market share screen indicative screen.

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<sup>14</sup> Southern Companies explain that since the three Southeastern Power Administration Balancing Authority Areas that are first-tier to the Southern Balancing Authority Area (Hartwell, Thurmond, and Russell) have generation capacity located within their electrical boundaries but not load, the companies did not apply the indicative screens to these Balancing Authority Areas.

<sup>15</sup> Updated Market Power Analysis, Attachment 6: Summary of Market Screen Results, Base Case.

<sup>16</sup> The pivotal supplier screen measures the ability of a supplier to dominate the market during peak periods; the market share analysis measures whether a supplier has a dominant position in the market. Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 65.

17. Under the Commission's regulations, there is a rebuttable presumption that a seller possesses horizontal market power if it fails either indicative screen.<sup>17</sup> The Commission's regulations provide that a seller who fails one or both of the indicative screens may rebut the presumption of horizontal market power by submitting a DPT analysis and that a seller that does not rebut a presumption of horizontal market power or that concedes market power is subject to mitigation.<sup>18</sup> The regulations also provide that a seller that is presumed to have horizontal market power by virtue of failing the horizontal market power screens may adopt the default mitigation provided in 18 C.F.R. § 35.38(b) or may instead propose mitigation tailored to its own particular circumstances to eliminate its ability to exercise market power.<sup>19</sup>

18. According to Southern Companies, they submitted the auction proposal in Docket No. ER09-88-000 to mitigate any perceived generation market power in the Southern Balancing Authority Area. The Auction Order directs Southern Companies to submit a compliance filing within 30 days of issuance of that order notifying the Commission whether they will revise the Proposed Auctions based on the conditions therein. As explained in the Auction Order, if Southern Companies revise the auction proposal in accordance with the Commission's direction, the Commission will conclude that the auctions adequately mitigate any market power Southern Companies may have in the Southern Balancing Authority Area. Furthermore, the Commission will not institute an investigation under section 206 of the Federal Power Act<sup>20</sup> in this proceeding for the Southern Balancing Authority Area if Southern Companies implement the revised auctions.

## **2. Vertical Market Power**

### **a. Transmission Facilities**

19. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved Open Access Transmission Tariff (OATT) on file before granting a seller market-based rate authorization.<sup>21</sup>

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<sup>17</sup> 18 C.F.R. § 35.37(c)(1) (2008).

<sup>18</sup> 18 C.F.R. § 35.37(c)(3) (2008).

<sup>19</sup> 18 C.F.R. § 35.38(a) (2008).

<sup>20</sup> 16 U.S.C. § 824e (2006).

<sup>21</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 408.

20. Southern Companies explain that they maintain an OATT and thus have adequately mitigated any potential transmission market power.

**b. Barriers to Entry**

21. In addition to whether an OATT is on file, the Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.<sup>22</sup> The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).<sup>23</sup> The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.<sup>24</sup> The Commission has adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.<sup>25</sup>

22. Southern Companies provide a description of their ownership of and/or control over sites for generation capacity development, sources of fuel supplies, and transportation facilities. According to Southern Companies, they do not operate coal mines, but own approximately 125 million tons of recoverable coal reserves in the Warrior and Cahaba Basins and approximately 100 million tons of recoverable lignite reserves in the Damascus Reserve, Wilcox Outcrop. Southern Companies explain that these holdings are for their use in the production of electric power and are a small fraction of total recoverable reserves available to generators. Southern Companies also own or control, through lease, a fleet of coal railcars for private use in connection with the companies' coal-fired generation.

23. Southern Companies note that they entered into a lease agreement, which expires in 2009, that allows a third-party to mine for coal bed methane gas located on property owned by Southern Electric Generating Company. In addition, Southern Companies note that they presently own or have options on thirty-four sites for generation capacity

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<sup>22</sup> *Id.* P 440.

<sup>23</sup> *Id.* P 447; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

<sup>24</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

<sup>25</sup> *Id.* P 446.



development scattered across states in the Florida Reliability Coordinating Council and the Southeastern Electric Reliability Council. They explain that the precise number of sites for generation capacity development is subject to change and dependent on market conditions and opportunities.

24. Southern Companies affirmatively state that they have not erected and will not erect barriers to entry into the Southern Balancing Authority Area or the companies' first-tier Balancing Authority Areas, and that they do not own or control, directly or through affiliates, intrastate natural gas transportation, storage or distribution facilities. Based on Southern Companies' representations, Southern Companies satisfy the Commission's requirements for market-based rates regarding vertical market power.

### C. Reporting Requirements

25. Consistent with the procedures the Commission adopted in Order No. 2001,<sup>26</sup> an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.<sup>27</sup> Public utilities must file Electric Quarterly Reports no later than 30 days after the end of the reporting quarter.<sup>28</sup>

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<sup>26</sup> *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003).

<sup>27</sup> Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

<sup>28</sup> The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

26. Southern Companies must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>29</sup>

27. Based on Southern Companies' representations, we find that they meet the criteria for a Category 2 seller and are so designated.<sup>30</sup> As a Category 2 seller, Southern Companies must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.<sup>31</sup> The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) Southern Companies must submit a compliance filing within 30 days of the date of issuance of this order to inform the Commission of whether they plan to proceed with revising their auction proposal in Docket No. ER09-88-000, based on the findings provided in the Auction Order. This compliance filing should indicate how Southern Companies intend to comply with the conditions regarding the Independent Auction Monitor. Southern Companies should submit a separate compliance filing no later than 60 days prior to the expansion of the auctions to allow third-party sellers to participate, consistent with this order.

(B) Southern Companies are directed to make a compliance filing, within 30 days of this order, amending their market-based rate tariff to include a provision identifying their seller category in accordance with Order No. 697-A.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>29</sup> *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

<sup>30</sup> In Order 697-A, the Commission required that each seller include in its market-based rate tariff a provision identifying the category of the seller as defined in 18 C.F.R. § 35.36(a) (2008). Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 391. Southern Companies are directed to include this provision in their market-based rate tariffs as part of a compliance filing due within 30 days of this order.

<sup>31</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 882, App. D.