

UNITED STATES OF AMERICA 95 FERC ¶ 61,282
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

Carolina Power & Light Company
Duke Energy Corporation
South Carolina Electric & Gas Company
GridSouth Transco, LLC

Docket No. RT01-74-001

ORDER DENYING REHEARING AND GRANTING, IN PART,
CLARIFICATION

(Issued May 30, 2001)

This order addresses the requests for rehearing and clarification of the Commission's March 14, 2001 order (March 14 order)¹ finding that, subject to certain modifications, the Regional Transmission Organization (RTO) proposal submitted by Carolina Power & Light Company (CP&L), Duke Energy Corporation (Duke) and South Carolina Electric & Gas Company (SCE&G) (referred to collectively as "the Applicants") complies with Order No. 2000.² The March 14 order also granted provisional RTO status to GridSouth Transco, LLC (GridSouth). The requests for rehearing are denied and the requests for clarification are granted in part and denied in part, as discussed below.

I. Background

On October 16, 2000, the GridSouth Applicants submitted a compliance filing to comply with Order No. 2000. They requested the Commission's approval for the

¹Carolina Power & Light Company, et al., 94 FERC ¶ 61,273 (2001).

²Regional Transmission Organizations, 65 FR 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 FR 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), petitions for review pending sub nom., Public Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir.).

formation of an independent, for-profit transmission company or "transco." The Applicants submitted a GridSouth Open Access Transmission Tariff (Tariff or OATT), pursuant to which GridSouth will provide open access transmission and ancillary services. The compliance filing included a GridSouth Transmission Operating Agreement (Operating Agreement), pursuant to which the Applicants will transfer functional control of their transmission facilities to GridSouth. The Applicants also tendered a Limited Liability Company Agreement of GridSouth Transco, LLC (LLC Agreement) that will establish GridSouth as a limited liability company under Delaware law, and includes the governance provisions for the proposed RTO.

The March 14 order provisionally accepted the Applicants' compliance filing and found that their proposal, as modified by the order, would create a viable, stand-alone transmission business that complies with Order No. 2000. The March 14 order required the Applicants to revise various provisions of the OATT and other corporate documents and to submit a revised compliance filing within sixty days. The March 14 order also directed the Applicants to meet with representatives of Santee Cooper to attempt to reach agreement on the latter's participation in the GridSouth RTO. Further, the order required the Applicants to submit, by May 14, 2001, a status report regarding (1) efforts to expand the scope and configuration of the RTO and (2) interregional coordination discussions with neighboring transmission entities.

Requests for Rehearing and Clarification

Timely requests for rehearing and/or clarification of the March 14 order were filed by the GridSouth Applicants, Dynegy Inc. (Dynegy), Enron Power Marketing, Inc. (EPMI), SMI Steel-South Carolina, a division of Commercial Metals Company (SMI Steel) and South Carolina Public Service Authority (Santee Cooper). Central Electric Power Cooperative, Inc., New Horizon Electric Cooperative, Inc., North Carolina Electric Membership Corporation, ElectriCities of North Carolina, Inc., Piedmont Municipal Power Agency, and the Cities of Orangeburg and Seneca, SC (collectively "Joint Protestors") filed a timely, joint request for rehearing and clarification. On April 30, 2001, the GridSouth Applicants filed an answer to the motions for clarification.

Lockhart Power Company (Lockhart) and Alcoa Power Generating Inc. (Alcoa) filed motions to intervene out of time (but do not seek rehearing).

Discussion

I. Procedural Matters

As noted in Lockhart's motion to intervene, the March 14 order discussed objections to GridSouth's failure to include the transmission facilities owned by Lockhart and encouraged Lockhart and GridSouth to continue to explore "opportunities of mutual advantage." Because of Lockhart's interest in this proceeding, and no undue burden will be placed on existing parties, we will grant Lockhart's motion to intervene out of time. 18 C.F.R. § 385.214(d) (2000). However, the late intervention of Alcoa is denied.

The Applicants' answer to the requests for clarification is granted. Unlike answers to requests for rehearing, answers to requests for clarification are not prohibited under the Commission's Rules of Practice and Procedure. See 18 C.F.R. § 385.212(a) (2000).

II. RTO Characteristics

A. Independence

1. Passive ownership

The March 14 order accepted the Applicants' proposal regarding the fundamental structure of the RTO - that GridSouth will operate as a transco, and its members will retain a passive ownership interest, without any day-to-day control over RTO activities.³ In rejecting Santee Cooper's argument that allowing the GridSouth members to retain a passive interest in the RTO will compromise independence, the Commission noted that Order No. 2000 provided that passive ownership of a transmission entity is acceptable if properly designed and that the Commission would review passive ownership proposals on a case-by-case basis. The March 14 order then found that the Applicants proposal, with certain modifications, is adequately designed to assure that the passive owners will have relinquished control over the decision making process, and explained that this finding was based on the detailed review of the individual provisions of the proposed LLC structure. Further, the March 14 order explained that, contrary to Santee Cooper's position, Order No. 2000 did not limit passive ownership to circumstances where the transfer of the ownership of transmission assets is imminent so that transmission owners will not have to recognize capital gains on the transfer of their facilities.

On rehearing, Santee Cooper reiterates that, as a general matter, allowing unlimited passive ownership compromises the independence of an RTO and should not be allowed. It argues that Order No. 2000 itself suggests that passive ownership inevitably compromises the perception of independence and creates an incentive for

³March 14 order, 94 FERC at 61,985-86.

market participants to abuse their ownership status to manipulate RTO decisions. Further, it contends that the March 14 order did little more than cite to Order No. 2000 in explaining why passive ownership was acceptable in the case of GridSouth.

Santee Cooper seeks a generic ruling that passive ownership proposals are generally unacceptable. While expressing concerns about the independence of proposed structures that allow transmission owners to retain a passive interest in the RTO, Order No. 2000 concluded that these concerns could be overcome and a proposal for passive ownership could meet the standards relating to independence and governance if properly designed.⁴ Order No. 2000 explained that the Commission would conduct a case-by-case review of such proposals to "provide assurances to all market participants that any passive ownership interest is truly passive and will in no way interfere with the independent operation and decisionmaking of the RTO."⁵ Further, the Commission noted that passive ownership comes in many forms, which may be complicated and multi-layered.⁶ On the other hand, conventional arrangements that are purely financial, *i.e.*, designed to protect the financial investment of the passive owners, are acceptable.⁷ GridSouth's passive ownership proposal is designed to protect the financial interests of the passive owners, and is not multi-layered or otherwise present complications that may obscure the transmission owners' retention of control over the decision making process. Thus, Santee Cooper's arguments are an impermissible collateral attack on the conclusion of Order No. 2000 that a properly structured proposal for passive ownership is acceptable if properly designed.

Moreover, we also deny Santee Cooper's rehearing to the extent that it contests the March 14 order's findings regarding the specific passive ownership proposal of the GridSouth Applicants. Order No. 2000 articulated three key elements necessary for an acceptable passive ownership proposal: (1) case-by-case review whether the passive owners have relinquished control over operational, investment and other decisions; (2) processes for an independent compliance audit to ensure the independence of the RTO's decisionmaking process from the passive owners; and (3) the Commission will take

⁴Order No. 2000, at 31,065-66.

⁵Id., at 31,065.

⁶Id., at 31,066.

⁷Id., at 31,068.

appropriate action if it finds evidence of abuses.⁸ The March 14 order analyzed the Applicants' proposal in light of the above three elements and concluded that passive ownership would not be an impediment to the independence of the GridSouth RTO. The March 14 order painstakingly reviewed the individual provisions of the Applicants' proposed LLC structure for fairness and independence and concluded that, with certain modifications, the proposal satisfied the independence characteristic of Order No. 2000 and would create an RTO in which the passive owners will relinquish control over the decisionmaking process.⁹ Further, the Commission accepted the Applicants' proposal for an independent compliance audit,¹⁰ and, of course, the passive owners will be subject to appropriate action if the Commission finds evidence of abuses. Santee Cooper does not challenge on rehearing these detailed findings of the March 14 order.

Santee Cooper also contends that passive ownership is only appropriate when transmission owners would have to recognize capital gains on the transfer of their facilities, and notes that the Applicants' proposal does not contemplate such a transfer until such time that retail unbundling is implemented in the Carolinas. In fact, while Order No. 2000 discusses in the broad context of removing impediments to RTO formation the triggering of Federal capital gains taxes as one generic reason for allowing passive ownership, it did not make the triggering of tax consequences a necessary criterion for allowing passive ownership.¹¹

Accordingly, we deny Santee Cooper's request for rehearing on this issue.

2. Section 4.4(d) of the LLC Agreement - right of first refusal

Section 4.4(d) of the LLC Agreement gives the existing GridSouth members a right of first refusal to purchase new equity interests issued by the GridSouth Board of Directors (Board). This right expires upon the consummation of an Initial Public Offering (IPO). The Applicants explained that this provision was designed to protect existing members from dilution of the value of their membership interests should the Board issue new equity at too low a price, and the March 14 order found that the anti-

⁸Id., at 31,066.

⁹See March 14 order, 94 FERC at 61,985-91.

¹⁰March 14 order, 94 FERC at 61,985 and 62,006.

¹¹Order No. 2000, at 31,064-65.

dilution provision was acceptable to protect the value of the investment of the GridSouth members.¹²

Joint Protestors reiterate the arguments made in their earlier protest that existing members can use the right of first refusal to exclude new entities from obtaining ownership interests and that the Board's fiduciary duty to maximize the value of the members' interests offers sufficient protection from dilution. They also contend that the Commission's acceptance of this provision was inconsistent with its denial of the proposed right of the GridSouth members to veto proposed changes to the equity-based compensation plans for Board members and LLC senior officers (section 6.13(b)(ix) of the LLC Agreement), which the Applicants also argued was necessary to prevent dilution of member interests.

We deny the request for rehearing on this issue. The March 14 order denied the proposal that GridSouth members retain veto authority over equity-based compensation for GridSouth executives because, in balance, the potential influence over the Board by retaining control of compensation was significant while the Applicants' contention that such compensation may dilute membership interests was unconvincing. With regard to the right of first refusal, we find that the balance is just the opposite: the possibility of a dilution in value of membership interests due to an undervalued offering by the Board is a legitimate concern of the GridSouth members, while the claim that this provision could be used to limit membership is not convincing. We note that section 4.4(d) relates to the issuance of equity to raise capital and could not be used to preclude transmission owners from joining GridSouth as a member. Further, once an IPO occurs, equity in GridSouth will be publicly traded and the disputed provision will expire.

B. Scope

The March 14 order provisionally accepted the GridSouth Applicants' proposed scope and configuration as consistent with Order No. 2000. The order considered that, as proposed, GridSouth will encompass an area of about 65,000 square miles, its facilities will include 22,000 miles of transmission wires, it will manage a connected peak load of 34,000 MWs, the boundaries of GridSouth will encompass a contiguous area and that the Applicants have a history of cooperating together on transmission assessment and expansion planning.¹³ The March 14 order found that the GridSouth proposal, "while not ideal with respect to scope and configuration, represents a good first

¹²March 14 order, 94 FERC at 61,990.

¹³March 14 order, 94 FERC at 61,993.

step toward the creation of an RTO in the Southeast region and can serve as a platform for the formation of a larger RTO in the Southeast."¹⁴ The Commission emphasized the need for GridSouth to continue to expand and, in that vein, required the Applicants to meet with Santee Cooper to attempt to reach agreement on the latter's participation in the GridSouth, and required the Applicants to file a status report by May 14, 2001 regarding their efforts to expand the scope and configuration of the RTO.

Joint Protestors argue that the March 14 order is in error because GridSouth is lacking in scope and that the acceptance of the Applicants' proposal will, despite the order's admonishments, create a disincentive for further expansion of GridSouth membership. Further, they contend that the March 14 order is inconsistent with the Commission's subsequent ruling in Southwest Power Pool, Inc., et al., 94 FERC ¶ 61,359 (2001) (SPP), in which the Commission did not accept the scope and configuration of the SPP RTO, finding that natural markets extend beyond the SPP RTO borders. Joint Protestors contend that, based on this criterion, GridSouth's scope is also insufficient since its borders do not encompass a natural market. They argue that the Administrative Procedure Act requires the Commission to act consistently and to articulate the criteria used to reach differing results in otherwise similar cases.

We deny Joint Protestors' request for rehearing on this point. The March 14 order addressed in detail the reasoning for provisionally accepting the Applicants' proposal on scope and configuration. With regard to the contention that acceptance of the proposal will deter expansion because the Applicants will "rest on their laurels," the Applicants acknowledged in their October 16, 2000 compliance filing the need to continue to expand and expressed their aspiration that GridSouth be a platform for the development of a larger RTO in the Southeast. Moreover, the March 14 order directed the Applicants to continue its efforts to expand and file a compliance report by May 14, 2001 that addresses its efforts. The Applicants have submitted their compliance report, and the Commission is currently seeking public comment on the filing. We plan to address the Applicants' efforts to enlarge the scope of GridSouth in a separate order.¹⁵ As we said in the March 14 order, GridSouth can serve as an initial platform for the formation of a larger RTO in the Southeast. The Commission's goal, however, is the formation of a single RTO in the Southeast.

¹⁴Id.

¹⁵We have shortened the comment period on this aspect of the May 14, 2001 compliance filing to expedite our review.

Moreover, there is no inconsistency between the March 14 order and SPP. While the March 14 order found that the Applicants' proposal was consistent with Order No. 2000 although not "ideal" on scope, the structure of the proposed RTO was sufficiently sound to serve as a platform for a larger RTO in the Southeast. In contrast, SPP's proposal not only failed to encompass natural markets, it also suffered from other serious deficiencies that called into question whether SPP could achieve the currently proposed scope and configuration. Thus, Joint Protestors misconstrue SPP when claiming that the sole criterion for the Commission's action in that case was based on the fact that SPP's proposal did not encompass natural markets within its borders. In fact, it was the ambiguous nature of SPP's filing and the failure of any SPP transmission owner to commit to file an application under section 203 of the Federal Power Act that led to the Commission's decision not to approve SPP's proposal on scope and configuration.¹⁶

Further, we deny EPMI's request that the Commission direct the various interested parties in the Southeast to participate in a settlement judge proceeding to assist in their joining together under one regional transmission umbrella. The Commission has exercised its discretion to pursue this goal through other means.

II. RTO Functions

A. Tariff Administration and Design

1. Transmission Service for Serving Bundled Retail Load

The March 14 order noted that, to comply with Order No. 2000, the GridSouth Applicants have given functional control of all their transmission facilities to GridSouth.¹⁷ In so doing, the Applicants are no longer transmission providers and have no alternative but to take all transmission service from GridSouth as the only provider of transmission service on its grid. The Applicants fully recognized this in their compliance filing by placing the transmission service needed to serve bundled retail load under the terms and conditions of the GridSouth Tariff, but proposed to waive the Tariff charges.¹⁸ The March 14 order stated that, in waiving the charges, the Applicants ensured that they would not be assessed transmission charges any different than the transmission component of their bundled retail rates. In our March 14 order, we held that the

¹⁶SPP, mimeo at 14.

¹⁷March 14 order, 94 FERC at 61,999.

¹⁸GridSouth Transmission Operating Agreement, Section 2.09.

Applicants must place their retail load completely under the GridSouth Tariff, and their desire to be assessed a charge equal to the transmission component of their bundled retail rate must be accomplished not by waiver, but by contract between GridSouth (the transmission service provider) and each of the Applicants, who are now transmission customers.¹⁹

The Applicants now request that we clarify that we are not requiring the unbundling of retail rates, and are not making retail rates subject to our jurisdiction. The Applicants state that they intended to place their bundled retail load under the GridSouth Tariff for purposes of terms and conditions, but not rates. They argue that paying GridSouth for transmission service at a charge equal to the transmission component of their bundled retail rates effectively makes their retail rates subject to our jurisdiction. They therefore request that they not be required to enter into contracts to compensate GridSouth for their use of GridSouth facilities to serve bundled retail load. In the alternative, they request that we defer ruling on this issue until the Supreme Court rules on EPMI's petition of the D.C. Circuit's ruling on Order No. 888.

Neither Order No. 2000 nor the March 14 order assert jurisdiction over bundled retail rates, *i.e.*, the bundled price for electric energy delivered to ultimate consumers. However, as we stated in the March 14 order, GridSouth is now the sole provider of transmission service and the applicants must take all transmission services, including transmission used to deliver power to bundled retail customers, from GridSouth. As a result, the rates, terms and conditions of transmission service purchased by the Applicants from GridSouth in order for the Applicants to serve their retail customers must be on file with the Commission. This reflects the simple reality that GridSouth is now providing all transmission service and must be compensated, as would any independent entity. We disagree, however, that paying GridSouth for the transmission needed to serve bundled retail customers makes the applicants' retail rates subject to our jurisdiction. The fact that the price the Applicants pay to GridSouth will become their cost for transmission of the energy they sell at retail does not give this Commission jurisdiction over the other costs that the Applicants recover in their retail rates. As we stated in the March 14 order, we are willing to accommodate the Applicants paying GridSouth a transmission rate equal to the transmission component of their bundled retail rates, as long as the price is clearly stated, is reduced to writing in contracts with GridSouth, and is not accomplished by omission.

¹⁹March 14 order, 94 FERC at 61,999.

Finally, we will not defer to the EPMI petition before the Supreme court. That case poses the question whether a transmission provider's use of its transmission to serve its retail load is subject to our jurisdiction. In contrast, the entities who serve load (such as CP&L) are no longer transmission providers because they now all take service from a regional service provider which has no retail load. In any event, to the extent the Supreme Court issues rulings on Order No. 888, we will assess their relevance to Order No. 2000 at that time.

EPMI requests that we clarify that our March 14 order requires that all uses of the transmission system be under the GridSouth Tariff at the same terms, conditions, and rates. As we have stated above, the transmission services needed by the Applicants must be placed completely under the GridSouth Tariff. Our March 14 order deferred a ruling on the rate issues because GridSouth's application stated that its supplemental filing would address rates (including incentive rates). We wanted to address all rate issues at that time and, therefore, EPMI's requests are premature. We will address all rate issues when GridSouth files its rates.

2. GridSouth Tariff Superiority

The March 14 Order

The March 14 order found that the benefits provided by an RTO are greater than those provided by the Applicants' existing OATTs. In particular, we stated that "[a]n appropriate RTO should improve efficiencies in grid management through improved pricing, congestion management, more accurate estimates of ATC, improved parallel path flow management and more efficient planning among other benefits."²⁰ We also stated that, "[w]e will not impose the provision of [Network Contract Demand (NCD)] service on GridSouth parties that were not part of the CP&L/[Florida Power Company (FPC)] merger because such service is not required under the pro forma tariff."²¹ We noted that, with respect to grandfathering, Order No. 2000 did not generically abrogate existing transmission agreements and instead adopted a measured approach allowing each RTO to propose whatever contract reform it concludes is necessary. Finally, we indicated that, since the GridSouth Applicants intend to finalize their list of grandfathered contracts 60 days prior to GridSouth's operation date, ". . . we encourage

²⁰March 14 order, 94 FERC at 61,999.

²¹Id.

the Applicants to negotiate appropriate contract reforms during the intervening time period."²²

Requests for Rehearing

Joint Protesters ask the Commission to redress what they see as an inequitable situation resulting from the replacement of what they claim are more favorable transmission terms and conditions under their existing GridSouth Applicants' OATT service agreements with the GridSouth Tariff.²³ They assert that the Commission gave short shrift to their concerns about losing these benefits, and that the Commission erroneously concluded that GridSouth's Tariff would be superior to the Applicants' existing OATT services.²⁴

First, Joint Protesters reiterate the concerns they had expressed in their original protest about the loss of NCD transmission service provided under CP&L's OATT; that the Applicants seemed to be seeking to abrogate agreements previously reached with transmission customers by forcing them to migrate to the less flexible GridSouth Tariff; that it is antithetical to the concept of RTO-wide Network Service for Section 28.3 of the GridSouth tariff to require Network Service transmission customers to execute separate service agreements for each of the GridSouth participants' control areas where the customer has load served by the GridSouth RTO. Joint Protesters assert that the increased flexibility that one would assume to be available to Network Service customers in an RTO environment allowing them to serve loads in more than one zone with resources in more than one zone would not be available to GridSouth customers. Joint Protesters contrast the GridSouth Tariff with the PJM tariff that permits the integration of network resources with network loads located in more than one pricing zone.

Second, Joint Protesters specify for the first time in their rehearing petition²⁵ that the GridSouth Tariff compares unfavorably with the Applicants' existing OATT service arrangements in the following additional ways: (1) Section 28.5 of Duke's OATT

²²Id.

²³Joint Protesters' rehearing request, pp. 15-20.

²⁴Joint Protesters contend that the small size of the GridSouth region as proposed so far limits the putative benefits of the GridSouth tariff with respect to improved parallel path flow, improved pricing, and unified ATC calculations.

²⁵Joint Protesters' rehearing petition, pages 18-19.

provides for the possibility that Duke might provide losses in-kind for Network Service customers, whereas Section 28.5 of GridSouth's Tariff does not permit this practice; (2) CP&L's OATT customers have been able to negotiate reasonable power factor requirements under their existing Network Integration Service Transmission Agreements (NITSA's), whereas Section 2.43 of the GridSouth Tariff is so general as to not assure the continuance of such arrangements; and (3) Network Service customers have been able to negotiate with certain GridSouth Applicants various NITSA arrangements that accommodate customer-owned generation for the self-supply of certain ancillary services and other matters and, as new GridSouth RTO customers, they should not have to negotiate again to obtain similar accommodations from the Applicants.

Third, Joint Protesters reiterate the concern from their original protest that Section 4.1 of the GridSouth Tariff will not permit GridSouth customers located in more than one control area to net their energy imbalances through the trading of their imbalances among the relevant control areas. As a remedy, Joint Protesters ask the Commission to require the GridSouth Applicants to revamp GridSouth's proposed Network Service to make it "truly" RTO-wide rather than control-area-by-control-area. In their view, this requirement would make the GridSouth Tariff indeed superior to the Applicants' individual OATT services.

Discussion

Joint Protestors argue that they should not be required to execute a separate network service agreement for each of GridSouth's control areas and that they should be allowed to integrate resources and loads across all control areas. While GridSouth will be the sole transmission provider, it will initially operate three control areas. Joint Protestors' request to integrate resources and loads anywhere on the GridSouth system would require a single control area which Order No. 2000 did not require. We see no basis, however, to require a customer to sign three separate service agreements. For ease of tariff administration and one-stop shopping, we direct GridSouth to require a single agreement which can contain information for each delivery zone. This revision should be made within 10 days of this order.

With respect to NCD service, as noted above, the Commission did not take away the NCD rights agreed to by the CP&L-FPC merger proceeding parties. We simply refused to expand the requirement to offer such service to GridSouth parties which were not part of the CP&L-FPC merger proceeding. With respect to the broader issue of more favorable terms and conditions claimed to be available under the Applicants' existing OATTs, we continue to believe that the GridSouth Tariff offers greater benefits overall to the GridSouth customers. At this juncture, however, given our expectation that the

Applicants should negotiate appropriate contract reforms before they finalize their list of grandfathered contracts, it would be premature for the Commission to impose changes to the GridSouth Tariff, especially with respect to the numerous new matters the Joint Protesters have raised on rehearing, until this negotiation process has been completed.

Third, consistent with the control area determinations that we have made earlier in this order, we are not prepared to modify GridSouth's Tariff to require the netting of individual RTO customer's imbalances among control areas. Control areas match the power output of the generators within each such area with the internal load within the area.²⁶ This process entails the automatic running of generation up and down within each control area to maintain an overall balance between supply and load as it continually changes within the area. As such, we recognize that there may be limitations on the ability to net and trade imbalances across control areas. However, when the control areas are located within the same RTO, there may be other ways of dealing with the imbalances. Therefore, GridSouth should give full consideration, in consultation with interested parties, of mechanisms to minimize energy imbalances on an RTO-wide basis through either operational or trading mechanisms.

Dynegy seeks rehearing of our denial of its proposed revisions to certain provisions of the pro forma tariff. We deny Dynegy's rehearing because, as stated in the March 14 order, its request is beyond the scope of the current proceeding. The issues raised are generic industry-wide issues that are more appropriately dealt with in a separate proceeding.

3. Transmission Service Charge

²⁶The Commission's pro forma open access transmission tariff defines "control area," in relevant part, as follows:

An electric power system or combination of electric power systems to which a common automatic generation control scheme is applied in order to:

- (1) match, at all times, the power output of the generators within the electric power system(s) and capacity and energy purchased from entities outside the electric power system(s). . . [Order No. 888-A, FERC Stats. & Regs., Regulations Preambles July 1996-December 2000, ¶ 31,048 at 30,507.]

The March 14 order noted that GridSouth had not filed its actual rates and that the Applicants stated that they would make a supplemental filing that would include their rate proposal. As a result, the March 14 order did not approve any actual rate levels. However, in response to the Applicants request for guidance, we explained that "with respect to the [Transmission Service Charge], it is reasonable for GridSouth to recover its operating costs from all transmission customers through this type of service charge."²⁷ The order further stated that, since the Applicants' supplemental filing would represent their formal Section 205 filing, it was premature to rule on any of the rate-related requests in the present proceeding.

In its rehearing request, SMI Steel states that the GridSouth Applicants should be required to justify the need for the Transmission Service Charge before the Commission approves the charge. SMI asserts that its request is based on its original protest which claimed that the Transmission Service Charge provided Applicants a vehicle to over-recover their costs and requested the Commission to direct the Applicants to remove the proposed Transmission Service Charge from the GridSouth OATT or require the Applicants to clarify that GridSouth will not recover the same costs twice.

Our March 14 order approved the concept of the Transmission Service Charge. It did not approve any specific level. When GridSouth files its rates under Section 205, it will be required to support the Transmission Service Charge level and SMI Steel can contest the appropriateness of the level at that time. Accordingly, SMI Steel's request for rehearing on this point is denied.

4. Transferred Facilities

The March 14 order denied Joint Protesters' request that the Commission direct GridSouth Applicants to submit a full listing of transferred and non-transferred transmission facilities. The order stated "[i]f GridSouth assesses a charge for direct assignment facilities, that charge will need to be filed in conjunction with service under the tariff (i.e., when the specific service agreement is filed). We agreed with the Applicants that affected customers have the opportunity to raise concerns at that time."²⁸

²⁷March 14th order, 94 FERC at 62,001. The Transmission Service Charge is designed to enable GridSouth to recover its operating costs and the cost of capital associated with GridSouth investments and is a surcharge to all transmission customers under GridSouth's Tariff.

²⁸March 14th order, 94 FERC at 61,998.

In their rehearing request, Joint Protesters again request that the Commission require the GridSouth Applicants to file a list of transferred facilities and to confer with affected parties before doing so. They state that, in their protest to the original filing, they raised a concern associated with the potential for rate pancaking associated with Non-Transferred Facilities and that, while concern over rate pancaking was one reason why they sought a listing of facilities, it was not the only reason.²⁹ Joint Protesters claim that such a list would enable the Commission to assure that the Applicants will hand over functional control over all significant facilities to GridSouth. They also assert that, in Alliance Companies, 94 FERC ¶ 61,070 at 61,329 (2001) (Alliance III), the Commission directed Alliance Companies to file a list facilities that would be transferred and, to the extent possible, undertake discussions regarding the facilities with concerned parties before submitting the list. Joint Protesters claim that, consistent with Alliance III, the Commission should direct the GridSouth Applicants to file a complete list of facilities to be transferred and to engage in discussions with interested parties beforehand.

The March 14 order required GridSouth to provide a listing of specific facilities if GridSouth were to assess charges related to direct assignment facilities. This simply means that such a list would be known as and when GridSouth filed service agreements that contained charges for direct assignment facilities. Moreover, in their initial filing, the Applicants explained that the transferred transmission assets include all facilities that are booked to Accounts 350-359 of the Uniform System of Accounts (other than generator step-up transformers included in Account 353).³⁰ Applicants have clearly identified which transmission facilities will be transferred to GridSouth, *i.e.*, all facilities in Accounts 350-359 (with the noted exclusions). Given this level of specificity, no further filing is necessary. Therefore, rehearing is denied on this point.

B. Ancillary Services

1. The March 14 Order

Since the GridSouth Applicants plan to file a comprehensive rate proposal in a supplemental filing, the March 14 order stated that the Commission would address issues regarding the Applicants' proposed Hourly Imbalance Charge when it reviews the supplemental filing. The March 14 order also directed the Applicants to file a plan describing how GridSouth will implement market mechanisms for real-time energy balancing within one year of the date that GridSouth commences operations (the

²⁹Joint Protesters' Rehearing Request at 11-12.

³⁰GridSouth Transmittal Letter at 29.

"independence date"), and stated that the Commission would address other issues regarding ancillary service and imbalance energy rates when it reviews the Applicants' proposal regarding the establishment of real-time imbalance energy markets.³¹

2. Requests For Rehearing and Clarification

Regarding the Schedule 4 Energy Imbalance Service, SMI-Steel argues on rehearing that the Commission should have addressed its claims that (1) the Applicants' proposed penalty for over-scheduling is unnecessarily punitive and discriminatory for variable load customers and (2) the Applicants did not sufficiently explain why the energy imbalance trading window is open for only two days.³² It also requests that the Commission require the Applicants to explain how large, interruptible loads will be included in GridSouth's ancillary service markets and to guarantee such loads will have the same opportunities to participate in ancillary service markets as do other resources. Further, SMI-Steel argues that the Applicants have not explained why the supplemental energy supplied under Schedules 5 and 6 will be provided under the Energy Imbalance Schedule.³³ SMI Steel believes that the provisions in Schedule 5 and 6 could result in the compounding of charges and the over-recovery of actual costs and requests rehearing on this issue.

Joint Protestors argue that the Commission erred in deferring a ruling on the Schedule 4 Energy Imbalance Service because the Applicants' proposal would take effect on Day One of RTO operations and would stay in effect until replaced with a true real-time balancing market. They contend that Schedule 4 discriminates in favor of the Applicants and against other RTO transmission customers because the Applicants, as control area operators, will not be subject to the Schedule 4 Energy Imbalance Services.³⁴

EPMI requests that the Commission clarify, or in the alternative grant rehearing, that the balancing function be ceded from the three individual control areas to the RTO

³¹March 14 order, 94 FERC at 62,003-4.

³²SMI-Steel Rehearing Request at 5-6.

³³Id., at 8.

³⁴Joint Protestors at 13-15.

because operating the balancing function at the control area level will lessen the value of energy balancing.³⁵

3. Discussion

With regard to SMI Steel's rehearing request, as we explained in the March 14, 2001 Order, addressing issues related to ancillary services, imbalance energy rates and the Hourly Imbalance Charge would be premature until GridSouth makes its supplemental filing. GridSouth's Application is silent on the issue of whether or not large, interruptible loads will be allowed to participate in ancillary service markets. Therefore, if GridSouth does not allow such participation, SMI Steel can raise its issues in the supplemental proceeding. Accordingly, we deny SMI Steel's request for rehearing on these matters.

We also deny Joint Protestors' request for rehearing regarding the issues raised related to ancillary services.

Our March 14 order also discussed Applicants' explanation in their December 5, 2000 Response regarding the circumstances in which a transmission customer would be subject to the imbalance energy charge. The order stated that:

Regarding energy imbalance penalty surcharges, Applicants explain that the energy imbalance penalty would only apply in the case where GridSouth would be forced to supply "bridge energy" to cover the period between the time the service is needed and the time the Customer's self-supplied service begins. If the Customer purchases the ancillary services from GridSouth, there would be no need for "bridge energy", since there would be no interim period. Therefore, Applicants conclude, there would be no need to impose a surcharge if the Customer purchases its Schedule 5 and Schedule 6 ancillary services from GridSouth.³⁶

In fact, Applicants stated that a Transmission Customer would have to pay an imbalance energy charge for such "bridge energy" only if it purchased its reserves from GridSouth. A Customer who self-provided or secured ancillary services from a third

³⁵EPMI Request for Clarification at 7-8.

³⁶March 14 order, 94 FERC at 62,003.

party would not have to pay the energy imbalance charge, because there would be no bridge energy supplied by GridSouth.³⁷

Given this correction of the March 14, 2001 order, the Applicants have shown that applying the imbalance energy charge for supplying "bridge energy" is not discriminatory, it is simply a means of recovering costs for energy provided by the Transmission Provider. In addition, the fact that control area operators will not be subject to Schedule 4 Energy Imbalance Services is not discriminatory. In fact, it is a function of being a control area operator, not of being an Applicant. Any GridSouth participant who is a control area operator would bear the costs of providing energy imbalance service to transmission customers (including themselves) within its control area.

Regarding EPMI's request for clarification, Order 2000 requires that an RTO must ensure that its transmission customers have access to a real-time energy balancing market that is developed and operated by the RTO itself or another entity that is not affiliated with any market participant.³⁸ GridSouth is required to make a filing with the Commission describing how it will implement market mechanisms for real-time energy balancing within one year of its independence date in compliance with Order No. 2000.³⁹ EPMI's request is premature since GridSouth has not yet made its proposal for a real-time energy balancing market. Accordingly, we deny EPMI's request for clarification or rehearing.

C. Transmission Planning and Expansion

In the March 14 order, we found that the transmission planning protocol proposed by the GridSouth Applicants complied with Order No. 2000 as long as the Applicants eliminated from section 3.1 of the GridSouth Planning Protocol a provision indicating that transmission owners will continue to be responsible for planning transmission to serve their native load, and eliminated from section 1.4 of the Planning Protocol a provision indicating GridSouth can withhold authorization of a transmission owner's plan "only in the event that studies determine that such facilities will have a detrimental effect on grid reliability or will have an adverse impact which exceeds the benefits produced by

³⁷ Applicants' December 5 Response at 96.

³⁸ Order No. 2000, at 31,142.

³⁹ March 14 order, 94 FERC at 62,003.

the planned facilities."⁴⁰ We also directed the Applicants to eliminate from section 2.08 of the Operating Agreement and section 2.8 of the Planning Protocol a provision that gives the transmission owners the right of first refusal to construct transmission facilities in their service areas. We found that these provisions unduly limited the decisional authority of GridSouth over transmission planning, presenting the possibility of discrimination by self-interested transmission owners favoring their own generation (as well as the possibility of conflicts that could reduce reliability) and possibly precluding lower cost or superior transmission facilities or upgrades by third parties from being planned and constructed.

The Applicants seek rehearing of the March 14 order arguing that the eliminated provisions of the Planning Protocol are connected to the transmission owners' obligation to serve native load customers. They contend that the March 14 order unnecessarily intrudes on state jurisdictional matters and that continued transmission owner planning for native load does not prevent GridSouth from meeting its regional transmission planning responsibilities. They note that the Commission has recognized states retain jurisdiction over bundled retail load as exists in North and South Carolina and that the eliminated provisions are intended to respect jurisdictional boundaries. With respect to the right of first refusal to build new transmission, the Applicants request that the following provision be substituted for the eliminated provision:

In the event that any Transmission Owner identifies a transmission project that is required to meet its obligations to serve its retail native load customers, GridSouth shall permit such Transmission Owner to undertake such project unless GridSouth identifies an equally efficient, alternative means of causing the transmission project to be constructed that satisfies the reasonable retail service needs of the affected Transmission Owner and does not adversely affect such Transmission Owner's other facilities.

We deny the Applicants' request for rehearing. Order No. 2000 held that an RTO must have control of transmission planning in order to design a regional grid which maximizes efficiency and optimizes needed infrastructure investment. There is no reason to believe transmission planning for native load will be jeopardized in any way when all transmission facilities are placed under the sole control and authority of GridSouth. The Applicants have not even asserted that transmission planning for retail native load will be

⁴⁰March 14 order, 94 FERC at 62,009.

adversely affected if GridSouth, rather than the Applicants, controls the planning process. Indeed, transmission planning for native load is an integral and critical part of the regional transmission plan. GridSouth will clearly need to work closely with both the transmission owners and the state commissions in formulating regional transmission plans and accommodate the demand placed on transmission by native load.

Furthermore, no jurisdictional conflicts are created by GridSouth assuming control over transmission planning. Order No. 2000 does not implicate the continuing jurisdiction of state commissions over bundled retail power sales.⁴¹ The requirement that the RTO control all transmission facilities in its region does not interfere with whether retail open access is provided or with the pricing of retail bundled power sales, which are decisions for the state commissions.

With regard to the proposed alternative Operating Agreement language on the right of first refusal to construct transmission facilities, we are concerned that the alternative language does not clearly recognize GridSouth's role as the operator of all of the transmission facilities within the RTO. With GridSouth as the decision maker, the Applicants can still meet their state-level obligations of planning for their native load. We expect that transmission owners will identify their transmission needs due to growth in native load or other changing circumstances, and submit those needs to GridSouth. Transmission Owners may tender proposed transmission projects to GridSouth for consideration. However, it is GridSouth that will make the determinations as to what transmission investment satisfies the needs of the affected Transmission Owner, including accounting for adverse effects on facilities of any of the Transmission Owners.

D. Interregional Coordination

The March 14 order directed the GridSouth Applicants to engage in discussions with neighboring transmission entities regarding the coordination and integration of transmission activities.⁴² Joint Protestors seek clarification that transmission customers (other than transmission entities) must also be included in such discussions.

The Applicants state in their answer that GridSouth participates in the Inter-RTO Seams Collaborative, which includes representatives from Eastern Interconnection RTOs, and is working on issues such as rate reciprocity, congestion management, electric scheduling and parallel flows. According to the Applicants, stakeholders may attend

⁴¹Order No. 2000-A, at 31,375.

⁴²March 14 order, 94 FERC at 62,012.

meetings of the Collaborative. The Applicants state that, on the other hand, their discussions with other transmission entities concerning potential participation in GridSouth as members or through a coordination agreement are business negotiations that "at least initially" must occur on a bilateral basis.

While Order No. 2000 does not specify stakeholder participation in seams discussions as a requirement, we encourage the approach the Applicants have taken for their RTO, as it allows stakeholders to be active in seams issues while respecting bilateral business negotiations.

III. Other Issues

In addition to issues relating to the functions and characteristics of the proposed GridSouth RTO, intervenors seek rehearing/clarification related to the following matters:

1. The March 14 order denied EPMI's request that the Commission condition market-based rate authority on RTO participation, noting that EPMI essentially was seeking a generic rulemaking and that the Commission had previously considered and denied EPMI's request in Order No. 2000.⁴³ On rehearing, EPMI argues that circumstances have changed since the issuance of Order No. 2000, since experience has shown that there are insufficient incentives to induce market participants to join RTOs. EPMI further contends that it is not seeking a generic rulemaking but, rather, "it is appropriate in each RTO proceeding to provide those entities that resist joining an RTO with an incentive to do so."

EPMI has not adequately supported its request to take action on either a generic or on a GridSouth RTO-specific basis. EPMI's conclusory statement that circumstances have changed since the issuance of Order No. 2000 is not sufficient for the Commission to make a finding of fact; such a finding would require a new proceeding with public notice and opportunity for comment. Accordingly, we deny EPMI's request for rehearing on this point.

2. EPMI, citing to our discussion in GridFlorida, LLC, 94 FERC ¶ 61,363 (2001), regarding start-up costs, seeks clarification that GridSouth cannot incur significant start-up costs before its independent Board is seated. EPMI contends that the Applicants should not be allowed to commit GridSouth to the development of hardware and

⁴³March 14 order, 94 FERC at 61,981.

software and other aspects of a business plan, so that the newly-seated Board will not simply be a "rubber stamp" for actions taken by the transmission owners.

EPMI's request is, in fact, a request for rehearing on an issue that neither EPMI nor any other intervenor raised previously with regard to the contents of GridSouth's compliance filing. As we explained in Baltimore Gas and Electric Company, et al.:

We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. Absent good cause, not presented here, we are not inclined to look favorably on the instant rehearing request.^[44]

We are not inclined to look favorable upon EPMI's request. However, we note that the GridSouth Applicants represent that they will not incur significant costs for software or hardware acquired for implementing a real-time balancing market without first being approved by an independent Board.⁴⁵ They state that they have incurred expenses for office staff, employee benefit plans, accounting and billing systems, and software to integrate data from the control areas to enable GridSouth to administer the OATT, perform its role as security administrator, and implement the congestion management procedures.

3. Santee Cooper argues that the Commission erred in failing to require the GridSouth Applicants to conduct a meaningful collaborative process with stakeholders as a condition for approval of the RTO.

We deny Santee Coopers' request for rehearing on this point. As the March 14 order discussed, the Applicants engaged in a series of meetings with stakeholders to further the collaborative process.⁴⁶ Further, to the extent that Santee Cooper objects that stakeholders were not given an opportunity to challenge the transco format chosen by the Applicants, the Commission already explained that "we respect the right of the

⁴⁴91 FERC ¶ 61,270 at 61,922 (2000) (citations omitted).

⁴⁵GridSouth Applicants' answer at 3.

⁴⁶Id., at 61,980.

Applicants to choose the type of RTO formation organization consistent with Order No. 2000"⁴⁷ and we will not reopen the collaborative process on this issue.

The Commission orders:

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

(B) The GridSouth Applicants are hereby directed to submit revisions to its compliance filing within ten days, as discussed in the body of this order.

(C) The motion for late intervention of Lockhart Power Company is hereby granted, as discussed in the body of this order.

(D) The motion for late intervention of Alcoa Power Generating Inc. is hereby denied, as discussed in the body of this order.

(E) The GridSouth Applicants' answer is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

David P. Boergers,
Secretary.

⁴⁷Id., at 61,993.