108 FERC ¶ 61, 174

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Services, Inc. Docket Nos. ER03-355-002 and ER03-355-003

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued August 9, 2004)

1. On May 30, 2003, Southern Company Services, Inc. (SCS)[1] filed a request for rehearing of the Commission's May 2, 2003 Order,[2] in which the Commission accepted for filing an executed rollover service agreement for firm, long-term, point-to-point transmission service with Oglethorpe Power Corporation (Oglethorpe) under the Open Access Transmission Tariff (OATT)[3] of the Southern Companies, as modified, to remove sections 5.0 and 6.0, that conditioned Oglethorpe's future rollover rights. In addition, on May 30, 2003, SCS filed a compliance filing under protest referencing its contemporaneous request for rehearing. SCS asks that the Commission accept the executed rollover service agreement with Oglethorpe as originally filed. This order denies SCS's request for rehearing of the May 2, 2003 Order and accepts the compliance filing.

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[1]Southern Company Services, Inc. is acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively, Southern Companies).

[2]Southern Company Services, Inc., 103 FERC ¶ 61,117 (2003).

[3]FERC Electric Tariff, Fourth Revised Volume No. 5, First Revised Service Agreement No. 431 under the OATT. The rollover agreement was filed as an addendum (Addendum 1) to the original Service Agreement For Firm Point-To-Point Transmission Service between Southern Companies and Oglethorpe.

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Background

2. The agreement at issue in this proceeding is a rollover service agreement between Oglethorpe and the Southern Companies for 50 MW of firm point-to-point transmission service with a term of one year, commencing on December 1, 2002 and terminating on November 30, 2003.[4]

3. On December 30, 2002, SCS filed an executed rollover agreement with limitations on future rollovers. Under section 5.0 of the rollover agreement, SCS conditioned Oglethorpe's right to continue to take service after November 30, 2003 upon the availability of sufficient transmission capacity after specified transmission customers (whom SCS states submitted requests for transmission service before Oglethorpe's February 26, 2001 initial request for transmission service) exercise their rights to transmission service or rollover. Section 6.0 required the Commission's acceptance of the rollover agreement without condition or modification. In the May 2, 2003 Order, the Commission accepted the rollover agreement for filing, but directed SCS to remove sections 5.0 and 6.0.

Compliance Filing and Request for Rehearing

4. On May 30, 2003, SCS made a compliance filing in which it removed sections 5.0 and 6.0 of the rollover agreement, in response to the directives of the Commission's May 2, 2003 Order. SCS submitted the compliance filing under protest, referencing its concurrent request for rehearing of the May 2, 2003 Order.

5. On May 30, 2003, SCS filed a request for rehearing, and asked the Commission to reconsider its rollover policies, vacate its May 2, 2003 Order, and accept SCS's original rollover agreement for filing without modification.[5]

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[4]Oglethorpe first requested transmission service from SCS on February 26, 2001. On November 30, 2001, SCS filed an executed service agreement, and it was accepted by the Commission on January 8, 2002. *See* Delegated Letter Order issued in Avista Corp., *et al.*, Docket No. ER02-384-000, *et al.*, (Southern Operating Companies, Docket No. ER02-428-000) issued January 8, 2002. On September 27, 2002, Oglethorpe requested SCS to rollover this service for another year beginning December 1, 2002 and terminating on November 30, 2003.

[5] In Docket No. ER04-353-000, SCS filed rollover service agreements with Oglethorpe (a continuation of the rollover agreement at issue here) and Calpine for firm point-to-point transmission service. Oglethorpe's agreement is effective from

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Discussion

Procedural Matters

6. Notice of SCS's compliance filing was published in the *Federal Register*, 68 Fed. Reg. 35,396 (2003), with interventions, comments, and protests due on or before June 20, 2003. No protests or comments were filed.

7. SCS raises the following issues on rehearing that are similar to those it has raised in other proceedings and that the Commission has previously addressed:[6] (1) the Commission's rollover policies are confusing, unclear and unlawfully developed;[7] (2) policy requiring rollover limitations to be included in original agreements has been unclear;[8] (3) the Commission failed to provide notice of its policies, the May 2, 2003 Order is arbitrary and capricious, and the rollover policy violates due process requirements;[9] (4) placing Oglethorpe ahead in the queue is inconsistent with the tariff;[10] (5) the rollover policy results in operating problems, can lead to industry-wide reliability problems, and will hamper Southern Companies' reliability;[11] (6) the Commission has been unclear on competing requests for transmission capacity;[12] and (7) the imposed

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December 1, 2003 through November 30, 2004 and the rollover transmission agreements became effective by operation of law. Those agreements included provisions that limit the customers' rollover rights. On March 16, 2004 in Docket No. EL04-87-000, the Commission instituted a section 206 investigation of those agreements as to why they should not be found to be unjust and unreasonable. *See* Southern Company Services, Inc., 106 FERC ¶ 61,248 (2004).

[6]*See* Southern Company Services, Inc., 102 FERC ¶ 61,200 (2003) (Dynegy rollover case) and Southern Company Services, Inc., 104 FERC ¶ 61,140 (2003) (Williams rollover case).

[7]SCS Rehearing at 7-8.

[8]*Id.* at 7, 12.

[9]*Id.* at 16-19.

[10]*Id.* at 21.

[11]*Id.* at 22-27.

[12]*Id.* at 15.

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effective date makes the rollover agreement a new agreement.[13] This agreement, SCS argues, may therefore contain limitations on new rollovers.

8. SCS also raises two issues that the Commission did not address in the prior SCS rollover cases: (1) the Commission has improperly abrogated a contract that Oglethorpe agreed to; [14] and (2) the Commission's requirement that Southern Companies' Electric Quarterly Report contain data on non-conforming transactions is contrary to the Commission's Order No. 2001.[15]

Issues Previously Addressed By The Commission in Other SCS Rollover Proceedings

Commission Rollover Policy

9. SCS argues that the Commission's rollover policy and procedures have been unclear and confused. Moreover, SCS claims that the Commission has clarified its rollover policies and improperly applied such clarifications retroactively. SCS questions the Commission's rollover policies in general, and asks at a minimum that new clarifications be applied on a prospective basis. Specifically, SCS asserts that the Commission's rollover policy addressed in *Nevada Power Company*,[16] requiring rollover limitations to be specified in the original service agreement is a new policy.[17] Therefore, SCS asks the Commission to vacate the May 2, 2003 Order and accept for filing without modification its rollover agreement with Oglethorpe.

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[13] *Id.* at 29.

[14] *Id.* at 6, 29-31.

[15] *Id.* at 31.

[16] Nevada Power Company, 97 FERC ¶ 61,324 (December 20, 2001) *(Nevada Power).*

[17] SCS Rehearing at 13.

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Commission Response[18]

10. As discussed in greater detail below, SCS's claim that the May 2, 2003 Order is based on a change in the Commission's rollover policy that did not exist at the time SCS executed its original service agreement with Oglethorpe is in error. SCS's request for rehearing of the May 2, 2003 Order is basically a collateral attack on the Commission's rollover rights policy as established in Order No. 888.[19] In that order, the Commission concluded that all firm transmission customers with contracts for a term of one-year or more should have the right to continue to take transmission service from their existing transmission provider upon the expiration of their contracts or at the time their contracts become subject to renewal or rollover.[20] In other words, the transmission provider is expected to plan its system to accommodate transmission customers' rollover rights. If the transmission system becomes constrained such that the transmission provider cannot satisfy existing customers, then the obligation is on the transmission provider to either curtail service pursuant to the provisions of its OATT or to build more capacity to relieve the constraint.

11. Many of the issues raised by SCS on rehearing (*e.g.*, the benefits versus the burdens of rollover rights; the one-year minimum term; the impact of the Commission's rollover policies on the reliability of transmission systems) go to the heart of the Commission's rollover rights policy established in Order No. 888. On this basis, they are issues that should have been raised on rehearing of Order No. 888. The Commission will not revisit in this order its prior determinations in Order No. 888, which have been affirmed by the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court.

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[18]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 10-11.

[19]*See* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs.¶ 31,036 at 31,694 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.* Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom.* New York v. FERC, 535 U.S. 1 (2002); *see also* Commonwealth Edison Co., 95 FERC ¶ 61,252 at 61,874, *reh'g denied*, 96 FERC ¶ 61,158 at 61,690 (2001).

[20]Order No. 888 at 31,665; Order No. 888-A at 30,195.

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Reservations in Initial Service Agreement

12. SCS argues that the Commission's rollover policy and procedures in general have been unclear and confused and that the Commission erred in its requirement that the limits on rollovers be contained in the original service agreement.[21] According to SCS, the Commission has recently acknowledged in its Notice of Proposed Rulemaking on Standard Market Design that its policies on rollover have been unclear.[22]

Commission Response[23]

13. We disagree with SCS that the Commission's statement in its SMD NOPR, that three clarifications on rollover policy have "significant impact" and should be codified, amounts to a Commission acknowledgment that its rollover policies in general are unclear.[24] Two of the clarifications in the SMD NOPR (the 60-day notice requirement and requests for alternate receipt/delivery point(s)) are not relevant to the present proceeding. Nevertheless, when the Commission recognized that its right of first refusal (ROFR) provisions of the pro forma tariff regarding the 60-day notice requirement "are not sufficiently clear," it applied this policy prospectively.[25] Further, the clarification that a long-term firm customer requesting alternate receipt or delivery point(s) retains its right of first refusal for service at the time the current service agreement expires was implied

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[21]SCS Rehearing at 8.

[22]*Id.* at 1, 7-8, 19, 20, 23, *citing* Remedying Undue Discrimination Through Open Access Transmission Service and Standard Market Design, Notice of Proposed Rulemaking, Docket No. RM01-12-000, 100 FERC ¶ 61,138 at P 121-22 (July 31, 2002) *(SMD NOPR).*

[23]The Commission previously addressed SCS;s argument in 104 FERC ¶ 61,140 at P 13-14.

[24]SCS Rehearing at 7-9, *citing* Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 100 FERC ¶ 61,138 at P. 122-23 (2002) *(SMD NOPR).*

[25]Entergy Power Marketing Corp. v. Southwest Power Pool, 91 FERC ¶ 61,276 at 61,933 and 61,937 (2000).

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from the intent of section 22.2 of the *pro forma* tariff in order to "provide flexibility to transmission customers to permit them to react in a competitive market."[26]

14. Regarding the third clarification in the *SMD NOPR*, we disagree with SCS's argument that the Commission's action in *Nevada Power* constitutes a change in its policy with regard to rollover rights. Our action in the May 2, 2003 Order and the other cases[27] cited by SCS is fully consistent with the rollover rights policy that we established in Order No. 888. In announcing the rollover rights policy in Order No. 888, we explained that there are circumstances under which a transmission provider can restrict a transmission customer's rollover rights under section 2.2. For example, the Commission determined that public utilities may reserve existing transmission capacity needed for native load growth reasonably forecasted within the public utility's current planning horizon.[28] In Order No. 888-A, the Commission stated that "if a utility provides firm transmission service to a third party for a time until native load needs the capacity, it should specify in the contract that the right of first refusal does not apply to that firm service due to a reasonably forecasted need at the time the contract is executed."[29]

The Commission's Policies Meet Due Process Requirements

15. SCS argues that the Commission failed to provide notice of its policies, the May 2, 2003 Order is arbitrary and capricious, and the rollover policy violates due process requirements.

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[26]Commonwealth Edison Co., 95 FERC ¶ 61,027 at 61,083 (2000).

[27]SCS Rehearing at 9-14, *citing, e.g.,* Entergy Power Marketing Corp. v. Southwest Power Pool, Inc., 91 FERC ¶ 61,276 (2000), *reh'g denied,* 100 FERC ¶ 61,104 (2002); Commonwealth Edison Co., 95 FERC ¶ 61,027 (2001); American Electric Power Service Corp., 97 FERC ¶ 61,207 (2001); Idaho Power Co., 94 FERC ¶ 61,311 (2001), *order denying reh'g and clarifying prior order,* 95 FERC ¶ 61,224 (2001); Exelon Generating Co., LLC v. Southwest Power Pool, Inc., 99 FERC ¶ 61,235 (2002); Tenaska Power Service Co. v. Southwest Power Pool, Inc., 99 FERC ¶ 61,344 (2002); Public Service Co. of New Mexico v. Arizona Public Service Co., 99 FERC ¶ 61,162 (2002); Constellation Power Source, Inc. v. American Electric Power Service Corp., 100 FERC ¶ 61,157 (2002), *order denying reh'g,* 102 FERC ¶ 61,142 (2003); Southwest Power Pool, Inc., 100 FERC¶ 61,239 (2002).

[28]Order No. 888 at 31,694.

[29]Order No. 888-A at 30,198.

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Commission Response[30]

16. Since the issuance of Order Nos. 888 and 888-A, the Commission has consistently reaffirmed this policy, stating that a transmission provider can deny a customer the ability to roll over its long-term firm service contract if the transmission provider includes in the original service agreement a specific limitation based on reasonably forecasted native load needs for the transmission capacity provided under the contract at the end of the contract term.[31]

17. Similarly, a transmission provider may limit the terms under which a new long-term agreement may be rolled over based on a pre-existing contract obligation that commences in the future. For example, if the transmission provider knows at the time of the execution of the original service agreement that available transfer capability to serve the customer will only be available for a particular time period, after which time it is already committed to another transmission customer under a previously-confirmed transmission request (*i.e.*, an agreement under which service would commence at some time in the future), the transmission provider can reflect those obligations in the long-term contract and thereby limit the prospective transmission customer's rollover rights.[32] However, such facts do not exist in the present circumstances because SCS failed to include such limiting language in its original service contract with Oglethorpe.

18. The industry was on adequate notice with the issuance of Order Nos. 888 and 888-A of the Commission's policy regarding restrictions on rollover rights. To the extent that, after the issuance of those orders, SCS was uncertain as to the Commission's policy in

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[30]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 16-21.

[31]*See, e.g.*, Public Service Co. of New Mexico v. Arizona Public Service Co., 85 FERC ¶ 61,240 at 62,066 (1998) *(1998 PSNM Order)* (discussing the requirement to state expressly in post-Order No. 888 transmission contracts if the right of first refusal does not apply due to a need for the capacity that is reasonably forecasted at the time of the contract's execution); Public Service Co. of New Mexico v. Arizona Public Service Co., 99 FERC ¶ 61,162 at 61,667 (2002) *(PSNM); Nevada Power*, 97 FERC at 62,493.

[32]*See* section 19.7 of the Order No. 888 *pro forma* tariff (concerning partial interim service); *see also* Morgan Stanley Capital Group v. Illinois Power Company, 93 FERC ¶ 61,081 at 61,220 (2000) ("[H]ad Morgan Stanley requested, for example, long-term service for a two-year period, but only one year was available, Illinois Power would have been obligated to offer service for that one available year").

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this regard, SCS could have sought clarification at that time. In any event, because the May 2, 2003 Order, and the other orders cited by SCS, were fully consistent with the Commission's rollover rights policy as established in the rulemaking proceeding, none of those orders provided a changed interpretation of section 2.2, as SCS contends.[33] Although such a factual scenario is presented in the instant case, (*i.e.*, SCS states that specified transmission customers have reservations for service to commence after the expiration of the rollover agreement and were submitted prior to Oglethorpe's initial request for service),[34] SCS did not include this information in the original service agreement with Oglethorpe. Instead, it sought to add language in this regard upon the first rollover of the Oglethorpe service agreement. However, as we explained in the May 2, 2003 Order, any such restrictions on rollover rights must be included in the original service agreement. For the Commission to have held otherwise would have been to ignore the very basis of the rollover rights policy as established in Order No. 888.

19. As explained above, once a transmission provider evaluates the impacts on its system of providing transmission service to a customer and decides to grant such a request (as SCS did in the case of Oglethorpe), the Commission's rollover rights policy obligates the transmission provider to plan and operate its system with the expectation that it will continue to provide service to that customer should the customer request rollover of its contract term. Recognizing this obligation, to the extent that the transmission provider is already committed to another transmission customer under a previously-confirmed transmission request, it is incumbent upon the transmission provider to reflect that fact in any initial service agreement that it subsequently enters into with other transmission customers. Otherwise, consistent with the rollover policy as laid out in Order No. 888, the transmission provider is obligated to be in a position to grant rollover of all long-term contracts. If the transmission system becomes constrained such that the transmission provider cannot satisfy all existing long-term customers, then the obligation is on the transmission provider to either curtail service pursuant to the provisions of its OATT or to build more capacity to relieve the constraint.

20. Thus, SCS's argument on rehearing that the May 2, 2003 Order contains the Commission's first indication that its rollover limitation policy is applicable to such situations (*i.e.*, where the conditions to the existing customer's ability to roll over its reservation are based on previously queued transmission requests) is inaccurate and appears to be an attempt to reargue the parameters of the rollover rights policy set forth in Order No. 888.

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[33]SCS Rehearing at 13-15.

[34]*Id.* at 3-4.

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21. Based on the foregoing, we also will reject SCS's request that the Commission apply its policy prospectively only to service agreements entered into after the date of the Commission's rehearing order in this proceeding or at least as of the date of the May 2, 2003 Order. Commission precedent is clear that such limitations must be clearly stated in the customer's original service agreement.[35]

Placing Oglethorpe Ahead in the Queue

22. SCS argues that the directive in the May 2, 2003 Order to remove section 5.0 of the rollover agreement violates Southern Companies' tariff provisions on queue priority.[36] SCS states that the transmission customers specified in section 5.0 submitted reservations before Oglethorpe's original request for service on February 26, 2001. Accordingly, SCS argues that removing section 5.0 from the rollover agreement, which subordinates Oglethorpe's rollover rights to those specified customers, violates section 13.2 of its tariff, which requires long-term, firm point-to-point transmission service to be made available on a first-come, first-served basis, *i.e.*, in the chronological sequence in which each transmission customer has reserved service.[37]

Commission Response[38]

23. The May 2, 2003 Order is not inconsistent with Southern Companies' tariff provisions on reservation priority. Although section 13.2 of the Southern Companies' OATT provides that long-term, firm point-to-point transmission service shall be available on a first-come, first-served basis, section 13.2 *also* states that reservation priorities for existing firm service customers are provided in section 2.2. According to section 2.2, existing firm service customers have the right to continue to take transmission service when the contract expires, rolls over, or is renewed. Since Oglethorpe, an existing firm service customer, properly complied with the requirements to exercise its rollover right, and no limitations were contained in the original service agreement, Southern Companies

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[35]*See, e.g.*, Order No. 888-A at 30,198; *1998 PSNM*, 85 FERC at 62,008; *Nevada Power*, 97 FERC at 62,493*; PSNM*, 99 FERC at 61,667; Exelon Generation Company, LLC. v. Southwest Power Pool, Inc., 101 FERC ¶ 61,226 (2002).

[36]SCS Rehearing at 21-22.

[37]*Id.* at 21.

[38]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 23.

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cannot now limit that right. The May 2, 2003 Order does not allow Oglethorpe to "jump ahead" of the higher priority customers listed in proposed section 5.0 of the rollover agreement. Rather, all existing firm service customers, those listed in proposed section 5.0 as well as Oglethorpe, have rollover rights under section 2.2 unless specific limitations are specified in the original service agreements. If Southern Companies do not have enough capacity, they must build the necessary transmission facilities or impose curtailments according to the terms of the OATT.

Operational and Reliability Issues

24. SCS raises three issues with regard to the operation and reliability of the system as affected by the requirement for rollover of contracts. These are: (1) the ability to forecast capacity availability; (2) anticompetitive conduct; and (3) the absolute right to capacity.

Ability to Predict All Factors That Could Limit Capacity

25. SCS argues that the Commission's rollover policies in general fail to protect customers since they impede the ability of transmission providers to reliably operate their systems. SCS states that the "speculative nature" of rollover rights impedes transmission providers' ability to protect customers from the effects associated with system overloads, constraints, and other operational problems.[39] Further, SCS argues that rollover rights abrogate transmission customers' need to request service for more than one year, which inhibits the ability of transmission providers to engage in long-term planning. Finally, SCS states that extreme uncertainty surrounds the issue of studies.

Commission Response[40]

26. SCS's argument that the Commission's rollover policies fail to protect customers because they impede the ability of transmission providers to reliably operate their system is mistaken. To the contrary, any reliability issues that Southern Companies might face would instead be the result of its failure to follow the requirements of Order No. 888. As noted above, once a transmission provider evaluates the impacts on its system of providing transmission service to a customer and decides to grant such a request, the rollover rights policy obligates the transmission provider to plan and operate its system with the expectation that it will continue to provide service to that customer should the

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[39]SCS Rehearing at 22-29.

[40]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 26-28.p

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customer request rollover of its contract term. Thus, under section 2.2 of the OATT, Southern Companies are responsible for maintaining available transmission capacity for existing long-term transmission customers with rollover rights, such as Oglethorpe, until the time expires for those customers to exercise their rollover rights. In providing for Oglethorpe's rollover rights in section 2.2, Southern Companies are responsible for evaluating the impact of the exercise of these rights on its system.

27. Notwithstanding SCS's attempt to portray rollover rights as detrimental to reliability, rollover rights are intended to promote system planning and reliability, not to undermine it. Rollover rights should facilitate a transmission provider's orderly planning and operation, i.e., provide for available capacity, which is essential to Southern Companies' obligation of preserving system reliability. A transmission provider is expected to include all long-term transmission customers (*i.e.*, those with rollover rights) in its long-term planning. While it may be the case, as SCS suggests, that subsequent circumstances may negatively impact a transmission provider's available transmission capacity, the presence of such constraints does not give a transmission provider the right to deny a rollover request. Under section 2.2 of the OATT, Southern Companies are responsible for maintaining available transmission capacity for existing long-term transmission customers with rollover rights, such as Oglethorpe, until the time expires for those customers to exercise their rollover rights. Thus, the constraints that SCS cites are not sufficient to override Oglethorpe's rollover rights. If constraints arise after a transmission provider enters into a long-term agreement with a transmission customer (and that agreement contains no restrictions on the transmission customer's rollover rights), the obligation is on the transmission provider to either build additional transmission facilities to relieve the constraint or to implement the curtailment procedures set forth in its OATT.

28. It was the intent of the Commission in establishing the rollover policy that long-term customers have the right to continue to take service and, accordingly, that the transmission provider be in the position of continuing to provide it. Again, to the extent that SCS disagrees with the Commission's policy call in this regard, it should have sought rehearing and/or clarification at the time that the Commission established the rollover rights policy.

29. SCS argues that its concerns are not speculative,[41] offering statements from Southwest Power Pool (SPP) in an American Electric Power (AEP) rollover

[41] *Id.* at 23.

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proceeding.[42] The Commission however found that SPP's argument that the Commission's approach has affected reliability and has been shown to exacerbate the need to call Transmission Loading Relief (TLR) and to increase the severity of these TLRs is disingenuous. The Commission found that, to the extent that SPP's assertion is true, SPP's need to call TLRs may be due to its failure to follow the requirements of Order No. 888 and not the result of any change in Commission policy.[43] Moreover, the Commission found that SPP's arguments do not diminish Constellation's rollover rights under section 2.2 of the AEP OATT. Under section 2.2 of AEP's OATT, SPP is responsible for maintaining available transmission capacity for existing long-term transmission customers with rollover rights, such as Constellation, until the time expires for those customers to exercise their rollover rights.[44] Accordingly, the Commission denies SCS' argument based on SPP's allegations.

Anticompetitive Conduct

30. SCS further contends that the May 2, 2003 Order removes any incentives for customers to request service for more than a year, which will inhibit the ability of transmission providers and transmission owners to engage in long-term planning, further harming reliability. SCS argues that rollover rights enable customers to engage in anticompetitive conduct and market abuses: "Because an existing customer can hold its capacity up to sixty days before its contract ends, rollover rights amount to little more than a license for an existing customer to hold that capacity hostage in order to foreclose its competitors from getting power to the market."[45]

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[42]Constellation Power Source, Inc., Docket No. EL02-95-001, 102 FERC ¶ 61,142 (2003) *(Constellation).*

[43]The Commission noted that SPP had not provided any evidence in support of its assertion that the TLRs it called were the direct result of the Commission's policy on rollover rights.

[44]*Constellation*, 102 FERC ¶ 61,142 at P 12-13.

[45]SCS Rehearing at 24.

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Commission Response[46]

31. As discussed below, an existing customer does not hold capacity "hostage" since, for example, competitors may supplant such service if the existing customer declines to match the requested term length. The Commission has consistently found that section 2.2 of the *pro forma* OATT requires a transmission provider to allow a customer with a one-year firm reservation to roll over that service for a longer period of time, subject to matching competing requests for that service. Order No. 888 contemplated such an arrangement,[47] and the policy took effect at the time Order No. 888 was issued. On this basis, we will not reexamine our decision that the rollover rights provisions of section 2.2 apply to contracts with terms of one year or more. Likewise, the Commission has previously justified its 60-day notice requirement for existing customers to roll over transmission service against similar anti-competition arguments, and will not reexamine our past decisions here.[48]

Absolute Right to Capacity

32. SCS argues that the May 2, 2003 Order grants transmission customers an absolute right to capacity based on a one-year long-term contract since "existing customers could rollover their reservations into perpetuity."[49] Consequently, SCS claims that the May 2, 2003 Order requires transmission providers to accept transactions regardless of whether sufficient capacity exists. As a result, according to SCS, transmission providers could overload their systems and have to curtail service, which increases the costs to all users of the transmission facility.[50]

33. SCS further contends that because construction times are usually longer than the 60-day renewal period provided to customers, the Commission's policy could force

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[46]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 30.

[47]*See* Order No. 888 at 31,655; *see also*, Order No. 888-A at 30,195 and 30,197-98.

[48]*See* Entergy Power Marketing Corp. v. Southwest Power Pool, 91 FERC ¶ 61,276 (2000), *reh'g denied*, 100 FERC ¶ 61,104 at P 19-22 (2002).

[49]SCS Rehearing at 25.

[50]*Id.* at 23-28.

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transmission providers to make improvements to its transmission system based on the possibility that a customer will roll over its service.[51] SCS states that this is infeasible.[52] Finally, SCS argues that there is no clear indication as to when a third-party request becomes a competing request within the context of section 2.2.[53]

Commission Response[54]

34. All long-term firm transmission customers have the right to roll over their service, but the potential that a transmission customer will choose to do so does not require Southern Companies to remove the associated capacity from its OASIS forever and restore it only if the customer declines to exercise its option at some future period. As the Commission has explained, Southern Companies may post the associated capacity on OASIS and accept competing reservations until the time that the existing customer chooses to roll over its contract by exercising its right of first refusal.[55] If the existing customer does so and agrees to match the rate and term offered by another potential customer seeking the same transmission capacity (up to the transmission provider's filed rate), it then takes priority over the competing reservation. If the existing customer declines to exercise its right of first refusal, the transmission provider may accept the next competing reservation.[56] In any event, Oglethorpe has not been granted service in perpetuity to the extent that competing service requests may: (1) replace service to Oglethorpe absent a rollover of its request; or (2) supplant such service if Oglethorpe declines to match a competing request with a longer term.

35. Furthermore, SCS has misconstrued our statement that "the right of first refusal provision applies to existing capacity and does not require a transmission provider to build additional capacity in response to a request to rollover a transmission service."[57]

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[51] *Id.* at 22-23.

[52] *Id.* at 25.

[53] *Id.* at 26.

[54] The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 33-35.

[55] Commonwealth Edison Co., 96 FERC ¶ 61,252 at 61,690 (2001).

[56] *Id.*

[57] Idaho Power Co., 95 FERC ¶ 61,224 at 61,759 (2001).

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By this statement, the Commission did not intend, as SCS seems to suggest, that a transmission provider could deny a customer's rollover request to the extent that the transmission provider did not have sufficient available capacity to meet the request and could only grant the request if it were to build additional capacity. Implicit in this statement was the expectation that the transmission provider had already studied the impacts on its existing system of providing the transmission service and determined that it could provide that service (including any rollover if requested) using its existing system. Because a determination to grant the initial service request carried with it the obligation to assume that the customer would continue to take service, the Commission expected that the transmission provider would have sufficient existing capacity to serve a rollover request and not then need to build additional capacity to serve that rollover request.

36. In evaluating Oglethorpe's original request for long-term firm transmission service, the Southern Companies were obligated to determine whether or not it had available existing capacity to serve Oglethorpe, taking into account Oglethorpe's right to renew or roll over its transmission service. As we have indicated above, if constraints arise after a transmission provider enters into a long-term agreement with a transmission customer (and that agreement contains no restrictions on the transmission customer's rollover rights), the obligation is on the transmission provider to determine whether or not to build additional facilities to accommodate new transmission customers. If the transmission system is constrained to the extent that the transmission provider cannot satisfy its existing transmission customers' contracts, then the transmission provider has the choice of either implementing the curtailment procedures set forth in its OATT or building additional transmission facilities to relieve the constraint.

Commission Policy on Competing Requests

37. SCS argues that the Commission has been unclear on competing requests for transmission capacity.[58] SCS asserts that the Commission's policy of requiring it to roll over long-term contracts will preempt customers with higher priorities for the service. SCS refers to section 13.2 of Southern Companies' tariff, which directs it to accommodate service requests based on the date upon which requests are submitted, with higher-queued reservations being accommodated first. If the transmission provider cannot accommodate all requests, the existing customer must either match the terms of the competing request or forego executing a subsequent contract. SCS claims that there is no answer to how it is expected to deal with these situations.

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[58] SCS Rehearing at 15-16, 26.

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Commission Response[59]

38. The Commission rejects these arguments because, *inter alia*, there has been no showing of any actual conflict in demands for capacity at this point on Southern Companies' systems. SCS refers to situations which may in the future constitute potential conflicts in demands for capacity. We decline to make a ruling on a hypothetical set of circumstances.[60] In addition, we have held that where there is a competitive situation, Southern Companies are obligated to determine whether or not they have available existing capacity to serve, taking into account a customer's right to renew or roll over its transmission service. If constraints arise after a transmission provider enters into a long-term agreement with a transmission customer (and that agreement contains no restrictions on the transmission customer's rollover rights), the obligation is on the transmission provider to determine whether or not to build additional facilities to accommodate new transmission customers. If the transmission system is constrained to the extent that the transmission provider cannot satisfy its existing transmission customers' contracts, then the transmission provider has the choice of either implementing the curtailment procedures set forth in its OATT or building additional transmission facilities to relieve the constraint.

The Effective Date of the Agreement

39. SCS argues in the form of a request for clarification that, because the Commission rejected SCS's proposed effective date of December 1, 2001 and imposed an effective date of December 1, 2002, the rollover agreement is a "new" agreement. SCS then argues that as the rollover agreement is a "new" agreement, it is entitled to have its future rollover obligations to Oglethorpe circumscribed by the newly-added provisions in section 5.0 of the rollover agreement.[61]

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[59]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 38.

[60]*But see* El Paso Electric Co., 102 FERC ¶ 61,060 at P 22-23, *order on reh'g,* 103 FERC ¶ 61,289 at P 8, 13 (2003) (addressing treatment of competing requests). Further, as we explain above (P 23), an existing customer such as Oglethorpe does not jump ahead of higher priority customer. Rather, all existing firm service customers have rollover rights unless specific limitations are specified in the original service agreements.

[61]*Id.* at 29.

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Commission Response[62]

40. SCS has misinterpreted our May 2, 2003 Order in this proceeding regarding this matter. We did not rule that the rollover agreement was a "new" or original agreement within the meaning of Order No. 888-A into which SCS could insert restrictions on future rollovers.[63] Rather, we held simply that the effective date of the rollover agreement was the day following the day on which service under the original agreement concluded, i.e., November 30, 2002. This ruling is consistent with our decisions in other proceedings, where we held that the effective date of an agreement is the date on which service takes effect.[64] Accordingly, SCS's request is denied.

Issues Not Addressed in Prior Southern Rollover Cases

41. SCS raises two issues in this proceeding that have not previously been raised by SCS and addressed by the Commission: (1) the Commission has improperly abrogated a contract to which Oglethorpe agreed; [65] and (2) the Commission's requirement that Southern Companies' Electric Quarterly Report contain data on nonconforming transactions is contrary to the Commission's Order No. 2001.[66]

Executed Rollover Agreement

42. SCS argues that the Commission must reverse its decision to require removal of rollover restrictions in the agreement with Oglethorpe.[67] SCS argues that the Commission is obligated to respect the sanctity of the contract agreed to by the parties, and that the Commission abrogated an agreement without providing a compelling reason for doing so.

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[62]The Commission previously addressed SCS's similar argument in 104 FERC ¶ 61,140 at P 42.

[63]Order No. 888-A at 30,198.

[64]*See, e.g.*, Southwestern Public Service Co., 82 FERC ¶ 61,083 at 61,311 (1998); Carolina Power & Light Co., 59 FERC ¶ 61,119 at 61,465 (1992).

[65]SCS Rehearing at 6, 29-31.

[66]*Id.* at 31.

[67]*Id.*

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Commission Response

43. The Commission agrees that this issue was not present in the preceding SCS rollover cases involving Dynegy and Williams, as those were unexecuted rollover agreements, whereas the service agreement at issue here was executed by the parties. However, that distinction is not controlling because the agreement at issue here includes restrictions on future rollover transmission rights contrary to Commission policy. An agreement contrary to Commission policy, such as this filing, cannot become effective until such time as accepted by the Commission.

44. SCS insists that the Commission is required to follow the contract agreed to by the parties.[68] We disagree. That the parties signed a contract is not dispositive. The Court of Appeals has stated that:

> [A]ll transmission service, even that resulting from voluntary arrangements, must be provided at a just and reasonable rate. FERC's responsibility under section 205 is to ensure just and reasonable rates for native load customers and for third parties. Whether a rate satisfies this requirement is to be determined by FERC, not the parties to an agreement, however voluntary their agreement may be.

Accordingly, we will not apply a public interest standard when considering changes to an executed contract in the absence of a prior just and reasonable determination.

45. The Commission here accepted the agreement but found that it must be modified to remove future rollover restrictions. The rationale for requiring modification of such agreements is contained in the explanations of Commission policy, which had their origins in Order Nos. 888 and 888-A, as previously explained.[69] Accordingly, SCS's request for rehearing on this issue is denied.

Requirement to File Electric Quarterly Report Information

46. SCS argues that the Commission's directive that Southern Companies modify their Electric Quarterly Report filings to include nonconforming agreements appears to be in conflict with the Commission's holdings in Order No. 2001.[70] SCS argues that because

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[68] SCS Rehearing at 30.

[69] *See* P 10, 11, 14, 16-21, 26, 29, 31, 40 supra.

[70] SCS Rehearing at 31-32.

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the filing requirements for nonconforming agreements are met by actual filings with the Commission pursuant to Order No. 2001, it is not necessary to list them on the Electric Quarterly Reports. Nevertheless, SCS states that Southern Companies revised their Electric Quarterly Reports to include both conforming and nonconforming transmission service agreements. However, it states that should the Commission rule differently in this or subsequent proceedings regarding this matter, Southern Companies reserve their right to revise their Electric Quarterly Reports.

Commission Response

47. In our May 2, 2003 Order, we required Southern Companies to include information on nonconforming agreements in their Electric Quarterly Reports because Order No. 2001 required both types of agreements to be included in the Electric Quarterly Reports. Order No. 2001 requires public utilities to electronically file "Electric Quarterly Reports summarizing the contractual terms and conditions in their agreements for all jurisdictional services. . . during the most recent calendar quarter" (emphasis added).[71] Accordingly, SCS's request for rehearing on this matter is denied.

Compliance Filing

48. The Commission's May 2, 2003 Order directed SCS to remove sections 5.0 and 6.0 of the rollover agreement. SCS submitted the compliance filing under protest, referencing its concurrent request for rehearing of the May 2, 2003 Order.

49. Our review of the compliance filing indicates that SCS has complied with the Commission's directive. Consistent with the discussion above, we dismiss SCS's protest and accept the compliance filing effective December 1, 2002, the effective date previously granted for the rollover agreement, as modified.

The Commission orders:

(A) SCS's request for rehearing is hereby denied.

[71] Order No. 2001, FERC Stats. & Regs., Regulations Preambles, ¶ 31,127 at 30,116, P 7.

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(B) SCS's compliance filing removing sections 5.0 and 6.0 from the rollover agreement is hereby accepted, to be effective December 1, 2002.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.