

109 FERC ¶ 61,275
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Energy Marketing, Inc. and Southern Company Services, Inc.	Docket Nos. ER97-4166-015 ER97-4166-016 ER96-780-005 ER96-780-006 EL04-124-000
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ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued December 17, 2004)

1. On August 9, 2004, as amended on August 27, 2004 and November 19, 2004, Southern Company Services, Inc. (SCS), acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company (collectively, Southern Companies), submitted for filing (compliance filing) revised generation market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004.¹ The filing, as amended, indicates that Southern Companies passes the pivotal supplier screen but fails the wholesale market share screen for each of the four seasons considered in Southern's control area.² The filing further indicates that Southern

¹ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g, AEP Power Marketing, Inc.*, 108 FERC ¶ 61,026 (2004) (July 8 Order). As discussed below, Southern Companies filed its regularly scheduled updated market power analysis in Docket No. ER96-780-005 on April 30, 2002. On August 27, 2004, Southern Companies filed an errata to the compliance filing, which Southern Companies states is ministerial in nature. On December 9, 2004, Southern Companies filed a second errata to the compliance filing.

² Southern Companies' filing, as amended, shows that it has a market share as high as 49 percent in the Southern control area. Southern Companies' filing identifies the Southern control area as the control area operated by SCS.

Companies passes the pivotal supplier screen and the wholesale market share screens in each of the directly interconnected first-tier control areas examined with market shares of zero to 14 percent in each of the four seasons considered. In addition, intervenors have filed protests alleging that Southern Companies has market power and requesting customer protection.

2. As we stated in the April 14 Order, where an applicant is found to have failed either generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)³ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁴ Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether Southern Companies may continue to charge market-based rates. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to Southern's control area because the compliance filing indicates that this is the geographic market for which Southern Companies fails the wholesale market share screen.

3. This order, including the refund effective date, will protect customers from excessive rates and charges that may result from the exercise of market power.

Background

4. On April 30, 2002, Southern Companies filed in Docket No. ER96-780-005 an updated market analysis utilizing a modified Supply Margin Assessment and a hub-and-spoke analysis (April 30 filing).

5. In the April 14 Order, as clarified by the July 8 Order, the Commission adopted two indicative screens for assessing generation market power: a pivotal supplier screen and a wholesale market share screen. The Commission stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess generation market power, while failure of either screen creates a rebuttable presumption that the applicant has generation market power. The Commission further stated that applicants and intervenors may, however, rebut the presumption established by the results of the initial screens by submitting a Delivered Price Test. Alternatively, an applicant may accept the presumption of market power or forego the generation market power

³ 16 U.S.C. § 824e (2000).

⁴ April 14 Order, 107 FERC ¶ 61,018, at P 201.

analysis altogether and go directly to mitigation.⁵ The July 8 Order directed Southern Companies to file within thirty days of the issuance of that order, generation market power analyses pursuant to these two indicative screens.⁶ As discussed above, Southern Companies submitted its compliance filing pursuant to the July 8 Order on August 9, 2004.

6. On October 29, 2004, the Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority, issued a data request seeking additional information relating to Southern Companies’ submittal.

7. On November 19, 2004, Southern Companies filed a response to the data request. In its response, Southern Companies provided additional information regarding the pivotal supplier and market share screens for its first-tier control areas, the simultaneous transmission import capability study, the transmission market power, barriers to entry and affiliate abuse/reciprocal dealing prongs of the Commission’s four-part test for granting market-based rate authority, and a revision to its market-based rate tariff adding the market behavior rules.⁷

Description of Southern Companies’ Filing

8. In its filing, Southern Companies submits the results of the two generation market power screens. Southern Companies states that it passes the pivotal supplier screen in Southern’s control area and in each directly interconnected control area. Southern Companies further states that it passes the wholesale market share screen in each directly interconnected control area, but that it fails the wholesale market share screen in Southern’s control area for each of the four seasons considered. In response to this failure, Southern Companies argues that the Commission’s pivotal supplier and

⁵ In addition, as the Commission stated in the April 14 Order, the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power. April 14 Order, 107 FERC ¶ 61,018 at P 37.

⁶ July 8 Order, 108 FERC ¶ 61,029 at Ordering Paragraph (B).

⁷ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at Ordering Paragraph (A) (2003), *order on reh’g*, 107 FERC ¶ 61,175 (2004) (Market Behavior Rules Order).

wholesale market share screens are flawed and do not represent legitimate tools for making meaningful determinations in this regard.⁸

9. In an effort to rebut the presumption of market power as indicated by the failure of the market share screen, Southern Companies states that it developed a modified version of the Commission's pivotal supplier screen. According to Southern Companies, the modified pivotal supplier screen determines the actual amount of wholesale load in the market rather than relying on a proxy for that wholesale load and applies this modified pivotal supplier screen on a monthly basis.⁹ Southern Companies states that it passes the modified pivotal supplier screen not only at peak demand times, but also for each month of the year. According to Southern Companies, the month-by-month application of its modified pivotal supplier screen is a superior alternative to the wholesale market share screen for addressing the potential to exercise market power during non-peak times.

10. Finally, based upon the application of the modified pivotal supplier screen, Southern Companies contends that there is a substantial surplus of capacity available from suppliers other than Southern Companies in Southern's control area. According to Southern Companies, this further diminishes any legitimate concern that Southern Companies may be able to exercise market power for wholesale sales in Southern's control area.

11. The November 19, 2004 response to the data request provides additional information that supports Southern Companies' conclusion that it lacks market power in the first-tier markets.

Notice of Filings and Responsive Pleadings

12. Notice of Southern Companies' April 30 filing of an updated market power analysis in Docket No. ER96-780-005 was published in the *Federal Register*, 67 Fed. Reg. 34,444 (2002), with interventions or protests due on or before May 21, 2002. On

⁸ We find no merit to Southern Companies' argument that the screens are flawed. Our July 8 Order considered, and rejected, Southern Companies' arguments regarding potential flaws in the Commission's pivotal supplier and wholesale market share screens. In particular, we rejected suggestions to broaden the pivotal supplier analysis to include monthly assessments and alternative proxies for the market share screen. July 8 Order, 108 FERC ¶ 61,026 at P 77, 89-91.

⁹ On December 9, 2004, SCS filed a second errata to the August 9 filing and a supplement to this modified pivotal supplier screen, using nameplate instead of seasonal capacity for the relevant inputs.

May 21, 2002, Calpine Construction Finance Company, L.P. (Calpine Construction Finance), filed a motion to intervene and protest Southern Companies' April 30 filing.

13. On June 5, 2002, Southern Companies filed an answer to Calpine Construction Finance's protest (June 5 response).

14. Notice of the August 9, 2004 compliance filing in Docket No. ER97-4166-015 was published in the *Federal Register*, 69 Fed. Reg. 51,658 (2004), with interventions or protests due on or before August 30, 2004. Timely motions to intervene were filed by Southeast Electricity Consumer Association and North Carolina Electric Membership Corporation, and motions to intervene out-of-time were filed by Longleaf Energy Associates (Longleaf) and PSEG Companies. On August 23, 2004, the Alabama Electric Cooperative, Inc. (AEC) filed with the Commission a request for an extension of time in which to file a protest,¹⁰ for an expedited ruling and a summary rejection of the compliance filing. On August 30, 2004, Electricity Consumers Resource Council (ELCON) filed a motion to intervene and comments supporting AEC's motion. On August 30, 2004, Calpine Corporation (Calpine) and Shell Trading Gas and Power Company (Shell) filed motions to intervene, protest, and comments, and Electric Power Supply Association (EPSA) filed comments. On September 3, 2004, Tenaska, Inc. (Tenaska) filed a motion to intervene out-of-time and comments.

15. On September 13, 2004, Southern Companies filed an answer to the motions and comments filed by EPSA, Calpine, Shell and Tenaska (September 13 answer). On October 19, 2004, Calpine filed an answer and response to Southern Companies' answer. On November 3, 2004, Southern Companies filed a motion to strike Calpine's motion and response (November 3 motion). On November 15, 2004, Calpine filed an answer to Southern Companies' motion to strike.

16. Notice of Southern Companies' November 19, 2004 filing in Docket No. ER97-4166-015 and ER96-780-005 was published in the *Federal Register*, 69 Fed. Reg. 69,596 (2004), with interventions or protests due on or before December 7, 2004. On December 7, 2004, Calpine and Shell filed comments and a protest regarding Southern Companies' response to the data request.

¹⁰ AEC's request for an extension of time is dismissed as moot, given the Commission's determination in this order to initiate a section 206 proceeding.

Summary of Pleadings

17. Calpine Construction Finance's protest of Southern Companies' April 30 filing argues that Southern Companies exercises transmission market power, erects barriers to entry and engages in affiliate abuse. In support of these assertions, Calpine Construction Finance cites the following advantages enjoyed by Southern Companies that its competitors lack: (1) real-time economic dispatch to manage its own energy imbalances; (2) a pooling and reserve-sharing arrangement between its regulated and unregulated generation assets;¹¹ (3) the ability to withhold transmission capability from customers seeking delivery from competing generators, which allows Southern Companies to hoard the best generation sites, and together with associated transmission capacity, transfer those sites to its unregulated affiliate, Southern Power; (4) granting preferential reservation to network capability to affiliated generating units in advance of construction, allowing affiliated generators to win requests for proposals (RFPs) and thereby avoid the costs incurred by generators that do not have the advantage of network service; (5) the ability to arrange transmission for power purchased for ultimate resale before it identifies a purchaser by designating its "sink" as the Southern control area, and preventing similarly-situated competitors from using network service to "park" their purchases; and (6) the ability to avoid delays by Southern Companies in responding to transmission service requests. Calpine Construction Finance further urges the Commission to impose a range of mitigation measures.

18. In its June 5 response, Southern Companies argues that Calpine Construction Finance's protest references allegations dealt with in other proceedings and constitute a collateral attack on Commission orders, such as Order No. 888. Southern Companies further argues that the Commission has approved a number of the practices challenged by Calpine, including its use of network service, its pooling arrangement and its native load reservations. Southern Companies also contends that Calpine neglected to mention the obligations and limitations that membership in the IIC entails.

19. AEC's protest argues that the bulk of Southern Companies' compliance filing constitutes arguments against the use of the analyses required by the Commission's April 14 and July 8 Orders. According to AEC, most of the matters raised in the compliance filing were not required by the Commission's July 8 Order and, accordingly, must be rejected as beyond the scope of a compliance filing.

¹¹ Calpine Construction Finance's protest refers to the Intercompany Interchange Contract (IIC) among the five Commission-regulated Southern Operating Companies and the unregulated operating company Southern Power Company (Southern Power).

20. EPSA, Calpine, Shell and Tenaska argue that, as a result of Southern Companies' failure of the wholesale market share screen, the Commission must initiate a section 206 proceeding to determine whether Southern Companies has generation market power in Southern's control area. Calpine, Shell and Tenaska also urge the Commission to establish refund protection. Calpine also contends that the Commission should reject Southern Companies' modified screens because they constitute a collateral attack on the April 14 and July 8 Orders.

21. EPSA, Calpine, Shell and Tenaska further request that the Commission examine all four prongs of the market power test in the section 206 proceeding, arguing that Southern Companies' exercises transmission market power, erects barriers to entry, and/or engages in affiliate abuse. First, Calpine and Shell argue that Southern Companies' operation of the Southern control area pursuant to the IIC allows it to exercise transmission market power and to engage in affiliate abuse by granting its unregulated affiliate, Southern Power, preferential access to transmission and to ancillary services, in violation of Order No. 888. Second, Calpine contends that Southern Companies exercises transmission market power and engages in affiliate abuse through its membership in the Southern power pool and through its use of transmission rights associated with Southern power pool transactions to favor its unregulated affiliate, Southern Power. Third, Calpine argues that Southern Companies' code of conduct does not establish adequate protections against affiliate abuse because it does not treat affiliates such as Southern Power that engage in power marketing activities as "marketing affiliates". Fifth, EPSA and Calpine argue that Southern Companies has engaged in affiliate abuse, citing previous Commission proceedings examining allegations of affiliate abuse. Finally, Calpine and Shell contend that Southern Companies can erect barriers to entry by reserving, or "hoarding", transmission capacity in the name of serving future native load growth to deter merchants from siting plants in their territory.

22. Southern Companies' September 13 answer argues that the motions to intervene out-of-time should be denied for failure to satisfy the Commission's requirements, that EPSA's comments should be rejected for failure to intervene, and that the arguments made by EPSA, Calpine, Shell and Tenaska to initiate a section 206 proceeding addressing all four prongs of the Commission's market power test are inappropriate. Southern Companies' answer contends that a section 206 proceeding is not warranted for any of the four prongs under the factual circumstances. Furthermore, Southern Companies argues that, even if it were, it would be a violation of Southern Companies' due process rights to expand the instant section 206 proceeding to cover any of the other prongs besides generation market power. Finally, Southern Companies rejects the contention by Calpine, EPSA and Shell that Southern Companies' inclusion of additional screens is impermissible, maintaining that it had properly exercised the flexibility invited by the April 14 and July 8 Order to provide historical data.

23. Southern Companies' November 3 motion argues that Calpine's answer does not satisfy the Commission's standard for allowing unauthorized responses, that Calpine submitted duplicative motions and that Calpine improperly attempted to introduce materials from a separate proceeding involving different parties and different issues.

24. Calpine's answer to Southern Companies' November 3 motion argues that good cause exists for Calpine to respond to Southern Companies' September 13 answer, which had not been authorized by the Commission, and that Southern Companies itself had opened the door for Calpine to submit materials from a separate docket when Southern Companies claimed that Calpine's market power concerns were based on nothing more than unsupported belief.

25. In their answer to Southern Companies' response to the date request, Calpine and Shell submitted additional evidence to support their allegations that Southern Companies exercises market power, erects barriers to entry and engages in affiliate abuse and urge the Commission to set this issue for hearing for further fact-finding and to devise appropriate mitigation for any remaining transmission market power.

Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Given the early stage of this proceeding and the absence of undue delay or prejudice, we find good cause to grant the motions to intervene out-of-time of Longleaf, Tenaska and the PSEG Companies, notwithstanding Southern Companies' opposition.

27. We also reject as without merit Southern Companies' motion to reject EPSA's comments for failure to intervene. EPSA correctly notes that its motion to intervene out-of-time in Docket No. ER97-4166-013 was accepted by the Commission in the April 14 Order.¹² Once an entity has been made a party to a proceeding it need not separately file a motion to intervene in each subsequent sub-docket to maintain its status as a party.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Calpine's and Southern Companies' answers and responses because they have provided information that assisted us in our decision-making process.

¹² April 14 Order, 107 FERC ¶ 61,018 at P 28 and Appendix A.

Discussion

29. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. The Commission also considers whether there is evidence of affiliate abuse or reciprocal dealing.¹³

Generation Market Power

30. In the April 14 Order, the Commission adopted two indicative screens for assessing generation market power. Southern Companies performed the generation market power screens for the Southern control area and twelve first-tier markets. The Commission has reviewed Southern Companies' generation market power screens, as amended, for the first-tier control areas, which indicate that Southern Companies passes both the pivotal supplier and wholesale market share screens in these geographic markets. Further, the Commission finds that Southern Companies has complied with the directives in the April 14 Order, as clarified by the July 8 Order, regarding performing a simultaneous transmission import capability study and relies on the results of that study herein. Accordingly, the Commission finds that Southern Companies satisfies the Commission's generation market power standard for the grant of market-based rate authority in the first-tier control areas.

31. Southern Companies states in its compliance filing, as amended, that Southern Companies' share of uncommitted capacity in the Southern control area exceeds 20 percent for each of the four seasons during the time period considered.¹⁴ Consequently, Southern Companies' compliance filing indicates that it fails the wholesale market share screen in Southern's control area.

32. In its submission, Southern Companies presents alternative evidence - the modified pivotal supplier screen using monthly wholesale data - to rebut the presumption of market power established by its failure of the wholesale market share screen. Southern Companies states that the modified pivotal supplier analysis uses actual wholesale load data rather than the proxy for wholesale load specified by the Commission in the April 14 Order to reflect native load obligations in the pivotal supplier screen.¹⁵ Southern

¹³ See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,921-22 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899-900 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

¹⁴ See Footnote 2.

¹⁵ April 14 Order, 107 FERC ¶ 61,018 at P 98.

Companies argues that this alternative evidence demonstrates that Southern Companies does not have the potential or the ability to exercise market power in the markets in which they participate. The Commission stated in the April 14 and July 8 Orders that applicants may present historical evidence to show that the applicant satisfies the generation market power concerns, however, the evidence that will be considered is historical sales and/or access to transmission to move supplies within, out of, and into a control area.¹⁶

33. Southern Companies' modified pivotal supplier screen data is under review. We will further examine this information in conjunction with other evidence submitted in the section 206 proceeding we institute herein.

34. As outlined in the April 14 Order, Southern Companies' failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to Southern's control area, to determine whether Southern Companies may continue to charge market-based rates in that market, and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the necessary procedural framework to promptly impose an effective remedy, in case the Commission determines that such a remedy is required. Our decision to establish a refund effective date does not constitute a determination that refunds will be ordered.

35. Our decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that Southern Companies has market power in Southern's control area. As discussed in the April 14 and July 8 Orders, the screens are conservatively designed to identify the subset of applicants who require closer scrutiny. Accordingly, for the Southern control area, Southern Companies will have 60 days from the date of issuance of this order finding a screen failure to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.¹⁷ In addition, as the Commission stated in the April 14 Order,¹⁸ the applicant or intervenors may present evidence such as historical sales data to support whether the applicant does or does not possess market power.

¹⁶ April 14 Order, 107 FERC ¶ 61,018 at P 102.

¹⁷ *Id.* at P 201, 207-209.

¹⁸ *Id.* at P 37 n.11.

36. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after publication of notice of the initiation of the Commission's proceeding in the *Federal Register*, and no later than five months subsequent to the expiration of the 60-day period. In order to give maximum protection to customers, and consistent with our precedent,¹⁹ we will establish a refund effective date at the earliest date allowed. This date will be 60 days from the date on which notice of the initiation of the proceeding in Docket No. EL04-124-000 is published in the *Federal Register*. In addition, section 206 requires that, if no final decision has been rendered by that date, the Commission must provide its estimate as to when it reasonably expects to make such a decision. Given the times for filing identified in this order, and the nature and complexity of the matters to be resolved, the Commission estimates that it will be able to reach a final decision by April 29, 2005.

Transmission Market Power

37. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an OATT on file before granting such authorization. In its response to the data request, Southern Companies states that it has an OATT on file with the Commission. We note that Southern Companies' OATT was accepted by Commission order.²⁰ Based on Southern Companies' representation, the Commission finds that Southern Companies satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

38. We recognize that protesters have expressed concern that Southern Companies may have the ability to exercise market power. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

Barriers to Entry

39. In its response to the data request, Southern Companies states that it does not own or control fuel supplies, delivery services to electric facilities, engineering or construction firms participating in the energy industry, or natural gas pipeline facilities; that it does not exercise control over sites for generating plants that could restrict entry of suppliers into competitive electricity markets due to the unavailability of other sites; and that it does not

¹⁹ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153 (1989), *reh'g denied*, 47 FERC ¶ 61,275 (1989).

²⁰ *Southern Company Services, Inc.*, 82 FERC ¶ 61,130 (1998), *order on reh'g*, 85 FERC ¶ 61,235 (1998).

otherwise possess the ability to raise other barriers to entry. Based on Southern Companies' representations, the Commission is satisfied that Southern Companies cannot erect barriers to entry.²¹

40. We recognize that protesters have expressed concerns that Southern Companies may have the ability to erect barriers to entry. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

Affiliate Abuse/Reciprocal Dealing

41. The Commission is also concerned with the potential for affiliate abuse. In its response to the data request, Southern Companies states that, in accordance with the Public Utility Holding Company Act (PUHCA),²² it functions as an integrated public utility system, which means that it does not have an affiliated wholesale power marketer that operates outside its system. Furthermore, Southern Companies points out that PUHCA imposes a number of restrictions and limitation on its activities that fall under the jurisdiction of the Securities and Exchange Commission and that its relationships and dealings with affiliates are subject to state regulation. Finally, Southern Companies notes that its market-based rate tariff and code of conduct contain the Commission's standard restrictions on affiliate transactions and that it complies with the Commission's standards of conduct set out in Order No. 2004.²³ Based on Southern Companies' representations, Southern Companies satisfies the Commission's concerns with regard to affiliate abuse.

42. We recognize protesters have expressed concerns regarding affiliate abuse. However, we believe that such arguments would be more appropriately raised in a separate complaint proceeding.

²¹ See, e.g., *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 (1993).

²² 15 U.S.C. § 79 *et seq.* (2000).

²³ *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (2003), FERC Stats. & Regs. ¶ 31,155 (2003), *order on re'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 (2004), *order on reh'g*, Order No. 2004-B, 108 FERC ¶ 61,118 (2004).

Market Behavior Rules

43. In the Market Behavior Rules Order, the Commission directed market-based rate sellers to include as an amendment to their market-based rate tariff the market behavior rules at such time as they seek continued authorization to sell at market-based rates.²⁴ On November 19, 2004, Southern Companies amended its tariff to include the market behavior rules set forth in Appendix A to the Market Behavior Rules Order. However, Southern Companies did not include the entire Appendix A as required. Accordingly, Southern Companies is directed to revise proposed Original Sheet No. 7 to include the following paragraph in accordance with Appendix A:

Any violation of these Market Behavior Rules will constitute a tariff violation. Seller will be subject to disgorgement of unjust profits associated with the tariff violation, from the date on which the tariff violation occurred. Seller may also be subject to suspension or revocation of its authority to sell at market-based rates or other appropriate non-monetary remedies.

Reporting Requirements

44. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rates must file electronically with the Commission an Electric Quarterly Report containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter.²⁵ Electric

²⁴ Market Behavior Rules Order, 105 FERC ¶ 61,218 (2003), at Ordering Paragraph (A).

²⁵ *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The Electric Quarterly Report must be submitted to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/Electric/eqr/eqr.htm>.

Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.²⁶

45. With regard to reporting changes in status that would reflect a departure from the characteristics the Commission has relied upon in approving market-based pricing, in a Notice of Proposed Rulemaking in Docket No. RM04-14-000, the Commission is proposing to amend its regulations and to modify the market-based rate authority of current market-based rate sellers to establish a reporting obligation for changes in status that apply to public utilities authorized to make wholesale power sales in interstate commerce at market-based rates.²⁷ Accordingly, the change in status reporting obligation for Southern Companies is subject to the outcome of the rulemaking.

The Commission orders:

(A) Southern Companies' updated market power analysis for all relevant markets not subject to the section 206 proceeding is hereby accepted for filing as discussed in the body of this order.

(B) Southern Companies' is directed to file, within 15 days from the date of issuance of this order, the revision to its market behavior rules, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL04-124-000 concerning the justness and reasonableness of Southern Companies' market-based rates, as discussed in the body of this order.

²⁶ The exact dates for these reports are prescribed in 18 C.F.R. § 35.10b (2004). Failure to file an Electric Quarterly Report (without an appropriate request for extension), or failure to report an agreement in an Electric Quarterly Report, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²⁷ Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority, 69 Fed. Reg. 61,180 (Oct. 15, 2004), FERC Stats. & Regs. ¶ 32,576 (2004).

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(D) The Secretary shall promptly publish in the Federal Register a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL04-124-000.

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

(F) For the Southern control area, Southern Companies is directed, within 60 days from the date of issuance of this order, to: (1) file a Delivered Price Test analysis; (2) file a mitigation proposal tailored to its particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that it will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.