

114 FERC ¶61,143
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

South Carolina Electric and Gas
Company

Docket Nos. ER96-1085-008
ER96-1085-009
EL05-122-000

ORDER ON PROPOSED MITIGATION MEASURES AND COMPLIANCE FILINGS

(Issued February 16, 2006)

1. In this order, we conditionally accept South Carolina Electric and Gas Company's (SCE&G's) proposal to mitigate the presumption of market power in the SCE&G control area, subject to Commission acceptance of the compliance filing directed herein. Also in this order, we accept SCE&G's revisions to its market-based rate tariff to incorporate the Commission's change in status reporting requirement and the market behavior rules.

I. Background

2. On July 18, 2005 and August 15, 2005, SCE&G submitted two separate compliance filings in response to the Commission's June 16, 2005 order¹ on SCE&G's updated market power analysis. SCE&G submitted its updated market power analysis in compliance with the Commission's order issued on May 13, 2004.²

¹ *South Carolina Electric and Gas Company*, 111 FERC ¶ 61,410 (2005) (June 16 Order).

² *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order). The May 13 Order addressed the procedures for implementing the generation market power analysis announced on April 14, 2004 and clarified on July 8, 2004. *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

3. SCE&G's generation market power analysis indicated that SCE&G passed the pivotal supplier and wholesale market share screens in each of the directly interconnected first-tier control areas examined and that it passed the pivotal supplier screen in the SCE&G control area but failed the wholesale market share screen in the SCE&G control area. As the Commission 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 pursuant to section 206 of the Federal Power Act (FPA)³ and establishes a rebuttable presumption of market power in the section 206 proceeding.⁴ Accordingly, because SCE&G's filing indicated that it failed the wholesale market share screen, the Commission instituted a section 206 proceeding to investigate generation market power in the SCE&G control area. The Commission also established a refund effective date pursuant to the provisions of section 206.

4. In the June 16 Order, the Commission directed SCE&G, for the SCE&G control area, to: (1) file a Delivered Price Test analysis (DPT); (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 would adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.⁵

5. In addition to addressing SCE&G's failure of the wholesale market share screen, the Commission directed SCE&G to revise to its market-based rate tariff to: (1) incorporate the Commission's change in status reporting requirement adopted in Order No. 652;⁶ and (2) amend its tariff to include the Market Behavior Rules set forth in Appendix A to the Market Behavior Rules Order.⁷

³ 16 U.S.C. § 824e (2000).

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

⁵ April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-09.

⁶ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

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

II. Compliance Filings

6. SCE&G's July 18, 2005 compliance filing includes revisions to its market-based rate tariff to include language requiring SCE&G to inform the Commission promptly of any change in status that would reflect a departure from the characteristics the Commission relied upon in granting SCE&G market-based rate authority. SCE&G's revised tariff also includes the market behavior rules adopted by the Commission in the Market Behavior Rules Order.

7. In SCE&G's August 15, 2005 compliance filing, SCE&G informs the Commission that in response to the Commission's directive to file a DPT, market power mitigation proposal or adopt the Commission's default cost-based rate model, SCE&G has chosen to propose mitigation measures. SCE&G states that it is proposing a voluntary prohibition on any wholesale sales to serve loads that sink within the SCE&G control area, absent Commission approval.

III. Notice of Filing and Responsive Pleadings

8. Notice of SCE&G's July 18, 2005 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 44,093 (2005), with comments, interventions, and protests due on or before August 8, 2005. North Carolina Electric Membership Corporation filed a motion to intervene.

9. Notice of SCE&G's August 15 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 50,312 (2005), with comments, interventions, and protests due on or before September 6, 2005. The City of Orangeburg, South Carolina (Orangeburg) filed a motion to intervene and protest.

10. Notice of the effective date in the section 206 proceeding was published in the *Federal Register*, 70 Fed. Reg. 43,139 (2005).⁸

IV. Discussion

A. Procedural Matters

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

⁸ Orangeburg included Docket No. EL05-122-000 in its motion to intervene.

B. Analysis

1. July 18, 2005 Compliance Filing

12. Order No. 652 requires that the change in status reporting requirement be incorporated in the market-based rate tariff of each entity authorized to make sales at market-based rates. As noted above, SCE&G revised its tariff to include the change in status reporting requirement. Accordingly, we will accept SCE&G's revision to its tariff to incorporate the change in status reporting requirement.⁹

13. With respect to SCE&G attaching the Commission's market behavior rules to its tariff, we note that SCE&G's language does not comply with the market behavior rules as established by the Commission.¹⁰ Specifically, section 2(b) of SCE&G's market behavior rules should state, "(...or scheduling non-firm service for products sold as firm)..." Accordingly, SCE&G is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to include such language, without variation, consistent with the Commission's market behavior rules.

2. August 15, 2005 Compliance Filing

14. For its mitigation proposal, SCE&G proposes a prohibition on wholesale sales by SCE&G within its control area, absent Commission approval for such sales. SCE&G states that if the Commission accepts this mitigation proposal, it will file revised tariff sheets.¹¹ SCE&G states that it is aware that the Commission's current default cost-based rate model prescribes different requirements depending on the duration of the sale: (1) sales of one week or less are to be priced at the seller's incremental cost plus a 10 percent adder; (2) sales of more than one week but less than one year are to be priced at an embedded cost "up to" rate reflecting the costs of the unit providing service; and (3) sales for one year or more are to be priced on an embedded cost-of-service basis, with each contract filed with the Commission for review. SCE&G states that it currently makes (and historically has made) no control

⁹ South Carolina Electric & Gas Company, FERC Electric Tariff, Fourth Revised Volume No. 2, Original Sheet Nos. 10-11.

¹⁰ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *order on reh'g*, 107 FERC ¶ 61,175 at P 73 (2004).

¹¹ SCE&G August 15, 2005 filing at 2.

area sales in either of the first two categories. Thus, SCE&G states that it does not anticipate making future filings seeking authorization for such sales. With regard to long-term sales, SCE&G states that its mitigation proposal would require, for future sales contracts, that SCE&G and each control area wholesale customer (whether a current customer under an expiring contract seeking a new contract, or a new customer) to work together in good faith to ensure that the parties agree in timely fashion on an appropriate contract to be filed with the Commission for review. SCE&G adds that it recognizes that Commission acceptance will be granted only where SCE&G has demonstrated that a proposed transaction would be in compliance with Commission pricing policies.

15. SCE&G states that, despite its expectation that the only control area sales it will make in the foreseeable future will be those under long-term contracts, the mitigation proposal covers SCE&G's control area sales of any duration. SCE&G states that the only sales that would remain permissible under its market-based rate tariff would be those sales of capacity and/or energy that do not sink within the SCE&G control area. SCE&G states that if the Commission accepts this mitigation proposal, it will file revised tariff sheets. In addition, SCE&G states that with respect to any future SCE&G control area wholesale sales, the mitigation proposal, as noted above, would require SCE&G to obtain Commission approval authorizing the transaction.

16. We will conditionally accept SCE&G's proposal to revise its tariff to prohibit wholesale sales by SCE&G within its control area, absent Commission approval for such sales, subject to SCE&G filing, within 30 days of the date of this order, revised tariff sheets to reflect its mitigation proposal.¹² We find that SCE&G's proposal not to make under its market-based rate tariff sales within its control area adequately addresses SCE&G's failure of the market share screen in its control area. Moreover, as SCE&G states, to the extent it seeks in the future to make sales in its control area, it will be required to demonstrate that a proposed transaction would be in compliance with Commission pricing policies. The Commission will thus have an opportunity at that time to review any such request to be sure that it is just and reasonable.

17. In its protest, Orangeburg states that the August 15 filing does not address the status of existing contracts for loads that sink in the SCE&G control area, such as Orangeburg's load for which its current contract with SCE&G is applicable. Orangeburg states that it believes that SCE&G's proposal is not intended to affect its

¹² The Commission will terminate the instant 206 proceeding upon finding that SCE&G has met the conditions set forth in this order.

existing agreement and requests that any tariff revisions filed by SCE&G, and any Commission order accepting such filing, make explicit that existing agreements would not be affected. Orangeburg requests that acceptance of SCE&G's proposal be conditioned to provide that any existing contracts that were entered into under SCE&G's market-based rate tariff remain in effect until terminated pursuant to their terms.¹³

18. We stated in the April 14 Order that with respect to an applicant that has been found to have market power or has accepted a presumption of market power, any mitigation will be prospective only.¹⁴ Where, as here, the Commission accepts a utility's proposed mitigation, such mitigation is accepted on a prospective basis. Thus, it is appropriate for existing long-term agreements to remain in effect until terminated pursuant to their terms.

3. Waivers

19. In Order No. 664, the Commission stated that it no longer intends to grant waivers of the full requirements of Part 45 in its orders granting market-based rate authority. Rather, persons seeking to hold interlocking positions will be required henceforth to comply with the full requirements of Part 45.¹⁵ With respect to an individual who currently is authorized to hold interlocking positions, that individual will not need to refile under the full requirements of Part 45 to continue to hold such

¹³ Orangeburg states that pursuant to an agreement entered into in May 2001 with SCE&G, as amended on August 28, 2003, Orangeburg receives power supply, transmission and ancillary services on a long-term basis pursuant to SCE&G's market-based rate tariff and open access transmission tariff. Orangeburg further states that the agreement continues through at least April 30, 2009 and continues thereafter for rolling terms of twelve months until terminated upon eighteen months notice.

¹⁴ See April 14 Order, 107 FERC ¶ 61,018 at P 154, *order on reh'g*, July 8 Order, 108 FERC ¶ 61,026, P 145 (affirming mitigation of market power in long-term as well as shorter-term markets on a prospective basis).

¹⁵ *Commission Authorization to Hold Interlocking Positions*, Order No. 664, 112 FERC ¶ 61,298 at P 34 (2005).

interlocking positions (unless and until that individual assumes different or additional interlocking positions).¹⁶ Thus, consistent with Order No. 664, SCE&G will be required henceforth to comply with the full requirements of Part 45.¹⁷

20. As we stated in the April 14 Order, where an applicant adopts cost-based rates in order to mitigate the presumption of market power, we will no longer waive our otherwise applicable accounting regulations (e.g., Parts 41, 101, and 141 of the Commission's regulations),¹⁸ and we will not grant blanket approval for issuances of securities or assumptions of liability pursuant to Part 34 of the Commission's regulations for the applicant and its affiliates.¹⁹

4. SCE&G's Next Market Power Analysis

21. SCE&G is directed to file an updated market power analysis within three years of the date of this order. The Commission also reserves the right to require such an analysis at any intervening time.

The Commission orders:

(A) SCE&G's mitigation proposal is conditionally accepted, subject to Commission acceptance of the compliance filing directed herein, as discussed in the body of this order.

(B) The correctly revised tariff sheets incorporating the change in status reporting requirement adopted in Order No. 652 are hereby accepted for filing, effective March 21, 2005.

(C) SCE&G is directed, within 30 days of the date of this order, to revise its market-based rate tariff consistent with the Commission's market behavior rules, as discussed in the body of this order.

¹⁶ *Id.* at P 36.

¹⁷ SCE&G was granted waiver of the full requirements of Part 45 in *South Carolina Electric & Gas Company*, 75 FERC ¶ 61,151 (1996).

¹⁸ April 14 Order, 107 FERC ¶ 61,018 at P 150.

¹⁹ *Id.*

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(D) SCE&G's next updated market power analysis is due within three years of the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.