

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Services, Inc.

Docket Nos. EL05-53-000
ER05-129-000

ORDER INITIATING INVESTIGATION OF RATES

(Issued March 25, 2005)

1. Southern Company Services, Inc.¹ has indicated that it is entitled to begin charging operations and maintenance (O&M) expenses to customers under 18 separate interconnection agreements (IAs) even though interested parties did not have a chance to intervene and comment on the filing that gave rise to these charges, as required under section 205 of the Federal Power Act (FPA).² We initiate this proceeding pursuant to sections 206 and 307 of the FPA³ to allow Southern to inform the Commission of the current status of these charges, and to provide interested parties with an opportunity to comment on these charges, including their justness and reasonableness, if they are currently being charged. This order protects customers by ensuring that only rates that are properly on file with the Commission are charged, and by providing the public with an opportunity to comment on filings to recover such charges.

Background

2. On November 1, 2004, Southern submitted an "Informational Filing Regarding Recovery of O&M Charges under Interconnection Agreements" ("Informational" Filing)

¹ Southern Company Services, Inc. acts as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively Southern).

² See 16 U.S.C. § 824d (2000).

³ See 16 U.S.C. §§ 824e and 825f (2000).

and stated its intent to charge certain customers O&M expenses starting on January 1, 2005.⁴ In the filing, however, Southern admitted that it was unsure if it nevertheless needed to request an effective date (since it was only making an informational filing). If an effective date were needed, though, Southern requested an effective date of January 1, 2005.

3. After receiving Southern's "Informational" Filing, the Commission issued a notice inviting comments.⁵ However, four days later the Commission issued a "Notice Rescinding Prior Notice." Despite rescinding the notice, the Commission received motions to intervene and protests from Tenaska Georgia Partners, L.P., Tenaska Alabama Partners, L.P., and Tenaska Alabama II Partners, L.P. (collectively Tenaska), Effingham County Power, LLC, and Calpine Corporation (Calpine). Southern then filed various responses and motions.

Discussion

4. Sections 205(c) and 205(d) of the FPA require public utilities to file all jurisdictional rates and charges in such time and such form as prescribed by the Commission, and to give notice before implementing a new rate or practice or modifying an existing rate or practice. Part 385 of the Commission's regulations also provides that the Commission will give interested persons an opportunity to file requests to intervene and protests to rate filings.

5. Because we do not know what charges, if any, Southern may be charging, let alone whether they are just and reasonable, and to provide an opportunity for public comment, we will order an investigation pursuant to sections 206 and 307 of the FPA. This investigation will provide Southern with an opportunity to explain to the Commission in a paper hearing in Docket No. EL05-53-000: (1) whether it is currently assessing these O&M charges to its customers, (2) whether its O&M rates for these IAs are properly on file with the Commission, (3) whether the rates (if they are on file) are just and reasonable, and (4) what is the appropriate remedy if Southern is collecting O&M charges contrary to the FPA. It will also provide an opportunity for public comment and intervention.

⁴ Southern stated that its filing was informational in nature and was "neither the filing of an initial rate nor a change in rate schedule for purposes of 18 C.F.R. §§ 35.12, 35.13." Southern's "Informational" Filing at n.1. Southern reiterated the "informational nature" of its filing at least a half dozen times over the course of its 10 page cover letter. Accordingly, the Commission did not treat Southern's "Informational" Filing as a FPA section 205 filing.

⁵ Southern's "Informational" Filing was initially assigned Docket No. ER05-129-000.

6. 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 Commission's investigation in the *Federal Register*, and no later than five months subsequent to expiration of the 60-day period. In order to give maximum protection to customers, we will establish the statutorily-directed refund effective date at earliest date allowed,⁶ 60 days after publication of the order initiating the Commission's investigation in Docket No. EL05-53-000 in the *Federal Register*.⁷

7. In addition, section 206 requires that, if no final decision has been rendered by the refund effective 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 June 30, 2005.

Other Matters

8. We note that Tenaska has filed several section 206 complaints regarding Southern's classification of certain upgrades as network upgrades instead of interconnection facilities under three of the 18 IAs addressed in this order.⁸ While those proceedings may ultimately affect generators' O&M cost assessments, they do not go to the issue that is the subject of this investigation.

9. As noted above, the *Federal Register* notice was rescinded because the Commission did not regard the filing as having been made under section 205. We note that Southern appears to agree with this assessment; it states that Calpine's filing is "unacceptable *ab initio*," since the Commission rescinded the *Federal Register* notice.⁹ Thus, any entity (including those who filed comments in Docket No. ER05-129-000) wishing to have its concerns on this issue considered by the Commission is invited to submit comments in Docket No. EL05-53-000.

⁶ See, e.g., *Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

⁷ We note that the refund effective date applies only to the section 206 portion of our investigation and not the section 307 portion of our investigation. If Southern is found to be illegally charging a rate, the Commission may order refunds of amounts improperly collected. See, e.g., *Entergy Services Inc.*, 104 FERC ¶ 61,061 at P 17 (2003) (explaining that the Commission, pursuant to section 205, "has the authority . . . to direct refunds of amounts improperly charged for Commission jurisdictional services").

⁸ See Docket Nos. EL05-25-000, EL05-26-000, and EL05-27-000.

⁹ See Southern's Motion to Strike Late-Filed Intervention and Protest at P 2 & n.3 (December 29, 2004).

The Commission orders:

(A) 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 the Federal Power Act, particularly sections 206 and 307 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 an investigation into Southern's assessment, if any, of O&M costs to generators pursuant to 18 IAs, as discussed in the body of this order.

(B) Southern is hereby directed, within 21 days of the date of this order, to inform the Commission in Docket No. EL05-53-000: (1) whether Southern is currently assessing these O&M charges to its customers, (2) whether Southern's O&M charges for these IAs are properly on file with the Commission, (3) whether the rates (if they are on file) are just and reasonable, and (4) what is the appropriate remedy if Southern is collecting O&M charges contrary to the FPA.

(C) The refund effective date in Docket No. EL05-53-000 will be 60 days following the date of publication of this order in the *Federal Register*.

(D) Any interested person desiring to be heard in Docket No. EL03-53-000 should file a notice of intervention or a motion to intervene with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2004)), within 21 days of the date of this order. Protests will be considered by the Commission in determining the appropriate action to be taken (18 C.F.R. § 385.211 (2004)), but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

(E) Responses to the submissions filed pursuant to Ordering Paragraphs (B) and (D) above may be submitted within 15 days of the date of filing of the submissions.

(F) The Secretary shall promptly publish a copy of this order in the Federal Register.

By the Commission. Commissioner Kelliher dissenting with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

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ER05-129-000

(Issued March 25, 2005)

Joseph T. KELLIHER, Commissioner *dissenting*:

I disagree with the Commission's decision to initiate an investigation under sections 206 and 307 of the Federal Power Act to require Southern Company Services, Inc. (Southern) to "inform" the Commission as to the status and justness and reasonableness of operations and maintenance (O&M) expenses Southern contends it is authorized to charge to its customers under 18 interconnection agreements (IAs) already accepted by and on file with the Commission.

The impetus for this order is an "Informational Filing" in which Southern informed the Commission of the methodology that it will use to recover on-going O&M expenses from certain customers pursuant to provisions authorizing recovery of such expenses in 18 IAs. Southern represents that the customers contractually agreed to bear responsibility for the O&M costs in the IAs, and that the IAs were approved by and are on file with the Commission. The United States Court of Appeals for the District of Columbia Circuit recently indicated that a public utility may recover certain costs from a customer if an IA that has been accepted by and filed with the Commission specifies that those costs are recoverable from the customer. *See Southern Company Services, Inc. v. FERC*, 353 F.3d 29, 34-35 (D.C. Cir. 2003).

In my view, Southern's "Informational Filing" at best presents a question as to whether or not the IAs in fact permit Southern to charge O&M expenses to its customers. I believe that question could be resolved simply by examining the IAs. If the intent of the parties is clearly expressed in the IAs, then that should be the end of the matter. If the IAs are ambiguous, then the Commission should interpret the provisions to determine whether or not they permit recovery of O&M expenses, as Southern suggests. I would have no objection to a hearing that addresses these issues.

However, that is not what this investigative order does. As I read the Commission's order, this investigation renders the issue of whether or not the IAs currently allow Southern to charge customers O&M expenses irrelevant. Instead, the Commission's investigation leapfrogs over that critical and, in my view, potentially dispositive question and instead focuses on the justness and reasonableness of Southern's O&M charges.

In my view, the Commission's order provides no basis for initiating such a far-reaching inquiry. The IA customers either contractually agreed to pay the O&M expenses or not, and any concerns the Commission had as to the justness and reasonableness of that arrangement should have been addressed at the time the Commission accepted the IAs. Notably, since the IAs were filed with and accepted by the Commission, none of Southern's customers who may be obligated to pay O&M expenses has filed a section 206 complaint challenging the justness or reasonableness of Southern's recovery of those expenses. In these circumstances, I do not think that Southern's "Informational Filing" provides a sufficient basis for the Commission, on its own initiative, to launch a section 206 investigation into whether Southern's recovery of O&M expenses under the 18 IAs is just and reasonable.

Joseph T. Kelliher