

111 FERC ¶ 61,410  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

South Carolina Electric and Gas Company

Docket Nos. ER96-1085-006  
ER96-1085-007  
EL05-122-000

ORDER ON UPDATED MARKET POWER ANALYSIS,  
INSTITUTING SECTION 206 PROCEEDING AND  
ESTABLISHING REFUND EFFECTIVE DATE

(Issued June 16, 2005)

1. On February 7, 2005, South Carolina Electric and Gas Company (SCE&G) submitted for filing an updated market power analysis in compliance with the Commission's order issued on May 13, 2004.<sup>1</sup> The May 13 Order addressed the procedures for implementing the new generation market power screens announced on April 14, 2004, and clarified on July 8, 2004.<sup>2</sup> The filing indicates that SCE&G fails the wholesale market share screen for each of the four seasons in the SCE&G control area.<sup>3</sup>
2. As the Commission stated in the April 14 Order, where an applicant is found to have failed a generation market power screen, such failure provides the basis for instituting a proceeding under section 206 of the Federal Power Act (FPA)<sup>4</sup> and establishes a rebuttable presumption of market power in the section 206 proceeding. Accordingly, as discussed below, in this order, the Commission institutes a proceeding pursuant to section 206 of the FPA to determine whether the SCE&G may continue to

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<sup>1</sup> *Acadia Power Partners, LLC*, 107 FERC ¶ 61,168 (2004) (May 13 Order).

<sup>2</sup> *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004) (July 8 Order).

<sup>3</sup> SCE&G's analysis shows market shares as high as 44 percent.

<sup>4</sup> 16 U.S.C. § 824e (2000).

charge market-based rates and establishes a refund effective date pursuant to the provisions of section 206. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the SCE&G control area because the filing indicates that this is the geographic market for which SCE&G 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 July 15, 2003, SCE&G filed a market power analysis employing a Supply Margin Assessment.

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 analysis altogether and go directly to mitigation.<sup>5</sup> The May 13 Order directed SCE&G to file a revised generation market power analysis based on these two indicative screens.<sup>6</sup>

6. SCE&G filed an updated market power analysis on February 7, 2005, in compliance with the Commission's May 13 Order.

### **Description of the SCE&G's February 7 Filing**

7. In its filing, SCE&G submitted the results of the two generation market power screens. As required in the May 13 Order, SCE&G also provided updated information on the other three parts of the Commission's four-part market-based rate analysis.

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<sup>5</sup> 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. *See* April 14 Order, 107 FERC ¶ 61,018 at P 37.

<sup>6</sup> *See* May 13 Order at Ordering Paragraph (A).

8. SCE&G states that it passes the pivotal supplier and wholesale market share screens in each of the directly interconnected first-tier control areas examined and that it passes the pivotal supplier screen in the SCE&G control area but fails the wholesale market share screen in the SCE&G control area.

9. SCE&G states that, despite the screen failure, it does not have market power because the screens are flawed. SCE&G contends that its generation capacity has nothing to do with efforts to attain market power, but rather is a function of the Company's satisfaction of its obligations under state regulatory requirements. SCE&G argues that nameplate capacity is an inaccurate measure of capacity and that the seller's control area is not an appropriate definition for the relevant geographic market.<sup>7</sup>

10. SCE&G states that bundled retail load makes up most of the load in the control area. SCE&G further states that the remaining wholesale load is served through either (a) long term power requirements contracts with rates negotiated for and agreed to by the respective customers, or (b) Commission-approved cost-based rates. As a result, the Company itself is the core market's lone spot market buyer. SCE&G maintains that because of its status as a buyer in its control area, it has no incentive to exercise market power to drive prices up above a competitive level.

#### **Notice of Filings and Responsive Pleadings**

11. Notice of the July 15, 2003 filing was published in the *Federal Register*, 68 Fed. Reg. 44,071 (2003), with interventions or protests due on or before August 5, 2003. Central Electric Power Cooperative, Inc. filed a motion to intervene and SMI Steel-South Carolina, a division of Commercial Metals Company, filed a motion to intervene and comments.

12. Notice of the February 7, 2005 filing was published in the *Federal Register*, 70 Fed. Reg. 9,067 (2005), with interventions or protests due on or before February 28, 2005. None was filed.

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<sup>7</sup> SCE&G did not propose an alternative geographic market but instead challenged in general the Commission's decision in the April 14 and July 8 Orders to use the applicant's control area as the default geographic market. SCE&G indicated that it may present an alternative market in future filings.

## **Discussion**

### **Procedural Matters**

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedures, 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.

### **Market-Based Rate Authorization**

14. 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.<sup>8</sup>

### **Generation Market Power**

15. SCE&G states that its share of uncommitted capacity in the SCE&G control area exceeds 20 percent for each of the four seasons during the relevant time period. Consequently, SCE&G fails the wholesale market share screen in the SCE&G control area.

16. SCE&G argues that the screens are flawed and points to other evidence to suggest that it does not have generation market power. As previously stated, SCE&G maintains that it has no incentive to exercise market power to drive prices up above a competitive level because of its status as a buyer. In addition, SCE&G further argues that (a) SCE&G has an obligation under state regulatory requirements to satisfy its load; (b) nameplate capacity is an inaccurate measure of capacity; and (c) the seller's control area is not an appropriate definition for the relevant geographic market. These arguments are an attempt by SCE&G to reargue issues already addressed by the Commission in the April 14 and July 8 Orders. We will reject these arguments as they constitute a collateral attack on the methodology of the April 14 and July 8 Orders.

17. As outlined in the April 14 Order, SCE&G's failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding, which is limited to the SCE&G control area, to examine whether SCE&G may continue to charge market-based rates and establishes a rebuttable presumption of market power. This order establishes a refund effective date in order to put in place the

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<sup>8</sup> See, e.g., *Progress Power Marketing, Inc.*, 76 FERC ¶ 61,155 at 61,919 (1996); *Northwest Power Marketing Co., L.L.C.*, 75 FERC ¶ 61,281 at 61,899 (1996); *accord Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223 at 62,062-63 (1994).

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. The instant section 206 proceeding, as well as any resulting mitigation or refunds, is limited to the SCE&G control area because the filing indicates that this is the control area for which SCE&G fails the pivotal supplier or wholesale market share screens.

18. The Commission's decision to institute the instant section 206 proceeding does not constitute a definitive finding by the Commission that SCE&G has market power in the SCE&G control area. As discussed in the April 14 and July 8 Orders, the indicative screens are conservatively designed to identify the subset of applicants who require closer scrutiny.

19. Accordingly, SCE&G 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 their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.<sup>9</sup>

20. 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,<sup>10</sup> 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. EL05-122-000 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 November 30, 2005.

21. The filing indicates that SCE&G passes the pivotal supplier screen and the wholesale market share screen in each of the directly interconnected first-tier control areas examined. The Commission finds that SCE&G satisfies the Commission's

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<sup>9</sup> April 14 Order, 107 FERC ¶ 61,018 at P 201, 207-209.

<sup>10</sup> *See, e.g., Canal Electric Company*, 46 FERC ¶ 61,153, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

generation market power standards for the grant of market-based rate authority in the first-tier markets.

### **Transmission Market Power**

22. When a transmission-owning public utility seeks market-based rate authority, the Commission has required the public utility to have an open access transmission tariff (OATT) on file before granting such authorization. SCE&G states that it has an OATT on file with the Commission.<sup>11</sup> Further, no intervenor has raised transmission market power concerns. The Commission finds that SCE&G satisfies the Commission's transmission market power standard for the grant of market-based rate authority.

### **Other Barriers to Entry**

23. SCE&G states that the continued absence of barriers to entry is evidenced by the fact that a major merchant electric plant has been constructed and has commenced operations within SCE&G's control area since the last Commission acceptance of an SCE&G triennial review and that SCE&G has allowed the load of an electric cooperative to be transferred from the SCE&G control area to another control area through dynamic scheduling. Based on SCE&G's representations, the Commission finds that SCE&G cannot erect barriers to entry.

### **Affiliate Abuse**

24. SCE&G states that its only marketing affiliate, SCANA Energy Marketing, Inc., terminated its market-based rate tariff in 2001. SCE&G states that affiliate abuse is not a risk and that it operates in strict accordance with the Commission's standards of conduct to protect against affiliate abuse and preferential access. Moreover, it states that it engages in no reciprocal dealing with any market participant. In addition, no intervenor has raised concerns regarding affiliate abuse. Based on these representations, the Commission finds that SCE&G satisfies the Commission's concerns with regard to affiliate abuse.

### **Market Behavior Rules**

25. 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

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<sup>11</sup> *South Carolina Electric & Gas Company*, 75 FERC ¶ 61,151 (1996).

rules at such time as they seek continued authorization to sell at market-based rates.<sup>12</sup> In its February 7 filing, SCE&G stated that it will propose an appropriate amendment to its market-based sales tariff in a separate filing, however, it has not yet made such a filing. SCE&G, therefore, is required to amend its tariff to include the Market Behavior Rules set forth in Appendix A to the Market Behavior Rules Order, within 30 days from the date of this order.

### **Reporting Requirements**

26. 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.<sup>13</sup> Electric Quarterly Reports must be filed quarterly no later than 30 days after the end of the reporting quarter.<sup>14</sup>

27. SCE&G must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.<sup>15</sup> 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. Accordingly, SCE&G is directed, within 30 days of

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<sup>12</sup> *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).

<sup>13</sup> *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/doc-filing/eqr.asp>.

<sup>14</sup> 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.

<sup>15</sup> *Reporting Requirement for Changes in Status for Public Utilities With Market-Based Rate Authority*, Order No. 652, 110 FERC ¶ 61,097 (2005) (Order No. 652).

the date of issuance of this order, to revise its market-based rate tariff to incorporate the following provision:

[insert market-based rate seller name] must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority. A change in status includes, but is not limited to, each of the following: (i) ownership or control of generation or transmission facilities or inputs to electric power production other than fuel supplies, or (ii) affiliation with any entity not disclosed in the application for market-based rate authority that owns or controls generation or transmission facilities or inputs to electric power production, or affiliation with any entity that has a franchised service area. Any change in status must be filed no later than 30 days after the change in status occurs.

The Commission orders:

(A) SCE&G's updated market power analysis for all relevant markets not subject to the section 206 proceeding instituted herein is hereby accepted for filing.

(B) SCE&G is directed, within 30 days of the date of issuance of this order, to revise its market-based rate tariff to incorporate the change in status reporting requirement adopted in Order No. 652.

(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. EL05-122-000 concerning the justness and reasonableness of SCE&G's market-based rates in the SCE&G control area, as discussed in the body of this order.

(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. EL05-122-000.

(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 SCE&G control area, SCE&G 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 their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the April 14 Order's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(G) SCE&G is required to amend its tariff to include the Market Behavior Rules set forth in Appendix A to the Market Behavior Rules Order, within 30 days from the date of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.