

108 FERC ¶ 61,093
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. ER04-563-000
ER04-563-001

ORDER ACCEPTING SERVICE AGREEMENT, AS MODIFIED, FOR FILING

(Issued July 29, 2004)

1. Southern Company Services, Inc. (Southern)¹ filed a long-term firm point-to-point transmission service agreement (Agreement) with Calpine Energy Services, L.P. (Calpine) under Southern's Open Access Transmission Tariff (OATT).² In this order, we accept for filing the Agreement, as modified below, to become effective the later of June 1, 2006 or the date upon which construction is completed, and direct Southern to make a compliance filing removing section 5.0, which conditions Calpine's future rollover rights. This order benefits customers because it provides certainty regarding transmission service customers' rollover rights consistent with Commission policy.

Background

2. On February 6, 2004, Calpine and Southern executed the Agreement to provide for long-term firm point-to-point transmission service beginning on June 1, 2006 and ending on May 31, 2012. On February 17, 2004, Southern submitted the Agreement to the Commission. Southern states that, consistent with Commission precedent, it is filing the

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 FERC Electric Tariff, Fourth Revised Volume No. 5, Service Agreement No. 466.

Agreement because it is a nonconforming agreement under its OATT since it contains a rollover restriction. Southern argues that the restriction is consistent with Commission precedent³ and similar to another Commission accepted agreement.⁴

3. Proposed section 5.0 of the Agreement states that “[t]he Transmission Provider has performed an analysis that indicates that, after May 31, 2012, insufficient capacity exists to accommodate both the future rollover of this Service Agreement by the Transmission Customer and to provide service to Transmission Customers having an earlier priority for transmission service.” It then provides that Calpine’s rollover rights are expressly conditioned on the availability of sufficient transmission capacity after a specified list of transmission customers (identified by OASIS Reference Numbers) exercise their rights to transmission service or to roll over their respective service agreements. The section further states that “[b]ased on the Transmission Provider’s most recent analysis of its native load needs, the Transmission Provider has determined that 7500 MW of transmission capacity are required to meet forecasted native load growth through 2011.” It then concludes that based on a December 17, 2003 Transmission Facility Study Report that “insufficient capacity exists to accommodate the future rollover of this Service Agreement by the Transmission Customer, the service associated with the above-listed OASIS Reference Numbers, and the Transmission Provider’s service requirements to meet native load needs.” It further provides that Calpine’s rollover rights are expressly conditioned upon the availability of sufficient transmission capacity after the requests for transmission service on the Georgia Integrated Transmission System having an earlier priority than Calpine have been accommodated.

4. Southern requests that the Commission waive its notice requirement and permit the Agreement to be effective June 1, 2006, the date upon which service will commence under the Agreement.

³ *Citing Southern Company Services, Inc.*, 100 FERC ¶ 61,237 (2002).

⁴ *Citing Southern Company Services, Inc.* (Docket No. ER02-2217-000, August 30, 2002) (unpublished letter order issued pursuant to delegated authority which accepted a transmission service agreement with a similar rollover provision).

5. On May 19, 2004, Southern submitted responses to a deficiency letter issued by Commission staff requesting additional information with respect to Southern's filing.⁵ Southern states that the information it provided supports its duty to service "native load, network, and point-to-point customer obligations that have higher-priority firm rights to transmission capacity than any rights Calpine has to that capacity" beyond the term of Calpine's Agreement.⁶ Southern further asserts that "if Calpine's right to roll over its service agreement is not conditioned to reflect higher priority commitments, then reliability will be threatened because the Calpine Facility Study shows that there will not be sufficient transmission capacity to simultaneously accommodate all such uses of the transmission system."⁷ Southern provided data it states supports Southern's native load growth projections. Additionally, Southern provided a list of "higher-priority transmission service reservations" that when included in these studies demonstrates how Southern's capacity could be constrained, and insufficient to support Calpine's rollover request. However, Southern states these higher priority agreements are not restrictions, but conditions on Calpine's rollover rights.

6. Southern now states that it is possible that service will not begin on June 1, 2006. Southern, however, explains that the Agreement provides for service to begin on the later of: (1) June 1, 2006; (2) the date upon which construction is completed; or (3) such other date as permitted by the Commission. Southern requests waiver of the Commission's 120-day notice requirement to permit such an effective date.

Notice, Intervention and Comments

7. Notice of Southern's filing was published in the *Federal Register*, 69 Fed. Reg. 9,609 (2004) with intervention or protests due on or before March 9, 2004. Its amended filing was published in the *Federal Register*, 69 Fed. Reg. 31,606 (2004) with interventions or protests due on or before June 9, 2004. Calpine filed a timely motion to intervene and comments.

⁵ In its February 17, 2004 filing of the Agreement, Southern provided no support for restricting Calpine's rollover right. Staff's letter, dated April 19, 2004, directed Southern to provide documentation, a breakdown of native load projections and a copy of Southern's current transmission expansion plans.

⁶ Southern Response at 2.

⁷ *Id.* at 3.

8. Calpine states that while it does not agree with Southern's proposed rollover restrictions, it does not wish to delay acceptance of the Agreement. Thus, it urges the Commission to accept the Agreement on the condition that the rollover restriction would be subject to modification based on a further Commission determination.

Discussion

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motion to intervene serves to make Calpine a party to this proceeding.

10. The Commission has consistently stated that a transmission provider can deny a customer the ability to roll over its long-term firm service contract only 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.⁸ The Commission has further stated that a transmission provider may limit the terms under which a new long-term agreement may be rolled over if it has a pre-existing contract obligation that commences in the future.⁹ 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 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.

11. In order to make this demonstration, a transmission provider must identify the pre-existing contracts that commence in the future or show that native load growth projections are sufficiently specific and supported in the record at the time of the original transmission service agreement.¹⁰ We find that Southern has failed to demonstrate that

⁸ See Nevada Power Co., 97 FERC ¶ 61,324 at 62,493 (2001); Public Service Company of New Mexico v. Arizona Public Service Company, 99 FERC ¶ 61,162 at 61,667 (2002); Constellation Power Source, Inc. v. American Electric Power Service Corporation and Southwest Power Pool, Inc., 100 FERC ¶ 61,157 at P 34 (2002).

⁹ Southern Company Services, Inc., 102 FERC ¶ 61,200 (2003) (Southern).

¹⁰ See Nevada Power Co., *et al.*, 97 FERC ¶ 61,324 (2001); American Electric Power Service Corp., 101 FERC ¶ 61,384 (2002).

native load growth or pre-existing contract obligations that commence sometime in the future will constrain Southern's transmission system such that it cannot provide transmission service to Calpine beyond the end of its Agreement. In its filing, rather than indicate that it was making such a demonstration, Southern, in section 5.0 of the Agreement, indicates that "insufficient capacity exists to accommodate both the future rollover of this Service Agreement by the Transmission Customer and to provide service to Transmission customers having an earlier priority for transmission service." In this regard, Southern listed in section 5.0 of the Agreement a number of pre-existing firm point-to-point transmission service agreements that it maintains have a higher priority to transmission capacity than Calpine's Agreement. It claims that, if these agreements are rolled over in the future or are still valid at the time Calpine seeks to roll over its Agreement, they would have rights to the transmission capacity that are superior to the rights reflected in Calpine's Agreement. We disagree. As we have previously stated, 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 it has here, 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.¹¹ If the transmission system becomes constrained (for reasons other than those initially identified, *i.e.*, reasonably forecasted native load growth or pre-existing contract obligations that commence in the future) such that the transmission provider cannot satisfy all existing long-term customers, then the obligation is on the transmission provider to either curtail service to all affected customers (not just the later accepted firm customers) pursuant to provisions of its OATT or to build more capacity to relieve the constraint.¹² Restricting rollover rights based on the potential exercise of other customers' rollover rights is not an option. Thus, Southern itself does not claim that native load growth or pre-existing contract obligations that commence sometime in the future alone are what is preventing it from providing rollover rights to Calpine.

¹¹ Southern Company Services, Inc., 104 FERC ¶ 61,140 (2003).

¹² Southern's argument that reliability will be threatened if Calpine's rollover rights are not conditioned to reflect higher priority commitments is unavailing. As discussed above, Southern has not demonstrated that it cannot provide Calpine rollover rights because of native load growth or pre-existing contracts that commence in the future. Rather, it appears that Southern may not be able to provide the rollover rights because of its failure to follow the requirements of Order No. 888. As discussed above, Southern must either build additional transmission facilities to relieve the constraint or implement the curtailment procedures set forth in its OATT.

12. Moreover, in responding to Staff's April 19, 2004 letter, Southern provided, among other things, company-specific load forecasts that were filed with or provided to applicable state commissions, related state commission orders finding the load forecasts to be reasonable, aggregate peak load forecasts for 2011 – 2014, the December 17, 2003 TSR Facility Study Report for Calpine, and 2003 base cases used to study the requested service. While this is a significant amount of data, it appears incomplete and nowhere can the Commission find the data that would support a conclusion that Southern cannot provide rollover rights to Calpine simply because Southern will have native load growth that will require Calpine's transmission capacity or Southern has pre-existing contract obligations that will commence sometime in the future that will require Calpine's transmission capacity. Further, in providing its responses to Staff's data requests, Southern merely reiterates its position: "[t]hese enclosures demonstrate and support Southern Companies' duty to serve native load, network, and point-to-point customer obligations that have higher-priority firm rights to transmission capacity than any rights Calpine has to that capacity beyond the term of the Calpine [Agreement]."¹³ It does not claim that the submitted data support a conclusion that it cannot provide Calpine rollover rights solely because it has native load growth or pre-existing contract obligations that commence sometime in the future.

13. Accordingly, we will accept the proposed Agreement, as modified,¹⁴ for filing, to be effective the later of June 1, 2006, or the date upon which construction is completed, as requested.¹⁵ We further direct Southern to make a compliance filing removing section 5.0 of the Agreement within 30 days of the date of this order. This modification allows Calpine to exercise its rollover rights in accordance with section 2.2 of Southern's OATT.

¹³ May 19, 2004 Transmittal Sheet at 2.

¹⁴ While Southern cites to an unpublished delegated letter order in support of its position that the section 5.0 rollover restriction should be accepted, the fact that the Director may have, without explanation, accepted a similar rollover restriction does not mean that similar action should be taken in other cases. Actions taken by the Commission staff "do not constitute precedent binding the Commission in future cases." *See, e.g.,* Midwest Generation, LLC, 95 FERC ¶ 61,231 (2001).

¹⁵ We grant waiver of our 120-day notice requirement to permit the requested effective date.

The Commission orders:

(A) The Agreement, as modified, is hereby accepted for filing effective the later of June 1, 2006 or the date upon which construction is completed, as discussed in the body of this order.

(B) Southern is hereby directed to submit a compliance filing, as discussed in the body of this order, within 30 days from the date of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.