

119 FERC ¶ 61,301
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southern Companies Energy Marketing, L.P. and
Southern Companies Services, Inc.

Docket Nos. ER97-4166-022
ER96-780-012
EL04-124-004

ORDER GRANTING IN PART AND DENYING IN PART REHEARING

(Issued June 21, 2007)

1. In this order, we grant in part and deny in part the request of Southern Company Services, Inc. made on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Power Company (collectively, Southern Companies) for rehearing of the Commission order issued in this proceeding on July 8, 2005.¹

I. Background

2. In the July 2005 Order, the Commission established a trial-type evidentiary hearing to resolve issues of material fact regarding, and to address the serious deficiencies in, Southern Companies' Delivered Price Test (DPT) for the Southern control area² submitted in response to the Commission's order issued in this proceeding on December 17, 2004.³ The Commission ruled that pending the outcome of the evidentiary hearing, Southern Companies' sales at market-based rates in the Southern control area will remain subject to refund for the statutory refund period commencing

¹ *Southern Companies Energy Marketing, Inc. and Southern Companies Services, Inc.*, 112 FERC ¶ 61,054 (2005) (July 2005 Order).

² Southern Companies identify the Southern control area as the control area operated by Southern Company Services, Inc.

³ *Southern Company Energy Marketing, Inc. and Southern Company Services, Inc.*, 109 FERC ¶ 61,275 (2004) (December 17 Order).

with the refund effective date established in the December 17 Order. The Commission also made a number of specific rulings regarding the Southern Companies' DPT in the July 2005 Order, and these are the focus of the present order.

3. In their request for rehearing, Southern Companies state that although the Commission, as a general matter, reached a proper result in affording Southern Companies their due process opportunity to have a full evidentiary hearing concerning their DPT analysis and other related issues, there are certain aspects of the July 2005 Order for which Southern Companies seek rehearing.

II. Discussion

A. Southern Companies' Use of Projected Data

4. Southern Companies submitted their DPT analysis using projected data for 2005. The Commission found in the July 2005 Order that use of such projected data is inconsistent with the Commission requirement that historical data be used.⁴

1. Rehearing Request

5. In their request for rehearing, Southern Companies state that they relied on the guidance provided in the April 14 and July 8 Orders⁵ concerning the DPT (including Appendix F of the April 14 Order), while also adhering to the framework described in Appendix A of the Merger Policy Statement and revised in Order No. 642, when they used projected data in their DPT analysis.⁶ Southern Companies argue that while

⁴ July 2005 Order, 112 FERC ¶ 61,054 at P 54.

⁵ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 at P 118 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 at P 112 (2004) (July 8 Order).

⁶ *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595, FERC Stats. & Regs., ¶ 31,044 (1996), *order on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 at 70,996 (2000), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,111 at 31,891, *order on reh'g* Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001) (Order No. 642).

applicants performing indicative screens must use “historical data as a snapshot in time,” the DPT involves “forward-looking analyses or studies” only.⁷ Southern Companies go on to argue that only the Commission’s indicative screens require use of historical data, and since the DPT analysis is forward-looking, it “should be or – at the very least – may be performed using projected (*i.e.*, forward-looking) data.”⁸ Southern Companies maintain that the Commission’s orders support this argument. For example, they state that the DPT-related provisions of the Commission’s merger policy orders explicitly require the DPT to be a forward-looking analysis, and, according to Southern Companies, “[e]ven the [July 2005 Order] concedes that ‘the Commission will consider the use of estimated prices if they are accurate representations of prevailing market conditions and are supported by available data.’”⁹ Southern Companies thus conclude that their use of projected data in the DPT is consistent with prior Commission guidance and precedent and maintain that the July 2005 Order’s requirement that historical data be used is inconsistent with past Commission practice and therefore arbitrary and capricious.

6. Southern Companies also argue that the Commission’s justification for criticizing the use of projected data in the DPT is plainly erroneous.¹⁰ Specifically, Southern Companies maintain that the Commission incorrectly concluded that the DPT calculated the available economic capacity measure based on the assumption that peak load would grow at a rate of 7.5 percent between 2003 and 2005. Southern Companies state that it is unclear how the Commission reached this conclusion, but they conjecture that the likely data source for the Commission’s assumed growth rate was the load data reported in FERC Form 714 for the year 2003, which reports a 2003 annual system peak load for Southern Companies’ system of 31,034 MW. The projected 2005 peak load used in Southern Companies’ DPT analysis was 36,070 MW. Southern Companies note that a calculation using these two load values suggests a compound annual growth rate of 7.8 percent, which they say is reasonably close to the Commission-derived 7.5 percent growth rate estimate.¹¹

⁷ Southern Companies Rehearing Request at 8-9.

⁸ *Id.*

⁹ *Id.* at 10 (*citing* the July 2005 Order at n. 29).

¹⁰ *Id.* at 11.

¹¹ *Id.* at 11-12.

7. Southern Companies identify two flaws in this reasoning, however. First, they argue that the load data set forth in the 2003 FERC Form 714 does not reflect actual loads on Southern Companies' system and therefore cannot be relied on to develop an accurate load growth assessment without adjustment. Specifically, the loads reported on FERC Form 714 do not include approximately 1,878 MW of wholesale customer loads that were being served by Southern Companies at the peak hour in 2003.¹² Second, Southern Companies maintain that unexpectedly mild weather in 2003 resulted in much lower than normal peak load that year for their system.¹³ Southern Companies conclude that once this misunderstanding concerning load growth is rectified, it is clear that their DPT is not calculated on the basis of a load growth rate of 7.5 percent and that the projected peak load of 36,070 MW used in the DPT analysis was quite reasonable and even conservative.¹⁴

2. Commission Determination

8. The Commission rejects Southern Companies' argument that their use of forward-looking data to perform the DPT was appropriate and consistent with Commission precedent. The Commission's determination in the July 2005 Order that Southern erred in using projected data in its DPT was fully consistent with existing precedent requiring that historical data be used. As the Commission stated in the April 14 and July 8 Orders, in performing all screens, applicants are required to prepare them as designed, and must use the most recent unadjusted 12 months' historical data as a snapshot in time.¹⁵

9. Although Southern Companies filed their DPT analysis in February 2005, they nevertheless included projected capacity and load for 2005. For purposes of the market-based rate generation market power analysis, in the case of both the indicative screens and the DPT, the issue is whether the applicant has market power based on a snap shot in time. The Commission stated in the April 14 Order that "[i]n all cases [i.e., in both the indicative screens and the DPT], the applicant or intervenors may present evidence such as historical wholesale sales data to support whether the applicant does or does not

¹² *Id.*

¹³ *Id.* at 12.

¹⁴ *Id.* at 13.

¹⁵ April 14 Order, 107 FERC ¶ 61,018 at P 118; July 8 Order, 108 FERC ¶ 61,026 at P 112.

possess market power.”¹⁶ It is clear from this that the use of historical data was not somehow limited to the indicative screens. Rather historical data should be used when performing both the indicative screens and the DPT since both inquiries address the same issue.

10. Southern Companies’ statement that, “[e]ven the [July 2005 Order] concedes that ‘the Commission will consider the use of estimated prices if they are accurate representations of prevailing market conditions and are supported by available data’”¹⁷ is misplaced. The passage from the July 2005 Order to which Southern Companies cite is a statement from Order No. 642 which was intended to provide notice of the Commission’s understanding that, in the context of a DPT analysis, “prices” are necessarily estimated. Because the results of the DPT depend critically on the assumed market price, applicants are required to provide tests of the sensitivity of their results to changes in the market price. In this regard, market prices are varied slightly to see what effect, if any, a change in the market price has on the market. Further, Order No. 642 discussed the use of estimated prices in the context of “instances where actual price data may be limited or unavailable.”¹⁸ This would necessarily be implied as part of the sensitivity analyses of the DPT. Providing notice of the Commission’s understanding in this regard was intended to provide clarity on this issue and does not represent a departure from Commission precedent. Moreover, in Southern Companies’ case, the projected data at issue did not involve pricing; instead, the Commission objected to Southern Companies’ inclusion of projected capacity and load as part of its DPT.¹⁹ Accordingly, we reject Southern Companies’ rehearing request regarding the use of projected data.

11. We note that this is consistent with the Market-Based Rate Final Rule being issued concurrently with this order.²⁰ There we adopt our current requirement that applicants

¹⁶ *Id.*

¹⁷ Southern Companies Rehearing Request at 10 (*citing* the July 2005 Order at n.29).

¹⁸ Order No. 642, FERC Stats. & Regulations. Preambles July 1996-Dec. 2000 ¶ 31,111 at 31,891.

¹⁹ July 2005 Order, 112 FERC ¶ 61,054 at P 54.

²⁰ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 119 FERC ¶ 61,295, at P 298 – 301 (2007) (MBR Final Rule).

use the most recent unadjusted 12 months' historical data when preparing a DPT for a market-based rate analysis. The Commission notes in the MBR Final Rule that it has previously held that historical data are more objective, readily available, and less subject to manipulation than future projections.

B. Import Capability Measurement

12. The Commission found in the July 2005 Order that Southern Companies' DPT overstated the amount of the non-Southern Companies' generation that can be imported into the Southern control area because it used total transfer capacity (TTC), which the Commission has previously found assumes an unrealistically high degree of transmission access for competitors.²¹ The Commission noted that Southern Companies stated that their TTC measures take simultaneous limits into account but that Southern Companies did not explain or support this claim or otherwise address the Commission's specific determination that simultaneous import capability is the more accurate and appropriate measure of the effect that transmission limitations have on the amount of generation that actually can be imported into the relevant market.²²

1. Rehearing Request

13. Southern Companies argue that the July 2005 Order suggests that a simultaneous import capability study must be used in measuring import capability in the DPT but that in fact the provisions that form the basis of that proposition pertain to the indicative screens, not the DPT.²³ According to Southern Companies, Commission precedent specifies that simultaneous transfer limits are also considered when calculating import capability for DPT purposes, and the Commission's "DPT specific discussion in *no way* suggests that the Commission has mandated the use of the Appendix E simultaneous import capability study or declared it to be the only way to take into account the impact of simultaneous interface limitations."²⁴ Southern Companies argue that if the Commission had intended that a particular methodology be used, it would have stated

²¹ July 2005 Order, 112 FERC ¶ 61,054 at P 51.

²² *Id.*

²³ Southern Companies Rehearing Request at 15.

²⁴ *Id.* at 16 (emphasis in original).

that expressly in its April 14 and July 8 Orders.²⁵ According to Southern Companies, the Commission's decision to do so in this case is inconsistent with previous Commission statements and therefore in error.²⁶ Finally, Southern Companies again assert that they took simultaneous limits into account and maintain that in the July 2005 Order the Commission dismissed Southern Companies' "sworn (and uncontested) testimony" to that effect.²⁷

2. Commission Determination

14. The Commission rejects Southern Companies' argument that they correctly calculated import limits in the DPT. Southern Companies' DPT analysis relied upon TTC for calculating the amount of transmission capacity available for imports into the Southern control area. However, Southern Companies did not provide adequate support for the claim that their TTC accounted for simultaneity, nor did Southern Companies provide the rationale for not using their previously approved Simultaneous Import Limit (SIL). We note that the use of TTC as a proxy for imports was abandoned in the April 14 Order, where the Commission stated that the use of TTC assumes an unrealistically high degree of transmission access for competitors. The April 14 Order clearly stated that the Commission was replacing the use of TTC with simultaneous import capability as the appropriate measure of the effect of transmission limitations on how much generation can be imported in the relevant geographic market.²⁸ Accordingly, the Commission correctly found in the July 2005 Order that Southern Companies' DPT overstated the amount of non-Southern Companies generation (competing supply) that can be imported into the Southern control area because it used TTC. The Commission noted in the July 2005 Order that although Southern Companies stated that their TTC measures take simultaneous limits into account, Southern Companies did not explain or support that claim.²⁹

²⁵ April 14 Order, 107 FERC ¶ 61,018; July 8 Order, 108 FERC ¶ 61,026.

²⁶ Southern Companies Rehearing Request at 16.

²⁷ *Id.* at 17.

²⁸ April 14 Order, 107 FERC ¶ 61,018 at P 81-82.

²⁹ July 2005 Order, 112 FERC ¶ 61,054 at P 51.

15. Notwithstanding Southern Companies' claim to the contrary, the Commission did not limit the applicability of a SIL to the generation market power indicative screens.³⁰ Moreover, as the Commission stated in the July 2005 Order, Southern Companies had already performed and submitted the required simultaneous import capability study, which the Commission accepted in the December 17 Order. Southern Companies have presented no reason to depart from the previously-submitted SIL analysis and accept the higher TTC proxy for imports instead.

16. Commission precedent on this issue fully supports the conclusion that use of an SIL when performing the DPT in this case is necessary. In addition, we have accepted only the use of a SIL by other sellers that have conducted the DPT in section 206 proceedings.³¹ Accordingly, we reject Southern Companies' rehearing request regarding the import capability measure.³²

C. Absence of a Pivotal Supplier Analysis Using the Economic Capacity Measure

17. The Commission found in the July 2005 Order that Southern Companies' DPT analysis was incomplete and therefore not fully reliable because Southern Companies did

³⁰ July 8 Order, 108 FERC ¶ 61,026 at P 37 ("The April 14 Order replaced total transfer capability (TTC) with simultaneous transmission import capability as the appropriate measure of transmission capability available for imports.").

³¹ *See, e.g., Kansas City Power and Light Company*, 113 FERC ¶ 61,074 (2005); *Public Service Company of New Mexico*, 115 FERC ¶ 61,090 (2006).

³² The MBR Final Rule continues the use of an SIL study in the DPT analysis. The Commission cites a number of reasons for this: uniformity of modeling affiliated and unaffiliated supply, consideration of simultaneity, consideration of applicant and affiliate transmission commitments and reservations, consideration of all internal transmission limitations, consideration of all external transmission limitations existing in first-tier areas, consideration of the applicant's (or the applicant's transmission provider's) practices for posting ATC, and consideration of peak seasonal conditions. The Commission concludes that requiring the SIL study in the DPT analysis assures that all factors important in determining transmission access to the applicant's market are taken into account. *See MBR Final Rule*, 119 FERC ¶ 61,295, at P 386.

not perform the pivotal supplier analysis based on the economic capacity measure as required by the April 14 Order.³³

1. Rehearing Request

18. Southern Companies state that performing the pivotal supplier analysis using economic capacity would not yield a result that is materially different from the one reached using available economic capacity. Southern Companies further state that the Commission disregarded without explanation their argument that because they easily passed the DPT application of the pivotal supplier screen using the available economic capacity measure, they necessarily would have passed by an even greater amount when the economic capacity measure is used to measure other competitors' supplies. The additional analysis therefore would amount to an "essentially redundant study."³⁴ Moreover, according to Southern Companies, the Commission's finding "suggests that the DPT study is simply a mechanical exercise" and is inconsistent with the Commission's own policy, which notes the importance of flexibility in analytic methods and holds that proper analysis cannot be reduced to purely mechanized computation.³⁵

2. Commission Determination

19. The Commission rejects Southern Companies' argument that performance of the pivotal supplier screen for the economic capacity measure is superfluous. Southern Companies argue that passing the pivotal supplier screen for available economic capacity means that an applicant necessarily passes the pivotal supplier screen for economic capacity because competitors' economic capacity necessarily exceeds available economic capacity.

20. However, the April 14 Order states that the pivotal supplier test must be calculated for both economic capacity and available economic capacity measures.³⁶ The amount of

³³ July 2005 Order, 112 FERC ¶ 61,054 at P 53.

³⁴ Southern Companies Rehearing Request at 18.

³⁵ *Id.* at 19-20.

³⁶ April 14 Order, 107 FERC ¶ 61,018 at P 108 ("... [t]he applicant will be considered pivotal if the sum of the competing suppliers' economic capacity is less than the load level The analysis should also be performed using available economic capacity to account for applicants' and competing suppliers' native load commitments. In

(continued)

the load to be served differs depending on whether economic capacity or available economic capacity is used. When using available economic capacity, the load to be served is the load above and beyond native load, but in the case of economic capacity, the load to be served is the entire market load, including native load.³⁷ Southern Companies' conclusion that where a seller is not pivotal under the available economic capacity measure it will not be pivotal under the economic capacity measure is inherently flawed. In markets where utilities retain significant native load obligations, an analysis of available economic capacity may more accurately assess an individual seller's competitiveness, as well as the overall competitiveness of a market, because available economic capacity accounts for (by subtracting out) the native load obligations of sellers. On the other hand, in markets where sellers have been predominantly relieved of their native load obligations, an analysis of economic capacity more accurately reflects market conditions and an applicant's relative size in the market. For example, in *Entergy Services, Inc.*, the seller was pivotal in several periods under the economic capacity measure and in none under the available economic capacity measure.³⁸ Southern Companies have not demonstrated that the economic capacity measure was unnecessary in this instance. Thus, contrary to Southern Companies' assertion, the additional analysis does not constitute an "essentially redundant study," and requiring it does not suggest that the DPT is a "mechanical exercise." Accordingly, we reject Southern Companies' rehearing request in this regard.

D. Sensitivity Analysis and Data Necessary to Corroborate DPT Results

21. The Commission found in the July 2005 Order that Southern Companies did not provide adequate sensitivity analyses and the data necessary to corroborate their DPT results and that they provided incomplete information regarding transmission constraints, firm transmission rights, and historical trade and transmission access data.³⁹

that case, native load in the relevant market would be subtracted from the load in each season/load period.”).

³⁷ *Id.* at P 108.

³⁸ *Entergy Services, Inc.*, 111 FERC ¶ 61,507 at P 15-16 (2005).

³⁹ July 2005 Order, 112 FERC ¶ 61,054 at P 55.

1. Rehearing Request

22. Southern Companies argue that the Commission's finding in this regard seems to ignore the evidence that Southern Companies presented on this topic, which included a sensitivity analysis and an explanation of why additional sensitivities were unnecessary in this context. Specifically, Southern Companies note that their sensitivity analysis used competitive market-clearing prices that were derived from a regional dispatch model that incorporated the same variable costs and other characteristics from the generator dataset used for its DPT analysis. Because the competitive market-clearing prices were fully consistent with the generator dataset, Southern Companies maintain that it inevitably will be the case that changing both fuel prices and competitive prices by small amounts in a consistent fashion will not have a significant effect on the result provided.⁴⁰ In addition, Southern Companies argue that the Commission invites, but does not require, applicants to present historical evidence bearing on the results of the DPT. Southern Companies continue that the July 2005 Order suggests that applicants are required to submit extensive detailed data of the type required by the Commission's merger regulations. Southern Companies argue that they should not be taken to task here for failure to comply with the Commission's merger regulations.

23. Southern Companies make similar arguments in connection with the Commission's requirement that they file historical trade and transmission service data that can be used to corroborate the results of the DPT. Southern Companies argue that this requirement is not included in the relevant Commission precedent and that it appears for the first time in the July 2005 Order without explanation or justification. Southern Companies maintain that the Commission's merger regulations require submission of historical data with a merger application to corroborate the results of a DPT, but the data is not part of the DPT analysis. Southern Companies also maintain that the requirement to submit historical data for corroborative purposes is found nowhere in the April 2004 or December 17 Orders and appears for the first time in the July 2005 Order without explanation or justification.⁴¹

2. Commission Determination

24. The Commission rejects Southern Companies' argument that the July 2005 Order's emphasis on corroborative data was unjustified or unprecedented. In its analysis

⁴⁰ Southern Companies Rehearing Request at 21.

⁴¹ *Id.* at 24.

of Southern Companies' DPT, the Commission found that Southern Companies' corroborative data was incomplete and their sensitivity analyses were inadequate. The April 14, July 8, and July 2005 Orders repeatedly cite to Order No. 642 as providing a set of guidelines that permit Southern Companies to submit such data and sensitivity analyses to corroborate their DPT results.⁴²

25. Among other things, Order No. 642 adopts the current provisions of Part 33 of the Commission's regulations that describe the information requirements necessary to support the DPT. These include: long-term purchase and sales data; transmission and ancillary service prices; actual market prices for the past two years; transmission capacity, including TTC, ATC, and, if available, simultaneous transfer capability; transmission constraints; firm transmission rights, both physical and financial; historical trade data on all wholesale sales of electricity for the past two years; and historical transmission data, which is information on denial and curtailments of service, for the past two years, to the extent this information is available from OASIS.⁴³

26. In addition, in Order No. 642 the Commission encouraged applicants to test the sensitivity of their DPT results to changes in assumptions regarding transmission allocation,⁴⁴ the treatment of announced – but not consummated – mergers,⁴⁵ and market

⁴² April 14 Order, 107 FERC ¶ 61,018 at P 112 and n. 214; July 8 Order, 108 FERC ¶ 61,026 at P 26; July 2005 Order, 112 FERC ¶ 61,054 at P 55-57.

⁴³ 18 C.F.R. § 33(d) (2006). The Director, Division of Tariffs and Market Development – South, acting pursuant to delegated authority has requested corroborating data to support another company's DPT, as well as a sensitivity analysis. *Entergy Services Inc.*, Docket No. ER91-569-023, October 29, 2004 (unpublished letter order), among the corroborating data requested that relied on 18 C.F.R. § 33.3(d) included support for contractual commitment assumptions, transmission constraints, transmission capability, and historical long-term capacity sales. The seller was also directed to provide sensitivity analyses of how results of the DPT changed with respect to changes in wholesale market size, native load definition, competing suppliers' capacity, or transmission constraints.

⁴⁴ Order No. 642, FERC Stats. & Regulations. Preambles July 1996-Dec. 2000 ¶ 31,111 at 31,895.

⁴⁵ *Id.* at 31,887.

prices.⁴⁶ Sensitivity analyses show whether the results of the DPT can vary significantly depending on the assumptions regarding the inputs to the model. The results of Southern Companies' DPT are particularly sensitive to changes in the assumptions regarding transmission availability. Citing the April 14 Order and responding to an intervenor's arguments, the Commission found that Southern Companies' use of TTC in its DPT was inappropriate and understated Southern Companies' position in the market by overstating the amount of non-Southern Companies generation.⁴⁷ Moreover, as explained above, the Commission has directed other sellers to provide additional sensitivity analyses. Accordingly, Southern Companies' claim that the July 2005 Order's emphasis on sensitivity analyses was unexpected to the point of being arbitrary is unsupported and contradicted by Commission precedent.

E. Relevant Geographic Market

27. The Commission found in the July 2005 Order that important questions exist concerning whether the entire Southern control area is the appropriate relevant geographic market or whether there exist binding transmission constraints such that it is more appropriate to define more than one geographic market within the Southern control area. The July 2005 Order stated that this is an issue of material fact that may affect the results of the DPT in this case and the Commission required an evidentiary hearing on this issue of relevant geographic market.⁴⁸

1. Rehearing Request

28. Southern Companies object to the Commission's decision to set for hearing the issue of whether the entire Southern control area is the appropriate relevant geographic market or whether binding transmission constraints exist that make it more appropriate to define more than one geographic market within the Southern control area. Southern Companies note that the April 14 and July 8 Orders permit, but do not require, applicants and/or intervenors to identify a geographic market that is different than the applicant's home control area. Southern Companies argue that no alternative market has been proposed in this proceeding, and there was insufficient record evidence to permit the conclusion that factual questions exist concerning internal transmission constraints.

⁴⁶ *Id.* at 31,892.

⁴⁷ July 2005 Order, 112 FERC ¶ 61,054 at P 52.

⁴⁸ *Id.* at P 58.

Finally, Southern Companies argue that consideration of internal transmission constraints introduces a new element into the DPT analysis and is not supported by existing Commission precedent.⁴⁹

2. Commission Determination

29. The Commission grants rehearing on whether the entire Southern control area is the appropriate relevant geographic market or whether there exist binding transmission constraints that make it more appropriate to define more than one geographic market within the Southern control area. Upon further review, we agree with Southern Companies to the extent that they argue that there is insufficient record evidence to permit the conclusion that factual questions exist concerning an alternative relevant geographic market. Intervenors in this proceeding provided no studies or other concrete evidence to support the proposal of an alternative relevant geographic market (*e.g.*, a sub-market within the Southern control area). Also, when the intervenors performed their own DPT study, they used the Southern control area as the relevant market.

30. In the April 14 Order, the Commission set as the default relevant geographic market the home control area for companies such as Southern Companies.⁵⁰ However, the Commission also stated that “we will allow applicants and intervenors to present additional sensitivity runs as part of their market power studies to show that some other geographic market should be considered as the relevant market in a particular case. [footnote omitted] For example, applicants or intervenors could present ... evidence that because of internal transmission limitations (*e.g.*, load pockets) the relevant market (or markets) is smaller than the control area.”⁵¹ The Commission’s July 8 Order on rehearing upheld this standard and specified that “we will continue with the determination made in the April 14 Order that the approach of defining the default relevant geographic market as the control area is adequate and allow applicants and intervenors on a case-by-case basis to provide historical data and other evidence to demonstrate that, due to transmission limitations, the relevant market or markets is larger or smaller than the control area.”⁵²

⁴⁹ Southern Companies Rehearing Request at 25-26.

⁵⁰ April 14 Order, 107 FERC ¶ 61,018 at P 73.

⁵¹ *Id.* at P 75.

⁵² July 8 Order, 108 FERC ¶ 61,026 at P 35.

31. Thus, because the intervenors have not met their burden of showing (or in this case even proposing) that the default geographic market is not the relevant market, Southern Companies did not propose a different geographic market, and because the Commission sees no other basis here for including this issue in the hearing, the Commission grants rehearing on this issue.

The Commission orders:

The request for rehearing of the July 2005 Order is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.