116 FERC ¶ 61, 070
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Services, Inc. Docket Nos. EL05-53-001
EL05-53-002
ER05-129-001
ER05-129-002

ORDER DENYING REHEARING AND ACCEPTING COMPLIANCE FILING

(Issued July 20, 2006)

1. In this order, the Commission denies rehearing of our July 28, 2005 Order[1] in which we concluded an investigation under section 206 of the Federal Power Act (FPA)[2] into the status of operation and maintenance (O&M) expenses charged by Southern Company Services, Inc.[3] (Southern) to generators under 18 interconnection agreements.[4] We also accept Southern's compliance filing, which was required by that order.

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[1] *Southern Company Services, Inc.*, 112 FERC ¶ 61,145 (2005) (Order Concluding Investigation).

[2] 16 U.S.C. § 824e (2000).

[3] Southern acts as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company.

[4] The order commencing the section 206 investigation is *Southern Company Services, Inc.*, 110 FERC ¶ 61,362 (2005) (Investigation Order).

I. Background

2. On November 1, 2004, Southern submitted what it labeled as an "Informational Filing Regarding Recovery of O&M Charges under Interconnection Agreements" (Informational Filing) informing the Commission that Southern intended to begin charging its customers expenses associated with operating and maintaining the facilities necessary to allow the customers under 18 interconnection agreements to deliver power onto Southern's network.

3. 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 following parties filed motions to intervene and protests: Tenaska Georgia Partners, L.P., Tenaska Alabama Partners, L.P., and Tenaska Alabama II Partners, L.P. (collectively Tenaska), Effingham County Power, LLC (Effingham), and Calpine Corporation (Calpine). Southern then filed various responses and motions. The Informational Filing became effective as of January 1, 2005 under operation of law.[6]

4. On March 25, 2005, in the Investigation Order, the Commission initiated an investigation under sections 206 and 307 of the FPA to determine: (1) whether Southern was currently assessing the O&M charges to its customers; (2) whether its O&M charges for the interconnection agreements were properly on file with the Commission; (3) whether the rates (if they are on file) were just and reasonable; and (4) what would be the appropriate remedy if Southern was collecting O&M charges contrary to the FPA.[7]

5. In the Investigation Order, the Commission also noted that Tenaska had filed several complaints under section 206 of the FPA regarding Southern's classification of certain upgrades as "network upgrades" instead of "interconnection facilities" under three of the interconnection agreements addressed in the Informational Filing. The Commission held that, 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."[8]

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

[6] Order Concluding Investigation at P 38.

[7] Investigation Order at P 5.

[8] Investigation Order at P 8.

6. On July 28, 2005, in the Order Concluding Investigation, we found that Southern had begun charging for the O&M expenses on January 1, 2005.[9] We also found that, with certain qualifications, Southern's O&M rates were properly on file with the Commission. We rejected Southern's arguments that the interconnection agreements, by themselves, contain rates that are sufficiently detailed to allow Southern to collect O&M charges without first making another filing. We held that the Informational Filing was required to establish the level of the O&M charges and found the methodology used to develop the charges to be just and reasonable. However, we also noted that Southern's labeling of the filing as an "Informational Filing" led to a great deal of confusion over the status of the filing and we stated that, in the future, filings must be properly titled in accordance with our regulations or they will be rejected. We directed Southern to submit a compliance filing to link the O&M costs to specific FERC account numbers.

7. In the Order Concluding Investigation, we again made clear that we were not addressing whether the facilities underlying the O&M charges were "network facilities" or "interconnection facilities" and noted that the issue was being considered in several ongoing complaint proceedings. We concluded that the "O&M methodology at issue here is found to be just and reasonable only insofar as it is properly applied to directly assigned interconnection facilities."[10] With respect to the final issue raised in the Investigation Order, we found that, because Southern was not collecting O&M charges contrary to the FPA, there was no need to address the arguments made in response to that question.

8. On August 29, 2005, Southern submitted the compliance filing required by the Order Concluding Investigation and Effingham filed a request for rehearing.

II. Effingham's Request for Rehearing

A. Request for Rehearing

9. Effingham seeks rehearing of the Commission's finding that Southern's O&M charges are properly on file with the Commission under section 205 of the FPA. Effingham also seeks rehearing of the Commission's finding that the charges are just and reasonable.

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[9] Order Concluding Investigation at P 37-46.

[10] Order Concluding Investigation at P 45.

10. Effingham first argues that the Commission erred when it treated the Informational Filing retroactively as a section 205 filing and concluded that the O&M charges were properly on file. It argues that the Informational Filing was not a proper section 205 filing because Southern failed to comply with the Commission's section 205 filing requirements. Because a proper section 205 filing was not made to collect the proposed O&M charges, Effingham claims, the Commission should have ruled that the proposed O&M charges are not on file with the Commission.

11. Effingham points out that the Commission's rules require that all section 205 filings must be properly filed and labeled. Southern's mislabeling of the Informational Filing, Effingham continues, resulted in various actions by the Commission, such as the failure to act on the filing within 60 days of the filing. Effingham states that all of these actions confirm that Southern did not make a section 205 filing.

12. While the Commission may have the discretion to permit deviations from its filing requirements, Effingham complains that the circumstances in this case do not warrant any deviations. For example, Effingham argues that Southern's failure to properly label its filing was not a harmless mistake but caused actual harm because it resulted in the imposition of unjust and unreasonable O&M charges on Effingham.

13. Secondly, according to Effingham, the Commission erred in finding the proposed O&M charges to be just and reasonable because the Commission did not address the primary argument made by the generators: that the facilities to which the O&M charges apply are "network facilities," not "interconnection facilities." Allowing Southern to directly assign O&M costs for "network facilities," Effingham notes, is contrary to the Commission's "at or beyond" policy. Effingham argues that there is no need for an evidentiary hearing to make the required finding because the Commission's practice is to determine whether the subject facilities are "network facilities" or "interconnection facilities" based on the interconnection agreements.

14. Effingham next criticizes Southern's argument that the Commission policy regarding assigning costs for "interconnection facilities" and for "network facilities" is inapplicable because the interconnection agreements had been previously accepted by the Commission under section 205 and are therefore subject to the filed rate doctrine. Effingham argues that Southern's argument is baseless for two reasons. First, the Order Concluding Investigation rejected Southern's argument that the Commission had previously authorized Southern to collect the proposed O&M charges. Effingham states that the Commission ruled that the interconnection agreements were not sufficiently specific to support the proposed O&M charges and that an additional section 205 filing was needed. Second, Effingham states that, even if the proposed O&M charges had been accepted by the Commission when it accepted the

interconnection agreements, Southern would still be subject to a finding under section 206 that the charges were unjust and unreasonable.

15. Effingham argues that the Commission should have addressed the generators' argument on the direct assignment of the O&M charges related to "network facilities." According to Effingham, when the Commission sets for hearing the justness and reasonableness of a rate, the Commission must include all issues that are relevant to the justness and reasonableness of that rate. Further, Effingham continues, the direct assignment of the O&M charges for "network facilities" is a dispositive issue and was the most significant issue raised by the generators in their protests to the Informational Filing. Effingham argues that the Commission provided no rationale for excluding this issue from its evaluation of the justness and reasonableness of Southern's proposed O&M charges.

16. Effingham argues that it was unreasonable to exclude the classification of facilities issue from the section 206 investigation because two generators already had filed complaints challenging the classification of the facilities underlying those parties' O&M charges. Effingham maintains that the complaint proceedings involve only three of the 18 interconnection agreements at issue in the Informational Filing. Addressing the issue solely in the complaint proceedings is inadequate, it continues, because the Commission can provide only prospective relief in those proceedings for the specific complainants and cannot address the imposition of unjust and unreasonable O&M charges during the period from January 1, 2005 until a decision is issued on the complaints.

17. Finally, even if it were appropriate for the Commission to exclude from the section 206 investigation the generators' argument that the facilities at issue are "network facilities," Effingham argues that the Commission should have considered the issue as part of its examination of Southern's proposed O&M charges in the section 205 proceeding. Effingham states that the Commission had an obligation to scrutinize the nature of the facilities to which the charges applied before allowing Southern to impose them. Effingham maintains that the Commission is not barred from independently scrutinizing Southern's proposed O&M rates under section 205 because the Commission did not issue an order within sixty days.

B. Commission Response

1. Whether Southern's Rates Are Properly on File

18. Effingham argues that Southern's rates are not properly on file because of Southern's mislabeling of the Informational Filing and the confusion surrounding that Filing. We have informed Southern that its mislabeling of the Informational Filing

was an error and that we will reject any future filings that are mislabeled.[11] However, we reaffirm our finding that the Informational Filing, coupled with the various interconnection agreements, contained all the elements required of an abbreviated section 205 filing and that the rates became effective as of January 1, 2005.[12]

19. On the following facts, it was reasonable for the Commission to have found that the O&M rates went into effect as of January 1, 2005. The Effingham Interconnection Agreement (Interconnection Agreement) clearly imposes an obligation on Effingham to pay O&M charges. The Interconnection Agreement also specifically identifies the facilities that Effingham would be required to pay to operate and maintain. The only information added by the Informational Filing that was not already on file with the Commission was the formula to determine the dollar amount that Southern would actually collect to operate and maintain the facilities that the parties had already agreed would be subject to the O&M charges.[13] Once the Informational Filing was submitted in late 2004, Southern had submitted all of the information the Commission required to authorize Southern to start collecting the O&M charges in the manner set forth in the already approved Interconnection Agreement. Although there was some confusion in the processing of the Informational Filing, the record shows that the Interconnection Agreement and the Informational Filing were on file well in advance of January 1, 2005.[14] Accordingly, we will deny Effingham's request for rehearing on this point.

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[11] Order Concluding Investigation at P 38.

[12] *See, e.g.*, 18 C.F.R. § 35.13 (2005).

[13] Order Concluding Investigation at P 39 ("While the Interconnection Agreements reflect the parties' agreement that Southern will be able to charge some level of O&M costs, they are not specific enough to permit Southern to begin billing its customers without an additional filing to place a specific rate on file, i.e., either a stated rate or a formula rate specifying the cost components to be recovered.").

[14] Although there was some confusion in this proceeding, the record shows that all interested parties had adequate opportunity to raise issues that were within the scope of the investigation. Effingham's apparent problem with the Commission's procedures is not the confusion, but that the Commission refused to allow Effingham to raise issues that were outside the scope of the investigation. The Commission addresses that issue in P 21-26 herein.

2. Whether The Commission Was Required to Expand The Scope of The Section 206 Investigation to Address The Classification of Facilities

20. The Investigation Order identified the four issues the Commission would address in the section 206 investigation.[15] The Investigation Order also identified an issue that would be outside the scope of the section 206 investigation: the classification of certain facilities as "network facilities" instead of as "interconnection facilities." The Commission stated:

> 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. 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*. (Emphasis added). [16]

21. The primary basis of Effingham's request for rehearing is that Effingham was aggrieved because the Commission chose not to investigate the classification of the facilities to which the O&M charges apply. However, Effingham did not file a request for rehearing of the order establishing the scope of the investigation, the Investigation Order. Instead, Effingham waited until the issuance of the Order Concluding the Investigation to file a request for rehearing. The Order Concluding Investigation only reiterated the scope established in the Investigation Order. Because the scope of the section 206 investigation was established in the Investigation Order, and not in the Order Concluding Investigation, Effingham should have sought rehearing of the Investigation Order. Effingham did not do so, and its request for rehearing is thus untimely and barred.[17] In any event, as explained below, there is no merit to Effingham's claim.[18]

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[15] Investigation Order at P 5.

[16] *Id.* at P 8.

[17] Effingham filed its August 29, 2005 request for rehearing request more than 30 days after the issuance of the May 25, 2005 Investigation Order. *See* 16 U.S.C. § 825*l* (2000) (providing 30 days after issuance of an order to seek rehearing).

[18] In a pleading styled as an "Answer of Effingham County Power, LLC" filed on May 2, 2005 in response to Southern's response to the Investigation Order, Effingham

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22. Effingham argues that the Commission erred because it did not use the investigation (Docket No. EL05-53-000) or the section 205 review (Docket No. ER05-129-000) to re-open the previously approved Interconnection Agreement to reconsider the classification of the facilities to which the O&M charges will apply. However, as explained below, the Commission reasonably did not include that issue in the scope of the section 206 investigation.

23. The Interconnection Agreement was filed in early 2001. As mentioned above, the Interconnection Agreement imposed a contractual obligation on Effingham to pay an O&M charge, and identified the facilities that the parties agreed would be subject to the charge.[19] Effingham did not protest the contractual obligation or the classification of the facilities underlying the O&M charges when the Interconnection Agreement was filed in 2001. Further, Effingham did not seek rehearing of the order accepting the Interconnection Agreement with those terms.

24. Here, on rehearing, Effingham argues that the O&M provisions in the Interconnection Agreement are not just and reasonable because the facilities to which the O&M charges apply are "at or beyond" the point of interconnection, and therefore are "network facilities." According to Effingham, because the Commission decided to investigate the O&M rates in the Informational Filing, the Commission was required to re-open and investigate the terms of the Interconnection Agreement regarding the classification of the facilities as well. Effingham is incorrect. The Commission accepted the Interconnection Agreement in 2001.[20] That Interconnection Agreement imposed on Effingham an obligation to pay O&M charges. That Interconnection Agreement also identified the specific facilities that Effingham would pay to operate and maintain. The only information missing from the Interconnection Agreement was the methodology Southern would use to determine the exact level of the O&M charge that it would collect under the Interconnection Agreement. The fact that Southern had

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argues that the investigation should not be so limited because the provision in the Investigation Order carving out the facility classification issue is included under a section of the order titled "Other Matters" rather than the in the section of the order that establishes the four issues to be included in the investigation. We reject Effingham's attempt to recast the Investigation Order by such parsing. The Investigation Order at P 8 clearly put parties on notice that the classification of facilities issue was not within the scope of the section 206 investigation. Indeed, Effingham itself reached that conclusion as evidenced by its May 2, 2005 Answer.

[19] *Southern Company Services, Inc.*, 95 FERC ¶ 61,307 (2001).

[20] *Id.*

to submit additional information before it could start to bill O&M charges does not mean that the Informational Filing or the initiation of the investigation nullified or reversed the prior Commission order accepting the Interconnection Agreement, and its classification of facilities, and does not mean that the classification of facilities is not just and reasonable. Further, the Informational Filing did not propose a change to the terms of the Interconnection Agreement regarding the facilities underlying the O&M charges. Finally, Effingham had the opportunity to challenge Southern's O&M charge methodology in the section 206 proceeding. The Commission ultimately determined that the methodology was just and reasonable. Therefore, Effingham's assertion that the mislabeling of the Informational Filing led to the assessment of unjust and unreasonable rates is incorrect.

25. The Commission has wide discretion to address issues raised before it in a manner and under a timetable that it sees fit.[21] It also has wide discretion on how to perform and conclude its investigations.[22] In the earlier orders in this proceeding, the Commission chose not to expand the scope of the section 206 investigation to reconsider the classification of the facilities to which the O&M charges applied but only to investigate the methodology that Southern used to calculate the charges pursuant to the Interconnection Agreement because the Informational Filing did not seek to change those aspects of the previously approved Interconnection Agreement and the Commission already had before it complaints filed by other generators raising that issue and the Commission did not want to prejudge those complaints. Therefore, the Commission properly held that it would not use the investigation of the Informational Filing to review those provisions of the Interconnection Agreement that the Informational Filing did not seek to change. [23]

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[21] *See, e.g., Richmond Power & Light Co. v. FERC*., 574 F.2d 610, 624 (D.C. Cir. 1978) ("Agencies have wide leeway in controlling their calendars," *citing City of San Antonio v. CAB*, 374 F.2d 326, 329 (D.C. Cir. 1967)).

[22] E.g., Baltimore Gas and Electric Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001); Michigan Public Power Agency v. FERC, 963 F.2d 1574, 1579 (D.C. Cir. 1992).

[23] Effingham's argument is based on cases in which the Commission set rates for hearing under section 205 of the FPA. Effingham Rehearing at 14. In those instances, as the Commission stated in *Cincinnati Gas & Electric Co*., 59 FERC ¶ 61,072 at 61,291 (1992), the Commission casts a broad net in setting a section 205 rate filing for hearing because "the Commission generally is not in a position to enumerate for the benefit of the parties all of the issues that, upon compilation of a more extensive evidentiary record, may be relevant to a determination of the justness and reasonableness of the proposed rates." However, in this case the Commission initiated a limited investigation under section 206 of the FPA and identified the issues that would be investigated and those that

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26. Effingham's argument that the Commission should have addressed the classification of the facilities under section 205 is misplaced. This proceeding involves an investigation under section 206 of the FPA, not section 205. In any event, even if the Commission had acted under section 205, Effingham's request for rehearing would have been denied because the Commission would have been acting on Southern's Informational Filing in the section 205 proceeding, which addressed only the O&M methodology, not the classification of the facilities to which the O&M charges would apply. Effingham, through its intervention and protest, would be seeking to convert a section 205 review of the Informational Filing into an evaluation of the already approved Interconnection Agreement. A party seeking such a change must file a complaint under section 206 of the FPA. A protest does not expand the scope of a proceeding.[24] Requiring Effingham to follow normal procedures and file a complaint regarding the application of O&M charges to its facilities is reasonable and consistent with Commission policy.

27. Finally, the Commission's decision not to re-open the Interconnection Agreement to address Effingham's issues does not mean that Effingham is without recourse. If Effingham now believes that the O&M provisions of the Interconnection Agreement are unjust and unreasonable, it may raise those concerns by filing a complaint with the Commission, just as the parties cited in the Investigation Order did.[25]

III. Notice of Compliance Filing

28. Notice of Southern's August 29, 2005 compliance filing was published in the *Federal Register*, 70 Fed. Reg. 57,584 (2005), with protests and interventions due on or before October 3, 2005. None were filed.

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would not be investigated. As explained herein, such control over the issues set for investigation under section 206 of the FPA is within the Commission's discretion.

[24] *E.g.*, *Consolidated Edison Company of New York*, 97 FERC ¶ 61,241 at 62,092 (2001); *Entergy Services, Inc.*, 52 FERC ¶ 61,317 (1990); *Louisiana Power & Light Co.*, 50 FERC ¶ 61,040 at 61,062 (1990).

[25] *See generally Redbud Energy, Inc.*, 107 FERC ¶ 61,102 (requiring a generator to file a complaint under section 206 of the FPA if it believes that an already approved interconnection agreement improperly designates a "network facility" as an "interconnection facility"), *reh'g denied*, 109 FERC ¶ 61,119 (2004); *see also* Interconnection Agreement § 12.3 (describing Effingham's right to file a complaint).

A. Southern's Compliance Filing

29. Our review of Southern's August 29, 2005 compliance filing shows that Southern has complied with the requirements of the Order Concluding Investigation by linking the cost components of the O&M rates to specific FERC accounts. We therefore accept Southern's compliance filing.

The Commission orders:

(A) Effingham's request for rehearing is hereby denied, as discussed in the body of this order.

(B) Southern's compliance filing is accepted for filing effective January 1, 2005.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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ER05-129-002

(Issued July 20, 2006)

KELLY, Commissioner, *dissenting in part*:

I dissented from the finding in the underlying July 28, 2005 Order that Southern Company Services, Inc. (Southern)'s Informational Filing constitutes a specific rate on file pursuant to section 205 of the Federal Power Act (FPA). As today's order on rehearing of the July Order, and on the subsequent compliance filing, essentially continues to rely on the idea that Southern's informational filing met the specific rate on file requirements of FPA section 205, I respectfully renew my dissent in part.

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Suedeen G. Kelly