

126 FERC 61,279
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Southern Company Services, Inc.

Docket No. ER09-568-000

(Issued March 27, 2009)

ORDER ACCEPTING AND SUSPENDING TRANSMISSION SERVICE
AGREEMENT AND NOTICE OF CANCELLATION AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

1. In this order, we accept Southern Company Services, Inc.'s, as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, Southern), Service Agreement for Firm Point-to-Point Transmission Service by and between Southern and Topaz Energy Associates, LLC (Topaz) (Service Agreement)¹ and the corresponding Notice of Cancellation, and suspend them for a nominal period, to become effective January 1, 2009, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. On January 26, 2009, Southern filed the Service Agreement and corresponding Notice of Cancellation under section 205 of the Federal Power Act.² Southern contends that the filing does not appear to be required under the Commission's regulations because no transmission service was provided thereunder. However, Southern explains that the filing is being made because Topaz paid Southern approximately \$2.8 million for "three non-refundable annual reservation fees" in accordance with section 17.7 of Southern's open access transmission tariff (Tariff) to extend the commencement of service under the Service Agreement.

¹ Southern states that the Service Agreement was designated as Service Agreement No. 486 under the Southern Operating Companies' FERC Electric Tariff, Fourth Revised Volume No. 5.

² 16 U.S.C. § 824d (2006).

3. Southern states that Topaz submitted requests for firm point-to-point transmission service on February 1, 2005 in anticipation of the construction of a coal-fired generation facility in Early County, Georgia to be constructed by Topaz's affiliate, Longleaf Energy Associates LLC (Longleaf). Southern contends that, after studying the requested transmission service, it determined that providing the service would impose a significant impact on third-party Florida utilities³ due to thermal and voltage stability constraints. Southern also explains that the studies identified transmission improvements required to be constructed on Southern's transmission system prior to any transmission service being available to fulfill Topaz's request.
4. On December 22, 2005, Southern states that it executed a transmission service agreement to allow Topaz the opportunity to resolve the third-party constraints in Florida by reaching a binding agreement with the appropriate Florida Utilities to construct or upgrade the necessary transmission facilities by June 1, 2006. Southern contends that because Topaz never reached agreement with the Florida Utilities, this first service agreement, which had a service commencement date of June 1, 2009, terminated by its own terms prior to transmission service being provided.
5. On May 12, 2006, Southern executed the Service Agreement filed in this docket with Topaz. The Service Agreement offered Topaz transmission service of zero MW, but provided that once Topaz resolved the third-party constraints with the Florida Utilities, the parties would revise the Service Agreement for Southern to provide up to 430 MW of firm point-to-point transmission service. Southern contends that the Service Agreement gave Topaz until June 1, 2007 to reach binding agreements to resolve the Florida constraints and set forth a service commencement date of June 1, 2010.
6. Following the execution of the Service Agreement, the parties entered into what Southern characterizes as a "series of arrangements that generally provided Topaz additional time to reach an agreement with the Florida Utilities ... [because] Topaz was indicating that it was making progress with the Florida Utilities." Southern explains that the deadlines for Topaz in these letter agreements were driven by the estimate of the date by which Southern would need to start construction of upgrades required on its system if the requested service commencement date in the Service Agreement was to be met. Southern asserts that, via these arrangements, Topaz exercised its right under section 17.7

³ These utilities are Florida Power & Light, Progress Energy Florida, City of Tallahassee Electric Utility and Jacksonville Electric Authority (collectively, Florida Utilities).

of the Tariff to request extensions of the commencement of service under the Service Agreement.⁴

7. On November 16, 2007, Southern and Topaz entered into a letter agreement to extend the deadline for Topaz to resolve the third-party Florida constraints to January 1, 2008 (November 16 Letter Agreement). On January 17, 2008, Southern and Topaz entered into another letter agreement that extended the deadline for Topaz to resolve the third-party Florida constraints to June 1, 2008 (January 17 Letter Agreement), which superseded the November 16 Letter Agreement. The January 17 Letter Agreement extended the commencement of service date under the Service Agreement by two years to June 1, 2012.⁵ Southern states that, pursuant to the January 17 Letter Agreement, Topaz paid “a non-refundable reservation fee” of \$1,906,654.40 for the two year extension, based on Southern’s 2008 firm point-to-point transmission service charge for the expected transmission capacity of 430 MW. On January 22, 2008, Southern and Topaz entered into an Amended and Reinstated Service Agreement that incorporated the revised dates set forth in the January 17 Letter Agreement.

8. On May 27, 2008, Southern and Topaz entered into the final letter agreement to extend: (1) the commencement of service date for slightly more than one additional year to June 13, 2013; and (2) Topaz’s deadline to resolve the third-party constraints to January 1, 2009 (May 27 Letter Agreement). Southern states that, pursuant to the May 27 Letter Agreement, Topaz paid another “non-refundable reservation fee” in the amount of \$953,327.20 for a one year extension of the commencement of service, based on Southern’s 2008 firm point-to-point transmission service charge for the expected transmission capacity of 430 MW.

9. On January 2, 2009, Topaz informed Southern that it was unable to reach an agreement with the Florida Utilities to resolve the third-party constraints and stated that

⁴ Southern claims that in Amendment No. 1 to the Service Agreement, Southern agreed on June 1, 2007, to extend the deadline for Topaz to resolve third-party constraints to September 1, 2007; and in Amendment No. 2 to the Service Agreement, Southern agreed on September 1, 2007, to extend the deadline for Topaz to resolve third-party constraints to November 1, 2007.

⁵ Southern contends that Topaz requested a two year extension of the commencement of service under the Service Agreement. Southern January 26, 2009 Transmittal Letter at 6.

the Service Agreement had terminated.⁶ Topaz also requested a refund of the two reservation fee payments that it had made pursuant to section 17.7 of the Tariff “as there has not been, and will not be, a ‘Service Commencement Date.’”⁷

10. In its filing in this proceeding, Southern requests that the Commission accept the Service Agreement and corresponding Notice of Cancellation effective January 1, 2009, or in the alternative, reject the filing of the Service Agreement as not required.

11. In its protest, Topaz contends that Southern should return the approximately \$2.8 million paid for the extensions of the commencement of service under the Service Agreement. Topaz requests that the Commission condition the acceptance of the Notice of Cancellation on Southern’s return of the “improperly-collected reservation fees.”⁸ In the alternative, Topaz requests that, if the Commission does not require Southern to return the reservation fees, the Commission direct Southern to allow Topaz, or Longleaf, to apply the amounts of the reservation fees toward other transmission service requests and/or future interconnection or transmission service requests.

II. Notice of Filing and Responsive Pleadings

12. Notice of Southern’s filing was published in the *Federal Register*, 74 Fed. Reg. 6148 (2009), with interventions and protests due on or before February 17, 2009. Topaz filed a timely motion to intervene and protest. On March 4, 2009, Southern filed an answer to Topaz’s protest. On March 17, 2009, Topaz filed an answer to Southern’s answer.

⁶ In its answer, Southern argues that Topaz had an offer of service from FP&L in December 2008 that Topaz ultimately declined. Southern March 4, 2009 Answer at 6. Topaz responds that it had to reach binding agreements with all of the Florida Utilities (not just FP&L) to construct the specified upgrades on their transmission systems. Topaz March 17, 2009 Answer at 5.

⁷ Southern January 26, 2009 Transmittal Letter at 7 (quoting Topaz’s January 2, 2009 letter to Southern).

⁸ Topaz February 17, 2009 Protest at 25.

III. Summary of Pleadings

A. Requests For Extension of the Commencement of Service under Section 17.7 of Southern's Tariff

13. Southern argues that section 17.7 of the Tariff expressly and clearly provides that reservation fees are “non-refundable” and that it need not refund Topaz’s payment of approximately \$2.8 million in such fees because Topaz exercised its right to extend the commencement of service under the Service Agreement, and Southern in fact provided the extensions. Southern notes that Topaz acknowledged that the payments were made “in accordance with Section 17.7” and described the payments as “non-refundable.”⁹ Southern argues that by allowing Topaz to maintain its queue position for 430 MW of service while Topaz negotiated with the Florida Utilities and by granting the requested extensions, it provided Topaz with a *quid pro quo* for Topaz’s payment of the reservation fees.

14. In its protest, Topaz argues that it requested the extensions and paid the reservation fees solely in response to Southern’s threats to effectively terminate the Service Agreement.¹⁰ Topaz contends that Southern was not obligated to provide the transmission service, and Topaz was not required to take and pay for any transmission service, until the conditions in section 7 of the Service Agreement (regarding Topaz reaching an agreement with the Florida Utilities to construct the necessary upgrades to relieve the constraints) had been satisfied. Thus, Topaz maintains that Southern required it to pay the reservation fees to obtain rights to nothing.

⁹ Southern March 4, 2009 Answer at 13.

¹⁰ Southern, in its answer, states that it did not act improperly, but rather worked diligently with Topaz in order for Topaz to be able to take the requested transmission service. Southern March 4, 2009 Answer at 7.

15. Citing the *Bonneville Power Administration* orders,¹¹ Southern contends that Commission precedent contemplates circumstances under which the transmission customer might make a non-refundable annual reservation fee, but not actually receive service. Southern also states that, under section 17.7 of the Tariff, it is possible that a transmission customer might make a non-refundable payment, yet not actually receive service. For instance, this may occur during the extension of the commencement of service, when a subsequent transmission customer submits a request that only can be satisfied by releasing all or part of the reserved capacity, such capacity will be released unless the original customer agrees to pay for the reserved capacity concurrent with the new service commencement date.

16. Topaz argues that Southern's reliance on the *Bonneville* Orders is misplaced because, unlike the *Bonneville Power Administration*, Southern never had the capacity available on its system to grant Topaz any of the contemplated 430 MW of transmission service, and Southern would have to construct about \$25 million of upgrades on its system before it could provide any of the transmission service Topaz requested.

17. Topaz argues Southern violated section 17.7 of the Tariff by requiring Topaz to request a two year extension when the maximum period for such extensions under the Tariff is one year and that Southern's demand for a two year extension is a *prima facie* violation of the express requirements of section 17.7 of the Tariff.

18. In response, Southern states that it did not "require" Topaz to do anything and that there is no prohibition to multi-year extensions in section 17.7 of the Tariff.

19. In its protest, Topaz also argues that Southern improperly linked Topaz's transmission service request to Longleaf's interconnection service in conflict with the Commission's long-standing policy to treat transmission service and interconnection service as two separate services. Topaz contends that it should not have been required to terminate its obligations under a confirmed transmission service request based on a change in the commercial operation date associated with Longleaf's interconnection

¹¹ *Bonneville Power Administration*, 110 FERC ¶ 61,001 (2005), *order on reh'g*, 110 FERC ¶ 61,094 (2005) (*Bonneville Orders*). Southern explains that the *Bonneville Orders* essentially provide that Topaz would have to reach an agreement with the Florida Utilities to address the upgrades needed on the Florida Utilities' systems prior to Southern agreeing to provide transmission service.

request and that Southern's failure to perform the transmission service request studies was the primary factor contributing to the delay in Longleaf's commercial operation date.

20. Southern, in its answer, responds that this argument is irrelevant and simply wrong because a transmission service request that points to a non-existent generator has failed to designate a valid source for that transmission service request.

B. Service Commencement Date

21. Topaz argues that an extension of the service commencement date was not required under the Service Agreement or under the Tariff. Topaz notes that section 4 of the Service Agreement provides that the service commencement date shall be the later of the "requested service commencement date" or the date on which construction of required facilities on both the Southern and the Florida Utilities' respective transmission systems have been completed.¹² Topaz contends that because the requested service could not commence prior to the completion of the construction of the facilities on the Florida Utilities' systems, any delays Topaz may have had in reaching binding agreements with the Florida Utilities would not have changed the service commencement date specified in the Service Agreement and thus no "extension" of that date was required.

22. In its response, Southern states that Topaz's argument has no merit and is a *post hoc* allegation to justify Topaz's request for the return of the "non-refundable reservation fees." Southern argues that it is the known requested service commencement date (and not an unknown commencement date tied to the construction of the facilities) that is used to maintain the transmission customer's transmission reservation consistent with its queue position, and the customer's exercise of its deferral of service rights under section 17.7 of the Tariff relates to the known requested service commencement date.

C. Waiver of the Right to Request a Refund

23. Southern argues that Topaz never protested the payment of the reservation fees despite the dispute resolution mechanism available in section 7.3 of the Tariff and other Commission mechanisms for challenging the payments. Southern notes that Topaz never claimed that the fees were refundable or that it need not pay them. Thus, Southern argues that Topaz has waived any rights it may have to request refund of the reservation fees at this point in time.

¹² Topaz February 17, 2009 Protest at 10.

24. In response, Topaz states that it did in fact repeatedly object to Southern's demands for payment and the other impermissible conditions that Southern sought to impose on Topaz to avoid termination of the Service Agreement. Topaz contends that the Commission's long-standing policy provides that a waiver of a claim or right "must be clearly established and will not be inferred from doubtful or equivocal acts or language."¹³

IV. Discussion

A. Procedural Matters

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹⁴ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213 (a)(2) of the Commission's Rules of Practice and Procedure¹⁵ prohibits an answer to a protest and/or an answer unless otherwise ordered by the decisional authority. We accept Southern's answer and Topaz's answer because the answers have provided information that assisted us in our decision-making process.

B. Hearing and Settlement Judge Procedures

26. The rates, terms and conditions of the proposed Service Agreement and the corresponding Notice of Cancellation raise issues of material fact, including, but not limited to, Topaz's payment of the reservation fees, that cannot be resolved based on the record before us, and are more appropriately addressed in the hearing and settlement judge procedures ordered below.

¹³ Topaz February 17, 2009 Protest at 12 (citing *Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 76 FERC ¶ 61,285, at 62,458 (1996) remanded on other grounds sub nom. *Sithe/Independence Power Partners L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999); *Central Maine Power Co.*, 54 FERC ¶ 61,206, at 61,114 (1991)).

¹⁴ 18 C.F.R. § 385.214 (2008).

¹⁵ 18 C.F.R. § 385.213(a)(2) (2008).

27. Our preliminary analysis indicates that Southern's proposed Service Agreement and Notice of Cancellation have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Therefore, we will accept Southern's proposed Service Agreement and the corresponding Notice of Cancellation, and suspend them for a nominal period, make them effective January 1, 2009, as requested, subject to refund, and set them for hearing and settlement judge procedures.

28. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure. If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Southern's proposed Service Agreement and the corresponding Notice of Cancellation are hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2009, as requested, subject to refund, as discussed in the body of this order.

(B) 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

¹⁶ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges and a summary of their background and experience (www.ferc.gov – click on Office of Administrative Law Judges).

sections 205 and 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), a public hearing shall be held concerning Southern's proposed Service Agreement and the corresponding Notice of Cancellation, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2008), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

