

131 FERC ¶ 61,120
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Southern Company Services, Inc.

Docket No. ER08-129-005
ER08-129-006

ORDER ON COMPLIANCE FILING AND REQUEST FOR REHEARING

(Issued May 6, 2010)

1. On March 10, 2008, the Commission issued an order accepting, in part, proposed revisions to formula rates that were filed by Southern Company Services, Inc., as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (collectively, Southern Companies).¹ The proposed revisions incorporated the entire balance of Southern Companies' "prepaid pension assets" in their rate base. The March 10 Order also directed a further compliance filing. On September 24, 2009, the Commission issued an order rejecting Southern Companies' compliance filing, directing a further compliance filing, and clarifying the March 10 Order.² In this order, the Commission denies the request for rehearing of the September 24, 2009 Order submitted by South Mississippi Electric Power Association, Power South Energy Cooperative, and Southeastern Federal Power Customers, Inc. (collectively, Customer Group), and accepts Southern Companies' October 26, 2009 compliance filing.

I. Background

2. As relevant here, on October 31, 2007, Southern Companies filed, pursuant to a settlement agreement approved by the Commission,³ proposed revisions to their formula

¹ *Southern Company Services, Inc.*, 122 FERC ¶ 61,218 (2008) (March 10 Order).

² *Southern Company Services, Inc.*, 128 FERC ¶ 61,276 (2009) (September 24 Order).

³ *Southern Company Services, Inc.*, 105 FERC ¶ 61,019 (2003). Southern Companies' formula rate is set forth in the Formula Rate Manual in Attachment M of Southern Companies' OATT.

rates. The revisions sought to implement, for billing purposes, the Accounting and Reporting Guidance,⁴ which requires jurisdictional public utilities to record the overfunded assets of their defined postretirement benefit plans (including “prepaid pensions”) in Account No. 129 (Special Funds).

3. In the March 10 Order, the Commission found that Southern Companies had not justified the inclusion of the entire Account No. 129 prepaid pension balance in rate base, as Southern Companies had shown only that a portion of the total corresponding pension income was used to reduce rates, which is a necessary pre-requisite for inclusion of prepaid pensions in rate base. Specifically, the Commission found that Southern Companies had shown that only the jurisdictional portion of prepaid pensions accrued since May 1, 2003 were eligible for rate base inclusion.⁵ The Commission directed Southern Companies to submit a compliance filing reflecting this conclusion.

4. As relevant here, in their April 8, 2008 “Clarification of Record and Compliance Filing,” Southern Companies stated that they would not seek rehearing of the March 10 Order, but “concluded that it is appropriate to provide the following discussion so as to clarify the record regarding two matters raised in the Order.”⁶ Southern Companies further stated that they believed “that the [March 10] Order does not preclude Southern Companies from submitting in the future a filing seeking to include their pre-May 2003 prepaid pension accruals in rate base by demonstrating that pension income reduced transmission rates prior to May 2003.”⁷ The Commission interpreted this statement as a request for clarification and stated, in the September 24 Order, that it agreed with Southern Companies, and that “[n]othing herein precludes Southern Companies from making a fully supported filing seeking to include additional amounts of prepaid pension income in their [Open Access Transmission Tariff (OATT)] formula rates for periods prior to May 1, 2003.”⁸

⁴ *Commission Accounting and Reporting Guidance to Recognize the Funded Status of Defined Benefit Postretirement Plans*, Docket No. AI07-1-000 (Mar. 29, 2007), clarified by *Correction to Commission Accounting and Reporting Guidance to Recognize the Funded Status of Defined Benefit Postretirement Plans*, AI07-1-001 (Jan. 16, 2008).

⁵ March 10 Order, 122 FERC ¶ 61,218 at P 22.

⁶ Southern Companies April 8, 2008 Compliance Filing at 5.

⁷ *Id.*

⁸ September 24 Order, 128 FERC ¶ 61,276 at P 16. The Commission also stated in its analysis of Southern Companies’ compliance filing that, “[i]f, in a subsequent section 205 proceeding, Southern Companies are able to show that their rates were reduced by any portion of the prepaid pension asset earned prior to May 1, 2003, then such portion of the prepaid pension asset would also be eligible for rate base treatment.”

(continued)

5. On October 21, 2009, Customer Group filed a request for rehearing of the September 24 Order. On October 26, 2009, Southern Companies submitted a compliance filing in response to the September 24 Order.

II. Notice of Filing and Responsive Pleadings

6. Notice of Southern Companies' compliance filing was published in the *Federal Register*, 74 Fed. Reg. 57300 (2009) with comments, protests, or interventions due on or before November 16, 2009. None was filed.

7. On November 5, 2009, Southern Companies filed an answer to Customer Group's request for rehearing.

III. Discussion

8. Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2009), prohibits an answer to a request for rehearing. Accordingly, we will reject Southern Companies' answer to Customer Group's request for rehearing.

A. Request for Rehearing

9. Customer Group seeks rehearing of the Commission's statement that Southern Companies may relitigate the issue of whether they included their prepaid pension asset in rate base prior to May 1, 2003. Customer Group argues that Southern Companies did not seek rehearing or clarification on the matter, and that the Commission's statement was unnecessary. Moreover, Customer Group contends that the Commission invited additional litigation, in violation of the Commission-recognized principles of *res judicata*, collateral estoppel, and *stare decisis*, against relitigating issues. Customer Group states that a claim is barred by *res judicata* if the prior proceeding involved the same cause of action as the current proceeding, and here both proceedings involved the same parties, and there was a final judgment on the merits in the previous action.⁹ Customer Group asserts that any attempt by Southern Companies to relitigate their claim would violate this doctrine, because it would be a second proceeding on the same cause of action, between the same parties, where there was an unqualified final judgment on the merits.¹⁰ Additionally, it maintains that any relitigation would violate the principle of collateral estoppel, because Southern Companies had an opportunity to present their

Id. P 11 n.11.

⁹ Customer Group Request for Rehearing at 7 (citing *Williams Natural Gas Co.*, 72 FERC ¶ 63,006, at 65,135 (1995); *Panhandle Eastern Pipe Line Co.*, 38 FERC ¶ 63,030, at 65,204 (1987)).

¹⁰ *Id.* at 9 (citing March 10 Order, 122 FERC ¶ 61,218 at P 24).

evidence and should not be permitted to waste resources on further litigation. Finally, Customer Group asserts that relitigation would violate the doctrine of *stare decisis*, because it would necessarily include the same facts already presented. Customer Group states that the factual matter at issue here, the existence of a rate benefit for OATT customers related to the pre-May 2003 prepaid pension amounts, is a matter of historical record, and thus not eligible for the “changed circumstances” exception to the various preclusion doctrines.¹¹

10. The Commission will deny the request for rehearing. As noted above, Southern Companies made a *statement* of clarification in their April 8, 2008 “Clarification of Record and Compliance Filing.”¹² However, we characterized the statement as a *request* for clarification and provided the requested clarification. The Commission is not bound by a party’s characterization of its arguments.¹³

11. In the March 10 Order, the Commission found that Southern Companies had not produced sufficient evidence to support their claim that they had reduced transmission rates by the amount of their prepaid pension asset prior to May 1, 2003. Because Southern Companies did not produce sufficient evidence, they did not make their case that including the prepaid pension asset in their rate base would be just and reasonable, as is their burden under section 205, and the Commission effectively dismissed their tariff filing as to prepaid pension asset amounts accumulated prior to May 1, 2003. We did not, however, find that inclusion of those assets in rate base would be inappropriate if Southern Companies could justify their inclusion. Therefore, the Commission may consider substantive evidence by Southern Companies that would support its argument regarding the prepaid pension asset amounts accumulated prior to May 1, 2003, as circumscribed by the Commission’s orders in this proceeding.¹⁴

¹¹ *Id.* at 9 n.5.

¹² See September 24 Order, 128 FERC ¶ 61,276, at P 16.

¹³ *Black Hills Power, Inc.*, 126 FERC ¶ 61,104, at P 6 n.4 (2009) (citing *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001, at 61,002 and n.3 (1984)).

¹⁴ See, e.g., *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 54, 119, *on reh’g*, 128 FERC ¶ 61,157 (2009) (rejecting portions of PJM’s tariff filing, without prejudice for refile with additional explanation and support); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,069, at P 12, *aff’d in relevant part*, 103 FERC ¶ 61,217, at P 6-7 (2003) (finding that the Commission is required to reject a rate filing that is not adequately supported, but the Commission may reject a filing without prejudice to the party’s ability to refile an expanded, supported proposal).

12. As a general matter, *res judicata* does not bar relitigation of issues in rate cases based on new facts or arguments,¹⁵ and litigation of rate issues is not precluded by a prior Commission determination on the same subject.¹⁶ Additionally, the Commission has discretion in applying the doctrine of *stare decisis*.¹⁷ As noted above, Southern Companies failed to provide sufficient evidence to support their claim that they had reduced transmission rates by the amount of their prepaid pension asset they sought rate base treatment for prior to May 1, 2003. We disagree with the Customer Group's assertion that the Commission made a definitive finding that there was no rate benefit for OATT customers related to the prepaid pension amounts accumulated prior to May 1, 2003. This is not a case in which Southern Companies produced evidence that was refuted, nor was evidence produced that was contrary to Southern Companies' position. Therefore, the Commission finds that consideration of a tariff filing related to prepaid pension asset amounts accumulated prior to May 1, 2003, would not be precluded.

B. Compliance Filing

13. The September 24 Order found that Southern Companies failed to comply with our directives in the March 10 Order to: (1) add Account No. 128 to those accounts included in their OATT formula rate; and (2) specify that only the jurisdictional portion of prepaid pensions accrued since May 1, 2003 be included in rate base. We rejected proposed OATT Sheet Nos. 165 and 172, and directed Southern Companies to file amended tariff sheets. We also directed Southern Companies to include a provision in their formula rates that limits the amount of the prepaid pension assets that they collect in their future OATT formula rates to the portion of prepaid pensions that have been accrued after May 1, 2003, to ensure that ratepayers will ultimately pay only for pension costs that Southern Companies have contributed to the pension trust. In their October 29, 2009 filing, Southern Companies complied with our directives. Therefore, the Commission will accept Southern Companies' compliance filing.¹⁸

¹⁵ See, e.g., *The United Illuminating Co.*, 119 FERC ¶ 61,182, at P 91 (2007); *Transcontinental Gas Pipe Line Corp.*, 85 FERC ¶ 61,357 (1998).

¹⁶ See, e.g., *Doswell Limited Partnership*, 113 FERC ¶ 61,003, at P 18 & n.7 (2005), and the cases cited therein.

¹⁷ *Entergy Services, Inc.*, 127 FERC ¶ 61,226, at P 12 (2009).

¹⁸ Designations are Second Substitute 2nd Revised Sheet No. 165, Second Substitute Fourth Revised Sheet No. 172, and Original Sheet Nos. 165a and 172a, under Southern Operating Companies, FERC Electric Tariff, Fourth Revised Volume No 5.

The Commission orders:

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

(B) Southern Companies' compliance filing is hereby accepted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.