

153 FERC ¶ 61,068
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Southern Power Company

Docket Nos. ER15-1950-000
ER15-2564-000

ORDER GRANTING AUTHORIZATION TO MAKE AFFILIATE SALES

(Issued October 16, 2015)

1. In this order, we grant Southern Power Company's (Southern Power) request to make power sales to its affiliate, Georgia Power Company (Georgia Power), pursuant to a competitive solicitation that we find satisfies the Commission's concerns regarding the potential for affiliate abuse.

I. Background

2. On June 18, 2015, in Docket No. ER15-1950-000, as amended on August 17, 2015, Southern Power and Georgia Power (collectively, Applicants) requested authority for Southern Power to make sales to its affiliate, Georgia Power, under the terms of the Pawpaw power purchase agreement (Pawpaw PPA). On August 28, 2015, in Docket No. ER15-2564-000, Applicants requested authority for Southern Power to make sales to Georgia Power under the terms of the Decatur Parkway power purchase agreement (Decatur Parkway PPA). Applicants explain that the Pawpaw and Decatur Parkway PPAs are the products of a competitive solicitation/request for proposals issued by Georgia Power in 2014 (the Solar RFP).

3. Applicants state that Southern Power is an investor-owned public utility that acquires, builds, manages, owns, operates, and enters into wholesale power sales contracts for the output of generation assets that have been constructed for the wholesale market in the southeastern United States and elsewhere. Applicants state that Georgia Power is an investor-owned public utility that serves more than 2.4 million customers in Georgia; it is engaged in the generation, transmission, and distribution of electricity in Georgia. Southern Power and Georgia Power are each wholly owned subsidiaries of The Southern Company.

4. Applicants state that on April 2, 2014, Georgia Power issued the Solar RFP to implement two programs: the Advanced Solar Initiative (ASI) program and the 2015 and 2016 ASI Prime (ASI Prime) program. According to Applicants, the Solar RFP sought 495 megawatts (MW) of solar resources with 210 MW in service by the end of 2015 and 215 MW in service by the end of 2016 to fulfill the ASI Prime program requirements. The remaining 70 MW were solicited to fulfill the ASI program requirements. Applicants state that 56 different bidders submitted 142 unique proposals in response to the Solar RFP. According to Applicants, the Solar RFP resulted in 10 winning proposals totaling 515 MW, including ASI Prime proposals from LS-Pawpaw, LLC (LS-Pawpaw) and Decatur Parkway Solar Project, LLC (Decatur Parkway).

5. Applicants represent that the process used in the Solar RFP followed the Georgia Public Service Commission's (Georgia Commission) Rule 515-3-4-.04(3) (Georgia RFP Rule), which details requirements regarding procedures and processes that Georgia public utilities must use when conducting competitive solicitations for new long-term supply-side options. Applicants represent that the Solar RFP was administered under the direct supervision of the Georgia Commission and overseen by an independent evaluator (IE), Accion Group, Inc. Applicants state that both the ASI and ASI Prime programs used a *pro forma* PPA, and as a result, the executed PPAs differ from one another only in terms of the program, counterparty, pricing, and delivery details.

6. Applicants explain that the Pawpaw PPA was executed on October 8, 2014 by Georgia Power and LS-Pawpaw, an entity then unaffiliated with the Applicants, following LS-Pawpaw's successful bid in Georgia Power's ASI Prime program. The 30-year Pawpaw PPA provides for the delivery by Southern Power, as successor to LS-Pawpaw, and purchase by Georgia Power of energy and capacity benefits and the related Renewable Energy Credits (RECs) from the 30 MW Pawpaw solar generation project located in Butler, Georgia, that is currently under construction by Southern Power. Applicants explain that although the Pawpaw PPA was not an inter-affiliate power sales agreement at the time of its execution, it has since become one. According to Applicants, on May 29, 2015, Southern Power acquired the upstream ownership of LS-Pawpaw from Longview Solar, LLC (Longview Solar).

7. Applicants state that the Decatur Parkway PPA was executed on October 8, 2014 between Georgia Power and Decatur Parkway, an entity then unaffiliated with the Applicants, following Decatur Parkway's successful bid in Georgia Power's ASI Prime program. The 25-year Decatur Parkway PPA provides for the delivery by Southern Power, as successor to Decatur Parkway, and purchase by Georgia Power of energy and capacity benefits and RECs from the 80 MW Decatur Parkway solar generation project located in Decatur County, Georgia, that is currently under construction by Southern Power. According to Applicants, the Decatur Parkway PPA was not an inter-affiliate power sales agreement at the time of its execution. Applicants

state that on February 19, 2015, Southern Power acquired the upstream ownership of Decatur Parkway from Tradewind Energy, LLC (Tradewind Energy).

8. Applicants represent that Southern Power had no role in drafting or negotiating either the Pawpaw PPA or the Decatur Parkway PPA. Applicants state that the terms of the Pawpaw and Decatur Parkway PPAs were established by LS-Pawpaw and Decatur Parkway's respective binding bids and the terms of the *pro forma* PPA. Applicants further represent that Southern Power completed negotiations with Longview Solar and Tradewind Energy regarding acquisition of LS-Pawpaw and Decatur Parkway after the Georgia Commission certified the Pawpaw and Decatur Parkway PPAs on December 16, 2014.

9. Applicants maintain that even if the Pawpaw and Decatur Parkway PPAs had been between affiliates at the time of execution, there would be no affiliate abuse concerns because the Solar RFP that produced the Pawpaw and Decatur Parkway PPAs satisfies the competitive solicitation process requirements established by the Commission for affiliate power sales in *Edgar*¹ as well as the four guidelines outlined by the Commission in *Allegheny* (i.e., Transparency, Definition, Evaluation, and Oversight).² Applicants also maintain that the Pawpaw and Decatur Parkway PPAs' pricing terms and *pro forma* non-price terms and conditions constitute benchmark evidence because they reflect arm's length dealing between non-affiliates.

10. On July 24, 2015, the Director of the Division of Electric Power Regulation – West issued a letter under delegated authority directing Applicants to clarify certain aspects of their June 18, 2015 filing in Docket No. ER15-1950-000 and to submit additional information.³ Applicants submitted their individual responses to the letter on August 17, 2015.⁴

¹ *Boston Edison Co. Re: Edgar Electric Energy Co.*, 55 FERC ¶ 61,382 (1991) (*Edgar*).

² *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 (2004) (*Allegheny*).

³ *Southern Power Co.*, Docket No. ER15-1950-000 (July 24, 2015) (delegated letter order).

⁴ Applicants explain that they submitted separate responses because, in accordance with the Georgia RFP Rule, Southern Power is treated the same as any bidder in the Solar RFP and does not have access to Georgia Power's confidential evaluation methodology or results.

II. Notices and Responsive Pleadings

11. Notice of Applicants' June 18, 2015 filing was published in the *Federal Register*,⁵ with interventions and protests due on or before July 9, 2015. None was filed.
12. Notice of Southern Power's August 17, 2015 filing was published in the *Federal Register*,⁶ with interventions and protests due on or before September 8, 2015. None was filed.
13. Notice of Georgia Power's August 17, 2015 filing was published in the *Federal Register*,⁷ with interventions and protests due on or before September 8, 2015. None was filed.
14. Notice of Applicants' August 28, 2015 filing was published in the *Federal Register*,⁸ with interventions and protests due on or before September 18, 2015. None was filed.

III. Discussion

A. Affiliate Abuse Analysis

15. At issue here is whether Applicants' filings satisfy the Commission's concerns regarding the potential for affiliate abuse. In *Edgar*, the Commission stated that, in cases where affiliates are entering into market-based rate agreements, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted. Under *Edgar*, the Commission has approved affiliate sales resulting from competitive bidding processes after the Commission has determined that, based on the evidence, the proposed sale was a result of direct head-to-head competition between affiliated and competing unaffiliated suppliers.⁹

⁵ 80 Fed. Reg. 36,769 (2015).

⁶ 80 Fed. Reg. 51,547 (2015).

⁷ 80 Fed. Reg. 51,545 (2015).

⁸ 80 Fed. Reg. 56,979 (2015).

⁹ See *Edgar*, 55 FERC ¶ 61,382 at 62,167-69. See also *Connecticut Light & Power Co.*, 90 FERC ¶ 61,195, at 61,633-34 (2000); *Aquila Energy Marketing Corp.*, 87 FERC ¶ 61,217, at 61,857-58 (1999); *MEP Pleasant Hill, LLC*, 88 FERC ¶ 61,027, at 61,059-60 (1999).

16. When an entity presents evidence seeking to satisfy the *Edgar* criteria, the Commission has required assurance that: (1) a competitive solicitation process was designed and implemented without undue preference for an affiliate; (2) the analysis of bids did not favor affiliates, particularly with respect to non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.¹⁰

17. In *Allegheny*, the Commission provided guidance as to how it will evaluate whether a competitive solicitation process satisfies the *Edgar* criteria.¹¹ As the Commission stated in *Allegheny*, the underlying principle when evaluating a competitive solicitation process under the *Edgar* criteria is that no affiliate should receive undue preference during any stage of the process. The Commission stated that the following four guidelines will help the Commission determine if a competitive solicitation process satisfies that underlying principle: (1) Transparency: the competitive solicitation process should be open and fair; (2) Definition: the product or products sought through the competitive solicitation should be precisely defined; (3) Evaluation: evaluation criteria should be standardized and applied equally to all bids and bidders; and (4) Oversight: an independent third party should design the solicitation, administer bidding, and evaluate bids prior to the company's selection.¹² The *Edgar* criteria and *Allegheny* guidelines are designed to ensure that the transactions between affiliates do not unduly favor affiliates, and thereby protect captive customers from affiliate abuse.

18. As discussed below, the Commission concludes that the competitive solicitation described by Applicants satisfies the Commission's concerns regarding affiliate abuse. Accordingly, the Commission will grant Applicants' requests for authorization for Southern Power to make affiliate sales to Georgia Power pursuant to the Pawpaw and Decatur Parkway PPAs, effective August 18, 2015, and October 12, 2015, respectively, as requested.

¹⁰ *Edgar*, 55 FERC ¶ 61,382 at 62,168.

¹¹ *Allegheny*, 108 FERC ¶ 61,082. See also *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 540, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

¹² *Allegheny*, 108 FERC ¶ 61,082 at P 22.

1. Transparency Principle

19. Applicants claim that the Solar RFP was consistent with the Transparency guideline. They explain that the terms of the Solar RFP and all relevant information were provided to registered parties through a dedicated competitive-procurement website designed and administered by the IE. According to Applicants, when the IE website was released, a notice was sent to all individuals who had registered for notification on the IE's home website. Applicants state that the Georgia Commission also sent a notice of the Solar RFP to a variety of media sites. According to Applicants, any person or company interested in participating in the Solar RFP, as either a bidder or a non-bidder, could register for access to the IE website, which was available to the public and was accessible via the Georgia Commission's website. Applicants explain that the IE website provided all registered parties access to the same information at the same time, including all communications between Georgia Power and bidders, unless specific to an individual bid. Applicants state that email notices were automatically sent to registered parties whenever an announcement or new information was posted to the IE website.

20. Based on Applicants' representations, we find that the Solar RFP competitive solicitation was consistent with the Commission's Transparency guideline.

2. Definition Principle

21. Applicants claim that the Solar RFP was consistent with the Definition guideline. Applicants explain that the products sought by Georgia Power in the Solar RFP were clearly defined in the RFP documents and other materials provided to bidders through the IE website. More specifically, Applicants explain that the Solar RFP documents stated that Georgia Power was interested in procuring 495 MW of solar energy and sought bid proposals for solar photovoltaic (fixed or tracking) generating system resources located in Georgia with required commercial operation dates beginning in 2015 and continuing in 2016. Applicants note that potential bidders and interested parties were invited to participate in a bidders' conference at which they could ask questions regarding the Solar RFP. Applicants state that registered parties could also post anonymous questions to the IE website. According to Applicants, all questions submitted and answers provided were accessible to all registered participants immediately after the information was posted.

22. Based on Applicants' representations, we find that the Solar RFP competitive solicitation was consistent with the Commission's Definition guideline.

3. Evaluation Principle

23. Applicants claim that the Solar RFP was consistent with the Evaluation guideline. Applicants explain that the Solar RFP documents provided clear and complete product definitions and full disclosure of the evaluation process. According to Applicants, potential bidders and interested parties were able to comment on and question the evaluation criteria to be employed. Applicants note that the Solar RFP required all bids to be submitted via the IE website. According to Applicants, following receipt of bids, Georgia Power and the IE, with the oversight of Georgia Commission staff, each analyzed bids quantitatively and compared their results to create a short ranked list of bids that met the Solar RFP criteria and presented the best price. Applicants explain that the final rankings were based on the quantitative analysis, and non-price factors did not influence the rankings. Applicants state that there were no differences to resolve between Georgia Power's and the IE's results for the short ranked bid list. Applicants explain that following identification of the short ranked bids, Georgia Power's transmission planning department studied all short ranked bids to determine the incremental costs associated with interconnection of the bid project to the transmission grid. Finally, according to Applicants, Georgia Power, the IE, and Georgia Commission staff met with each short ranked bidder to confirm the bidder's willingness to execute a PPA.

24. Based on Applicants' representations, we find that the Solar RFP competitive solicitation was consistent with the Commission's Evaluation guideline.

4. Oversight Principle

25. Applicants claim that the Solar RFP was consistent with the Oversight guideline. They explain that the Solar RFP was overseen by the IE, which was integrally involved in all aspects of the Solar RFP process and that the IE's oversight responsibilities began before the draft RFP documents were released for public review. Applicants affirm that the IE had no financial interest in any of the bidders, Georgia Power, Georgia Power's affiliates, or in the outcome of the process. According to Applicants, the IE website served as the sole link for all interactions between bidders and Georgia Power, and allowed the IE the ability to monitor every question, comment, document upload, and interaction during the solicitation. Applicants represent that the security of the IE website and the anonymity of the bidders allowed the IE to make a strong judgment as to the fairness of the Solar RFP process.

26. Based on Applicants' representations, we find that the Solar RFP competitive solicitation was consistent with the Commission's Oversight guideline.

B. Other Issues

27. This order satisfies the requirement that Southern Power must first receive Commission authorization, pursuant to section 205 of the Federal Power Act (FPA), before engaging in power sales at market-based rates for these affiliate sales. We note that Southern Power must receive prior approval from the Commission under section 205 of the FPA for any other sales to affiliates with a franchised electric service territory and captive customers.

28. In light of our determination that the competitive solicitation as represented by Applicants satisfies the Commission's concerns regarding affiliate abuse, we need not address Applicants' alternative contention that the PPAs constitute benchmark evidence under *Edgar*.

29. Southern Power requests authorization to make market-based rate sales under the terms of the Pawpaw and Decatur Parkway PPAs to its affiliate, Georgia Power, without such sales being subject to refund pursuant to the section 206 proceeding pending in Docket No. EL15-39-000 regarding the blanket market-based rate authority of Southern Power and its affiliates.¹³

30. In support of this request, Applicants state that each PPA is a long-term power supply agreement executed at arm's length between non-affiliates, was executed before the refund effective date was established in Docket No. EL15-39-000, and was transferred and assigned to Southern Power well after the terms and conditions had been fixed by agreement and certified for retail supply and cost recovery by the Georgia Commission.

31. In Order No. 697, the Commission stated that mitigation does not modify, abrogate, or otherwise affect existing contractual agreements.¹⁴ Here, we determine that

¹³ See *Alabama Power Co.*, 151 FERC ¶ 61,071 (2015).

¹⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 822. See also *Duke Power*, 111 FERC ¶ 61,506, at P 4 n.8 (2005) ("The revocation of Duke Power's market-based rate authority in the Duke Power control area does not apply to, or affect, existing market-based rate contracts that were entered into prior to the refund effective date in this proceeding."); *South Carolina Elec. & Gas Co.*, 114 FERC ¶ 61,143, at P 18 (2006) ("Where, as here, the Commission accepts a utility's proposed mitigation, such mitigation is accepted on a prospective basis. Thus, it is appropriate for existing long-term agreements to remain in effect until terminated pursuant to their terms."); *J.P. Morgan Ventures Energy Corp.*, 141 FERC ¶ 61,131 (2012), *order granting clarification*, 142 FERC ¶ 61,085, at P 15 (2013) ("Consistent with this precedent, the Commission did

(continued...)

the Pawpaw and Decatur Parkway PPAs are not subject to refund pursuant to the section 206 proceeding. The PPAs were executed by unaffiliated parties on October 8, 2014, which is prior to the May 11, 2015 refund effective date in the section 206 proceeding. Additionally, Southern Power completed the acquisition of Decatur Parkway from Tradewind Energy on February 19, 2015, which is prior to the May 11, 2015 refund effective date. Similarly, Southern Power entered into a purchase agreement to acquire LS-Pawpaw on April 22, 2015, also prior to the May 11, 2015 refund effective date.

32. In light of our determination that Southern Power may make sales under the terms of the PPAs pursuant to its market-based rate authority and that the PPAs will not be subject to refund pursuant to the section 206 proceeding, we dismiss as moot Applicants' alternative request that the Commission accept the PPAs as stand-alone agreements. Accordingly, we reject as moot the PPAs filed as stand-alone agreements on June 18, 2015, and August 28, 2015.

33. Finally, we direct Southern Power to submit a compliance filing, within 30 days of the date of this order, revising the limitations and exemptions section of its market-based rate tariff to list the specific, limited waivers granted herein and including a citation to this order.¹⁵

The Commission orders:

(A) Applicants' request for authorization for Southern Power to make power sales to Georgia Power pursuant to the Pawpaw PPA is granted, effective August 18, 2015, as discussed in the body of this order.

(B) Applicants' request for authorization for Southern Power to make power sales to Georgia Power pursuant to the Decatur Parkway PPA is granted, effective October 12, 2015, as discussed in the body of this order.

(C) Applicants' stand-alone agreements filed on June 18, 2015 and August 28, 2015 are hereby rejected as moot, as discussed in the body of this order.

not modify or abrogate pre-existing contracts in the Suspension Order. Rather, pursuant to section 206 of the FPA, the Commission suspended JP Morgan's authorization to enter into new arrangements to sell electric energy, capacity, and ancillary services at market-based rates on a prospective basis."); *Pinnacle West Capital Corp.*, 120 FERC ¶ 61,153, at P 54 (2007).

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at Appendix C; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 385 n.517.

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.