

112 FERC ¶ 61,015
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Services, Inc.
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Savannah Electric and Power Company
Southern Power Company

Docket No. EL05-102-000

ORDER ON CLARIFICATION

(Issued July 5, 2005)

1. In this order, we grant in part and deny in part the joint motion for clarification of the order issued on May 5, 2005,¹ and grant the request for expedited consideration submitted by Southern Companies,² Trial Staff, Calpine Corporation, Coral Power, L.L.C., and the Williams Power Company, Inc. (collectively, participants). As discussed below, the participants are not required to submit all of the testimony and exhibits previously filed in Docket No. ER03-713-000 to the extent that they relate to the two issues set for hearing in that proceeding that are no longer relevant to the instant proceeding.
2. This order benefits customers by ensuring that the Commission hearing will proceed in an expeditious manner.

Background

3. In the May 5 Order, in response to allegations submitted by intervenors, the Commission set for hearing a number of issues related to the Southern pooling agreement, known as the Intercompany Interchange Contract (IIC). The Commission also directed the parties to preserve as evidence in Docket No. EL05-102-000 the testimony and exhibits submitted in Docket No. ER03-713-000. Docket No. ER03-713-000 is an earlier proceeding in which the Commission investigated allegations that Southern Companies

¹ *Southern Company Services, Inc.*, 111 FERC ¶ 61,146 (2005) (May 5 Order).

² Southern Companies include Southern Companies Services, Alabama Power Company, Georgia Power Company (Georgia Power), Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company (Savannah Electric), and Southern Power Company (Southern Power).

had used its control of the transmission service reservation process to provide a competitive advantage to its affiliate, Southern Power, during the request for proposal (RFP) process in which it was awarded two power purchase agreements (PPAs) to supply two other Southern Companies affiliates, Georgia Power and Savannah Electric.

Request for Clarification

4. Participants seek clarification that the reference in the May 5 Order to preserve as evidence in Docket No. EL05-102-000 the testimony and exhibits previously submitted in Docket No. ER03-713-000 was not intended to require the resubmission of all such testimony and exhibits, but rather was intended to allow parties, at their discretion, to decide which parts, if any, of the previously-filed testimony and exhibits they wish to refile and sponsor.³

5. Participants note that the presiding judge assigned to this proceeding has determined that full compliance with the May 5 Order requires that all testimony and exhibits previously submitted in Docket No. ER03-713-000 must be resubmitted in this proceeding. Moreover, the presiding judge has indicated that the participants must seek reconsideration from the Commission if they wish to be allowed to include only selected portions of these materials as part of their submission.

6. Participants contend that the May 5 Order is unclear as to what the Commission intended with respect to the refiling of testimony and exhibits previously submitted in Docket No. ER03-713-000. However, participants emphasize that, had the Commission intended that the parties simply refile their prior testimony, the May 5 Order presumably would have so stated. Participants submit that the language in the ordering paragraphs of the May 5 Order instead suggests that the Commission intended to allow the presiding judge and the participants to determine, at their discretion, how to use materials from Docket No. ER03-713-000 in this proceeding.

7. Participants further contend that effectively forcing a litigant to sponsor evidence presents due process concerns. They argue that, as every piece of testimony and every exhibit submitted in a proceeding becomes potentially subject to discovery, such a requirement could place a participant in the position of fielding requests and defending depositions regarding a witness that it otherwise had not intention of sponsoring in this docket.

³ In the May 5 Order, the Commission directed that the presiding judge convene a prehearing conference to, among other things, “address ... how to preserve as evidence in Docket No. EL05-102-000 the testimony and exhibits submitted in Docket No. ER03-713-000, and the need to supplement that testimony and exhibits,” and “to discuss the preservation and supplementation of the testimony and exhibits submitted to date in Docket No. ER03-713-000.” May 5 Order, 111 FERC ¶ 61,146 at P 34, Ordering Paragraph (B).

8. In addition, a mandate to refile all prior testimony and exhibits ignores differences between the issues set for hearing in the two proceedings. The issues set for hearing in Docket No. ER03-713-000 considered issues related to the PPAs under review and the RFP process that had produced them, while the issues set for hearing in Docket No. EL05-102-000 concern the IIC, the Commission' Standards of Conduct, and Southern Companies' code of conduct. While participants acknowledge that there is some overlap between the two sets of issues, substantial portions of the testimony and exhibits submitted in Docket No. ER03-713-000 will have no relevance to the investigation in Docket No. EL05-102-000.

Motion for Expedited Consideration

9. The procedural schedule currently in place in this proceeding establishes a July 18, 2005 deadline for the resubmission of all testimony and exhibits previously submitted in Docket No. ER03-713-000. Participants assert that Commission clarification on the question above well in advance of this deadline would enable the parties to formulate their litigation strategy regarding the selective use of those materials. Moreover, they would avoid the time and effort associated with a blanket resubmission.

Commission Determination

10. We will grant both the request for clarification and the motion for expedited consideration. In the May 5 Order, the Commission did not intend to require the refiling of all testimony and exhibits previously submitted in Docket No. ER03-713-000. The six issues the Commission originally set for hearing in Docket No. ER03-713 were: (a) whether in the design and implementation of the RFP Georgia Power and Savannah Electric unduly preferred its own affiliate, Southern Power; (b) whether the analysis of the RFP bids unduly favored Southern Power, particularly with respect to evaluation of non-price factors; (c) whether Georgia Power and Savannah Electric selected the affiliate based upon a reasonable combination of price and non-price factors; (d) whether Southern Power received an undue preference or competitive advantage in the RFP as a result of access to its affiliate's transmission system; (e) whether and to what extent the PPAs impact wholesale competition; and (f) whether the PPAs are just and reasonable and not unduly discriminatory.⁴ With the withdrawal of the PPAs, we agree that prior testimony and exhibits filed in response to the final two issues are no longer relevant and therefore, need not be resubmitted. However, the Commission intended that all prior testimony and exhibits concerning the first four issues are to be placed in the record of this proceeding because those issues relate to the unresolved issues concerning affiliate abuse by Southern Companies. In the May 5 Order, we determined that the participants in Docket No. ER03-713-000 "raised credible allegations that remain unresolved despite the withdrawals of the

⁴ *Southern Power Company*, 104 FERC ¶ 61,041 at P 27 (2003).

PPAs, and the Commission will consider the evidence submitted in this proceeding in the section 206 proceeding in Docket No. EL05-102-000.”⁵ Those issues remain unresolved, and prior testimony and exhibits related to those issues are relevant to the instant proceeding.

11. We further clarify that parties may revise their testimony as appropriate to reflect the differing procedural context and burden of proof in the instant proceeding, which was instituted under section 206 of the Federal Power Act (FPA),⁶ and that in Docket No. ER03-713-000, which was established under section 205.

12. Finally, we reject participants’ argument that their due process rights would be violated by requiring them to resubmit the testimony and exhibits previously filed in Docket No. ER03-713-000. It is clearly within the scope of the presiding judge’s authority to make determinations as to the burden of proof, depositions, and other discovery matters, as well as all other procedural or housekeeping matters that may arise in this proceeding. Accordingly, we leave it to the presiding judge’s discretion to determine whether particular discovery requests are unduly burdensome or otherwise violate a party’s due process rights.

The Commission Orders:

(A) The request for clarification of the May 5 Order is granted in part and denied in part, as discussed in the body of this order.

(B) The motion for expedited consideration is granted.

By the Commission. Chairman Wood not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.

⁵ May 5 Order, 111 FERC ¶ 61,146 at P 35.

⁶ 16 U.S.C. § 824e (2000).