

128 FERC ¶ 61,276
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Services, Inc.

Docket Nos. ER08-129-002
ER08-129-003
ER08-129-004
(not consolidated)

ORDER ON CLARIFICATION AND COMPLIANCE FILING

(Issued September 24, 2009)

1. On March 10, 2008, the Commission issued an order accepting, in part, a proposed revision to formula rates, made by Southern Company Services, Inc., acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (individually, Operating Company; collectively, Southern Companies).¹ Southern Companies proposed to include “prepaid pension assets” in rate base. In the March 10 Order, the Commission directed Southern Companies to revise their formula rates to include only prepaid pension amounts accumulated after May 1, 2003 in rate base and required Southern Companies to recompute their 2007 formula rates to reflect this determination. On April 9, 2008, as amended on December 4, 2008, Southern Companies submitted a clarification of record and compliance filing. In addition, the South Mississippi Electric Power Association, Power South Energy Cooperative, and Southeastern Federal Power Customers, Inc. (collectively, Customer Group) filed a request for clarification and rehearing of the March 10 Order. In this order, we clarify the March 10 Order, reject Southern Companies’ compliance filing, and require a further compliance filing.

I. Background

2. In the March 10 Order, the Commission accepted, in part, Southern Companies’ proposed formula rate revision, finding that Southern Companies could include the Commission-jurisdictional portion of prepaid pension amounts in rate base to the extent

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

that rates under their Open Access Transmission Tariff (OATT) were correspondingly reduced by pension income.² The Commission agreed with Southern Companies that, to the extent that non-cash reductions to expense for pension income reduced rates under the OATT, they were financing such rate reductions because they were not allowed to withdraw the pension income from the external pension trust. Because Southern Companies demonstrated only that prepaid pensions accrued since May 1, 2003 reduced OATT rates, the Commission directed Southern Companies to revise their OATT formula rate and their 2007 billings thereunder to specify that only the jurisdictional portion of prepaid pensions accrued since May 1, 2003 be included in rate base.³

3. On April 9, 2008, Customer Group filed a request for clarification and rehearing of the March 10 Order. In addition, on April 9, 2008, Southern Companies submitted a clarification of record and a compliance filing. The compliance filing included a table showing the recalculation of charges, a revised 2007 Annual Informational Filing⁴ accompanied by supporting exhibits and workpapers, and revised tariff sheets. Commission Staff sent a deficiency letter with questions on November 4, 2008, and Southern Companies filed an amendment to their compliance filing in response to that letter on December 4, 2008.

II. Notice of Filings and Responsive Pleadings

4. Notice of Southern Companies' April 9, 2008 compliance filing was published in the *Federal Register*, 73 Fed. Reg. 22145 (2008), with protests due on or before April 30, 2008. On April 30, 2008, Customer Group filed a protest. On May 15, 2008, Southern Companies filed a motion to answer and answer to the protest of Customer Group. On May 30, 2008, Customer Group filed a motion to strike Southern Companies' answer. On June 5, 2008, Southern Companies filed a motion for leave to respond and response to Customer Group's motion to strike.

² March 10 Order, 122 FERC ¶ 61,218 at P 21-24. Pension income is income earned on the pension funds in an external trust that exceeds the current year's pension expense.

³ *Id.* P 25.

⁴ "The Annual Informational Filing is to be filed by November 1 before each upcoming Rate Year and uses projected cost data to calculate charges for transmission services for the next Rate Year. On or before May 1 of the year following the Rate Year, Southern Companies must file a True-Up Filing that recalculates the charges based on actual costs for the Rate Year and provides for any necessary refunds or surcharges." *Id.* P 3 (footnote omitted). On May 1, 2008, Southern Companies submitted their 2007 True-Up filing, which was accepted subject to the outcome of this proceeding.

5. Notice of Southern Companies December 4, 2008 amended compliance filing was published in the *Federal Register*, 73 Fed. Reg. 76624 (2008), with protests due on or before December 26, 2008. On December 29, 2008, Customer Group filed a protest to Southern Companies' response to the deficiency letter. On January 13, 2009, Southern Companies filed an answer to Customer Group's protest.

6. On April 24, 2008, Southern Companies filed a motion for leave to answer and an answer to Customer Group's April 9, 2008 request for clarification and rehearing.

III. Discussion

7. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest or to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Southern Companies' May 15, 2008 answer to Customer Group's protest because it did not provide information that assisted us in our decision-making process and will, therefore, reject it. 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' January 13, 2009 answer to Customer Group's request for rehearing.

A. Southern Companies' Compliance Filings

8. According to Southern Companies, their amended compliance filing reflects the removal of all prepaid pension asset amounts accrued prior to May 1, 2003, as well as offsetting adjustments in other accounts, from their formula rates.⁵ To correct the amount of the prepaid pension asset included in rate base for their 2007 formula rates, Southern Companies first calculated the amount of their prepaid pension asset as of May 1, 2003.⁶ Then they imputed earnings of 8.5 percent on that amount – approximately \$70.2 million per year from 2003 through 2007. Southern Companies subtracted those earnings from their actual pension fund earnings accrued after May 1, 2003, to arrive at the amount of prepaid pension income that they include in rate base and other accounts

⁵ Southern Companies, December 4, 2008 Compliance Filing at 1-2.

⁶ To arrive at this amount, Southern Companies took the balance of prepaid pension assets as of December 31, 2002 that was reported on each Operating Company's 2002 Securities and Exchange Commission's Form 10-K, and added the amount of prepaid pension income earned from January 1, 2003 to April 30, 2003 (i.e., one-third of the pension income earned by the Operating Companies during 2003). Southern Companies' Transmittal Letter at 7, and Exhibit A at 2, ll. 10-12 (Dec. 4, 2008).

for their 2007 formula rates.⁷ Southern Companies propose to adjust their original 2007 formula rates by the differences between the revised amounts and the amounts originally used in the 2007 formula rates.⁸

9. Customer Group protests Southern Companies' compliance filings, alleging that Southern Companies has improperly made adjustments to gross plant, accumulated depreciation, cash working capital, deferred income taxes, administrative and general expenses and depreciation expense, that are neither required nor permitted by the March 10 Order and must be eliminated from the compliance filing. Customer Group suggests that the Commission require that Southern Companies provide additional information regarding prepaid pension asset adjustments to ensure proper reconciliation to Southern Companies' income statement and balance sheet accounts.

10. In the March 10 Order, the Commission determined that Southern Companies could include the jurisdictional portion of their prepaid pension assets in rate base provided that they could demonstrate that there were corresponding reductions in the amount of revenue collected from ratepayers resulting from the crediting of pension income to reduce OATT rates. The Commission found that Southern Companies had demonstrated that there were corresponding reductions to ratepayers since May 1, 2003, when Southern Companies' formula rates became effective.⁹ In accordance with this finding, the Commission required Southern Companies to exclude any amounts related to prepaid pensions accumulated prior to May 1, 2003 from their 2007 formula rate base, along with any corresponding amounts of working capital reductions and deferred income taxes, and to recompute their 2007 formula rates to reflect only the jurisdictional portion of prepaid pensions accrued since May 1, 2003.¹⁰

⁷ The accounts include Account 926, Employee pension and benefits; Account 101, Electric Plant in Service; Account 108, Accumulated provision for depreciation of electric utility plant; Account 283, Accumulated deferred income taxes – other; and Account 411.1, Provision for deferred income taxes – Credit, utility operating income. Southern Companies used various assumptions in development of the amounts to be allocated to these rate base and expense accounts. Southern Companies, December 4, 2008 Transmittal Letter at 9.

⁸ Southern Companies, December 4, 2008 Transmittal Letter at 10, Operating Company Exhibit B, and differences by Operating Company determined on sheets labeled "Summary of Filing Data".

⁹ March 10 Order, 122 FERC ¶ 61,218 at P 22.

¹⁰ *Id.* P 25. The Commission directed Southern Companies to revise their OATT to "specify that only the jurisdictional portion of prepaid pensions accrued since May

(continued...)

11. We find that Southern Companies' compliance filing, as amended, does not comply with the March 10 Order. Southern Companies' 2007 formula rates should include in rate base the jurisdictional portion of the accumulated total pension income accrued since May 1, 2003, without reduction for any imputed earnings on the prepaid pension assets accumulated before May 1, 2003. Instead, Southern Companies excluded approximately \$70.2 million per year from 2003 through 2007, asserting that this amount was attributable to earnings on the prepaid pension assets accumulated prior to May 1, 2003. This adjustment was incorrect, as it does not comply with either the explicit direction in the Commission's March 10 Order or the underlying basis for such direction. Southern Companies were directed to include only prepaid pension income earned since May 1, 2003 because that is the date on which Southern Companies' formula rates became effective, so that is when Southern Companies' rates were reduced to reflect the pension income. Further, all pension income has been included in Southern Companies' formula rate calculations since May 1, 2003, rather than only a portion of it. The inclusion of pension income in formula rates was a necessary predicate for allowing the inclusion of prepaid pensions (i.e., accumulated pension income) in rate base.¹¹ Additionally, the Commission did not direct Southern Companies to re-compute their rates starting May 1, 2003; instead it directed Southern Companies that because their rates since May 1, 2003 reflected pension income earned since May 1, 2003, they could include such amounts in rate base.

12. Southern Companies should have simply accumulated the total pension income earned since May 1, 2003 and included the jurisdictional portion of that total in rate base for their 2007 formula rate, in accordance with the March 10 Order.¹² This method ensures that prepaid pensions accumulated prior to May 1, 2003 would be excluded from OATT rate determinations, but all earnings from the external pension fund would be used to reduce the OATT formula rates (current pension expense), as also required by the March 10 Order. Therefore, we will direct Southern Companies to revise their 2007

2003 be included in rate base" and "to recompute their 2007 formula rates to reflect this determination." The jurisdictional portion by Operating Company starts with total company numbers and then derives the jurisdictional portion by using the allocation factors that are described in the OATT formula rate.

¹¹ March 10 Order, 122 FERC ¶ 61,218 at P 21. If, 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.

¹² This is consistent with our holding in the March 10 Order that Southern Companies' formula rates reflect the jurisdictional portion of total pension income accrued since May 1, 2003.

formula rate calculations to reflect the jurisdictional portion of the total amount of pension income accrued after May 1, 2003.¹³

13. Contrary to Customer Group's arguments, we further find that Southern Companies should also adjust corresponding accounts in their formula rates related to prepaid pensions includable in rate base. The adjustments that Southern Companies proposes to utility plant, accumulated depreciation, deferred income taxes and working capital, are all a result of the need to reflect in their formula rates only pension income accrued since May 1, 2003. The difference between the amounts originally included in the related accounts and those based only on Southern Companies' pension income accrued after May 1, 2003, represent the amount by which the rate base and expense items must be adjusted in order to remove the pension income accrued before May 1, 2003 from Southern Companies' original OATT formula rate computation. Once Southern Companies revise their calculations as explained above, the 2007 formula rates will include only post-May 1, 2003 prepaid pension income amounts, in accordance with the March 10 Order.¹⁴ For these reasons, we deny the Customer Group's request for clarification and motion for rehearing on adjustments to corresponding accounts in formula rates.

14. Southern Companies also failed to comply with our directives 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 is included in rate base.¹⁵ Southern Companies filed revisions to their formula rates on revised OATT Sheet Nos. 165 and 172. We will reject these sheets and will direct Southern Companies to file amended tariff sheets. First, Southern Companies' OATT, as currently written, could allow for the inclusion of amounts associated with "Other Postretirement Benefits" in the Working Capital component of rate base. However, Southern Companies explain that these amounts were not recognized under, or included in, the OATT formula rate when it was negotiated.¹⁶ Therefore these amounts should be explicitly excluded from the OATT formula rate. Additionally, these sheets fail to reflect the Commission's directive in the March 10 Order to revise the OATT to specify that only the jurisdictional

¹³ Essentially, Southern Companies should remove line 6 on Exhibit A, page 2 of 6, which decreases pension income by \$70.2 million each year and recalculate its 2007 formula rate adjustments accordingly.

¹⁴ Because Southern Companies' adjustments to their formula rates in the 2007 True-Up filing also incorrectly adjusted pension income, they should also revise the 2007 True-Up filing to reflect the determinations in this order.

¹⁵ March 10 Order, 122 FERC ¶ 61,218 at P 25.

¹⁶ See Southern Companies, January 10, 2009 Filing at 3-4.

portion of prepaid pensions accrued since May 2003 be included in rate base. This, too, should be specified in the formula rate.

15. Southern Companies must also limit the amount of the prepaid pension assets that they collect in their future OATT formula rates. In years subsequent to 2007, Southern Companies incurs net pension expense and must reverse the amounts of prepaid pension assets that they have recorded in Account 128, the account used to reflect the prepaid pension asset, by charges to Account 926, the account used to reflect pension expense in Southern Companies' formula rates. However, we note that Southern Companies has included more in Account 128 than the Commission found allowable as prepaid pension asset in the March 10 Order.¹⁷ As discussed above, Southern Companies may only include the reversal of the portion of prepaid pensions that have been accrued after May 1, 2003 in their formula rates; they may not include any amount accrued before May 1, 2003. This will ensure that ratepayers will ultimately pay only for pension costs that Southern Companies have contributed to the pension trust. If Southern Companies charged ratepayers for the reversal of prepaid pensions accrued prior to May 1, 2003, ratepayers would pay more than Southern Companies actually paid to the pension trust. Accordingly, we will direct Southern Companies to include a provision in their OATT formula rate that limits the amount of prepaid pension reversals included in Account 926 of their formula rates to the jurisdictional portion of the prepaid pension asset accumulated after May 1, 2003.

B. Southern Companies' Clarification of the Record

16. Southern Companies' initial compliance filing also included two requests for clarification. While Southern Companies state that rehearing of the March 10 Order is not warranted, they seek to clarify the record concerning two matters raised in the March 10 Order. First, Southern Companies state that the March 10 Order does not preclude them from submitting a future section 205 filing seeking to include prepaid pension costs accrued before May 1, 2003 in rate base by demonstrating that pension income reduced transmission rates prior to May 2003, and that they incurred financing costs associated with those reduced rates. We agree. Nothing herein precludes Southern Companies from making a fully supported filing seeking to include additional amounts of prepaid pension income in their OATT formula rates for periods prior to May 1, 2003.

17. Second, they contend that the Commission should have concluded that Southern Companies justified the inclusion of their prepaid pension assets in rate base beginning September 1, 2002, not May 1, 2003. They assert that September 1, 2002, is the date

¹⁷ Using data supplied by Southern Companies, it appears that the allowable prepaid pension asset as of December 31, 2007 is approximately \$319.5 million.

when billings under the OATT formula rate first began, and therefore, is the date from which the reductions to OATT rates and the financing costs associated with such reductions first occurred.¹⁸ Southern Companies emphasize however, that they do not request rehearing of this issue, and that they fully accept the Commission's determinations in this regard. The Commission agrees with Southern Companies' assertion and will so clarify the record.

C. Customer Group's Request for Clarification and Rehearing

18. In addition to its request for clarification or rehearing regarding adjustments to utility plant accounts in rate base, which we discussed above, Customer Group also seeks clarification of the Commission's statement that, absent the settlement which initiated this proceeding,¹⁹ Southern Companies could have filed for a change in their formula rates pursuant to Attachment N of their OATT, which permits Southern Companies to make *pro forma* adjustments to the formula rate if there is a change to a "fundamental predicate," such as Commission accounting directives and precedents.²⁰ Customer Group argues that Southern Companies cannot rely on this statement to make unilateral changes to their formula rate in lieu of making a section 205 filing. Further, Customer Group states that fundamental predicate challenges may only be made by OATT customers and other interested parties, not the transmission provider. In addition, Customer Group contends that Commission precedent holds that the formula on file with the Commission is the actual filed rate, and not the inputs used or the charges produced by use of the formula; to change a filed rate, a section 205 filing must be made. Moreover, Customer Group argues that the contested statement is not essential to the conclusions in the March 10 Order and the Commission did not restate Customer Group's arguments in that order, so Customer Group asserts that the Commission did not make a substantive ruling on the subject. If the Commission did intend that as a substantive ruling, Customer Group requests rehearing for the reasons stated above.

¹⁸ Although the settlement that established formula rates had an effective date of May 1, 2003, the settlement provided that for the period of September 1, 2002, through May 1, 2003, "refunds will be determined by comparing the charges that emanate under the formula." *See Southern Company Services, Inc.*, Docket No. ER02-851-000, Offer of Settlement, Section VII.c.i. (June 18, 2003), *approved* 105 FERC ¶ 61,019 (2003).

¹⁹ The instant proceeding was initiated as a result of a settlement between Southern Companies, Customer Group, and Alabama Municipal Electric Authority (AMEA), resolving the 2005 True-Up proceeding. *Southern Company Services, Inc.*, Offer of Settlement, Docket No. ER06-919-000 (filed October 2, 2007) (2007 Settlement); see also March 10 Order, 122 FERC ¶ 61,218 at P 5.

²⁰ March 10 Order, 122 FERC ¶ 61,218 at P 20 n.17.

19. Southern Companies contend that the Commission merely recited a fact and that whether the Commission intended the statement to be a substantive ruling is immaterial because the proceeding was not filed pursuant to the OATT Attachment N's *pro forma* adjustment procedures.

20. In the March 10 Order, the parties argued whether Southern Companies had submitted their initial filing in this docket under Attachment N of the OATT. Attachment N states that "changes to fundamental predicates^[21] may necessitate *pro forma* adjustments to the formula rate calculations or changes to the formula rate, which may require changes to the input data, to restore the intent of the formula rate as reflected by such fundamental predicates." Southern Companies stated that, by filing under Attachment N, they were not required to submit all of the supporting data and meet the burden of persuasion otherwise required with a section 205 filing.²² However, we held that, because Southern Companies had submitted their filing under the 2007 Settlement agreement which required a section 205 filing, Southern Companies were obligated to meet all of the requirements that accompany a section 205 filing.²³ In a footnote, we opined that, absent the 2007 Settlement, Southern Companies could have filed under Attachment N.²⁴

21. We agree with Customer Group that the footnote regarding Attachment N was not a substantive ruling. The filing addressed in the March 10 Order was treated as a section 205 filing, due to the circumstances of the case. If the issue of whether a filing may be made under Attachment N arises again, we will address that issue within the context of that situation.

The Commission orders:

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

²¹ The fundamental predicates are as follows: (i) the FERC Uniform System of Accounts; (ii) the Transmission Provider's accounting policies/practices/procedures; (iii) FERC accounting directives and precedents; and (iv) the ratemaking practices of the transmission provider at the federal and state levels.

²² March 10 Order, 122 FERC ¶ 61,218 at P 12.

²³ *Id.* P 20.

²⁴ *Id.* P 20 n.17.

(B) Southern Companies are hereby directed to revise OATT Sheet Nos. 165 and 172 and revise their 2007 formula rates, as discussed in the body of this order within 30 days of the date of this order.

(C) Customer Group's request for clarification or rehearing is hereby granted in part, and denied in part, as discussed herein.

(D) Southern Companies are directed to submit a revised 2007 True-Up Filing, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.