

131 FERC ¶ 61,232
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. ER08-756-001

ORDER DENYING REHEARING

(Issued June 14, 2010)

1. Alabama Municipal Electric Authority (AMEA) filed a request for rehearing of the Commission's May 27, 2008 order in this proceeding,¹ which accepted a Transmission Facility Cost Allocation Tariff (Cost Allocation Tariff) and Pro Forma Service Agreement (Service Agreement) filed by Southern Company Services, Inc. In this order, the Commission denies AMEA's request for rehearing, as discussed below.

I. Background

2. On March 28, 2008, Southern Company Services, Inc., acting as agent for Alabama Power Company (Alabama Power), Georgia Power Company (Georgia Power), Gulf Power Company (Gulf Power), and Mississippi Power Company (Mississippi Power) (collectively, Southern), filed a Cost Allocation Tariff and Service Agreement pursuant to section 205 of the Federal Power Act (FPA)² and section 35 of the Commission's Rules of Practice and Procedure.³ Southern explained that the Cost Allocation Tariff and Service Agreement provide the contractual vehicle for these transmission-owning operating company affiliates to allocate cost responsibility among themselves for certain upgrades to the transmission system of one affiliate by another affiliate, and will prevent cross-subsidization between retail ratepayers and promote transmission infrastructure development.

3. Alabama Power, Georgia Power, Gulf Power, and Mississippi Power are transmission-owning operating company affiliates and are each subsidiaries of The

¹ *Southern Company Services, Inc.*, 123 FERC ¶ 61,204 (2008) (Initial Order).

² 16 U.S.C. § 824d (2006).

³ 18 C.F.R. § 35.12 (2009).

Southern Company, a public utility holding company. Each of these operating company affiliates is a traditional, vertically-integrated public utility, and each owns and operates generation, transmission, and distribution facilities and provides electric service for retail and wholesale customers in its service area. Southern has coordinated and integrated its electric utility system operations and planning in order to achieve economies of scale, and operates as an integrated system under a single control area. Each operating company affiliate is regulated by its respective state public service commission and by this Commission.

4. In its March 28, 2008 filing, Southern explained that each operating company affiliate is responsible for the costs associated with serving its respective retail customers. Southern has experienced and anticipates future instances in which one of the operating companies (Burdened Operating Company) will incur costs associated with transmission system improvements or upgrades undertaken for the benefit of another Operating Company (Benefited Operating Company), as the improvements relate to serving the Benefited Operating Company's retail load. Southern explained that the Cost Allocation Tariff, a contractual cost-allocation agreement, ensures that the Burdened Operating Company is properly reimbursed for the costs it incurs on behalf of, and for the benefit of, the Benefited Operating Company.

5. AMEA protested Southern's March 28, 2008 filing, requesting that the Commission reject the Cost Allocation Tariff and Service Agreement, or, in the alternative, suspend them for five months and set them for hearing. In its protest, AMEA explained that it buys electricity at wholesale for its eleven members who each own and operate retail distribution systems. AMEA sells power to these eleven members pursuant to long-term wholesale power sales contracts. Beginning on January 1, 2006, AMEA began taking service under Southern's market-based rate tariff through a Power Sales Agreement with Alabama Power to supply its members' requirements. At this time, AMEA also began taking transmission service pursuant to Southern's Open Access Transmission Tariff (OATT).

6. In its protest, AMEA argued that the proposed Cost Allocation Tariff worsens the lack of comparable rates AMEA has experienced as a network customer under Southern's OATT. Specifically, AMEA asserted that comparability requires that a transmission provider's use of its transmission system for bundled retail service be comparable to its treatment of wholesale customers using the transmission system to serve their native load.⁴ AMEA also argued that the comparability issues raised by Southern's Cost Allocation Tariff and Service Agreement were tied to those already being addressed by the Commission on rehearing in Docket No. EL06-93-001. Thus, AMEA requested that

⁴ AMEA April 18, 2008 Protest at 8 (citing *American Electric Power Service Corp.*, 67 FERC ¶ 61,168, at 61,490 (1994) (*AEP*)).

the Commission make acceptance of the Cost Allocation Tariff and Service Agreement contingent on the outcome of the proceeding in Docket No. EL06-93-001.⁵

7. In the Initial Order, the Commission rejected AMEA's argument that the Cost Allocation Tariff and Service Agreement should be rejected because they exacerbate Southern's and Alabama Power's alleged violation of the Commission's comparability standard. The Commission found that AMEA had previously raised, and the Commission had previously rejected, the arguments upon which AMEA's protest is premised.⁶ The Commission also rejected AMEA's argument that Commission approval of the Cost Allocation Tariff and Service Agreement would appear to preempt state regulation of a portion of the Operating Companies' costs of providing retail service because transmission costs that would be reallocated under the Cost Allocation Tariff would include transmission costs that are recovered in bundled retail rates.⁷ In addition, the Commission disagreed with AMEA's argument that the Cost Allocation Tariff is not a tariff of general applicability under which conforming service agreements may be filed with the Commission pursuant to the Commission's Electric Quarterly Report filing requirements. The Commission rejected AMEA's argument that the Cost Allocation Tariff allows Southern to unduly discriminate against independent power producers when computing the Monthly Facilities Charge under section 6.2 of the Cost Allocation Tariff. Finally, the Commission denied AMEA's request that the outcome of the instant proceeding be made contingent on the outcome of the proceedings in *Alabama Municipal*.

II. Request for Rehearing

8. On June 26, 2008 AMEA submitted a request for rehearing of the Initial Order.

9. AMEA makes a variety of arguments, but in essence, seeks rehearing of the Commission's findings in the Initial Order that: (1) comparability does not encompass a comparison of unbundled transmission (OATT) rates with the transmission components of bundled grandfathered wholesale sales or bundled retail sales of electric energy; and (2) requiring Southern to replace its system-average OATT rates with zonal rates set at

⁵ AMEA April 18, 2008 Protest at 3.

⁶ Initial Order, 123 FERC ¶ 61,204 at P 26 (citing *Alabama Municipal Electric Authority v. Alabama Power Co. and Southern Company Services, Inc.*, 119 FERC ¶ 61,286, at P 38 (2007) (*Alabama Municipal*)).

⁷ *Id.* P 27.

the level of the transmission component of Alabama Power's bundled retail rates⁸ would require the Commission to adopt a state-set transmission rate component over which it has no jurisdiction for use as a Commission-jurisdictional transmission rate and also would result in unjust and unreasonable cost shifting to other customers.

10. Specifically, AMEA argues that the Initial Order errs by departing from precedent regarding the scope of the Commission's comparability principle and relying on the Commission's holding in *Alabama Municipal* that comparability requires only "a comparison of the transmission components of unbundled wholesale and retail rates."⁹ AMEA contends that the Commission's failure to reconcile this precedent with its Initial Order is arbitrary and capricious and not the product of reasoned decision-making.¹⁰ AMEA alleges that the Initial Order permits Southern to charge AMEA under a different rate structure for transmission service than it uses for charging itself without any analysis as to whether the higher rate charged to AMEA for using the same facilities that Alabama Power uses to serve its native load constitutes undue discrimination.¹¹ It asserts that the Initial Order contradicts the Transmission Pricing Policy Statement, which requires that any transmission pricing proposal must meet the comparability standard articulated in *AEP*.¹² AMEA also argues that the Commission affirmed in Order No. 890-B that

⁸ Under AMEA's proposal, a transmission customer would be charged only the zonal rate where power sinks, regardless of the number of zones between source and sink.

⁹ AMEA June 26, 2008 Request for Rehearing at 8 (citing Initial Order, 123 FERC ¶ 61,204 at P 26 (quoting *Alabama Municipal*, 119 FERC ¶ 61,286 at P 38)).

¹⁰ *Id.* at 12 (citing *East Kentucky Power Coop.*, 489 F.3d 1299, 1306 (D.C. Cir. 2007) (quoting *United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 210 (D.C. Cir. 1984)).

¹¹ *Id.* at 8-10 (citing *AEP*, 67 FERC ¶ 61,168 at 61,490; citing Initial Order, 123 FERC ¶ 61,204 at P 26).

¹² *Id.* at 10-11 (citing *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act: Policy Statement*, FERC Stats. & Regs. ¶ 31,005, at 31,140-43 (1994) (comparability of service applies to price as well as terms and conditions), *order on reconsideration*, 71 FERC ¶ 61,195 (1995) (Transmission Pricing Policy Statement); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 117, 122 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009)).

comparability involves a comparison between the service received by the transmission provider for its native load and service received by transmission customers for serving their load.¹³

11. AMEA argues that the Initial Order errs by holding that the Commission's decision to not exercise jurisdiction over bundled retail sales in Order No. 888 renders the Commission unable to demand a comparable rate structure in unbundled wholesale rates over which it has jurisdiction.¹⁴ It states that Southern's OATT, which adopts the Commission's *pro forma* OATT, confirms the broader scope of the Commission's comparability requirement because it provides by its terms that Network Integration Transmission Service under the OATT is intended to be comparable to the manner in which Southern uses its transmission system to serve Alabama Power's bundled retail power customers. AMEA also asserts that Order No. 890 confirms that the Commission's comparability requirement requires that open access transmission service to third parties be comparable to the way that the transmission provider uses its system to serve its bundled retail native-load customers.¹⁵

12. AMEA contends that contrary to the finding in the Initial Order, the Commission's comparability requirement has required a comparison between open access and unbundled transmission service to third parties and the transmission provider's bundled service to wholesale and retail native load customers. It argues that the Commission ignores record evidence that Southern is providing a service under the Cost Allocation Tariff designed to "protect [its] retail customers" while denying that same protection to AMEA and other competitors that take transmission service under Southern's OATT.¹⁶ In addition, AMEA contends that the Initial Order errs by concluding that the Commission cannot remedy undue discrimination where the

¹³ *Id.* at 11 (citing *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-B, 123 FERC ¶ 61,299, at P 124).

¹⁴ *Id.* at 12-16 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036; Order No. 890, FERC Stats. & Regs. ¶ 31,241; *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681, 694-95 (D.C. Cir. 2000)).

¹⁵ *Id.* at 14-15 (citing Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 489-95, 770, 924, 927).

¹⁶ *Id.* at 16 (quoting Order No. 890-A at P 7).

necessary comparison is between a jurisdictional wholesale transmission rate and a non-jurisdictional bundled retail rate.¹⁷

13. In response to the Commission's determination that AMEA has not connected the lack of comparability that it perceives under Southern's OATT to the instant proceeding, AMEA argues that the undue discrimination it complains of in this proceeding is a product of the fact that AMEA's rate under Southern's OATT is not affected in a manner comparable to the treatment of Alabama Power's rates under the Cost Allocation Tariff.¹⁸ It concludes that the Initial Order creates a loophole in the Commission's comparability regime and that the Commission's regulatory oversight capability is undermined in violation of its mandate under FPA sections 205 and 206 to prescribe just and reasonable rates.¹⁹

14. Finally, AMEA argues that the Initial Order erroneously concluded that granting AMEA's protest would require the Commission to set wholesale OATT rates at levels equal to the transmission component of state-regulated bundled retail rates.²⁰ It states that it is not arguing that the Commission use state-set rates to match the Alabama Power rate, and requests that Southern use consistent rate determinants and consistent cost-allocation principles in setting unbundled transmission rates and bundled wholesale and retail rates charged by Southern.²¹

III. Discussion

15. For the reasons discussed below, we will deny AMEA's request for rehearing of the Initial Order. AMEA's request for rehearing restates the same arguments regarding

¹⁷ *Id.* at 17-18 (citing *FPC v. Conway Corp.*, 426 U.S. 271, 272 (1976); *Kansas Cities v. FERC*, 723 F.2d 82, 91 (D.C. Cir. 1983)).

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 20-21 (citing 16 U.S.C. §§ 824d, 824e (2006)).

²⁰ *Id.* at 21-23 (citing Transmission Pricing Policy Statement, FERC Stats. & Regs., ¶ 31,005, at 31,140-43; *FPC v. Conway Corp.*, 426 U.S. 271; 16 U.S.C. §§ 824d, 824e (2006)).

²¹ *Id.* at 22.

comparability that it raised in its request for rehearing of the Commission's order in *Alabama Municipal*, which the Commission denied.²²

16. As explained in the *Alabama Municipal* Rehearing Order, upon further consideration, the Commission concluded that its initial analysis in *Alabama Municipal* was unnecessary to resolve the matter raised by AMEA. While the Commission explained at some length in *Alabama Municipal* its interpretation of the comparability standard and its application to AMEA, that explanation was a digression from the matter at issue: Was it appropriate for AMEA to bear a Southern-wide system average rate under Southern's OATT or an Alabama Power-specific transmission rate under the OATT? As explained in the *Alabama Municipal* Rehearing Order, the answer turns on whether or not Southern's OATT, which includes a system-wide, system average²³ transmission rate, complies with the comparability standard as set forth in Order No. 888.²⁴ The simple answer, as discussed in the *Alabama Municipal* Rehearing Order and below, is that Southern's system-average rate meets the requirement of the Commission's rate comparability standard.

17. On rehearing, AMEA contends that the Initial Order errs by permitting Southern to charge AMEA under a different rate structure for transmission service than it uses for charging itself contrary to Order No. 888, Order No. 890,²⁵ the Transmission Pricing Policy Statement,²⁶ and other Commission precedent.²⁷ AMEA contends that its view of

²² See *Alabama Municipal Electric Authority v. Alabama Power Company and Southern Company Services, Inc.*, 131 FERC ¶ 61,101 (2010) (*Alabama Municipal* Rehearing Order).

²³ Southern's system-wide tariff includes a system average rate. In 1991, the Commission directed Southern to revise the transmission component of its formula rate to reflect system-wide costs. *Southern Company Services, Inc.*, 55 FERC ¶ 61,173, *order on reh'g*, 57 FERC ¶ 61,093 (1991), *aff'd sub nom. Alabama Power Company v. FERC*, 993 F.2d 1557 (D.C. Cir. 1993); *see also Southern Company Services, Inc.*, 105 FERC ¶ 61,019 (2003) (approving settlement with Southern's OATT structure). Southern has used system-average costs for pricing its single system-wide OATT service since then.

²⁴ As explained further below, Order No. 888 contemplated that, for a multi-utility system like Southern, a compliant OATT would include just one, single-system transmission rate. In this order, we use the term "rate" to refer to the single system-wide rate that Order No. 888 requires certain public utility holding companies to provide for in a *pro forma* tariff.

²⁵ Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 489-95.

²⁶ Transmission Pricing Policy Statement, FERC Stats. & Regs. ¶ 31,005.

the Commission's comparability requirement, which would require comparing Southern's OATT rates to the transmission component of Alabama Power's bundled rates, is consistent with pre-Order No. 888 precedent. AMEA further argues that both Order No. 888 and Order No. 890 make clear that comparability requires a comparison of unbundled transmission service to third parties with the transmission provider's use of its system to provide bundled (either retail and wholesale) service to native-load customers.²⁸

18. AMEA's arguments do not persuade us to grant rehearing. As explained in the *Alabama Municipal Rehearing Order*, while Order No. 888 discussed comparability at length, it primarily discussed comparability with respect to non-rate terms and conditions. Order No. 888 only discussed comparability with respect to rates in the context of public utility holding companies. It specifically provided that certain public utility holding companies must file a single system-wide rate:

Public utility members of registered and exempt holding companies that are also members of tight or loose pools are subject to the tight and loose pool requirements set forth above. The remaining holding company public utility members ... are required to file a single system-wide Final Rule pro forma tariff permitting transmission service across the entire holding company system at a single price....²⁹

The Commission found that, for certain public utility holding companies such as Southern, the filing of a system-wide rate would meet the comparability requirement. As Southern argued in its answer to AMEA's complaint in Docket No. EL06-93-000,

²⁷ *AEP*, 67 FERC ¶ 61,168.

²⁸ See AMEA June 26, 2008 Request for Rehearing at 4-5, 9, 13, 16; AMEA April 18, 2008 Protest at 8. By the phrase, "the transmission provider's use of its system to service its bundled retail native load," AMEA is referring to the cost, or rate, that the transmission provider (here, Alabama Power) is deemed to charge itself to serve its native load customers and which it then passes on to those customers in the transmission component of its bundled rates to those customers. It is AMEA's position that it should not be required to pay Southern's OATT rates because they are higher than the transmission component of Alabama Power's bundled rates; in other words, Alabama Power's charge for use of the system, as set in bundled rates, should not be lower than the unbundled transmission rates that its competitors (that is, AMEA and its member cities) pay under the Southern OATT.

²⁹ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,728.

because it is a public utility holding company that is not a member of a tight or loose pool, it was required to have a single system-wide transmission rate on file with the Commission.³⁰ All of the arguments raised by AMEA in both the complaint proceeding and in this proceeding, including its argument on rehearing that the Initial Order erred by finding that AMEA has not connected the lack of comparability that it perceives under Southern's OATT to the instant proceeding, concerned either prior Commission pronouncements concerning comparability with respect to non-rate terms and conditions or companies in different circumstances from Southern (companies that are not public utility holding company members that are also members of tight or loose pools). Accordingly, because Southern's "single system-wide [open access transmission] tariff permitting transmission service across the entire holding company system at a single price" is just and reasonable insofar as it satisfies the comparability requirement in Order No. 888,³¹ we reject AMEA's argument that the Initial Order errs by permitting Southern to charge AMEA under a different rate structure for transmission service than it uses for charging itself.

19. Because AMEA continues to misapply the comparability principle, its arguments that Southern's Cost Allocation Tariff and Service Agreement do not meet the requirement of the Commission's comparability standard are unfounded. Thus, we will deny rehearing.

The Commission orders:

AMEA's request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ Southern, in the complaint proceeding in Docket No. EL06-93-000, explained that Order No. 888 requires holding company systems, such as Southern, to file a tariff that uses a single, system-wide price, and therefore, Southern's use of single system pricing is just, reasonable, and not unduly discriminatory. Southern Company Services, Inc., Answer to Complaint, Docket No. EL06-93-000, at 11 (filed August 21, 2006).

³¹ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,728.