

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Southern Power Company

Docket Nos. ER03-713-000 and  
ER03-713-001

ORDER ACCEPTING AND SUSPENDING POWER PURCHASE AGREEMENTS,  
SUBJECT TO REFUND, ESTABLISHING HEARING PROCEDURES, AND  
DENYING PRIVILEGED TREATMENT

(Issued July 9, 2003)

1. In this order, the Commission accepts, suspends, and sets for hearing the long-term power purchase agreements (PPAs) between Southern Power Company (Southern Power) and its affiliates, Georgia Power Company (Georgia Power) and Savannah Electric and Power Company (Savannah Electric). As discussed below, we will accept the PPAs for filing, suspend them for a nominal period, to become effective on June 1, 2003, as requested, subject to refund. We will deny the request for privileged treatment of the PPAs. This order benefits customers by ensuring that affiliate transactions are just and reasonable.

**I. Background**

2. On April 7, 2003, Southern Power submitted a request for acceptance of two long-term, market-based rate power purchase agreements by and between Georgia Power and Southern Power (Georgia PPA) and Savannah Electric and Southern Power (Savannah Electric PPA). On May 16, 2003, Southern Power filed a non-public, confidential copy of the agreements with the Commission. The PPAs provide for the sale of capacity and energy from two new 620 MW gas-fired, combined cycle generating units to be constructed by Southern Power in Effingham County, Georgia. Under the Georgia Power PPA, Southern Power will provide Georgia Power with 1040 MW of power. Under the Savannah Electric PPA, Southern Power will provide Savannah Electric with 200 MW of power. Service under each of the PPAs is scheduled to commence on June 1, 2005 and terminate on May 31, 2020. The PPAs are the result of a Spring 2002 request for proposals (RFP) by Georgia Power and Savannah Electric.

3. While Southern Power and its affiliates have authorization to make sales at market-based rates, Southern Power states that it is submitting the PPAs for approval because they involve market-based rate sales to affiliates with franchised service territories. Southern Power states that "the [Georgia Commission] has certified the [PPAs] and, by virtue of its order, found such PPAs to include the most cost-effective and reliable capacity resources from the competitive wholesale market."<sup>1</sup>

## **II. Description of Selection Process**

### **RFP Process**

4. On April 3, 2001, Georgia Power and Savannah Electric issued a joint RFP to solicit proposals for 2,000-2,500 MW of power. Southern Power states the intent of the RFP was to enable Georgia Power and Savannah Electric to procure the most economical and reliable capacity resources for their customers. The RFP specifically requested proposals for seven- and fifteen-year terms beginning in the year 2005.

5. According to Southern Power, Georgia Power and Savannah Electric each selected the PPAs based on a mandatory competitive resource solicitation process conducted pursuant to Georgia law referred to as the Georgia Integrated Resources Planning (IRP) Act.<sup>2</sup> The Georgia IRP Act was adopted in 1991, and established comprehensive rules (IRP Rules) that specifically include requirements governing a utility's solicitation of new capacity and energy resources.

6. Pursuant to the IRP Rules, a utility first identifies its specific resource needs for serving retail customers based on load and demand forecasts that are reviewed and approved by the Georgia Commission. After identifying new resource needs, the utility then prepares an RFP that is submitted to the Georgia Commission and approved prior to issuance. The RFP identifies the capacity and energy needed, the time frame for the need, and the rules governing the competitive solicitation process. The RFP is then publicly announced and distributed in order to encourage the submittal of proposals. The RFP process is open to all potential power suppliers.

7. According to Southern Power, once the proposals were received, Georgia Power and Savannah Electric selected a short list of potential suppliers for further evaluation and

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<sup>1</sup>Southern Power Application at 9.

<sup>2</sup>O.C.G.A. § 46-3A-1 et seq. (2002).

negotiation. Southern Power states that the short list enabled the affiliates to save time and resources by focusing their efforts on the most likely candidates based on pricing and reliability. The affiliates then conducted negotiations with the short-listed suppliers in order to make their final selection. Southern Power states that, under Georgia law, the affiliates are permitted to negotiate both price and non-price factors as long as any changes made during negotiations improve each proposal with respect to the overall portfolio of proposals.

8. Nineteen potential bidders responded by submitting proposals. The RFP evaluation process resulted in Georgia Power's selection of two bidders: Southern Power and Duke Energy Southeast Marketing, LLC.<sup>3</sup> Under the Georgia Power PPA, Southern Power will provide Georgia Power with 1040 MW of power for fifteen years. The RFP evaluation process also resulted in Savannah Electric's selection of Southern Power to provide Savannah Electric with 200 MW of power for fifteen years. Both agreements will commence in the year 2005.

9. On October 30, 2002, the Georgia Commission initiated certification procedures and a consolidated public hearing on the Georgia Power and Savannah Electric RFP solicitation. Southern Power states that, on December 17, 2002, the Georgia Commission certified the PPAs as the most economical and reliable capacity resources for meeting the needs of the retail customers of Georgia Power and Savannah Electric.

### **III. Notice of Filing and Pleadings**

10. Notice of Southern Power's initial filing was published in the Federal Register, 68 Fed. Reg. 19,524 (2003), with protests and motions to intervene due on or before April 28, 2003. The Electric Power Supply Association (EPSA) filed a timely motion to intervene and protest. Calpine Corporation (Calpine) filed a timely motion to intervene stating it intended to file a protest detailing Calpine's concerns regarding the PPAs. On April 29, 2003, Calpine, filed a protest out of time. Both EPSA and Calpine state that the Commission should withhold approval of the PPAs, or in the alternative set the PPAs for

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<sup>3</sup>Consistent with Commission precedent, the rates, terms, and conditions of the Duke Energy PPA selected as a result of the RFP will be included in Southern Power's Electric Quarterly Report when such obligation arises pursuant to Order No. 2001. See Revised Public Utility Filing Requirements, Order No. 2001, 67 Fed. Reg. 31,043, FERC Stats. & Regs. ¶ 31,127 (2002); reh'g denied, Order No. 2001-A, 100 FERC ¶ 61,074 (2002); reconsideration and clarification denied, Order No. 2001-B, 100 FERC ¶ 61,432 (2002); Order No. 2001-C, 101 FERC ¶ 61,314 (2002).

hearing. On May 13, 2003, Southern Power filed an answer in opposition to EPSA and Calpine's motions to intervene and an answer to the protests. On May 28, 2003, Calpine filed a response to Southern Power's May 13 Answer. On June 12, 2003, Southern Power filed an answer to Calpine's May 28 response.

11. Notice of Southern Power's May 16, 2003 filing of the PPAs was published in the Federal Register, 68 Fed. Reg. 31,696 (2003), with protests and comments due on or before June 6, 2003. No further comments were filed.

#### **IV. Discussion**

##### **A. Procedural Matters**

12. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,<sup>4</sup> we will grant the timely, opposed motions to intervene of EPSA and Calpine. We find that good cause exists to grant the motions given their interest in this proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

13. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest or an answer to an answer unless otherwise ordered by the decisional authority.<sup>5</sup> We are not persuaded to allow Southern Power's and Calpine's answers, and will, therefore, reject them.

##### **B. Market-Based Sales to Affiliates**

###### **Southern Power's Arguments**

14. Southern Power contends that the rates in the PPAs are no higher than the prices Georgia Power or Savannah Electric would pay to purchase power from a non-affiliate and that the PPAs resulted from a competitive bidding process that satisfies the requirements set forth in Edgar.<sup>6</sup> Southern Power states that the Commission has previously accepted for filing five separate long-term, market-based rate power sales arrangements by Southern Power and its operating company affiliates. According to

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<sup>4</sup>18 C.F.R. § 385.214 (2003).

<sup>5</sup>18 C.F.R. § 385.213(a)(2) (2003).

<sup>6</sup>Boston Edison Re: Edgar Electric Energy Co., 55 FERC ¶ 61,382 (1991) (Edgar).

Southern Power, the PPAs at issue here are substantially similar to the PPAs previously accepted by the Commission and were also selected and certified pursuant to the same state public service commission supervised competitive bidding process.<sup>7</sup> Thus, Southern Power asserts that the Georgia Power PPA and the Savannah Electric PPA satisfy the Commission's concerns regarding affiliate abuse, and should be accepted conditioned upon Southern Power's adherence to the filing obligations set forth in Order No. 2001 for market-based power sales agreements.

### **Protestors' Arguments**

15. Calpine argues that the mere presence of an RFP process does not validate the request for market-based rates where improper affiliate relationships exist. It notes that, in Edgar, the Commission sought assurance that the benchmark evidence for non-price terms was not ultimately distorted by the exercise of market power by the seller or its affiliates. Calpine submits that Southern Power has offered no record evidence to substantiate this requirement of Edgar.

16. Calpine also argues that Southern Company (Southern)<sup>8</sup> used its control of its transmission service reservation process to provide a competitive advantage for its affiliates in the RFP process. Specifically, Calpine alleges that Southern effectively treated its affiliate Southern Power as a network resource while, in comparison, non-affiliate bids were either assessed cost adders by Southern for transmission expansion during the RFP bid evaluation process or rejected outright due to an inability to complete the required system upgrades in time to satisfy the in-service date under the RFP. In addition, Calpine argues that Southern Power leverages its monopoly position to further support its merchant generation arm. According to Calpine, the PPAs are part of Southern Power's low risk competitive generation strategy, in which substantially all of Southern Power's merchant generation capacity is hedged through affiliated contracts before plants are constructed.

17. EPSA raises concerns that the PPAs may limit wholesale competition and states that the Commission must ensure a level playing field for all competitors, especially in the context of generation owned by, or affiliated with, transmission owners. Calpine

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<sup>7</sup>Southern Power Application at 3.

<sup>8</sup>Southern Company includes Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company.

argues that Southern Power is attempting to lock up its merchant generation capacity under long-term contracts with its regulated franchised utilities which is similar in nature to Cinergy Services, Inc. (Cinergy).<sup>9</sup> Calpine notes that in Cinergy, the Commission stated that it would in the future consider modifying its approach to analyzing competitive effects of intra-corporate transactions of this nature.<sup>10</sup> Protestors submit that the time is ripe for the Commission to engage in such an analysis, and that the Commission must definitively establish policy parameters regarding affiliate transactions that may impact competitive markets.

18. According to Protestors, this case is complicated further by Southern Power's existing generation and transmission market power. They note that, in AEP,<sup>11</sup> the Commission applied a new generation market power screen, known as the Supply Margin Assessment ("SMA") and found that Southern had the ability to exercise market power within its control area market because its generation is needed to meet the market's peak demand, and imposed mitigation measures on Southern and its affiliates inside its control area market. Protestors argue that it is inappropriate at this time for the Commission to approve the PPAs until Southern has adequately mitigated its market power either by implementing the mitigation measures identified in AEP, or pursuant to another Commission initiative designed to address Southern's market power.<sup>12</sup>

19. Accordingly, Protestors request that the Commission reject the application, or set this matter for an evidentiary trial-type hearing.

### **Commission Determination**

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<sup>9</sup>See Cinergy Services, Inc., 102 FERC ¶ 61,128 at P 24 (2003) (Cinergy) (affiliate transactions can pose problems for the competitive procurement process and the development of robust regional wholesale competition).

<sup>10</sup>See Cinergy.

<sup>11</sup>See AEP Power Marketing, Inc., et al., 97 FERC ¶ 61,219 (2001) (AEP), reh'g pending.

<sup>12</sup>In light of our decision to set the PPAs for hearing, as discussed below, if the PPAs are found to be just and reasonable, Protestors' concerns in this regard will have been addressed in this case.

20. As the Commission stated in Edgar, "where affiliates are entering agreements for which approval of market-based rates is sought, it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted."<sup>13</sup> In Edgar, we held that in analyzing market-based rate transactions between an affiliated buyer and seller, we must ensure that the buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and non-price terms. The Commission noted several ways for a utility to show it has not unduly favored its affiliates. One type of evidence is direct head-to-head competition between the seller and competing unaffiliated suppliers either in a formal solicitation or in an informal negotiation process. When such evidence is presented, the Commission seeks assurance that: (1) the solicitation or negotiation was designed and implemented without undue preference for the affiliate; (2) the analysis of the bids or responses did not favor the affiliate, particularly with respect to evaluation of non-price factors; and (3) the affiliate was selected based on some reasonable combination of price and non-price factors.<sup>14</sup> If the affiliate is not the lowest priced option, the applicant must provide sufficient justification for why the affiliate was chosen over alternative non-affiliated sellers.

21. An alternative type of evidence would be the prices which non-affiliated buyers were willing to pay for similar services.<sup>15</sup> The Commission would also consider benchmark evidence showing the prices, terms and conditions of sales that non-affiliated sellers have made. This evidence could include purchases made by the buyer, or by other buyers in the relevant market.<sup>16</sup>

22. Notwithstanding Southern Power's argument that the Commission has previously accepted substantially similar PPAs between Southern Power and its operating company affiliates, the Commission has become increasingly concerned about affiliate transactions

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<sup>13</sup>Edgar, 55 FERC at 62,167. The Commission explained that its "concern with the potential for affiliate abuse is that a utility with a monopoly franchise may have an economic incentive to exercise market power through its affiliate dealings. The potential abuses include such practices as affiliates selling products to a franchised utility at excessive prices . . . which are examples of market power that is exercised to the disadvantage of captive customers and other potential nonaffiliated power suppliers." Id. n.56.

<sup>14</sup>Id. at 62,168.

<sup>15</sup>Id. at 62,169.

<sup>16</sup>Id. See also Ocean State Power II, 59 FERC ¶ 61,360 at 62,333 (1992), order denying reh'g and granting clarification, 69 FERC ¶ 61,146 (1994).

and their potential impact on wholesale competition. In Ameren Energy Marketing Company, 99 FERC ¶ 61,226 (2002), the Commission set for hearing a case in which Ameren Energy Marketing Company (AEM) proposed to make sales to its franchised utility affiliate, Union Electric Company d/b/a AmerenUE (AmerenUE). The power sales agreement between AEM and AmerenUE was the result of an RFP initiated by AmerenUE. AEM argued that its proposal was consistent with several prior Commission orders granting authority to make such sales.<sup>17</sup> Specifically, AEM argued that the bidding process initiated by AmerenUE involved the participation of AEM and many other bidders and that an independent consultant evaluated the bids. AEM claimed that the PSA resulted from a competitive process, and that there was benchmark evidence of market value of contemporaneous sales by non-affiliate sellers for similar services in the relevant market. AEM asserted that these factors satisfied the Commission's concerns about affiliate abuse. However, citing to concerns as to the potential for cross-subsidization and market power gained through affiliate relationships and finding that AEM did not provide sufficient evidence to show that its benchmark analysis was appropriate, the Commission ordered an evidentiary hearing.

23. Our Section 205 review of affiliate transactions under Edgar is intended to prevent affiliate abuse and to ensure prices that would be consistent with competitive outcomes. Where, as here, affiliates seek Commission authorization to transact with each other at market-based rates, "it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted."<sup>18</sup>

24. Accordingly, the Commission must examine affiliate transactions to ensure that they do not adversely impact either customers or wholesale competition. We note that the Protestors have raised concerns regarding the RFP process and the impact of the PPAs on wholesale competition. Protestors contend that Southern Power has failed to demonstrate that the PPAs are the product of a fair, non-discriminatory, and non-preferential process which is not injurious to wholesale competition in the region.

25. As discussed above, where affiliates are entering into agreements for which approval of market-based rates is sought, it is essential that customers be protected and

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<sup>17</sup>See, e.g., Boston Edison Re: Edgar Electric Company, 55 FERC ¶ 61,382 (1991) (Edgar); Ocean State Power II, 59 FERC ¶ 61,360 (1992), reh'g denied, 69 FERC ¶ 61,146 (1994).

<sup>18</sup> Edgar, 55 FERC at 62,167; see also Entergy Services, Inc., et al., 103 FERC ¶ 61,256 (2003).

that transactions be above suspicion in order to ensure that the market is not distorted. The Commission's preliminary analysis indicates that the PPAs have not been shown to be just and reasonable, and may be unjust unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed PPAs for filing, suspend them for a nominal period, to become effective on June 1, 2003, as requested, subject to refund, and establish a hearing on the justness and reasonableness of the PPAs.

26. As a matter of policy, the Commission carefully scrutinizes all transactions involving public utilities and their affiliates, including the potential adverse impacts of those transactions on customers or wholesale competition. Where, as here, there is insufficient evidence to determine whether affiliate transactions will adversely affect wholesale competition, the Commission examines these matters in evidentiary hearings. We emphasize that in deciding to set this matter for hearing, it is not our intention to second-guess state decisions regarding the best way to supply retail load requirements. Instead, we are acting pursuant to our obligation under the FPA to ensure that wholesale rates remain just and reasonable and are not unduly discriminatory.

27. The hearing should determine: (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.

### **Request For Privileged Treatment of PPAs**

28. Southern Power filed the PPAs with the Commission under seal, requesting privileged treatment pursuant to Section 388.112 of the Commission's regulations.<sup>19</sup> Applicants submit that the PPAs contain confidential, proprietary, and highly commercially sensitive information. We will deny Southern Power's request for privileged treatment. The Commission has held that the longstanding benefits of public access to filings under Section 205 of the FPA outweigh the potential competitive disadvantage of public disclosure. We have also stated that long term service agreements are not entitled to confidential treatment as trade secrets, commercial or financial information obtained from a person, or privileged or confidential under Section 388.107 of our regulations.<sup>20</sup>

The Commission orders:

(A) As discussed in the body of this order, the PPAs are hereby accepted for filing, suspended for a nominal period, to become effective on June 1, 2003, subject to refund.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act, (18 C.F.R., Chapter I) a public hearing shall be held in Docket Nos. ER03-713-000 and ER03-713-001, as discussed in this order.

(C) A Presiding Administrative Law Judge (ALJ), to be designated by the Chief Administrative Law Judge for that purpose, pursuant to 18 C.F.R. § 375.304 (2003), must convene a prehearing conference in this proceeding to be held within approximately fifteen (15) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. The prehearing conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided for in the Commission's Rules of Practice and Procedure.

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<sup>19</sup>18 C.F.R. § 388.112 (2003).

<sup>20</sup>See *Southern Company Services, Inc., et al.*, 100 FERC ¶ 61,328 (2002); Order No. 2001, FERC Stats. & Regs. ¶ 31,127 (2002).

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(D) Southern Power's request for privileged treatment of the PPAs is hereby denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.