

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell and Joseph T. Kelliher,

Southern Company Services, Inc.

Docket Nos. ER02-851-017

ORDER DENYING REHEARING

(Issued December 22, 2004)

1. In this order, we deny a request by Southern Company Services, Inc.¹ (Southern) for rehearing of our order issued in this proceeding on September 22, 2004.² *Southern Company Services, Inc.*, 108 FERC ¶ 61,295 (2004) (September 2004 Order).

2. In the September 2004 Order, we granted in part a request for rehearing by Alabama Municipal Electric Authority (AMEA) seeking resolution of an issue upon which the Commission had previously reserved decision because the issue was premature, *see Southern Company Services, Inc.*, 105 FERC ¶ 61,019 at P 32 (2003) (October 2003 Order). In the September 2004 Order, we again concluded that AMEA's concerns were premature, but that they could be raised when Southern files its November 2005 Annual Informational Filing (discussed more fully below). September 2004 Order, 108 FERC ¶ 61,295 at P 15-16. In response to the September 2004 Order, Southern argues that the Commission erred by mischaracterizing the terms of the parties' Settlement and the formula rates approved in the October 2003 Order by allowing parties an opportunity to reopen issues resolved by the Settlement.

¹ Southern Company Services, Inc., filed as agent for Alabama Power Company (Alabama Power), Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, and Southern Electric Generating Company (collectively, Southern Companies).

² Southern styles its pleading as a "request for clarification or, in the alternative, rehearing;" however, in substance it is a request for rehearing and we will treat it accordingly.

3. In this order, we will deny rehearing because the findings in the September 2004 Order are consistent with the terms of the parties' Settlement. This order benefits customers by providing clarity concerning the process by which customers of Southern can raise objections to Southern's proposed open access transmission tariff (OATT) rates.

Background

4. The October 2003 Order approved the parties' Settlement (with a modification not relevant here), and reserved decision on AMEA's argument that, when it begins taking transmission service under Southern's OATT in 2006, it will be at a competitive disadvantage *vis a vis* Southern's affiliate, Alabama Power, if AMEA is required to pay transmission rates calculated based on Southern's system-wide average costs, while Alabama Power is allowed to continue to purchase transmission services to serve its retail load based on its stand-alone costs. The October 2003 Order reserved decision on this issue because AMEA will continue taking transmission service under its existing contract with Alabama Power until 2006.

5. The September 2004 Order affirmed that the issue raised by AMEA regarding the transmission costs it would pay under Southern's OATT was premature because AMEA was not yet taking service under Southern's OATT and, thus, AMEA was not presently being harmed by the alleged unfairness of the OATT rate to be charged to AMEA compared to the transmission rates charged to Alabama Power. However, the order found that this determination did not preclude AMEA from raising this issue at the appropriate time in a forum where the merits of this issue would more appropriately be addressed, *i.e.*, in response to Southern's November 2005 Informational Filing laying out the charges it planned to collect under Southern's OATT for calendar year 2006.³

6. The September 2004 Order explained that, if AMEA begins taking service under Southern's OATT in 2006, the rate AMEA would be charged would be the rate developed in Southern's November 2005 Annual Informational Filing. AMEA and Southern would have an opportunity at that time to informally resolve the matter and, if the parties are unable to informally resolve their differences, AMEA could then file a Formal Challenge with the Commission concerning Southern's filing. The September 2004 Order stated

³ The Settlement, the process for calculating the OATT rates, and the process for challenging the OATT rates are described in greater detail in the October 2003 Order, 105 FERC ¶ 61,019 at P 10-21.

that, in that Formal Challenge, AMEA could raise the issue of whether AMEA's transmission rates under the OATT should be developed based on Southern's system-wide average costs.

7. In response to the September 2004 Order, Southern filed a request for rehearing arguing that the September 2004 Order would allow AMEA to seek to undo the underlying OATT rate structure in the Annual Informational Filing review process, and that this would violate the procedures agreed upon by the Settlement Parties and included in Southern's OATT. Specifically, Southern argues that the procedures for review and challenge of its Annual Informational Filings were not designed as a forum for a party to advocate a change in a "Fundamental Predicate." To the contrary, Southern argues, the purpose of such Predicate Challenges is solely to restore the parties' original bargain, when necessitated by a change in accounting standards or ratemaking principles.

8. In Southern's view, its Annual Informational Filings are submitted merely to update the data inputs to the formula rate and AMEA should be barred from raising its reserved issue in the context of a challenge to an Annual Informational Filing. In Southern's view, if AMEA persists in its claims, the appropriate forum for it to challenge the rate it must pay under the OATT is to request the filing of an unexecuted transmission service agreement or to file a complaint.

9. Alabama Electric Cooperative, Inc., South Mississippi Electric Power Association and Southeastern Federal Power Customers (collectively, Customers) jointly filed an answer. Customers take no position on the merits of AMEA's contention as to an appropriate rate and take no position on whether the OATT procedures contemplate the precise issue raised by AMEA. However, Customers are deeply concerned that Southern's arguments mischaracterize the review and challenge procedures as much more limited and less functional than they are, or ever were, intended to be.

10. AMEA also filed an answer. AMEA expresses support for Customers' arguments and argues that when the Commission identified the proceeding in which AMEA could raise its arguments, it was acting within its lawful discretion, regardless of whether this conformed to the parties' Settlement.

11. Finally, Southern filed an answer to the answers of Customers and AMEA, stating that it basically agrees with Customers' characterization of the review and challenge procedures, but arguing that these procedures do not apply to the issue raised by AMEA. Southern also argues that AMEA's answer raises a new argument and should be denied.

Discussion

12. As a preliminary matter, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2004), prohibits an answer to a request for rehearing. Thus, the answers of Customers and AMEA will be rejected. Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004), we also will deny Southern's answer thereto.

13. The heart of Southern's argument is that assuming AMEA begins taking transmission service under Southern's OATT in 2006, it should not be permitted to raise this issue in response to Southern's November 2005 Annual Informational Filing because such challenges may only occur when there is a change to a Fundamental Predicate.

14. The problem with this argument is that it overlooks the fact that, when the parties were unable to reach agreement on this issue, they specifically kept the issue out of the Settlement and preserved AMEA's right to raise the issue later.⁴ Excluding consideration of this issue from the Settlement's procedures to review and challenge Southern's November 2005 Annual Informational Filing would have the practical effect of deciding the issue against AMEA, without any consideration of the merits of the argument, even though the parties expressly agreed in their Settlement that the issue was to be left open and even though the Commission explicitly reserved decision on this issue in both the October 2003 Order and the September 2004 Order.

15. We stand by our finding in the September 2004 Order that AMEA's issue (*i.e.*, how AMEA's transmission rates should be developed) may appropriately be raised in response to Southern's November 2005 Annual Informational Filing. Accordingly, we deny rehearing.

⁴ The parties' Offer of Settlement provides, at n.1, that "[t]he Settlement resolves all of the issues that are common among the active parties; however, two party-specific issues remain unresolved. Those parties, [AMEA] and Calpine Corporation, support the Settlement in this proceeding, but reserve the right to pursue resolution of their respective discrete issues." The issue reserved by AMEA is the same issue discussed here and in the prior two orders in this proceeding.

The Commission orders:

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

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Deputy Secretary.