

121 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Company Energy Marketing, L.P. Southern Company Services, Inc.	Docket Nos. ER97-4166-024 ER96-780-017 EL04-124-005
---	---

ORDER DENYING REQUEST FOR REHEARING

(Issued October 18, 2007)

1. On July 23, 2007, Southern Company Services, Inc., acting as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company (collectively, Southern Companies), filed a request seeking clarification or, in the alternative, rehearing of the Commission's order issued on June 21, 2007 in this proceeding.¹ The June 21 Order granted in part and denied in part the request of Southern Companies for rehearing of the Commission's order issued in this proceeding on July 8, 2005.² For the reasons discussed below, we deny Southern Companies' request for rehearing.

I. Background

2. On August 8, 2004, as amended on August 27, 2004 and November 19, 2004, Southern Companies submitted for filing revised horizontal market power screens in compliance with the Commission's orders issued on April 14, 2004 and July 8, 2004.³ By order dated December 17, 2004, the Commission acted on those filings by instituting a proceeding pursuant to section 206 of the Federal Power Act to determine whether Southern Companies may continue to charge market-based rates within the Southern

¹ *Southern Company Energy Marketing L.P. and Southern Company Services, Inc.*, 119 FERC ¶ 61,301 (2007) (June 21 Order).

² *Southern Company Energy Marketing L.P. and Southern Company Services, Inc.*, 112 FERC ¶ 61,054 (2005) (July 2005 Order).

³ *AEP Power Marketing, Inc.*, 107 FERC ¶ 61,018 (April 14 Order), *order on reh'g*, 108 FERC ¶ 61,026 (2004).

Companies control area.⁴ The Commission limited the section 206 proceeding, as well as any resulting mitigation or refunds, to Southern Companies' balancing authority⁵ area because the information filed indicated that Southern Companies failed the wholesale market share screen for this geographic market.

3. Southern Companies subsequently submitted a Delivered Price Test (DPT) to rebut the Commission's finding of a presumption of horizontal market power in the Southern balancing authority area. This included testimony dealing with transmission access limitations pertinent to assessing whether suppliers outside of Southern's balancing authority area are physically and economically capable of supplying power into the Southern balancing authority area. Southern Companies' testimony relied on historically posted Total Transfer Capability (TTC) values. Southern Companies' witness stated that his studies used Open Access Same Time Information System (OASIS)-posted TTC data, and he testified to his understanding that posted TTC values take into account, as appropriate, simultaneous limits.

4. The Commission subsequently issued the July 2005 Order, which established a trial-type evidentiary hearing to resolve issues of material fact regarding, and to address the serious deficiencies in, Southern Companies' DPT for the Southern balancing authority area. In that order the Commission found one of those deficiencies to be Southern Companies' "use of TTC, rather than simultaneous import capability, to account for transmission constraints. . . ."⁶ The Commission stated that due to these deficiencies and issues of material fact, it was unable to rely on or verify the results of Southern Companies' DPT and that the errors in the DPT and the parties' pleadings raise issues of material fact that cannot be resolved based on the written record and instructed the presiding judge to make any factual findings necessary to develop the record fully and to provide the Commission with a properly-constructed DPT on which the Commission could rely.⁷ In its instructions to the presiding judge, among other things, the

⁴ *Southern Company Energy Marketing, Inc. and Southern Company Services, Inc.*, 109 FERC ¶ 61,275 (2004).

⁵ We note that the Commission adopted the use of "balancing authority area" in place of "control area" in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 15, n.9 (2007).

⁶ July 2005 Order, 112 FERC ¶ 61,054 at P 59.

⁷ *Id.* at P 60.

Commission stated: “For purposes of developing a properly-constructed DPT, the issues to be addressed include, but are not limited to: (i) the use of simultaneous import capability, rather than TTC, as the measure of transmission constraints”⁸

5. Southern Companies sought rehearing of the July 2005 Order. Southern Companies argued that the July 2005 Order suggests that a simultaneous import capability study must be used in measuring import capability in the DPT but that in fact the provisions that form the basis of that proposition pertain to the indicative screens, not the DPT. Southern Companies argued that if the Commission had intended that a particular methodology be used, it would have stated that expressly in its April 14 and July 8 Orders. According to Southern Companies, the Commission’s decision to do so in this case is inconsistent with previous Commission statements and therefore in error. Finally, Southern Companies again asserted that they took simultaneous limits into account and maintain that in the July 2005 Order the Commission dismissed Southern Companies’ “sworn (and uncontested) testimony” to that effect.⁹

6. In the June 21 Order, the Commission, among other things, denied rehearing on the claim by Southern Companies’ that they had used correct procedures to calculate import limits in their DPT.¹⁰ In rejecting Southern Companies’ argument that they correctly calculated import limits in their DPT, the Commission noted that Southern Companies’ DPT analysis relied upon TTC for calculating the amount of transmission capacity available for imports into the Southern balancing authority area, but that Southern Companies did not provide adequate support for the claim that their TTC accounted for simultaneity, nor did they provide the rationale for not using their previously approved Simultaneous Import Limit (SIL). The June 21 Order explains that, “as the Commission stated in the July 2005 Order, Southern Companies had already performed and submitted the required simultaneous import capability study, which the Commission accepted in the December 17 Order. Southern Companies have presented no reason to depart from the previously-submitted SIL analysis and accept the higher TTC proxy for imports instead.”¹¹ The June 21 Order further states that “Commission precedent on this issue fully supports the conclusion that use of an SIL when performing the DPT in this case is necessary. In addition, we have accepted only the use of a SIL by

⁸ *Id.* at P 61.

⁹ Southern Companies Request for Rehearing in ER97-4166-022, *et al.*, dated August 8, 2005 at 17.

¹⁰ June 21 Order, 119 FERC ¶ 61,301 at P 14.

¹¹ *Id.* at P 15.

other sellers that have conducted the DPT in section 206 proceedings.”¹² The Commission rejected Southern Companies’ claim that Commission precedent required using a simultaneous import capability study for measuring import capability in the indicative screens but not in the DPT.¹³

II. Request for Rehearing or Clarification

7. Southern Companies state that they, along with the Commission Trial Staff and intervenors, have been actively engaged developing a record in accordance with the Commission’s instructions. However, they note that the June 21 Order stated that Southern Companies had not provided “adequate support for the claim that their TTC accounted for simultaneity” and that “Southern Companies have presented no reason to depart from the previously-submitted SIL analysis and accept the higher TTC proxy for imports instead.”¹⁴ Southern Companies state that to the extent these (and related) observations in this portion of the June 21 Order could be construed as somehow modifying the July 2005 Order’s requirement that a record be developed and an Initial Decision issued regarding SIL within the framework of a properly constructed DPT, they seek clarification or in the alternative, rehearing. They note that Commission Trial Staff took the position at hearing that the TTC issue may have been terminated by the June 21 Order and that the presiding judge should not consider the issue.

8. Southern Companies point to certain aspects of Order No. 697 as supporting the use of TTC values posted on OASIS. They note that the Commission stated in Order No. 697 that the use of “simultaneous TTC values” can be consistent with the SIL study required by the Commission, “provided that these TTCs are the values that are used in operating the transmission system and posting availability on OASIS.” Southern Companies also note that the Commission specified that sellers submitting simultaneous TTC values must provide evidence that these values account for simultaneity, for all internal transmission limitations, all external transmission limitations existing in first-tier areas, as well as all transmission reliability margins, and that they are used in operating the transmission system and posting availability on OASIS.¹⁵ Southern Companies

¹² *Id.* at P 16. *See, e.g., Kansas City Power and Light Company*, 113 FERC ¶ 61,074 (2005); *Public Service Company of New Mexico*, 115 FERC ¶ 61,090 (2006).

¹³ *Id.* at P 13.

¹⁴ *Id.* at P 14.

¹⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 364.

request that the Commission clarify and confirm that they are permitted to present such evidence in this proceeding and that the presiding judge may consider such evidence in formulating a properly constructed DPT.

III. Discussion

A. Procedural Matters

9. Shell Trading Gas and Power Company (Shell) filed an answer to Southern Companies' request for clarification stating that clarification is not necessary. Pursuant to Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, answers to requests for rehearing are prohibited.¹⁶ Accordingly, as Southern Companies' request for clarification or rehearing is essentially a request for rehearing, we will reject Shell's answer.

B. Substantive Matters

10. The statements from the June 21 Order relating to import capability measurement referred to by Southern Companies reiterate findings from the July 2005 Order concerning appropriate DPT procedures on which rehearing was denied in the June 21 Order. These statements do not purport to reach conclusions that differ from or go beyond those findings.

11. As the Commission stated in the July 2005 Order:

[t]he Commission rejected the use of TTC, in favor of the simultaneous import capability measure, for transmission constraints on the grounds that, while TTC is a measure of maximal transmission capability, it does not reflect reliability and operational limits on the line. We note that Southern Companies had already performed and submitted the required simultaneous import capability study, which we accepted in the December 17 Order.¹⁷

12. Accordingly, the Commission found in the July 2005 Order "that Southern Companies' use of TTC in its DPT *is inappropriate* and understates Southern Companies' position in the market by overstating the amount of non-Southern Companies generation."¹⁸ Nothing contained in the June 21 Order changed the findings

¹⁶ 18 C.F.R. § 385.713(d)(1) (2007).

¹⁷ July 2005 Order, 112 FERC ¶ 61,054 at P 52 (footnotes omitted).

¹⁸ *Id.* (emphasis supplied).

made in the July 2005 Order. Moreover, in their present rehearing request Southern Companies misstate the issue that was set for hearing. The Commission did not set for hearing “use of TTC, rather than simultaneous import capability, to account for transmission constraints.”¹⁹ When read in context, that language is meant to describe something that the Commission found to be a “serious deficiency” and earlier described as “inappropriate.”²⁰ Further, in its instructions to the presiding judge the Commission identified five aspects of Southern’s DPT that needed to be addressed in order to develop a properly-constructed DPT analysis. Among them were the use of simultaneous import capability rather than TTC, performance of the pivotal supplier analysis under the economic capacity measure, and the use of historical data rather than projected data. All of these correspond to previously-identified deficiencies in Southern Companies’ DPT analysis discussed in other portions of the order, namely, its use of TTC, rather than simultaneous import capability, to account for transmission constraints; its failure to perform the pivotal supplier analysis using the economic capacity measure; and its use of projected data, rather than historical data. Thus, the question of whether it is appropriate to use TTC in the context of the DPT was not an issue set for evidentiary hearing. This therefore precludes an inquiry into whether TTC values take into account simultaneous limits for purposes of measuring transmission limitations to importation of competing supplies in a properly formulated DPT.

13. Although Order No. 697 does discuss the circumstances under which use of simultaneous TTC values could be consistent with the SIL study required by the Commission, that discussion did not alter our previous finding that Southern Companies did not provide adequate support for the claim that their TTC accounted for simultaneity. Moreover, consistent with that finding, the Commission specified that a properly-constructed DPT in this case was to use simultaneous import capability, not TTC, as the measure of transmission constraints. On this basis, Order No. 697 does not alter the findings made in this proceeding.

¹⁹ July 23, 2007 Rehearing Request at 4.

²⁰ July 2005 Order, 112 FERC ¶ 61,054 at P 52, 59.

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.