

129 FERC ¶ 61,254
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. ER09-635-000
ER09-635-001
ER09-635-002

ORDER ACCEPTING *PRO FORMA* NETWORK OPERATING AGREEMENT

(Issued December 17, 2009)

1. On February 2, 2009 and October 20, 2009, Southern Company Services, Inc., as agent for Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, (collectively, Southern) submitted filings, pursuant to section 205 of the Federal Power Act (FPA),¹ to amend its open access transmission tariff (Tariff) by revising its *pro forma* Network Operating Agreement. The Commission accepts the proposed revisions to be effective August 28, 2008, April 4, 2009 and December 20, 2009 as set forth below.

I. Background

2. On February 2, 2009, Southern submitted an initial filing proposing amendments to its *pro forma* Network Operating Agreement, including an Unauthorized Use Penalty and a penalty for failure to manually shed load. After responding to a deficiency letter and reaching an agreement with certain network customers regarding the Unauthorized Use Penalty, Southern later submitted a revised filing on October 20, 2009.

A. February 2, 2009 Initial Filing

3. In the February 2, 2009 Filing, Southern explains that it identified two issues in its current Network Operating Agreement² that have required a significant amount of

¹ 16 U.S.C. § 824d (2006).

² Southern previously submitted a *pro forma* Network Operating Agreement to the Commission on July 31, 2007, which was approved in *Southern Company Services, Inc.*, 120 FERC ¶ 61,288 (2007).

negotiation with individual network customers. Accordingly, Southern proposes revisions to expedite the negotiation of future agreements, and it states that it intends to use the revised terms prospectively in all new Network Operating Agreements. Southern requests that the Commission approve these revisions as consistent with or superior to the *pro forma* Tariff.

4. The first provision sets forth an Unauthorized Use Penalty that will be applied in the event that a network customer does not dynamically schedule some or all of its resources to its network load in a given hour, but instead uses network service to block schedule all or a portion of the energy requirements for its network load from one or more resources. The proposed penalty would apply where the sum of the network customer's block schedules in any hour exceeds the network customer's total network load for that hour. Southern states that network customers often submit block schedules for the delivery of output from resources for which the customers do not have operational control. If, Southern argues, the network customer's hourly network load is less than the sum of the block schedules, the network customer is using more network service than is appropriate. Southern contends that such an occurrence could allow the network customer to use network service to schedule power for non-network loads, instead of procuring point-to-point transmission service for such purpose. Accordingly, Southern argues that a penalty provision is necessary to ensure the appropriate use of the transmission system and create an incentive for network customers to accurately schedule.

5. Southern states that the current penalties available in the *pro forma* Tariff for unreserved use or energy imbalance are not applicable to the situation involving a network customer where, in a given hour, the sum of the block schedules exceeds the customer's hourly network load. Southern argues that there is no unreserved use because the individual block schedules at issue could still be less than each corresponding reservation. Therefore, Southern is proposing a new penalty provision called an Unauthorized Use Penalty. In the February 2, 2009 Filing, Southern proposed that if the amount of energy scheduled in an hour is in excess of the transmission customer's hourly network load for that hour but is less than or equal to 107.5 percent of the transmission customer's hourly network load for that hour (referred to as Tier 1 Hourly Energy), the transmission customer shall pay the appropriate (i.e., on-peak or off-peak) non-firm hourly point-to-point transmission rate for that hour times the amount of Tier 1 Hourly Energy (later revised to be called Level 1 Hourly Energy) for that hour. If the amount of energy the network customer block schedules for an hour is more than 107.5 percent of the hourly network load for that hour, the customer shall pay 200 percent of the daily firm point-to-point transmission rate multiplied by the largest amount of energy that

exceeds 107.5 percent of the hourly network load in an hour for that day referred to as Tier 2 Hourly Energy (later revised to be called Level 2 Hourly Energy).³

6. Southern states that its proposed penalty provision is just and reasonable because it serves as an appropriate incentive to deter improper use of network service while recognizing the complexities associated with scheduling energy to network loads. Southern states that because customers cannot change block schedules during an hour, the 7.5 percent buffer provides some flexibility for unforeseen changes in load.

7. The second provision relates to the rate treatment associated with a network customer's failure to shed load upon request. Southern notes that its Tariff requires that the procedures and terms and conditions that govern load shedding be set forth in network operating agreements. Southern's proposed revision requires network customers to manually shed network load if the customer is unable to deliver power to its network load as a result of a power supply emergency that affects the customer. If the customer fails to manually shed load as required, the proposed revision sets forth the associated rate treatment.

8. Under the second provision, a network customer who fails to shed load must pay for monthly network service, as well as an additional amount equal to: (1) 25 percent of the charge(s) for firm point-to-point transmission service applied on a monthly basis to the amount of load at the delivery points requested to be shed; and (2) any other costs and/or damages incurred by Southern due to the failure to shed load. Southern states that these costs could include, but are not limited to, unit start up, system losses, changes in generation dispatch and NERC compliance penalties⁴ incurred by Southern as a result of failure to shed load. Southern argues that such a penalty is just and reasonable because the costs are directly attributable to the network customer's conduct.

9. Southern states that pursuant to the Commission's Order No. 676-C,⁵ it is incorporating by reference certain NAESB Business Practices into its Tariff. Specifically, Southern states that it proposes to revise Tariff Sheet Nos. 202 and 203 of

³ Southern's October 20, 2009 Filing later revised this proposal.

⁴ Southern's response to the deficiency letter later revised this proposal regarding NERC penalties.

⁵ *Standards for Business Practices and Communication Protocols for Public Utilities*, Order No. 676-C, 73 Fed. Reg. 43848 (July 29, 2008), FERC Stats. & Regs. ¶ 31,274 at P 83 (2008) (setting forth the language public utilities must use in their Tariffs).

Attachment O of its Tariff to incorporate the WEQ-001 NAESB standards adopted in Order No. 676-C by reference, using the specific language set forth in the rule.

B. Deficiency Letter

10. On March 25, 2009, the Director, Division of Tariffs and Market Development – East, issued a deficiency letter to obtain additional information regarding the proposed changes to the *pro forma* Network Operating Agreement, including information regarding the assignment of NERC penalties, the 7.5 percent buffer for the Unauthorized Use Penalty, the block scheduling process and Southern’s energy imbalance provisions.

11. In its response to the deficiency letter, Southern states that its justification for the pass-through of costs caused by a network customer's failure to shed load is based upon its Tariff, as well as basic principles of cost causation and fairness. Southern states that in the event the network customer fails to manually shed load, Southern may incur certain prudently incurred costs, such as unit start up, system losses and changes in generation dispatch. Southern believes it is appropriate for a network customer to be responsible for such direct costs incurred by Southern as a result of the network customer's failure to manually shed load.

12. In the response to the deficiency letter’s question regarding the assignment of NERC penalties, Southern states that, upon further review, it now concludes that NERC or the SERC Reliability Corporation would assess any penalties directly against the entity that violated the reliability standard (e.g., transmission provider or network customer) and that if a network customer fails to manually shed load and NERC determines that a penalty will be assessed due to such failure, the penalty would be assessed directly against the network customer and not Southern. As a result, Southern states that it would not need to recover any NERC penalties as part of the costs caused by a network customer's failure to shed load. Southern indicates that it will file with the Commission for its review any attempt by Southern to recover the costs caused by the network customer's failure to shed load. Southern also explains that it will not pass any costs of NERC penalties to network customers; however, if such a situation were to occur, Southern states that it would develop a process by which Southern would assign these costs to network customers and submit it to the Commission for approval.

13. With respect to the Unauthorized Use Penalty, Southern believes the 7.5 percent buffer approach is the best means of balancing the need to provide an appropriate incentive for the network customer to engage in accurate scheduling practices (and to avoid intentionally using its network service for unauthorized purposes) with the need to accommodate network customers due to the difficulties faced by block scheduling network resources. Furthermore, Southern maintains that the selection of the 7.5 percent buffer seems to strike a reasonable balance between those network customers with large loads and those with small loads. Southern states that if the buffer is too small, a network customer having a small load would run a high risk of violating the buffer. On the other

hand, too large of a buffer would provide little or no incentive to submit accurate block schedules for a network customer having a large load.

14. Southern states that it will determine that a party is inappropriately using network service to serve non-network load by comparing the sum of the network customer's block schedules for an hour to the customer's network load for that same hour. If the sum for an hour exceeds the network load for that hour, Southern will conclude that the network customer is inappropriately using network service. Southern believes that such an approach is consistent with the Tariff and the Commission's precedent that neither transmission providers nor network customers may use network service to deliver energy that is used to serve non-network load (i.e., make off-system sales or serve load other than network load). Southern provides examples and data of the actual amount of energy scheduled in 2007 and 2008 by two of Southern's network customers.

15. In response to the deficiency letter, Southern states that their review of tags submitted from designated network resources is largely limited to reviewing whether the tags contain any patent defects/errors, such as if the schedule does not reference the matching transmission reservation, if the designated network resource does not have firm transmission service, or if the schedule does not specify a valid source. Concerning the impediments to Southern policing tags to ensure that the scheduled amounts do not exceed the network customer's forecasted load, Southern states that it can receive a large number of tags for a given hour and that a transmission provider may only approve or deny a tag (i.e., the transmission provider cannot adjust the information contained in the tag, such as limiting the amount of energy specified to flow thereunder).

16. Southern also states that the Unauthorized Use Penalty is needed because Southern's energy imbalance provisions do not apply at all in a situation of unauthorized use because Southern's network customers are not taking energy imbalance service from Southern. Instead, such customers are self-supplying the energy imbalance service. Southern states that since such self-supplying network customers are doing their own balancing, if they bring in more energy than needed to serve their network load by block-scheduling too much energy, then the network customer balances that excess by using it to serve its non-network load.

17. SouthEastern Power Administration (SEPA) is Southern's only network customer that does not self-supply Schedule 4 Energy Imbalance as well as the other ancillary services that may be self-supplied. For such a network customer that takes all of ancillary services from Southern, the Schedule 4 Energy Imbalance Service provision would account for deviations between block schedules and actual hourly load. With regard to such a network customer that purchases all ancillary services from Southern,

Southern revised its *pro forma* Network Operating Agreement to clarify when the Unauthorized Use Penalty would and would not apply.⁶

C. October 20, 2009 Revised Filing

18. On May 27, 2009, Southern filed a request for the Commission to defer action, informing the Commission that it had reached an agreement with Georgia Transmission Corporation (GTC) and PowerSouth Energy Cooperative (PowerSouth). Southern requested additional time to effectuate the agreement. Southern filed further requests to defer action on July 9, 2009 and September 3, 2009. On October 20, 2009, Southern submitted a revised filing based on the agreement reached with GTC and PowerSouth, with proposed amendments to its *pro forma* Network Operating Agreement. As a result of the agreement with GTC and PowerSouth, Southern revises its proposed Unauthorized Use Penalty in three ways. First, Southern clarifies that the proposed Unauthorized Use Penalty will only apply to network customers that self-supply energy imbalance service (or acquire this service from someone other than the transmission provider under the Tariff). Second, Southern agrees to increase the buffer for the Unauthorized Use Penalty for energy allowed to exceed the hourly network load before the penalty is imposed from 7.5 percent to the greater of: (1) 10 percent of the network customer's hourly network load; or (2) the network customer's actual hourly network load plus 25 megawatts during that hour. Third, Southern reduces the proposed Unauthorized Use Penalty from 200 percent to 125 percent of the daily firm point-to-point rate multiplied by the largest amount of energy in a single hour for that day that exceeded the buffer.

19. Southern argues that its revised Unauthorized Use Penalty is just and reasonable, and is intended to achieve a reasonable balance between network customers serving a large amount of network load and those serving a small amount of network load. It also argues that Southern's energy imbalance service does not apply to this situation for several reasons. First, Southern contends that because the penalty only applies to customers who are not taking energy imbalance service from Southern, energy imbalance service would obviously not apply. Second, Southern argues that if a network customer is doing its own balancing between its resources and load, it is inherently using any excess block scheduled power to serve non-network load, which violates the Tariff. Finally, Southern contends that if it were to have to apply its energy imbalance provisions to network customers who self-supplied energy imbalance service, it would be forced to pay the network customer for excess energy. Such a result would be wrong, Southern states, because it is the network customer who receives excess energy to serve its non-network load in the circumstances at issue.

⁶ Southern's October 20, 2009 Filing later revised this language.

20. Southern also resubmitted its proposed revisions regarding the failure of network customers to shed load. Southern requests an effective date of April 3, 2009 for Tariff Sheet No. 130 (failure to shed load), and December 19, 2009 for Tariff Sheet Nos. 130a, 130b and 130c (Unauthorized Use Penalty).

II. Notice and Responsive Pleadings

21. Notice of Southern's February 2, 2009 filing was published in the *Federal Register*, 74 Fed. Reg. 7414, with interventions and protests due on or before February 23, 2009. GTC filed a timely motion to intervene and protest. On March 11, 2009, Southern filed an answer to GTC's protest. On March 26, 2009, GTC filed a response to Southern's answer.

22. Notice of Southern's response to the deficiency letter was published in the *Federal Register*, 74 Fed. Reg. 18571, with interventions and protests due on or before May 5, 2009. PowerSouth filed a motion to intervene. Notice of Southern's October 20, 2009 filing was published in the *Federal Register*, 74 Fed. Reg. 59151, with interventions and protests due on or before Nov. 10, 2009. Alabama Municipal Electric Authority filed a motion to intervene. GTC filed a notice of conditional withdrawal of its protest, noting that its withdrawal was contingent on the Commission's acceptance of Southern's revised filing. PowerSouth filed comments indicating that it supports the revised filing.

III. Discussion

A. Procedural Matters

23. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷ the timely, unopposed motions to intervene of GTC, PowerSouth and Alabama Municipal Electric Authority serve to make them parties to this proceeding. We accept GTC's notice of withdrawal of its protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,⁸ prohibits an answer to a protest unless otherwise ordered by the decisional authority. Given the withdrawal of GTC's protest, we find that Southern and GTC's answers are no longer relevant, and thus we reject them.

⁷ 18 C.F.R. § 385.214 (2009).

⁸ 18 C.F.R. § 385.213(a)(2) (2009).

B. Commission Determination

24. Under Order No. 890, transmission providers may submit filings pursuant to section 205 of the FPA to propose rates for the services offered in their tariffs, as well as non-rate terms and conditions that differ from those set forth in Order No. 890 if those non-rate terms and conditions are “consistent with or superior to” the *pro forma* Tariff.⁹ The *pro forma* Tariff does not provide a form of Network Operating Agreement and simply notes that the language is “[t]o be filed by the Transmission Provider.”¹⁰ The Commission previously accepted revisions to Southern’s *pro forma* Network Operating Agreement in *Southern Company Services, Inc.*, 120 FERC ¶ 61,288 (2007). Here, we find that the proposed revisions regarding the Unauthorized Use Penalty and the failure to shed load penalty in the October 20, 2009 filing and the NAESB revision in the February 2, 2009 filing are consistent with or superior to the *pro forma* Tariff.

25. With respect to the Unauthorized Use Penalty, we find that the proposal provides for a reasonable penalty to deter the misuse of block scheduling. Although the circumstances to which the Unauthorized Use Penalty would apply in Southern’s *pro forma* Network Operating Agreement are somewhat analogous to the circumstances under which an Unreserved Use Penalty¹¹ as described in Order No. 890 would apply, the applicability of the Unauthorized Use Penalty differs in an important respect. Order No. 890’s Unreserved Use Penalty involves load exceeding an OASIS reservation whereas Southern’s proposed Unauthorized Use Penalty addresses a situation where a network customer’s block schedules exceed its load and the network customer could use network service to deliver energy that is used to serve non-network load.¹² Given this

⁹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 135, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

¹⁰ Order No. 890, FERC Stats & Regs. ¶ 31,241 at App. C, Original Sheet No. 158.

¹¹ As defined in Order No. 890, a customer is subject to an Unreserved Use Penalty “where the transmission customer has a transmission service reservation, but uses transmission service in excess of its reserved capacity. A transmission customer also [is] subject to an unreserved use penalty if the transmission customer uses transmission service where it does not have a transmission service reservation.” Order No. 890, FERC Stats & Regs. ¶ 31,241 at P 826.

¹² Southern includes a graphical representation of its proposed Unauthorized Use Penalty and the existing Unreserved Use Penalty in its October 20, 2009 Filing at Exhibit D.

difference, we find that the proposed new Unauthorized Use Penalty is consistent with or superior to the *pro forma* Tariff. We accept the unopposed proposal for an Unauthorized Use Penalty of 125 percent of the firm point-to-point transmission rate with a buffer of the greater of: (1) 10 percent of the network customer's hourly network load; or (2) the network customer's actual hourly network load plus 25 megawatts during that hour.

26. With respect to the failure to shed load penalty provision, we approve the proposed revisions as consistent with or superior to the *pro forma* Tariff. We find that the proposed penalty of 25 percent of the charge for firm point-to-point transmission service applied on a monthly basis to the amount of load at the delivery points that the transmission provider requested to be shed and any other costs and/or damages incurred by the transmission provider due to the customer's failure to shed network load is reasonable.

27. Southern indicates in its response to the deficiency letter that it would not need to recover any NERC penalties from network customers under the proposed *pro forma* Network Operating Agreement. Southern also states that if it were to decide to assign such penalties, it would file for the Commission's review any attempt by Southern to recover costs caused by a network customer's failure to shed load. Additionally, Southern explains that it will not pass any costs of NERC penalties to network customers, but if such a situation were to occur, Southern states that it would develop a process by which Southern would assign these costs to network customers and submit it to the Commission for approval. The Commission recently addressed the recovery of NERC and SERC reliability penalties in *E.ON U.S., LLC*, 127 FERC ¶ 61,134 (2009). In that order, the Commission placed conditions on the ability of E.ON to assign NERC and SERC penalties to a customer, including notification provisions and the requirement to make a section 205 filing with the Commission.¹³ If Southern were to attempt to pass any costs of NERC or SERC penalties to its network customers, Southern would be required to make a filing with the Commission consistent with *E.ON U.S., LLC* and Southern's representations.

28. We will accept Tariff Sheet Nos. 130a, 130b and 130c (unauthorized use penalty) with an effective date of December 20, 2009.¹⁴ We will accept Tariff Sheet No. 130 (failure to shed load penalty) with an effective date of April 4, 2009.¹⁵

¹³ *E.ON U.S., LLC*, 127 FERC ¶ 61,134 at P 15 (2009).

¹⁴ Southern requests an effective date of December 19, 2009, 60 days after the date of its revised filing. However, the earliest date that a filing may become effective, absent waiver of the notice requirements, is the day after the 60-day notice period has expired.

¹⁵ Southern requests an effective date of April 3, 2009, 60 days after the date of its
(continued)

29. We find that the revisions to Attachment O of Southern's Tariff to incorporate the WEQ-001 NAESB standard by reference satisfactorily comply with the directives of Order No. 676-C. We will accept Tariff Sheet Nos. 202 and 203 (NAESB) with an effective date of August 28, 2008, as requested.

The Commission orders:

(A) Southern's revised *pro forma* Network Operating Agreement is hereby accepted for filing, as discussed in the body of this order.

(B) Tariff Sheet Nos. 130a, 130b and 130c are hereby accepted with an effective date of December 20, 2009.

(C) Tariff Sheet No. 130 is hereby accepted with an effective date of April 4, 2009.

(D) Tariff Sheet Nos. 202 and 203 are hereby accepted with an effective date of August 28, 2008.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

original filing. However, the earliest date that a filing may become effective, absent waiver of the notice requirements, is the day after the 60-day notice period has expired.