

113 FERC ¶ 61,239
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Southern Company Services, Inc.

Docket No. ER06-10-000

ORDER REJECTING TARIFF AMENDMENTS

(Issued December 2, 2005)

1. On October 3, 2005, Southern Company Services, Inc., acting as agents for Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Savannah Electric and Power Company (collectively, Southern Companies), submitted proposed amendments to Southern Companies' Open Access Transmission Tariff (OATT)¹ to include limited liability provisions that would protect and/or indemnify the Southern Companies in the event of service interruptions in cases of gross negligence or intentional misconduct. As discussed below, the Commission will reject Southern Companies' proposed OATT amendments.

Proposed OATT Amendments

2. Southern Companies propose to add new section 10.3 (Limitation of Liability) to their OATT that would limit their liability to Transmission Customers and/or third parties for damages (whether direct, indirect, or punitive) resulting from service interruptions, except in instances of gross negligence or intentional misconduct. Also, Southern Companies propose that such damages be limited to direct damages of the affected Transmission Customers. Southern Companies also propose to amend section 10.2 (Indemnification) of their OATT to change the existing ordinary negligence standard to gross negligence, among other edits,² so that a Transmission Provider would be

¹ Electric Tariff, Fourth Revised Volume No. 5.

² Namely, Southern Companies propose to revise the indemnification provision so that damages, etc. arising out of *the actions or omissions of the Transmission Customer and/or the Transmission Provider's performance in favor of the Transmission Customer* triggers indemnification, not just a Transmission Provider's performance of obligations on behalf of the Transmission Customer. (Proposed changes emphasized.)

indemnified by the Transmission Customer in all instances except where the Transmission Provider was grossly negligent or engaged in intentional wrongdoing. Further, Southern Companies propose to add section 10.4 to their OATT to apply amended section 10.2 and new section 10.3 to owners and/or operators of generating facilities when they act in good faith to implement or comply with directives of Southern Companies pursuant to any service agreement.

3. Southern Companies state that these OATT amendments are consistent with Commission policy and precedent. Southern Companies point out that the Commission stated in its Reliability Policy Statement that it would consider proposals by public utilities on a case-by-case basis to amend their OATTs to include limitations on liability in light of the Commission's interpretation that a public utility's "Good Utility Practice includes compliance with [North American Electric Reliability Council (NERC)] reliability standards and NERC compliance audit recommendations."³ Southern Companies note that the Commission recently approved liability limits for the Midwest Independent Transmission System Operator, Inc. (Midwest ISO),⁴ the Southwest Power Pool, Inc. (SPP),⁵ and ISO New England, Inc. (ISO New England).⁶ In the SPP Order and the ISO New England Orders, Southern Companies note that the Commission approved the proposed amendments to the indemnification provisions that changed the ordinary negligence standard to gross negligence or intentional wrongdoing.

4. Southern Companies assert they are similarly situated to regional transmission organizations (RTOs) and independent system operators (ISOs) with regard to liability exposure for service under their OATT, and, therefore, Southern Companies should be allowed to adopt similar limitations on liability and indemnification provisions as did the Midwest ISO, SPP, and ISO New England. Specifically, according to Southern Companies, the finding that damage awards from interruptions of service are potentially excessive is true whether the damages occur in an RTO/ISO's footprint or within a vertically integrated utility's footprint. In addition, they assert that Southern Companies,

³ *Policy Statement on Matters Related to Bulk Power System Reliability*, 107 FERC ¶ 61,052, at P 40 (2004) (Reliability Policy Statement) (noting also that the limitation on liability issue had not been resolved on a standardized basis and, at that time, the Commission had only entertained specific proposals from RTO Transmission Providers).

⁴ *Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,164 (2005) (Midwest ISO Order).

⁵ *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005) (SPP Order).

⁶ *ISO New England, Inc.*, 106 FERC ¶ 61,280, *order on reh'g*, 109 FERC ¶ 61,147 (2004) (ISO New England Orders).

like Midwest ISO, SPP, and ISO New England, are obligated to serve all eligible customers under their OATT and cannot deny service to particular customers based on the risk of potential damages associated with service interruptions to those customers. Southern Companies also point out that, like the Midwest ISO, SPP, and ISO New England, service provided pursuant to their OATT is regulated solely by the Commission, and therefore, the liability limits provided by the states in which Southern Companies operate may not extend to service provided under their OATT. Southern Companies conclude that the Commission should allow them to adopt similar limitations on liability and indemnification provisions as those approved for the Midwest ISO, SPP, and ISO New England.

Notice of Filing

5. Notice of Southern Companies' application was published in the *Federal Register*, 70 Fed. Reg. 61,279 (2006), with motions to intervene and protests due on or before October 21, 2005. None was filed.

Discussion

6. Southern Companies have proposed to amend the provisions in their OATT with respect to liability exposure for service, arguing that, without strong limitation of liability provisions, the risk of liability would result in higher insurance premiums and higher cost of capital (both of which would be borne by customers). Southern Companies contend that the risk of potential damages associated with interruption of service is no different than that in RTOs and ISOs, like the Midwest ISO, SPP, and ISO New England. Furthermore, Southern Companies maintain that the limitations on liability provided by the states in which Southern Companies operate may not extend to service provided under Southern Companies' OATT, which is regulated solely by the Commission.

7. Having considered Southern Companies' proposed limitation on liability and indemnification provisions pursuant to our Reliability Policy Statement cited above, we find that Southern Companies have not shown that they are similarly situated to the RTOs/ISOs they cite in support. While Southern Companies claim that they "may not be protected by any State-regulated limitations on liability," Southern Companies offer no evidence to support this concern.⁷ The Commission has provided such liability protection to RTOs/ISOs because they were created by and solely regulated by the Commission, and otherwise would be without limitations on liability. Southern

⁷ *Midwest Indep. Transmission Sys. Operator, Inc.* 100 FERC ¶ 61,144, at P 24 (2002) ("[L]imited liability provisions may be appropriate for inclusion in Commission tariffs under certain circumstances, e.g., where there is no liability protection under state law."); see also *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264, at P 7 (2005).

Companies have proffered no evidence of any change in circumstances vis-à-vis their liability exposure post-Order No. 888.⁸ In Order Nos. 888-A and 888-B, the Commission explained that the *pro forma* tariff was not intended to address liability issues.⁹ Also, the Commission explained that transmission providers were not precluded from relying on state laws that protected utilities or others from claims founded in ordinary negligence.¹⁰ Later, the Commission declined to adopt a uniform federal liability standard and decided that, while it was appropriate to protect the transmission provider through *force majeure* and indemnification provisions from damages or liability when service is provided by the transmission provider without negligence, it would leave the determination of liability in other instances to other proceedings.¹¹ Southern Companies have not demonstrated that they are unable to rely on state laws, *i.e.*, the state laws provide inadequate protection, or that these amendments to their OATT are superior to the *pro forma* tariff. Moreover, we note that the Commission has, other than for RTOs/ISOs, rejected revisions to indemnification provisions (in particular, changing the standard from “negligence” to “gross negligence”).¹² Even in the SPP Order, we explicitly stated “that our acceptance here of the gross negligence and intentional wrongdoing indemnity standard is limited to SPP, in its role as an RTO, and its TOs; we do not intend to extent such protection to all transmission providers.”¹³ We therefore reject Southern Companies’ requested amendments to their OATT. Accordingly, we need not consider Southern Companies’ request for waiver of the notice requirements.

⁸ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh’g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997); order on reh’g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh’g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff’d sub nom. New York v. FERC, 535 U.S. 1 (2002).

⁹ The Order No. 888 *pro forma* tariff only included an indemnification provision. Section 10.2 of the *pro forma* tariff. In Order Nos. 888-A and 888-B, the Commission stated that liability was a separate issue from indemnification. *See* Order No. 888-A at 30,301 and Order No. 888-B at 62,081 (section 10.2 of the *pro forma* tariff).

¹⁰ Order No. 888-A at 30,301.

¹¹ Order No. 888-B at 62,081.

¹² *Northeast Utilities Serv. Co.*, 111 FERC ¶ 61,333 at P 24-30 (2005) (rejecting filing by Northeast Utilities to amend the indemnification provisions in its OATT for its local transmission facilities that were not under the control of ISO New England).

¹³ SPP Order at P 39.

The Commission orders:

Southern Companies' proposed amendments to their OATT are hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Kelly concurring with a
separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southern Company Services, Inc.

Docket No. ER06-10-000

(Issued December 2, 2005)

KELLY, Commissioner, *concurring*:

I agree with this order's rejection of Southern Companies' proposal to include limited liability provisions in their OATT that would protect and/or indemnify the Southern Companies in the event of service interruptions in cases of gross negligence or intentional misconduct. The order finds, in part, that the Southern Companies have not demonstrated that they are similarly situated to certain RTOs/ISOs where the Commission majority has approved such limitation on liability and indemnification provisions. As I have previously indicated, I do not think that such provisions were adequately supported or appropriate for those RTOs/ISOs.¹

Sudeen G. Kelly

¹ See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,164 (2005).