

134 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris, and Cheryl A. LaFleur.

Southern Company Services, Inc.

Docket No. ER09-88-004

ORDER ON COMPLIANCE FILING

(Issued March 24, 2011)

1. On January 19, 2010, 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 revisions to their market-based rate tariff with respect to third-party sellers in the bid-based, day-ahead and hour-ahead auctions for energy (the Auction) that they operate in the Southern Companies balancing authority area.

2. In this order, the Commission conditionally accepts the revised tariff sheets, effective January 4, 2010, and directs Southern Companies to revise their tariff within 30 days of the date of this order, as discussed below.¹

I. Background

3. On December 18, 2008, the Commission conditionally accepted a proposal and tariff revisions submitted by Southern Companies pertaining to Southern Companies' establishment of day-ahead and hour-ahead energy auctions.² Southern Companies proposed to institute, for at least a three year period, an Auction to make available all

¹ We note that Southern Companies' tariff is divided into the following segments: General Tariff Provisions; Rules of the Energy Auction (Auction Rules); Rules on Southern Companies' Energy Auction Participation (Participation Rules); Appendix DA-1 to Participation Rules; Appendix DA-2 to Participation Rules; Appendix HA-1 to Participation Rules; Appendix HA-2 to Participation Rules.

² *Southern Companies Services, Inc.*, 125 FERC ¶ 61,316 (2008) (December 2008 Order).

uncommitted thermal resources at cost-capped offer prices and proposed to contract with an Independent Auction Monitor³ to oversee the Auction. In the December 2008 Order, the Commission concluded that the Auction, with conditions, would sufficiently mitigate any potential that Southern Companies may have to exercise market power in the Southern Companies balancing authority area.⁴ The Commission's acceptance of Southern Companies' Auction proposal and related tariff revisions included two conditions: first, that the role and responsibilities of the Independent Auction Monitor be further developed and, second, that the Auction be expanded to include sellers other than Southern Companies within one year of the date of the December 2008 Order.⁵

4. On October 19, 2009, Southern Companies filed revisions to their market-based rate tariff to include third-party sellers in the Auction. Southern Companies explained that the expanded Auction (i.e., Phase II of the Auction) will act as a brokering system between potential buyers and sellers but will not mandate that such buyers and sellers (other than Southern Companies as seller) actually engage in sales.

5. On December 17, 2009, the Commission issued an order conditionally accepting Southern Companies' revised tariff sheets and directed Southern Companies to submit a compliance filing further revising their tariff.⁶ The Commission noted that Southern

³ The Independent Auction Monitor is separate from the Independent Auction Administrator and Southern Companies' Auction Administrator, which are discussed herein. Section 2.33 of the Auction Rules defines the Independent Auction Monitor as "[a]n independent entity engaged by Southern Companies, subject to Commission approval, to monitor and periodically review the [Auction] and be responsible for responding to questions from Bidders and/or regulators regarding the integrity of the auction process." The Independent Auction Monitor is The Brattle Group. The Independent Auction Administrator is TranServ International Inc.

⁴ December 2008 Order, 125 FERC ¶ 61,316 at P 52.

⁵ On January 21, 2009, as supplemented February 2, 2009, Southern Companies submitted a compliance filing, accepting the conditions imposed by the Commission in the December 2008 Order and including tariff revisions. On March 25, 2009, the Commission accepted Southern Companies' compliance filing. *Southern Company Services, Inc.*, 126 FERC ¶ 61,274 (2009) (March 2009 Order). On May 29, 2009, the Director, Division of Tariffs and Market Development – West, acting pursuant to delegated authority, issued an order accepting tariff revisions filed on April 3, 2009 and April 23, 2009 in compliance with the March 25, 2009 Order. *Southern Company Services, Inc.*, Docket No. ER09-88-002 (May 29, 2009) (delegated letter order).

⁶ *Southern Company Services, Inc.*, 129 FERC ¶ 61,253 (2009) (December 2009 Order).

Companies proposed to move certain administrative functions away from Southern Companies' Auction Administrator to an Independent Auction Administrator. The Commission directed that, to the extent that Southern Companies request that their employees have access to third-party confidential information after the Independent Auction Administrator assumes its duties, Southern Companies must, in a compliance filing, explain why their employees need access to this confidential information, and how such information will be protected from improper disclosure or misuse. The Commission also directed Southern Companies to provide further information regarding the responsibilities of the Independent Auction Administrator and Southern Companies' Auction Administrator personnel involved with administering the Auction. The Commission further reiterated that the Independent Auction Monitor is required to monitor the power purchased and sold by Southern Companies as well as other Auction participants as well as file annual reports regarding the clearing price for each Auction, the amount of energy offered and sold by each seller in each Auction, and the amount of energy bid or and purchased by each buyer in each Auction.⁷

II. The January 19, 2010 Compliance Filing

6. On January 19, 2010, Southern Companies submitted a compliance filing, including revised tariff sheets, as directed. That filing includes information relating to role of the Independent Auction Administrator and Southern Companies' Auction Administrator.⁸ Additionally, Southern Companies inform the Commission that they

⁷ *Id.* P 109.

⁸ Section 2.1A of the Participation Rules provides that "Southern Companies may delegate one or more [Southern Companies'] Auction Administrator functions to an independent Auction administrator (the 'Independent Auction Administrator')." Section 2.1B of the Participation Rules provides the following:

...Southern Companies, as the official operator of the Auction in accordance with this Tariff, may not delegate ultimate responsibility for the Auction to any outside party. In this regard:

(a) Southern Companies shall be the official licensee for the Auction software and shall manage the Auction website and its content; and (b) Southern Companies, through the [Southern Companies'] Auction Administrator, shall retain the right to access Bid Information, Offer Information, and other and [sic] transaction-related information insofar as such access is necessary (i) to enable Southern Companies to ensure that the Auction operates as designed and

(continued...)

have posted the Intercompany Interchange Contract on the Auction website. Last, Southern Companies stated that they began Phase II of the Auction on January 4, 2010.

A. Tariff Revisions

7. Southern Companies revised the following aspects of their market-based rate tariff, as directed by the Commission in the December 2009 Order.
8. Section 2.1 of the Participation Rules is revised to state that “[a]ny employee of Southern Companies may serve as [Southern Companies’] Auction Administrator; provided, however, that Southern Companies’ Marketing Function Employees and Transmission Function Employees, as those terms are defined in 18 C.F.R. §§ 358.3 (d) and (i), may not serve as [Southern Companies’] Auction Administrator.”
9. Sections 2.19a and 2.31 of the Auction Rules, which define Dependent Offer and Independent Offer, are revised to correct cross references.
10. Section 4.3.4 of the Auction Rules is revised to reflect the fact that Southern Companies will report annually any refunds or surcharges related to Southern Companies’ administrative charge by February 15, 2011 and each year thereafter. Southern Companies commit to provide such information in an annual report.
11. The General Tariff Provisions are revised to add a new section 8.2 to reference the restrictions previously approved in the December 2008 Order pertaining to market-based energy sales for delivery into the Southern Companies balancing authority area during the Auction periods.
12. Section 1.2.1 of Appendix DA-1 of the Participation Rules is revised to make clear that the term “peak” refers to the system-wide coincident peak of Southern Companies.
13. Sections 2.1.3 and 2.1.4 of Appendix DA-1 of the Participation Rules are revised to define the term “linked” by explaining that the term is used to describe the circumstance where the offer to sell is contingent on certain conditions.
14. Sections 4.2.2, 5.5.1, and 6.5.1 of the Auction Rules are revised to state that each winning Bidder or Offeror will be notified no later than 15 minutes subsequent to the close of the bid period for day-ahead auctions and no later than five minutes subsequent to the close of the bid period for hour-ahead auctions.

implemented and in compliance the Auction Rules and Participation Rules and/or (ii) to respond to questions or complaints regarding Auction administration.

15. New section 2.46 has been added to the Auction Rules to define the term “Southern Transmission Provider.”
16. The tariff is revised to reflect the appropriate effective date of January 4, 2010, the date of commencement of Phase II of the Auction.

B. Independent Auction Administrator

1. Southern Companies’ Auction Administrator Access to Confidential Information

17. In their compliance filing, Southern Companies state that they continue to serve as the tariff-defined Auction Administrator,⁹ charged with the responsibility for establishing and facilitating the day-ahead and hour-ahead auctions and will remain responsible to the Commission for the operation of the Auction in accordance with all applicable rules. They explain that some degree of administrative delegation is feasible and therefore have retained the Independent Auction Administrator; however, any assignment of operational oversight and day-to-day tasks to an outside entity must be consistent with Southern Companies’ need to perform their own monitoring of the Auction to ensure that it is functioning as designed and administered in accordance with the Auction Rules and Participation Rules. With this in mind, Southern Companies have delegated to the Independent Auction Administrator (TranServ International Inc.) the Auction Administrator function of coordinating the management, safeguard and storage of confidential information, including that of third-parties. Notwithstanding that delegation, however, Southern Companies represent that their Auction Administrator will continue to have the ability to access this information as necessary to assure compliance with their tariff. Absent inquiries from the Commission or a regulatory entity, Southern Companies represent that such access to confidential information will not involve sharing the confidential information outside of Southern Companies’ Auction Administrator function and the Independent Auction Administrator.

18. Southern Companies state that Southern Companies’ Auction Administrator normally will not need access to confidential information as part of the compliance-related activities but some circumstances could arise that would require such access. According to Southern Companies, such instances might involve, for example, questions or complaints regarding the outcome of a particular auction or a specific entity’s participation in a particular auction. In those instances, Southern Companies state that

⁹ We note that Auction Administrator is defined in the tariff as “[t]hose persons administering the Energy Auction consistent with the provisions set forth herein.” *See* section 2.1 of the Auction Rules. We refer to the Auction Administrator herein as Southern Companies’ Auction Administrator.

the Southern Companies' Auction Administrator will need to obtain and review confidential information in order to research and respond to those questions or complaints and ensure that the Auction is functioning as intended and consistent with the requirements of their market-based rate tariff.

2. Protection of Confidential Information from Improper Disclosure or Misuse

19. Southern Companies state that, as with Phase I, access in Phase II to confidential information continues to be limited to a discrete group of Southern Companies' personnel. Southern Companies' Marketing Function Employees and Transmission Function Employees, as those terms are defined in 18 C.F.R. §§ 358.3(d) and (i), are prohibited from serving as Auction Administrator personnel, and any other employee of Southern Companies directly engaged in wholesale electricity marketing and trading is prohibited from accessing confidential information. Southern Companies represent that furthermore, Southern Companies have internal data control restrictions similar to those used for Standards of Conduct compliance in order to ensure that confidential information is maintained in a secure fashion and protected from improper disclosure or misuse. They state that in addition to these provisions (as accepted by the Commission in the December 2008 Order), Phase II affords even more protection because the management, safeguard and storage of confidential information shifts entirely from Southern Companies to the Independent Auction Administrator. The information now will be stored at an off-site (non-Southern Companies) location. Southern Companies state that to the extent Southern Companies' Auction Administrator may be required to download confidential information, such instances will be documented accordingly. Southern Companies also represent that confidential information will not be shared outside of Southern Companies' Auction Administrator function and the Independent Auction Administrator absent inquiries from the Commission or a regulatory entity. Southern Companies also represent that all employees of Southern Companies directly engaged in wholesale electricity marketing and trading are prohibited from accessing confidential Auction data.

3. Administrative Functions Being Moved from Southern Companies' Personnel to the Independent Auction Administrator and the Role of the Independent Auction Administrator

20. Southern Companies state that in accordance with paragraph 32 of the December 2009 Order, they have inserted a new section 2.1A in the Participation Rules setting forth the specific duties and responsibilities of the Independent Auction Administrator and the Southern Companies personnel involved with Auction administration. In addition to being responsible for managing, safeguarding and storing confidential information, Southern Companies explain that the Independent Auction

Administrator also is charged with testing and verifying the configuration of the Auction software and interactions with potential and actual Auction participants. Examples of the various anticipated tasks within these functions include: storage of transaction-related information; ensuring the Auction software is configured and operates in accordance with the Auction Rules, including software testing; administering and/or managing participant registration and access to the Auction software and resolving participant questions; serving as the first point of contact for and between Southern Companies and Auction participants; coordinating with Southern Companies' Auction Administrator personnel, the Independent Auction Monitor and the software provider; and assisting, as directed by Southern Companies' Auction Administrator personnel, in responding to inquiries from regulatory entities related to Auction activities.

4. Responsibilities of the Southern Companies' Auction Administrator

21. Southern Companies state that they remain ultimately responsible to the Commission for the operation of the Auction in accordance with the Auction Rules and Participation Rules, as set forth in their market-based rate tariff. Southern Companies' Auction Administrator must therefore ensure that the Auction functions and clears as intended. In addition, responsibility for compliance with all mitigation-related matters, including compliance with the market-based rate tariff appendices relating to the submission and pricing of energy in the Auction, remains with Southern Companies' Auction Administrator. Further, Southern Companies remain the official licensee for the Auction software (and thus responsible for decisions regarding modifications to the software) and Southern Companies also maintain the Auction website. Accordingly, the role of Auction Administrator remains within Southern Companies and is carried out by the same individuals from the same three separate business functions as discussed below that attended to the operation of Phase I and the preparation for Phase II.

22. Southern Companies explain that the functions and the Auction Administrator roles specific to Southern Companies are as follows: (1) Financial and Contract Services Auction Administrator (responsible for ongoing quality assurance of the Auction software, as well as the coordination with the Independent Auction Administrator regarding the billing and collection of administrative and user fees from Auction participants); (2) Risk Control Auction Administrator (responsible for working with counterparties to facilitate the execution of Participant Agreements, as well as the coordination between counterparties and the software provider to obtain executed non-disclosure agreements, and, once agreements are in place, communicating with the Independent Auction Administrator to confirm counterparty setup in the Auction software); and (3) Regulatory Affairs and Energy Policy Auction Administrator (responsible for the implementation of decisions that Southern Companies make regarding future development and expansion of the Auction and for ensuring that all day-

ahead auctions and hour-ahead auctions performed as part of the Auction are carried out in accordance with the requirements of the Auction Rules and Participation Rules).

23. Southern Companies state that from an administrative, day-to-day perspective, Southern Companies do not envision the Southern Companies' Auction Administrator discharging many Auction Administrator tasks. However, the Independent Auction Administrator is expected to consult with Southern Companies' Auction Administrator on various matters, specifically including: (1) changes to the Auction software; (2) responses to Auction participant queries involving application of the Auction Rules; (3) responses to Auction participant comments suggesting or proposing changes to the Auction software or Auction Rules; (4) responses to inquiries or requests from regulatory agencies or the Independent Auction Monitor; and (5) any other matters on which the Independent Auction Monitor desires Southern Companies' guidance.

III. Notice of Filing and Responsive Pleadings

24. Notice of Southern Companies' filing was published in the *Federal Register*,¹⁰ with motions to intervene and protests due on or before February 9, 2010. None was filed.

IV. Discussion

25. We find that Southern Companies have complied with the Commission's directives specified in the December 2009 in many respects. We will accept their proposed tariff revisions and we will require a further compliance filing addressing our concerns discussed below. Primarily, the Commission remains concerned with Southern Companies' access to third-party confidential information, Southern Companies' description of who may serve as Southern Companies' Auction Administrator, and the role of the Independent Auction Monitor.

A. Confidential Information

26. In the December 2009 Order, the Commission directed Southern Companies to submit a compliance filing explaining why their employees need access to third-party confidential information, and how such information will be protected from improper disclosure or misuse.¹¹ The Commission also directed Southern Companies to revise their market-based rate tariff to set forth the specific duties and responsibilities of the Independent Auction Administrator and Southern Companies' Auction Administrator, if

¹⁰ 75 Fed. Reg. 5311 (2010).

¹¹ December 2009 Order, 129 FERC ¶ 61,253 at P 31.

any, involved with the administration of the Auction once the Independent Auction Administrator begins its duties.¹²

27. We agree with Southern Companies that their Auction Administrator personnel may require access to third-party confidential information in instances where they are addressing complaints or questions about a particular auction.¹³ However, Southern Companies' tariff provision is broader; it states that:

Southern Companies, through the Auction Administrator, shall retain the right to access Bid Information, Offer Information, and other and transaction-related information insofar as such access is necessary (i) to enable Southern Companies to ensure that the Auction operates as designed and implemented and in compliance the Auction Rules and Participation Rules and/or (ii) to respond to questions or complaints regarding Auction administration.¹⁴

28. Southern Companies have not justified their need for access to third-party confidential information "to ensure that the Auction operates as designed and implemented and in compliance [with] the Auction Rules and Participation Rules." Southern Companies' explanation has not persuaded the Commission to allow Southern Companies unfettered access to third-party confidential information. As Southern Companies explain, their "Auction Administrator personnel normally will not need" access to such information "as part of their compliance-related activities."¹⁵ Because Southern Companies have not justified why their Auction Administrator personnel would need access to third-party confidential information for any purpose other than to address a question or complaint about a particular auction, we will only grant Southern Companies access to such information at this time for the purpose of addressing questions or complaints about a particular auction. Further, we direct that, within 30 days of the date of this order, they revise section 2.1B(b) of the Participation Rules to indicate that Southern Companies' access to such information is permitted, through the Auction Administrator, only for the specific purpose of addressing questions or complaints about a particular auction. If Southern Companies continue to believe that they need access to third-party confidential information for purposes other than to address questions or complaints about a particular auction, then they should clearly state what those other

¹² *Id.* P 32.

¹³ Southern Companies' Jan. 19 Compliance Filing at 6.

¹⁴ Section 2.1B(b) of the Participation Rules.

¹⁵ Southern Companies' Jan. 19 Compliance Filing at 6.

purposes are in another compliance filing and explain why access to such information is necessary in those circumstances.

29. Further, Southern Companies have not demonstrated that the third-party confidential information will be protected. Southern Companies have limited such access to a “[d]iscrete group of Southern Companies’ personnel”¹⁶ but they have not affirmatively identified which personnel will have access. Although we note that Southern Companies represent that the Independent Auction Administrator will document when Southern Companies’ personnel download third-party confidential information, we remain concerned with potential misuse of third-party confidential information or inadvertent disclosure of information. The protections described by Southern Companies do not adequately address our concerns regarding protection of third-party confidential information. Southern Companies are directed to clearly state how the confidential information will be protected by describing when and how Southern Companies’ personnel will access and use third-party confidential information and how the Independent Auction Administrator will document such access and use. Further, we will require that such access be reported to the Independent Auction Monitor.

B. Southern Companies’ Auction Administrator

30. The December 2009 Order found that Southern Companies’ tariff language identifying who may not serve as Southern Companies’ Auction Administrator to be too broad. As such, that order directed Southern Companies to state affirmatively who may serve as Southern Companies’ Auction Administrator.¹⁷

31. We find Southern Companies’ proposed tariff revision in this regard to be insufficient. Southern Companies’ proposed tariff revision provides that “Any employee of Southern Companies may serve as Auction Administrator; provided, however, that Southern Companies Marketing Function Employees and Transmission Function Employees, as those terms are defined in 18 C.F.R. § 358.3 (d) and (i), may not serve as Auction Administrator.”¹⁸ However, the tariff does not affirmatively state which employees may serve as Southern Companies’ Auction Administrator. Rather, their proposed tariff language continues to identify which employees may not serve as Southern Companies’ Auction Administrator and does not specifically identify which employees may serve as Southern Companies’ Auction Administrator. Therefore, we again direct Southern Companies to include in their compliance filing revisions to their

¹⁶ *Id.* at 7.

¹⁷ December 2009 Order, 129 FERC ¶ 61,253 at P 33.

¹⁸ Section 2.1 of the Participation Rules.

tariff language to specify more narrowly and in the affirmative who may serve as Southern Companies' Auction Administrator. The tariff language should include the appropriate job titles and job descriptions, as well as information regarding where the employees are in relation to the rest of the company and the departments to which they report. We note that the Standards of Conduct for Transmission Providers and the market-based rate affiliate restrictions in section 35.39 of the Commission's regulations continue to apply to Southern Companies.

C. Independent Auction Monitor

32. In the December 2009 Order, the Commission stated that it expected the Independent Auction Monitor to identify suspected tariff violations and/or violations of Commission approved rules and regulations, including suspected manipulation, by any Auction participant or the Auction Administrator and promptly notify the Commission of any questionable behavior.

33. The Independent Auction Monitor must file reports to the Commission every twelve months for the first three years of the Auction.¹⁹ In the December 2009 Order, the Commission stated that in addition to the annual reporting requirement:

the Independent Auction Monitor has an obligation to report any complaints relating to the Auction or other serious concerns to the Commission as soon as possible rather than waiting for the next report. **We view this obligation as meaning that the Independent Auction Monitor is responsible for identifying suspected tariff violations and/or violations of Commission approved rules and regulations related to the Auction, including suspected [Auction] manipulation, by any [Auction] participant or the Auction Administrator and promptly notifying and/or referring such questionable behavior to the Commission's Office of Enforcement.** Further, any and all data and information accessible by the Independent Auction Monitor and/or the Auction Administrator, as well as any analyses performed of that data, should be made available to the Commission upon request, as the Commission may deem necessary.^[20]

34. The Commission is concerned that Southern Companies have failed to acknowledge that the Independent Auction Monitor is responsible for monitoring *all*

¹⁹ Section 4.3.4 of the Auction Rules.

²⁰ December 2009 Order, 129 FERC ¶ 61,253 at P 109 (emphasis added) (footnotes omitted).

Auction participants. Rather, it appears that Southern Companies have attempted to limit the focus of the Independent Auction Monitor's role to the technical functioning of the Auction and have not acknowledged the Independent Auction Monitor's responsibility to monitor for questionable behavior, whether by Southern Companies or other Auction participants. Notwithstanding Southern Companies' statement that they do not interpret the December 2009 Order as expanding or broadening the Independent Auction Monitor's role or existing duties, which "focus on the mitigation-related terms and conditions applicable to Southern Companies and the manner in which the Auction clears," we emphasize herein and reiterate our earlier requirement that we expect the Independent Auction Monitor to monitor *all* Auction participants and promptly notify and/or refer questionable behavior to the Commission's Office of Enforcement.²¹ Accordingly, Southern Companies are directed to revise section 4.3.5 of the Auction Rules to specify that the Independent Auction Monitor is responsible for monitoring all Auction participants and promptly reporting any questionable behavior by any Auction participant to the Commission.

35. Section 4.3.4 of the Auction Rules provides that the Independent Auction Monitor shall file reports with the Commission every twelve months for the first three years of operation of the Energy Auction. Such reports shall include, at a minimum, the following: (a) the clearing price for each Energy Auction; (b) the amount of Energy offered and sold by each seller (identified by name) in each Energy Auction; and (c) the amount of Energy bid on and purchased by each buyer in each Energy Auction.²² As noted above, the Independent Auction Monitor has an obligation to report any complaints relating to the Energy Auctions or other serious matters to the Commission as soon as possible rather than waiting for the next regularly-scheduled report. We will require that future versions of the Independent Auction Monitor's annual informational report are to be filed in a public version along with a justification for any request for privileged treatment of any portions of the report that the Independent Auction Monitor redacts in

²¹ Southern Companies' Jan. 19 Compliance Filing at n.5. Southern Companies state that they interpret the statements made in Paragraphs 88 and 109 of the December 2009 Order to indicate that the Independent Auction Monitor will monitor issues associated with the Auction. They also state that the term "Auction" should be used in place of the term "market" in a few instances. We clarify that in Paragraph 88 of the December 2009 Order "Independent Market Monitor" should refer to "Independent Auction Monitor" and in Paragraph 109 "market manipulation" and "market participant" should refer to "Auction manipulation" and "Auction participant."

²² On April 23, 2010, The Brattle Group submitted the first annual report in Docket No. ER09-88-000.

accordance with 18 C.F.R. § 388.112(b) (2010). The Commission believes that this will improve transparency while protecting confidential information.

The Commission orders:

(A) Southern Companies' revised tariff sheets are conditionally accepted, effective January 4, 2010, as discussed in the body of this order.

(B) Southern Companies are directed to submit a compliance filing, within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.