

are due. This order denies the requests for stay of Order No. 2003, but grants the requests to extend the effective date of the rule and the date on which compliance filings are due.

I. Background

2. On August 25, 2003, the Commission received requests for stay of all or part of Order No. 2003 from the Alabama Public Service Commission (Alabama PSC); Mississippi Public Service Commission (Mississippi PSC); Southern Company Services, Inc. (Southern); and the National Rural Electric Cooperative Association in a joint filing with the American Public Power Association (NRECA-APPA).²

3. On September 26, 2003, the Commission granted the requests of the Midwest Independent Transmission System Operator, Inc., the New York Independent System Operator, Inc., PJM Interconnection, L.L.C., the New England Power Pool Participants Committee and ISO New England, Inc., the New England Transmission Owners (NETO), the California Independent System Operator Corporation and its Jurisdictional Participating Transmission Owners and the New York Transmission Owners (NYTO) (Collectively, "Independent Movants") to extend the date on which compliance filings were due for independent transmission-owning entities until January 20, 2004.

4. Between September 22, 2003 and October 2, 2003, the Commission received requests from various non-independent transmission owners, including Arizona Public Service Company (APS), Cleco Energy, LLC, Entergy Services (Entergy), NETO, NYTO, Progress Energy, and Southern Company Services (Southern) (collectively "Non-Independent Movants") requesting that non-independent transmission owners also be granted an extension of time to comply with Order No. 2003 until January 20, 2004.

II. Request for Stay

A. Arguments Raised

5. Southern argues that the Commission should stay the final rule provisions on two issues: Network Resource Interconnection Service (NR Service) and refunds of Network Upgrade costs. Southern asks that the stay remain in effect until the Commission grants rehearing and

removes the two provisions, or, alternatively, if the Commission denies rehearing, until Southern is able to seek judicial review of the two provisions.

6. Southern first argues that NR Service threatens system reliability because it ignores the need to perform additional studies if the Generating Facility is ever designated a network resource, and removes the incentive to site new generation in close proximity to loads. Southern then argues that NR Service would harm transmission providers and their customer by eliminating the pricing signals that ensure that network resources are economical resource options. Also, the "contradictory and inherently vague" NR Service provisions would be difficult and costly to implement and revise once the Commission provides the necessary clarification. Furthermore, requiring transmission providers to adopt the "inherently vague and inconsistent" NR Service provisions is a violation of due process.³ Finally, the threat of irreparable harm is imminent because of the impending effective date of the Final Rule and the fact that Southern has "at least two" Interconnection Customers that could claim they would be entitled to take NR Service.

7. Second, Southern argues that a stay should be granted with respect to (1) the five-year deadline for refund to the Interconnection Customer of the cost of Network Upgrades, and (2) the requirement that an Interconnection Customer receive such refunds when transmission service is taken at locations on the Transmission Provider's system other than from the generating facility itself. Without a stay, other transmission customers will be subject to the costs of Network Upgrades that provide them no benefit. Southern argues that even if it is successful on appeal, because many generator owners are undercapitalized special-purpose entities and have had severe financial problems of late, it is possible that these Interconnection Customers would not be able to pay such amounts if ordered to do so.

8. Alabama PSC and Mississippi PSC raise arguments similar to those presented by Southern and request that the Commission stay the effective date of Order No. 2003 in its entirety until

the Commission acts on their requests for rehearing. And, if the Commission fails to grant their requests for rehearing, the Commission should stay the interconnection rule until these matters are addressed by a court. They argue that retail customers in their states will face irreparable harm because these customers risk losing their low-cost power, along with "the resulting negative impacts to their quality of life and comparative economic advantages for purposes of attracting new industries." Even if they prevail on judicial review, "it is unlikely that monetary damages could be awarded at that time to rectify this harm" because the Commission lacks the authority to make such awards and recovery from merchant power entities may not be possible.

9. NRECA-APPA request a stay of the effective date of Order No. 2003 "because the issues raised in this request are so important to NRECA-APPA, as well as consumers, state regulators, and many market participants."

B. Discussion

10. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.⁴ The Commission may stay its action when "justice so requires."⁵ In addressing motions for stay, the Commission considers: (1) Whether the moving party will suffer irreparable injury without a stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.⁶ The key element in the inquiry is irreparable injury to the moving party.⁷ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁸ The standard for showing irreparable harm is strict, as the DC Circuit has explained:

First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.' It is also well settled that economic loss does not, in and of itself, constitute irreparable harm. . . . Implicit in each of these principles is the further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur. Bare allegations of what is likely to occur are of no value since the court must

² Some movants requested a stay as part of their requests for rehearing or clarification (Alabama PSC, Mississippi PSC, and NRECA-APPA). All requests for rehearing and clarification will be addressed in a subsequent order.

³ *Citing Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 3 (DC Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (noting that the "alleged violation of a constitution right * * * triggers a finding of irreparable harm").

⁴ *Midland*, 56 FERC at 61,630. See also *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

⁵ 5 U.S.C. 705 (2000).

⁶ See e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,177 at 61,631 (1991) (*Midland*), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993).

⁷ *Midland*, 56 FERC at 61,631.

⁸ *Id.*