



SCOTT B. GROVER
t: (205) 226-8781
f: (205) 488-5660
e: sgrover@balch.com

June 15, 2018

Mr. Walter L. Thomas, Jr.
Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 950
Montgomery, Alabama 36130

Re: **Docket No. 32767,**
James H. Bankston, et al. v. Alabama Power Company

Secretary Thomas:

On behalf of Alabama Power Company (“Alabama Power” or “Company”), and pursuant to Rule 11 of the Commission’s Rules of Practice, we are submitting the attached Motion to Dismiss. As the motion explains, the above-referenced complaint is without merit, as it collaterally attacks an order of the Commission that is more than five years old. Insofar as the complaint could be construed as being directed against Rate Rider RGB (Supplementary, Back-Up, or Maintenance Power), the complaint is moot. Contemporaneously herewith, in Docket No. U-4226, Alabama Power has proposed modifications to the rate rider that reflect updates to the charges for Firm Back-Up Power.

In filing this motion, the Company recognizes that an order of dismissal would be without prejudice to the rights of complainants to intervene and participate in Docket No. U-4226, should they so desire. In connection therewith, the Commission possesses the latitude to tailor proceedings as it deems justified under the circumstances, including allowing complainants the opportunity, should they elect, to submit additional information. *See, e.g.*, Order Establishing Comment Cycle, Docket Nos. U-5024, et al. (June 7, 2011).

Mr. Walter L. Thomas, Jr.
June 15, 2018
Page 2

We are tendering this submission to the Commission through its e-filing system, consistent with the applicable rules and practices. To this end, an original and one copy of this filing are being delivered to the Commission by overnight mail (a copy of this filing, along with the filing in Docket No. U-4226, also has been served on counsel for complainants contemporaneously herewith). To the extent additional information is required, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Grover', with a long horizontal flourish extending to the right.

Scott B. Grover

SBG:eb
Attachments

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

JAMES H. BANKSTON, et al.,

Docket No. 32767

Complainants

v.

ALABAMA POWER COMPANY

Respondent

**MOTION TO DISMISS
OF ALABAMA POWER COMPANY**

Alabama Power Company (“Alabama Power” or “Company”) by and through its undersigned counsel, hereby moves the Alabama Public Service Commission (“Commission”) for dismissal of the Complaint and Petition for Declaratory Judgment and Injunctive Relief (“Complaint”). As explained below, the Complaint collaterally attacks an order of the Commission issued more than five years ago and for which the time for rehearing and appeal has long since passed. On this basis, and under governing law, the Complaint must be rejected.¹

Insofar as the public interest may warrant construction of the Complaint as one against Rate Rider RGB (Supplementary, Back-Up, or Maintenance Power) (“Rate Rider RGB”), the Complaint is moot. Alabama Power is entitled under both federal and Alabama law to collect charges for back-up power service. *See, e.g.*, 18 C.F.R. § 292.305(b) & (c); Ala. Code § 37-4-140(c). Contemporaneously herewith, Alabama Power has filed proposed modifications to Rate Rider RGB, and with that proposal has included the testimony of Ms. Natalie Dean, Pricing Manager for Alabama Power. Through her testimony, Ms. Dean demonstrates the justness and

¹ Alabama Power brings this motion to dismiss pursuant to Rule 11 of the Commission’s Rules of Practice, which authorizes recipients of a complaint to “plead or answer” In so doing, Alabama Power does not admit or acquiesce to any substantive allegation of the Complaint. In the event the relief requested here is not granted, Alabama Power reserves the right to submit an answer to the Complaint.

reasonableness of the rate rider and, relative to the allegations of the Complaint, the charges for Firm Back-Up Power service. Among other things, Ms. Dean explains the design of the rate rider and why it includes separate charges for the provision of Firm Back-Up Power service to customers, taking supplementary service under certain rate schedules, who seek to install and interconnect on-site generation to the Company's system (including but not limited to on-site solar generation). Ms. Dean also explains the cost basis for those charges and why, based on analysis performed using currently available information, the current charges being collected are due to be increased.

In sum, there is no legal basis for continued prosecution of the Complaint, as the claims are not justiciable and no relief can be afforded complainants. Rate Rider RGB is an effective rate schedule on file with the Commission, and complainants are not entitled to any retroactive relief relative to the charges under that rate, which are and shall remain the lawful charges until they are replaced with the proposed revisions. For these and other reasons, as more fully set forth below, the Complaint should be dismissed.

1. Federal law, specifically the Public Utility Regulatory Policies Act of 1978, requires Alabama Power to provide back-up power service to certain qualifying small power production and co-generation facilities. *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. ¶¶ 12214, 12215, 12229 (Feb. 25, 1980); 18 C.F.R. §§ 292.305(b) and (c).

2. Alabama law, specifically Title 37, Chapter IV, provides that the Commission “shall approve the utility’s rates, fees, and charges for services to a distributed generation facility including, but not limited to, metering service, administering metering service, standby power, supplementary power, back-up power, and maintenance power.” *See Ala. Code § 37-4-140.*

3. On or about December 20, 2012, in Docket Nos. U-4226 and 18126, Alabama Power filed proposed modifications to Rate Rider RGB (“Revision Fifth”) and the special rules governing application of the rate rider. In the filing, Alabama Power explained that the purpose of the filing was to “clarify the applicability of the rate rider, while expanding the number of rate options that are eligible to take service under the rider. Also included are updated rate definitions and service options to reflect changes in technology and system costs.” Alabama Power requested effectiveness of the proposed modifications beginning with May 2013 billings. No party submitted a motion to intervene or other response or comments in connection with the Company’s filing, and it was approved by the Commission on January 10, 2013, to be effective for May 2013 billings.

4. In the nearly five-month period between the order’s issuance and the effectiveness of the modifications, no party filed a request for rehearing of the order, or took an appeal of the order, or pursued any other formal action. Moreover, until the filing of the Complaint in May of 2018, no formal complaint regarding Rate Rider RGB has ever been filed with the Commission.

5. Under Alabama law, a utility must file with the Commission any new rate or service regulation, or any modification to an existing rate or service regulation. Absent suspension or disapproval by the Commission of the new or modified rate or service regulation, the rate or service regulation becomes effective as requested by operation of law. *See* Ala. Code § 37-1-81. Moreover, under Alabama law, prior orders of the Commission, unappealed, become “final and are beyond the Commission’s jurisdiction after 30 days.” *Charles Woods, et al. v. S. Cent. Bell Tel. Co.*, Docket No. 22563, 1993 WL 114543 (March 8, 1993) (citing Ala. Code § 37-1-122).

6. While “orders or judgments are usually based on some findings of facts [] it has been declared that failure in a matter of form where a mere irregularity has intervened in the rendition does not render such order of judgment void, but merely voidable on appeal.” *Alabama Water Co. v. City of Attalla*, 100 So. 490, 493 (Ala. 1924). Moreover, absent a change in the filed rate, that rate is “the only rate that may be charged.” *BellSouth Telecomms., Inc. v. APSC*, 987 So. 2d 1079, 1085-87 (Ala. 2007) (discussing the principles of the Filed Rate Doctrine as embodied in Alabama’s statutory rate-making system and as recognized in case law).

7. Complainants, as a matter of law, cannot bring a challenge in May of 2018 to the January 10, 2013 order of this Commission. Rate Rider RGB is a rate on file with the Commission, and was modified in accordance with the applicable provisions of Title 37. The Alabama Legislature has given the Commission comprehensive, exclusive jurisdiction over the rates of utilities, and has expressly authorized the Commission to approve rates filed by utilities covering the provision of back-up power service. *See* Ala. Code § 37-4-140.

8. The Commission could have allowed the modifications to Rate Rider RGB to go into effect without the entry of any order, by operation of law. Conversely, had any party intervened and raised materials issues or concerns regarding the modifications, the Commission could have taken action under Ala. Code § 37-1-81(b) and suspended the proposed modifications for investigation. The Commission instead entered its January 10, 2013 order. And no one sought rehearing or appeal of that order, including, but not limited to, complainants. Accordingly, as a matter of law, the Complaint must be rejected insofar as it mounts an impermissible collateral attack on an order of this Commission that became final over five years ago.

9. To the extent the Complaint challenges the existing rates for Firm Back-Up Power service under Rate Rider RGB, the Complaint is moot. Contemporaneously herewith, Alabama Power has filed modifications in Docket No. U-4226 to update the charges assessed for Firm Back-Up Power service under Part B of the rate rider. In support of these modifications, the Company has included the testimony of Natalie Dean, Alabama Power's Pricing Manager. In her testimony, Ms. Dean explains the design of Rate Rider RGB, and specifically the structure of the Firm Back-Up Power service provisions and their application to customers who install and interconnect on-site generation to the Company's system (including, but not limited to, on-site solar generation). In this respect, Ms. Dean elaborates on the underlying reasons for the assessment of separate charges to customers taking supplementary service under certain rate schedules, such as Rate FD. Ms. Dean also explains the cost basis for those charges and demonstrates, based on analysis performed using currently available information, that the existing charges being collected are due to be increased.

10. The gravamen of the Complaint and its Prayer for Relief focus strictly on the current charges for Firm Back-Up Power service under Part B of Rate Rider RGB (i.e., the charges set forth in Revision Fifth). In light of the action taken by the Company, there remains no justiciable controversy and no relief can be had by complainants. Accordingly, the Complaint is moot and should be dismissed. *See, e.g., Ex parte Merrill*, 2018 WL 2276105, at *3 (Ala. May 18, 2018).

11. The Company acknowledges that dismissal of the Complaint would be without prejudice to the rights of complainants to intervene and participate in Docket No. U-4226, should they so desire. In connection therewith, should the Commission determine the public interest so warrants, a comment cycle could be initiated to explore the need, if any, for further investigation

or proceedings. *See, e.g., Order Establishing Comment Cycle*, Docket Nos. U-5024, et al. (June 7, 2011).

12. Notwithstanding the procedural options available to complainants and to the Commission, Alabama Power submits that its proposed modifications to Rate Rider RGB are fully supported and can be approved as filed. The maintenance of charges for back-up power service is specifically contemplated under both Federal and Alabama law. As confirmed in the testimony of Ms. Dean, the design of Rate Rider RGB, and the proposed charges for Firm Back-Up Power service under Part B of the rate rider, are just and reasonable and in the public interest.

WHEREFORE, in consideration of the foregoing, Alabama Power Company respectfully requests the Commission enter an order dismissing the Complaint.



Attorney for Alabama Power Company

OF COUNSEL:

Dan H. McCrary
Scott B. Grover
Balch & Bingham LLP
1710 6th Avenue North
Birmingham, Alabama 35203
Tel. 205.251.8100
Email — dmccrary@balch.com
sgrover@balch.com

Robin G. Laurie
Riley W. Roby
Balch and Bingham LLP
105 Tallapoosa Street, Ste. 200
Montgomery, AL 36104
Tel. 334.834.6500
Email — rlaurie@balch.com
rroby@balch.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following counsel of record in this public proceeding by electronic transmission, hand delivery, and /or U.S. Mail on this the 15th day of June, 2018.

A handwritten signature in black ink, appearing to be 'SUN' followed by a long, sweeping horizontal stroke.

OF COUNSEL