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October 31, 2019

Via hand delivery and electronic delivery

Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 850
Montgomery, AL 36104

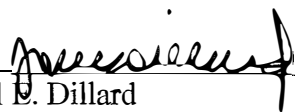
**Re: Petition for Approval of Accounting Authorization Related to
Construction Work in Progress Costs, Docket No. U-5316; Petition for a
Certificate of Convenience and Necessity, Docket No. 32953**

Dear Secretary Thomas:

Enclosed for filing in the above dockets, please find Sierra Club's petition for reconsideration of the order entered in docket U-5316 on October 1, 2019.

Please call me with any questions concerning this filing.

Sincerely,


Joel E. Dillard

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Counsel for Sierra Club

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION
MONTGOMERY, ALABAMA

IN RE: Petition for Approval of)	
Accounting Authorization Related to)	
Construction Work in Progress Costs by)	Docket U-5316
Alabama Power Company)	
)	

IN RE: Petition for a Certificate of)	
Convenience and Necessity by)	
Alabama Power Company)	Docket 32953
)	

**SIERRA CLUB’S PETITION FOR RECONSIDERATION OF
ORDER APPROVING CONSTRUCTION-WORK-IN-PROGRESS COSTS AND
OTHER COSTS ASSOCIATED WITH POWER PLANT BEFORE CERTIFICATION**

Sierra Club hereby seeks reconsideration of the order the Alabama Public Service Commission (“Commission”) entered in docket U-5316 on October 1, 2019 (“Order”),¹ because that order violates the prohibition against the construction of power plants before they obtain a certificate of convenience and necessity (“Certificate”) under section 37-4-28, Code of Alabama (1975). For a proposed gas-burning power plant in Mobile County, Alabama that is yet to obtain a Certificate, the Order approves costs incurred by Alabama Power Company (“Company”) for “construction work in progress” (“CWIP”)—and guarantees payment of “any costs that directly result from the non-issuance of the certificate.” But this blanket approval circumvents the letter of section 37-4-28 and its intent that the public pays only for power plants that the Commission has certified the public actually needs, based on evidence in the record, after a hearing.

¹ This Order is attached as Ex. 1.

As discussed further below, based on several independent legal grounds, and in accordance with Rule 21 of the Commission’s Rules of Practice,² the Order should be nullified and the Company’s underlying requests should be denied, or at least deferred until the conclusion of the statutory process for Commission action on the Company’s certification petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. On May 8, 2019, the Company entered into an agreement for vendors to construct a gas-burning power plant in Mobile County, Alabama by “the end of 2023.”³ The power plant is referred to alternatively by the Company as “the Facility,” “Barry 8,” and “Barry Unit 8.”

2. On September 6, 2019, the Company filed a report with the U.S. Securities and Exchange Commission stating that it “expects to recover costs associated with the Facility” through various rate recovery mechanisms.⁴ Further, this report states that these costs and the costs of acquiring another power plant are “currently estimated to total approximately \$1.1 billion.”⁵

² Rule 21 allows petitions for reconsideration to be filed within thirty days “from the date of the final action on the matter for which rehearing or reconsideration is sought.” Ala. Pub. Serv. Comm’n, Rules of Practice of the Alabama Public Service Commission 24 (1999). Because the Commission entered its order on October 1, this petition is timely filed. This petition also comports with Rule 21’s content requirements by stating the legal propositions involved and citing the relevant authorities.

³ Ala. Power Co., *SEC Form 8-K* (2019) Ex. 2, at 2; see also Petition for a Certificate of Convenience and Necessity at 260-262, Ala. Power Co., No. 32953 (Ala. Pub. Serv. Comm’n Sept. 6, 2019) [hereinafter Certification Petition] (testimony by Michal A Bush explaining that the scope of work in the agreement includes construction and that the plant will burn gas).

⁴ Ex. 2 at 3.

⁵ Id.

3. On September 6, 2019, the Company filed a petition with the Commission for a Certificate under section 37-4-28 “to construct and install” Barry 8, among other things.⁶

4. On September 9, 2019, the Commission issued a notice that it would review the Company’s petition in docket 32953, and that it would accept interested parties’ petitions to intervene until September 27, 2019.

5. On September 20, 2019, the Company sent the Commission a letter requesting approval of activities to meet the Company’s targeted “substantial completion date” for Barry 8 of November 1, 2023. Specifically, its request was twofold. First, the Company asked that the Commission “confirm the appropriateness of the Company recording Barry 8 construction work in progress (‘CWIP’) costs incurred prior to the issuance of an order on the certificate petition.”⁷ Second, “[s]hould a certificate for Barry 8 not be issued,” the Company asked that the Commission approve a specific cost recovery method from the public known as a “regulatory asset” for “Barry 8 CWIP costs and *any* costs that directly result from the non-issuance of the certificate.”⁸ The Company did not file its letter in docket 32953, in which its certification petition is under review. Nor did it identify a dollar amount or any other limit on its request; instead, the Company simply claimed that “it has been and will continue to be necessary to incur certain costs prior to the completion of the certificate proceeding,”⁹ and then listed examples of what these costs may include.¹⁰

⁶ Certification Petition 1-3.

⁷ Letter from Philip Raymond, Exec. Vice President, Ala. Power Co., to Walter L. Thomas, Jr., Sec’y, Ala. Pub. Serv. Comm’n, Ex. 3, at 2 (Sept. 20, 2019) [hereinafter The Company’s Letter] (on file with Sierra Club) (emphasis added).

⁸ Id. at 3 (emphasis added).

⁹ Id. at 2.

6. On or around September 27, 2019, Sierra Club and several other interested persons filed petitions to intervene in docket 32953.

7. On October 1, 2019, the Commission entered an order in docket U-5316 finding both requests in the Company's September 20 letter "reasonable and well-supported," and thereupon granting them.¹¹ The Commission's finding rested exclusively on the claims in the Company's letter, as there was no hearing on this matter. In particular, the Commission accepted the claim that "it has been and will continue to be necessary for the Company to incur certain limited preparatory costs" to meet the "completion date for Barry Unit 8 and have the facility available to serve winter needs in the 2023-2024 timeframe."¹² The Commission did not specify any further the "certain limited preparatory costs" that it approved under the Order. The only limit on the approval appears to be that if the balance of incurred costs reaches five percent of the "estimated in-service cost of the total project," then the Company must confer with the Commission on whether additional approvals are "warranted."¹³ But the Order does not define "total project" or provide a dollar amount for "estimated in-service costs" that trigger this requirement to confer with the Commission.

8. On October 9, 2019, the Commission approved the intervention in docket 32953 by all but one of the interested parties that had petitioned to intervene.

¹⁰ Id.

¹¹ Ala. Power Co., No. U-5316 (Ala. Pub. Serv. Comm'n Oct. 1, 2019) [hereinafter Order], Ex. 2 at 2.

¹² Id.

¹³ Id. at 3.

LEGAL BACKGROUND

9. “The Legislature has committed to the Public Service Commission matters of vast public interest to the people of this state. Among these powers are the regulation of utilities and their rates.”¹⁴ As relevant here, the Commission’s powers include acting on petitions for a certificate of convenience and necessity to construct power plants, and acting on requests to recover (from the public) or transfer (onto the public) costs incurred by utilities for power plants. In so acting, the Commission is bound by process requirements in the Alabama Code. Namely, the Commission’s actions on such petitions and requests must follow a set sequence,¹⁵ and must be based on evidence in the record, after a hearing.¹⁶

10. Section 37-4-28 establishes the “convenience and necessity” standard and the process requirements for pre-construction certification of a new power plant, as well as the associated property and facilities. The statute states:

No plant, property or facility for the production, transmission, delivery or furnishing of gas, electricity, water or steam shall be constructed, except ordinary extensions of existing systems in the usual course of business, until written application is first made to the [C]ommission for the issuance of a certificate of convenience and necessity, and the issuance by the commission of such certificate. Upon the filing of any such application, and after a public hearing of all parties interested, the [C]ommission may, or may not, in its discretion, issue such a certificate of convenience and necessity, and if issued, may prescribe such conditions upon the issuance as it may deem advisable.¹⁷

¹⁴ Ala. Pub. Serv. Comm’n v. Redwing Carriers, Inc., 199 So. 2d 653, 658 (Ala. 1967).

¹⁵ Redwing Carriers, 199 So. 2d at 658 (stating that parties in proceedings before the Commission are to be “accorded due process of law.”).

¹⁶ Ala. Pub. Serv. Comm’n v. S. Bell Tel. & Tel. Co., 42 So. 2d 655, 666-67 (Ala. 1949) (“[w]hen an administrative body is authorized to act only after hearing, its action must be based upon findings supported by the evidence adduced at the hearing.”).

¹⁷ Ala. Code § 37-4-28.

The plain language of the statute prohibits construction before certification. It also prohibits Commission action on a certification petition before a hearing. Under Alabama Supreme Court precedent construing a similar statutory hearing requirement, interim actions are likewise prohibited.¹⁸

11. Section 37-1-96, Code of Alabama (1975) establishes the general prohibition against the Commission's issuing orders that affect rates without a hearing. It states: "No order shall be made by the [C]ommission affecting any rate or service, except as otherwise specifically provided, unless or until a public hearing has been held in accordance with the provisions of this title."

12. As the Commission itself has recognized, it is further bound by the bedrock principle of utility regulation that rates must be limited to the reasonable costs incurred by a utility to serve the public.¹⁹

ARGUMENT

I. The Order violates the dual prohibitions in section 37-4-28 on construction before certification, and on action on a certification petition before a hearing.

13. The Order should be nullified because it violates two distinct constraints in section 37-4-28 on Commission action on proposed power plants: a prohibition on construction before certification, and a prohibition on action on a certification petition before

¹⁸ S. Cent. Bell Tel. Co. v. Ala. Pub. Serv. Comm'n, 425 So. 2d 1093, 1097 (Ala. 1983) (explaining that section 37-1-83 "specifically prohibits the [Commission] from issuing an order affecting the action complained of until after a hearing. The clause does not limit its application to a 'final order,' nor does it allow for a temporary or interlocutory order").

¹⁹ See Cont'l Tel. Co. of the S. v. Ala. Pub. Serv. Comm'n, 427 So. 2d 981, 987 (Ala. 1982) (internal citation omitted) ("A reasonable rate base consists of the 'reasonable value of its property devoted to the public service.'"); Cont'l Tel. Co. of S. v. Ala. Pub. Serv. Comm'n, 376 So. 2d 1358, 1368 (Ala. 1979) ("The statutory rate base is the value of the property used by the utility for public service.").

a hearing. These prohibitions ensure the Commission makes informed decisions “in matters of vast public interest,”²⁰ such as whether the public actually needs more power plants, and whether the specific power plants that a utility proposes actually are the best choice. But here the Commission did not abide by the statutory process for deciding these vital issues. Specifically, *before* certification or a hearing, the Order purports to approve the costs of “construction work in progress” and other costs associated with Barry 8. This is unlawful.

A. By approving costs incurred for “construction work in progress” and “any costs that directly result from the non-issuance of the certificate,” the Order violates the express prohibition in section 37-4-28 against construction before certification.

14. Here, it is beyond dispute that the Company is already incurring construction-related costs,²¹ that it intends to continue doing so,²² and that the Order approves the same, even though Barry 8 has no Certificate from the Commission.²³ But this approval violates section 37-4-28.

15. That statute states that “[n]o plant . . . shall be constructed . . . until written application is first made to the commission for the issuance of a certificate of convenience and necessity, and the issuance by the commission of such certificate.”²⁴ The statute is plain and unambiguous; it expressly prohibits construction before certification.

16. As applied here, the Order clearly violates the statute, because it approves

²⁰ Redwing Carriers, 199 So. 2d at 658.

²¹ The Company’s Letter at 2.

²² Id.

²³ Order at 2.

²⁴ Ala. Code § 37-4-28.

construction-related costs before certification: it grants the Company authority to record the costs of “*construction work in progress.*”²⁵ Further, the Order does so by accepting the Company’s claim that it has incurred, and will continue to incur, such costs “*prior to the issuance of an order on certification . . . to meet the targeted completion date of Barry Unit 8.*”²⁶ All the while, the Order does not acknowledge or apply the prohibition on construction before certification in section 37-4-28. And so even in the instances in which the Order appears to qualify the costs approved thereunder as “certain limited preparatory costs” or “preparatory CWIP costs,”²⁷ no attempt is made to define such “preparatory” costs or distinguish them from the construction-related costs that are prohibited by statute.²⁸ Rather, the Order simply accepts the Company’s examples of what its costs *may* include, without determining what, if any, costs *can* be incurred or approved now, before certification.²⁹

17. Similarly, although the Order directs the Company to confer with the Commission when the balance of costs incurred reaches five percent of the estimated in-service costs of the total project, the Order provides no dollar amount, definition, or any other limit regarding the construction of Barry 8. To the contrary, by approving “*any costs that*

²⁵ Order at 4 (emphasis added).

²⁶ Id. (emphasis added).

²⁷ Id. at 1-3.

²⁸ To be sure, the Company claims that “construction of the project can begin in earnest should the certificate authority be granted.” The Company’s Letter at 2. But besides this one self-serving statement, nothing in the Company’s letter or the Commission’s order precludes the Company from incurring construction-related costs. To the contrary, the Company sought and obtained approval for the costs of *construction work in progress*.

²⁹ Section 37-4-28 extends the prohibition on construction before certification to any “property or facility for the production, transmission, delivery or furnishing of gas, electricity, water or steam.” Ala. Code § 37-4-28. But, again, the order does not acknowledge or apply this statutory prohibition at all.

directly result from the non-issuance of the certificate,”³⁰ the Order gives the Company even more latitude to incur whatever costs it wants, including construction-related costs.

18. Such blanket approval cannot stand, because it circumvents the letter and intent of section 37-4-28, which is to ensure that the public pays only for power plants that the Commission has certified the public actually needs.³¹ Indeed, Sierra Club’s research has identified no examples of prior Alabama cases in which construction-work-in-progress costs of a power plant are recorded before that plant has obtained a certificate of convenience and necessity from the Commission.³² Nor do the Order or the Company’s September 20 letter cite any such precedents. As such, the express statutory prohibition against construction before certification controls this issue and renders the Order wrong as a matter of law.³³

B. By acting on the Company’s certification petition before holding a hearing, the Order violates the express prohibition in section 37-4-28 against such action.

19. Another, independent legal ground for reconsidering and nullifying the Commission’s order is that it was issued before a hearing.

20. When a petition for a certificate of necessity and convenience is pending

³⁰ Order at 4 (emphasis added).

³¹ The Commission itself has affirmed that “saddling current ratepayers with the cost of plant [sic] not currently devoted to their public service is inequitable and inconsistent with fundamental rate-making theory as historically practiced in our jurisdiction.” Mobile Gas Serv. Corp., No. 18590 (Ala. Pub. Serv. Comm’n July 18, 1983).

³² Nor has Sierra Club identified any precedent for the cost recovery method advocated by the Company and approved by the Commission: transferring into a “regulatory asset” the costs associated with a utility’s failure to secure certification under section 37-4-28. See Certification Petition at 5.

³³ S. Cent. Bell Tel. Co. v. Ala. Pub. Serv. Comm’n, 425 So. 2d 1093, 1097 (Ala. 1983) (“Because the jurisdiction of the [Commission] is statutory, compliance with the requirements of the statutes is necessary.”)

before the Commission, section 37-4-28 states, “*after* a public hearing of all parties interested, the commission may, or may not, in its discretion, issue such a certificate of convenience and necessity, and if issued, may prescribe such conditions upon the issuance as it may deem advisable.”³⁴ This language is plain and unambiguous; the Commission has discretion to take various actions on a certification petition, but first it must hold a hearing.

21. Hearing requirements like the one in section 37-4-28 have been strictly construed by the Alabama Supreme Court. In Choctaw County v. Alabama Public Service Commission,³⁵ the Court held that the Commission violated the hearing requirement in section 37-1-85, Alabama Code (1975),³⁶ by acting on a utility’s request “before the intervenors have completed their testimony and cross-examination.” Similarly, in South Central Bell Telephone Company v. Alabama Public Service Commission,³⁷ the Court held that the Commission violated the hearing requirement in section 37-1-83, Alabama Code (1975). That statute, the Court explained, “does not limit its application to a ‘final order,’ nor does it allow for a temporary or interlocutory order.”³⁸

22. Like Choctaw County and South Central Bell, this case presents another violation of a statutory requirement to hold a hearing. The requirement here was to hold a hearing before acting on the Company’s certification petition, per section 37-4-28. But

³⁴ Ala. Code § 37-4-28 (emphasis added).

³⁵ Choctaw County v. Ala. Pub. Serv. Comm’n, 368 So. 2d 280, 282 (Ala. 1979).

³⁶ Section 37-1-85 provides: “Whenever the commission shall determine to conduct an investigation either with or without complaint, as in this title provided, it shall fix a time and place for public hearings of the matters under investigation.”

³⁷ S. Cent. Bell, 425 So. 2d at 1097.

³⁸ Id. at 1096 (internal citation omitted).

instead, the Commission bypassed a hearing and, upon receipt of the Company's September 20 letter, summarily found that the positions advocated by the Company on the core issue of need in its petition were "reasonable and well-supported."³⁹ And so, the Order disconcertingly accepts three interrelated claims in the letter: (1) that the Barry 8 target substantial completion date should be November 2023; (2) that this date would "serve winter needs in the 2023-2024 timeframe;" and (3) that it has been and will continue to be "necessary" for the Company to incur costs to meet this date.⁴⁰ To be sure, all three claims implicate whether, and the extent to which, there is a public need for Barry 8—the core issue in the certification proceeding. By acting on this issue before holding a hearing, the Commission clearly violated section 37-4-28, and the Order, therefore, should be nullified.⁴¹

II. The Order violates the express prohibition in section 37-1-96 on the Commission entering any order affecting rates before holding a hearing.

23. The Order should be nullified for the additional reason that it violates the requirement in section 37-1-96, Code of Alabama (1975) for the Commission to hold a hearing before issuing any orders affecting rates.

24. Specifically, section 37-1-96 provides: "No order shall be made by the commission affecting any rate or service, except as otherwise specifically provided, unless or until a public hearing has been held in accordance with the provisions of this title."⁴² This statute clearly prescribes a broad hearing requirement through the Legislature's choice of the

³⁹ Order at 2.

⁴⁰ Id.

⁴¹ See S. Cent. Bell, 425 So. 2d at 1097.

⁴² Ala. Code § 37-1-96 (emphasis added).

broad categorical terms “*no order*” and “affecting *any* rate or service.”⁴³

25. Section 37-1-96 applies here because the Order affects rates. The Order, again, purports to approve costs of “construction work in progress” and “any other costs that directly result from the non-issuance of the certificate” for Barry 8.⁴⁴ This approval affects rates because costs that are recorded as construction-work-in-progress costs are included in rates through the Rate Stabilization and Equalization (“Rate RSE”) formula.⁴⁵ Moreover, the Order authorized a specific rate recovery method, known as a “regulatory asset,” for both CWIP costs and other costs that directly result from non-issuance of the certificate for Barry 8.⁴⁶ Clearly, the Order affects rates.

26. Therefore, the Commission violated section 37-1-96 by issuing the Order before holding a hearing. That the Commission purported to retain its jurisdiction to issue additional orders on this matter does not change the analysis.⁴⁷ Alabama Supreme Court precedent has affirmed that the Commission must comply with broad hearing requirements in

⁴³ Id. (emphasis added).

⁴⁴ Order at 4.

⁴⁵ In lieu of formal rate cases, the Commission has granted the Company an automatically adjustable rate structure via the Rate RSE formula. See Ala. Pub. Serv. Comm’n, Rate RSE: Rate Stabilization and Equalization Factor (2018) at 1 (describing Rate RSEs as “permitting the Company, through the operation of a filed and approved rate, to adjust its charges more readily to achieve the rate of return allowed it in the rate order of the Commission”). CWIP costs are included in the RSE formula. Id. at 9. That is, when the Commission allows the Company to record its costs as CWIP costs, then the costs automatically hit rates.

⁴⁶ Order at 3; see also Will Kenton, Regulatory Assets Defined, Investopedia (Feb. 13, 2018), <http://www.investopedia.com/terms/r/regulatoryasset.asp> (distinguishing between expenses that are recorded as regulatory assets and permitted to be amortized over a period of time through rates, and those which are not eligible to be recovered from ratepayers).

⁴⁷ Order at 5.

statutes and, specifically, that the Commission cannot circumvent such requirements through a “temporary or interlocutory order.”⁴⁸

III. The Commission’s Order impermissibly predetermines the outcome of the statutory certification process for Barry 8.

27. The Commission effectively predetermined the same question that it is statutorily obliged to resolve under the procedure set forth in section 37-4-28—that is, whether the Company should be allowed to build Barry 8, and if so, by when. The subject of the Commission’s Order is preserving Barry 8’s targeted completion date and costs related to “construction works in progress,” and the Commission exercising its authority to have those costs included in the public’s rates now, before the plant’s certification has been resolved.

28. The premise of the Commission authorizing the Company to recover those costs is the Company’s desire to build Barry 8 by its targeted completion date. And, the Company’s desire to build that plant—and if so, by when—are the very questions that the certification application process is designed to answer. Tossed by the wayside are the underlying related critical questions central to the outcome of the certification proceeding and purportedly open to challenge in that proceeding: that is, whether the public actually needs more power plants, when such needs arise, and whether Barry 8 specifically is the best choice. Yet, by issuing the Order, the Commission has predetermined the existence of a specific need for Barry 8, and the need for its targeted completion date.⁴⁹

29. The fact that the Company, in its letter, sees the need to “reiterate that the requested authorization shall in no way serve as a predetermination or precedent affecting the

⁴⁸ S. Cent. Bell, 425 So. 2d at 1097.

⁴⁹ Order at 4.

Commission's consideration of the certificate petition,"⁵⁰ and that the Order states essentially the same point,⁵¹ in no way detracts from the fundamental reality that the Order does predetermine the outcome of the certification proceeding. This emphasis by both the Company and the Commission reflects the concern that, in fact, by authorizing the Company to recover its CWIP, and accepting the claims the Company makes about Barry 8, the Order does predetermine the certification proceeding's outcome.

30. Accordingly, the Order impermissibly predetermines the very issues that are statutorily prescribed for determination under section 37-4-28, and as such, it should be reconsidered and nullified, and the Company's underlying requests should be denied, or at least deferred until the conclusion of the certification process.

IV. Because the Order was issued before certification and a hearing, it suffers from due process violations.

31. The Legislature established the certification and hearing requirements for power plants for good reason: these plants can be exorbitantly expensive, which is precisely why they are of "vast public interest to the people of this state."⁵² Here, the Company itself expects that constructing Barry 8 and acquiring another power plant will cost \$1.1 billion.⁵³ With costs this high, it is all the more important that the Commission exercise its powers in accordance with the procedural requirements that the Legislature prescribed to protect the public. But because the Commission failed to do so, its Order violates Due Process.

32. First and foremost, the Order suffers from the serious error of denying

⁵⁰ The Company's Letter at 2.

⁵¹ Order at 3.

⁵² Redwing Carriers, 199 So. 2d at 658.

⁵³ Ex. 2 at 3.

interested parties the full panoply of due process afforded them by the due process guarantees of the U.S. and Alabama Constitutions.⁵⁴ “[D]ue process of law means notice, a hearing” on the merits of the controversy “according to that notice, and a judgment entered in accordance with such notice and hearing.”⁵⁵ It offers protection against arbitrary conclusions by requiring a fair hearing, and findings supported by evidence.⁵⁶ Likewise, “[t]he right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.”⁵⁷

33. Here, the Commission entered the Order without notice or a hearing, and it did so only in docket U-5316, despite the fact that the Order concerns the Company’s certification petition, and the Commission notified interested parties that it will review that petition specifically in docket 32953. Clearly, this denies interested parties like Sierra Club due process, and renders the Order inherently arbitrary and devoid of evidentiary support.

34. The above serious errors are further grounds for nullification of the Order.

⁵⁴ The Alabama Constitution’s Due Process Clause provides: “That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.” Ala. Const., art. I, § 13.

⁵⁵ Ex parte Rice, 92 So. 2d 16, 19 (Ala. 1957); see also McCollum v. Birmingham Post Co., 65 So. 2d 689 (Ala. 1953).

⁵⁶ City of Birmingham v. S. Bell Tel. Co., 176 So. 301 (Ala. 1937); Opinion of the Justices, 345 So. 2d 1354, 1355 (Ala. 1977).

⁵⁷ R.R. Comm’n of Cal. v. Pac. Gas & Elec. Co., 302 U.S. 388, 393 (1938) (internal citation omitted).

CONCLUSION

Building a power plant is a high stakes decision. The Legislature took care to prescribe a full and fair, evidence-based decision-making process that is commensurate with the high stakes. By contrast, the back and forth between the Company and the Commission that led to the Commission's entry of the Order consisted of a few days and a few pages. The interested public was shut out. The merits of the Company's certification petition were prejudged. In short, there was no evidence-based process at all. To rectify these clear violations of the statutory process, the Order should be nullified.

Wherefore, Sierra Club respectfully requests the reconsideration and nullification of the Order, as well as the denial of the Company's underlying requests, or at least their deferral until the conclusion of the statutory process for the Commission to act on the Company's certification petition.

Respectfully submitted this 31st day of October, 2019.

/s/ Joel E. Dillard

Joel E. Dillard

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Counsel for Sierra Club

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been served on the following this 31st day of October, 2019.

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Counsel for Sierra Club

Exhibit 1



STATE OF ALABAMA
PUBLIC SERVICE COMMISSION
P.O. BOX 304260
MONTGOMERY, ALABAMA 36130

TWINKLE ANDRESS CAVANAUGH, PRESIDENT

JOHN A. GARNER, EXECUTIVE DIRECTOR

JEREMY H. ODEN, ASSOCIATE COMMISSIONER

CHRIS "CHIP" BEEKER, JR., ASSOCIATE COMMISSIONER

Alabama Power Company,
Petitioner

Petition: For approval of Accounting
Authorization Related to Construction
Work in Progress Costs.

Docket U-5316

ORDER

BY THE COMMISSION:

By letter dated September 20, 2019, Alabama Power Company ("Alabama Power" or "the Company") filed a petition with the Alabama Public Service Commission ("the Commission") requesting certain accounting treatment related to costs recorded in construction work in progress ("CWIP") and associated with the proposed combined cycle generating capacity at the site of the Company's existing Barry Steam Plant ("Barry Unit 8"). As the request explains, the Company has been incurring and will continue to incur certain limited preparatory costs prior to the completion of proceedings in Docket No. 32953 in order to preserve the targeted completion date of the facility should the Commission conclude that a certificate of convenience and necessity should be issued for Barry Unit 8. The Company thus requests the Commission confirm the appropriateness of the Company recording such limited preparatory costs as CWIP. The Company also requests that in the event a certificate of convenience and necessity is not issued for Barry Unit 8, the Commission authorize the Company to transfer into a regulatory asset the CWIP costs associated with Barry Unit 8 and any costs directly resulting from the non-issuance of the certificate, except to the extent such costs are otherwise properly includable as plant in service. The

Company would then amortize the balance of the regulatory asset over a prescribed period as determined by the Commission. For the reasons set forth, and with the conditions directed, the Commission finds that Alabama Power's request is reasonable and well-supported and grants the requested accounting authorization.

DISCUSSION AND FINDINGS

As indicated above, Alabama Power presently has before the Commission a petition for the issuance of a certificate of convenience and necessity. Filed on September 6, 2019, the petition seeks authority under Alabama Code § 37-4-28 relating to a portfolio of generating resource options, including the construction of new combined cycle capacity at Plant Barry. The proposed facility, which the Company refers to as Barry Unit 8, has a targeted substantial completion date of November 1, 2023.

In the instant petition for accounting authorization, the Company states that to meet the aforementioned completion date for Barry Unit 8 and have the facility available to serve winter needs in the 2023-2024 timeframe, it has been and will continue to be necessary for the Company to incur certain limited preparatory costs. Such costs include those associated with preliminary survey and investigation associated with Barry Unit 8, along with costs involving infrastructure in and surrounding the facility (e.g., initial roadwork and site access), preliminary unit design, labor, and early stage vendor progress payments. The Company notes that under Generally Accepted Accounting Principles ("GAAP") and the Federal Energy Regulatory Commission Uniform System of Accounts, these costs are properly recorded as CWIP until the facility is placed in service. Should it become probable that the construction will be abandoned because certificate authority for Barry Unit 8 is not granted, GAAP requires all such previously recorded CWIP costs to be immediately expensed, unless they are properly includable in plant in service.

Accordingly, the Company seeks confirmation as to its recording of certain limited preparatory costs associated with Barry Unit 8 in CWIP prior to the issuance of any certificate of convenience and

necessity for Barry Unit 8. In the event a certificate of convenience and necessity is not issued for Barry Unit 8, the Company also requests the Commission authorize the Company to transfer into a regulatory asset the Barry Unit 8 CWIP costs and any costs directly resulting from the non-issuance of the certificate, except to the extent such costs are otherwise properly includable as plant in service. The Company would then amortize the balance of the regulatory asset over a prescribed period as determined by the Commission. In making this request for accounting authorization, the Company emphasizes that the requested authorization will have no precedential or pre-determinative impact on proceedings in Docket No. 32953 or the Commission's review and consideration of the aforementioned certification petition. Matters in that docket will advance independently and on their own merits.

Commission Staff has reviewed the Company's request and is supportive of it, given the circumstances underlying the request and the Company's recognition that matters pending in Docket No. 32953 will proceed unaffected by any action of the Commission here. Staff does present several recommended conditions concerning the request. With respect to the length of the amortization period, Staff supports a five-year period. Staff also supports periodic reporting by the Company until final action by the Commission on the petition in Docket No. 32953, so that Staff can remain informed as to both the timing and amount of the preparatory CWIP costs incurred and related to Barry Unit 8. Staff recommends the Company provide an initial report of actual costs incurred through December 31, 2019, with monthly updates thereafter. If the balance of incurred costs, as reported, reaches 5 percent of the estimated in-service cost of the total project, the Company would then confer with the Commission as to the appropriateness of additional authorization consistent with that requested in this petition, with the Company then to pursue such authorization as determined to be warranted under the circumstances.

In view of the foregoing, the Commission **FINDS** that the requested accounting authorization described in the Company's petition and discussed herein is reasonable and should be granted. The

Commission **FURTHER FINDS** that the proposed reporting and review mechanism by Staff is appropriate, and that the requested accounting treatment should be conditioned accordingly. The Company shall be deemed to have accepted these conditions through its exercise of the accounting treatment authorized.

IT IS, THEREFORE, ORDERED BY THE COMMISSION that, consistent with the Company's request and the discussion provided herein, Alabama Power is granted authority to record construction work in progress costs incurred prior to the issuance of an order on certification as necessary in order to meet the targeted completion date of Barry Unit 8.

IT IS FURTHER ORDERED BY THE COMMISSION that, in the event the certificate of convenience and necessity pending before the Commission will not be issued and it becomes probable that the construction of Barry Unit 8 will be abandoned, the Company is authorized to establish a regulatory asset in which the Company would record construction work in progress costs and any costs that directly result from the non-issuance of the certificate, except as such costs are otherwise includable in plant in service.

IT IS FURTHER ORDERED BY THE COMMISSION that the Company amortize the regulatory asset over a five-year period.

IT IS FURTHER ORDERED BY THE COMMISSION that as a condition of this authorization, the Company shall provide an initial report of actual costs incurred through December 31, 2019, with monthly updates thereafter. If the balance of incurred costs, as reported, reaches 5 percent of the estimated in-service cost of the total project, the Company is directed to confer with the Commission as to the appropriateness of additional authorization consistent with that granted herein, with the Company then to pursue such authorization as determined warranted under the circumstances.

IT IS FURTHER ORDERED BY THE COMMISSION that jurisdiction in this cause is, hereby, retained for any further order or orders that this Commission may find just and reasonable under the circumstances.

IT IS FURTHER ORDERED BY THE COMMISSION that this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this the 1st day of October, 2019.

ALABAMA PUBLIC SERVICE COMMISSION



Twinkle Andress Cavanaugh, President



Jeremy H. Oden, Commissioner



Chris "Chip" Beeker, Jr., Commissioner

ATTEST: A True Copy



Walter L. Thomas, Jr., Secretary

Exhibit 2

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D. C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported) September 6, 2019

Commission File Number	Registrant, State of Incorporation, Address and Telephone Number	I.R.S. Employer Identification No.
1-3164	Alabama Power Company (An Alabama Corporation) 600 North 18th Street Birmingham, Alabama 35203 (205) 257-1000	63-0004250

The name and address of the registrant have not changed since the last report.

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Securities registered pursuant to Section 12(b) of the Act:

Registrant	Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Alabama Power Company	5.00% Series Class A Preferred Stock	ALP PR Q	New York Stock Exchange

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company ☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Item 8.01. Other Events.

On September 6, 2019, Alabama Power Company (“Alabama Power”) filed a petition for a certificate of convenience and necessity (the “CCN”) with the Alabama Public Service Commission (the “Alabama PSC”) for authorization to procure additional generating capacity through (1) the turnkey construction of a new combined cycle facility, (2) the acquisition of an existing combined cycle facility and (3) long-term contracts for the purchase of power from others, as more fully described below. In addition, Alabama Power will pursue approximately 200 megawatts (“MW”) of certain demand side management and distributed energy resource programs. This filing is predicated on the results of Alabama Power’s 2019 integrated resource plan, which identified an approximately 2,400-MW resource need for Alabama Power, driven by the need for additional winter reserve capacity.

The procurement of the resources identified below is subject to the satisfaction or waiver of certain conditions, including, among other customary conditions, approval by the Alabama PSC. The completion of the Combined Cycle Acquisition (as defined below) is also subject to (i) the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act and (ii) approval by the Federal Energy Regulatory Commission. All regulatory approvals are expected to be obtained by the end of the third quarter 2020.

On May 8, 2019, Alabama Power entered into an Agreement for Engineering, Procurement and Construction with Mitsubishi Hitachi Power Systems Americas, Inc. and Black & Veatch Construction, Inc. to construct an approximately 720-MW combined cycle facility (the “Facility”). The Facility is expected to be placed in service by the end of 2023.

On September 6, 2019, Alabama Power entered into a purchase and sale agreement to acquire all of the equity interests in Tenaska Alabama II Partners, L.P. (the “Combined Cycle

Acquisition”). Tenaska Alabama II Partners, L.P. owns and operates an approximately 885-MW combined cycle generation facility in Autauga County, Alabama. The transaction is expected to close by September 1, 2020. As part of the Combined Cycle Acquisition, Alabama Power will assume an existing power sales agreement under which the full output of the generating facility remains committed to another third party for its remaining term of approximately three years. The estimated revenues from the power sales agreement are expected to offset the associated costs of operation during the remaining term.

The capital investment associated with the construction of the Facility and the Combined Cycle Acquisition is currently estimated to total approximately \$1.1 billion.

Alabama Power intends to procure through long-term power purchase agreements approximately 640 MW of additional generating capacity, which will consist of combined cycle generation expected to begin in 2020 and solar generation coupled with battery energy storage systems (the “solar/battery systems”) expected to begin in 2022 through 2024. The terms of the agreements for the solar/battery systems permit Alabama Power to use the energy and retire the associated renewable energy credits (“RECs”) in service of customers or to sell RECs, separately or bundled with energy.

Upon certification, Alabama Power expects to recover costs associated with the Facility through its Rate Certificated New Plant (“Rate CNP”), which provides for adjustments to recognize the placing of new or acquired generating facilities into retail service. Additionally, Alabama Power expects to recover costs associated with the Combined Cycle Acquisition through Rate Stabilization and Equalization (“Rate RSE”) during the term of the existing power sales agreement and, on expiration of the agreement, through Rate CNP. Alabama Power expects to recover the capacity-related costs associated with the power purchase agreements through its

Rate CNP Power Purchase Agreement. The recovery of costs associated with laws, regulations and other such mandates directed at the utility industry are expected to be recovered through Rate CNP Compliance. In addition, fuel and energy-related costs are expected to be recovered through Rate Energy Cost Recovery. Any remaining costs will be incorporated through the annual filing of Rate RSE.

The ultimate outcome of this matter cannot be determined at this time.

Cautionary Note Regarding Forward-Looking Statements

Certain information contained in this Current Report on Form 8-K is forward-looking information based on current expectations and plans that involve risks and uncertainties. Forward-looking information includes, among other things, statements concerning projected generating capacity needs, completion dates and estimated capital expenditures for the Combined Cycle Acquisition and construction of the Facility, timing of regulatory approvals and rate recovery. Alabama Power cautions that there are certain factors that could cause actual results to differ materially from the forward-looking information that has been provided. The reader is cautioned not to put undue reliance on this forward-looking information, which is not a guarantee of future performance and is subject to a number of uncertainties and other factors, many of which are outside the control of Alabama Power; accordingly, there can be no assurance that such suggested results will be realized. The following factors, in addition to those discussed in Alabama Power's Annual Report on Form 10-K for the year ended December 31, 2018 and subsequent securities filings could cause actual results to differ materially from management expectations as suggested by such forward-looking information: state and federal rate regulations and the impact of pending and future rate cases and negotiations, including rate actions relating to fuel and other cost recovery mechanisms; the effects, extent and timing of the entry of additional competition in the markets in which Alabama Power operates, including from the development and deployment of alternative energy sources; variations in demand for electricity; available sources and costs of fuels; the ability to control costs and avoid cost and schedule overruns during the development, construction and operation of facilities, to construct facilities in accordance with the requirements of permits and licenses and to satisfy any environmental performance standards; the ability to successfully operate Alabama Power's generating, transmission and distribution facilities and the successful performance of necessary corporate functions; the ability of counterparties of Alabama Power to make payments as and when due and to perform as required; the ability of Alabama Power to obtain additional generating capacity (or sell excess generating capacity) at competitive prices; catastrophic events such as fires, earthquakes, explosions, floods, tornadoes, hurricanes and other storms, droughts, pandemic health events or other similar occurrences; and the direct or indirect effects on Alabama Power's business resulting from incidents affecting the U.S. electric grid or operation of generating resources. Alabama Power expressly disclaims any obligation to update any forward-looking information.

SIGNATURE

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Date: September 6, 2019

ALABAMA POWER COMPANY

By /s/Melissa K. Caen
Melissa K. Caen
Assistant Secretary

Exhibit 3



Alabama Power

Philip C. Raymond
Executive Vice President,
Chief Financial Officer & Treasurer

600 North 18th Street
Post Office Box 2641
Birmingham, Alabama 35291
205 257 2505 tel
205 257 2176 fax

September 20, 2019

Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 850
Montgomery, Alabama 36130

Attention: Mr. Walter L. Thomas, Jr.
Secretary

RE: Request for Accounting Authorization Related to Construction Work in Progress

Dear Commissioners:

On September 6, 2019, Alabama Power Company ("Alabama Power" or "Company") filed with the Alabama Public Service Commission (the "Commission") a petition for a certificate of convenience and necessity by which the Company would be authorized to make certain additions to its portfolio of supply resources. Among the proposed additions is the construction and installation of combined cycle generating capacity at the site of Alabama Power's existing Barry Steam Plant ("Barry 8"). By means of this letter, Alabama Power is requesting the Commission confirm the appropriateness of the Company recording Barry 8 construction work in progress ("CWIP") costs incurred prior to the issuance of an order on the certificate petition. As explained below, the incurrence of these costs is necessary to preserve the targeted in-service date of the project.

The Company would emphasize that issuance of the requested authorization will have no precedential or pre-determinative impact whatsoever on the Commission's review and consideration of the aforementioned certification petition. That petition will proceed in accordance with the applicable authority controlling such matters, including Alabama Code § 37-4-28. To this end, should circumstances transpire such that a certificate of convenience and necessity is not issued and the Company does not proceed with construction of Barry 8, Alabama Power would request authorization to transfer into a regulatory asset the Barry 8 CWIP costs and any costs that directly result from the non-issuance of the certificate, except as such costs are otherwise properly includable as plant in service. The regulatory asset would then be amortized over a prescribed period as determined by the Commission.

Background

As referenced above, the Company has filed a petition for a certificate of convenience and necessity, which has been assigned Docket No. 32953. By the petition, Alabama Power

seeks authorization to procure additional generating capacity through (1) the turnkey construction of Barry 8, (2) the acquisition of an existing combined cycle facility and (3) the entry into certain long-term contracts for the purchase of power from others. In addition to the authority requested under the certificate, the Company is seeking authorization to pursue approximately 200 MW of demand-side management and distributed energy resource programs. The petition is predicated on the results of Alabama Power's 2019 integrated resource plan, which identified an approximately 2400 MW resource need for Alabama Power, driven by the need for additional winter reserve capacity.

In order to meet the identified needs in the winter of 2023, Alabama Power is targeting a substantial completion date for Barry 8 of November 1, 2023. To meet that date, it has been and will continue to be necessary to incur certain costs prior to the completion of the certificate proceeding so that construction of the project can begin in earnest should the certificate authority be granted. Such costs include those associated with preliminary survey and investigation associated with Barry 8, along with costs involving infrastructure in and surrounding the facility (e.g., initial roadwork), preliminary unit design, labor, and early stage vendor progress payments. Under Generally Accepted Accounting Principles ("GAAP")¹ and the Federal Energy Regulatory Commission Uniform System of Accounts,² these costs are properly recorded as CWIP until the plant is placed in service. In contrast, should it become probable that the construction will be abandoned because certificate authority for Barry 8 is not granted, GAAP requires all such previously recorded CWIP to be immediately expensed,³ unless they are properly includable in plant in service.

Requested Regulatory Accounting Treatment

In light of the foregoing, Alabama Power is requesting the following accounting authorization from the Commission. Specifically, the Company requests the Commission confirm the appropriateness of recording Barry 8 CWIP costs incurred prior to the issuance of an order on the certificate petition. Should a certificate for Barry 8 not be issued and it becomes probable that the Company will not proceed with construction, the Company requests authorization to transfer into a regulatory asset the Barry 8 CWIP costs and any costs that directly result from the non-issuance of the certificate, except as such costs are otherwise properly includable as plant in service. The regulatory asset would then be amortized over a prescribed period as determined by the Commission.

The Company would again reiterate that the requested authorization shall in no way serve as a predetermination or precedent affecting the Commission's consideration of the certificate petition. Proceedings in Docket No. 32953 will advance in their own right, and without impact or influence by the authorization sought here. In addition, the Company supports the adoption of

¹ See Accounting Standards Codification ("ASC") 360-10-30 – *Property, Plant and Equipment*.

² See 18 CFR Part 101, Uniform System of Accounts Prescribed for Public Utilities and Licensees Subject to the Provisions of the Federal Power Act, Electric Plant Instructions.

³ See ASC 980-360, *Regulated Operations – Property, Plant and Equipment*.

a periodic reporting mechanism by which it would provide Commission Staff details on the Barry 8 CWIP costs incurred as of a specified reporting date, with such mechanism continuing until an order by the Commission is issued on the certificate petition. Lastly, and consistent with the requirements of Rule 26 of the Commission's Rules of Practice, the Company hereby certifies that a copy of this request is being delivered to the Office of the Attorney General contemporaneously with its filing.

Sincerely,

A handwritten signature in blue ink, appearing to read "P. C. Raymond", with a stylized, flowing script.

Philip C. Raymond

Exhibit 4



STATE OF ALABAMA
PUBLIC SERVICE COMMISSION
P.O. BOX 304260
MONTGOMERY, ALABAMA 36130

TWINKLE ANDRESS CAVANAUGH, PRESIDENT

JOHN A. GARNER, EXECUTIVE DIRECTOR

JEREMY H. ODEN, ASSOCIATE COMMISSIONER

CHRIS "CHIP" BEEKER, JR., ASSOCIATE COMMISSIONER

ALABAMA POWER COMPANY,

Petitioner

**PETITION: FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY**

DOCKET 32953

RULING ESTABLISHING PROCEDURAL SCHEDULE

The following Procedural Schedule is hereby established in the above-captioned matter:

- All Intervenor testimony shall be filed with the Secretary of the Commission no later than the close of business on November 27, 2019.

The Petitions to Intervene in this matter filed by the Office of the Attorney General of Alabama, the Alabama Industrial Energy Consumers, the Alabama Solar Industry Association Inc., Sierra Club, American Senior Alliance, The Alabama Coal Association, Manufacture Alabama and Energy Fairness.org are hereby granted. The Joint Petition to Intervene of Energy Alabama and GASP filed by Southern Environmental Law Center is also hereby granted. A subsequent Procedural Ruling will be entered regarding the Petition to Intervene submitted by the Southern Renewable Energy Association following a consideration of all pleadings relevant to that Petition to Intervene.

- Alabama Power shall file its rebuttal testimony in this cause with the Secretary of the Commission no later than the close of business on January 15, 2020.
- The public hearing in this cause shall commence on January 29, 2020, at 9:00 a.m. in the Main Hearing Room of the Carl L. Evans Chief Administrative Law Judge Hearing Complex in Montgomery, Alabama.
- Simultaneous, post-hearing briefs in the form of a proposed order may be filed with the Secretary of the Commission no later than the close of business on March 4, 2020.

The above schedule allows ample time for discovery by the parties while allowing the Commission to address the matters under consideration in this cause in an appropriate timeframe.

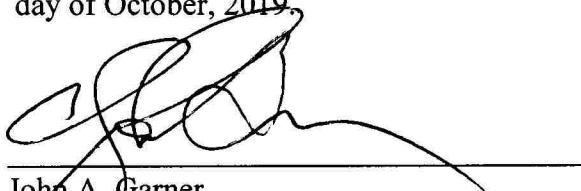
The following parameters shall apply to the discovery conducted:

- All discovery efforts shall be conducted in a manner consistent with Rule 16 of the Commission's Rules of Practice.
- Responses to all discovery requests shall be due in ten calendar days under a "best efforts" standard. Discovery responses for deadlines that fall on a weekend are due on the following Monday.
- Given the deadline calculation based on calendar days, discovery requests received after Friday at noon will be deemed received the following Monday.
- Extensions of the established deadlines for discovery responses shall be granted only for good cause shown. This will be particularly so in circumstances where agreement among the active party participants is absent.

IT IS SO RULED.

Done at Montgomery, Alabama this

 day of October, 2019.



John A. Garner
Chief Administrative Law Judge

c: All parties of record