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August 14, 2020

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

**Re: Docket 32953, Sierra Club's Motion to Supplement the Record**

Dear Secretary Thomas:

Please accept this "hard copy" filing of Sierra Club's Motion to Supplement the Record. I have filed this motion electronically today, and am making certain that its overnight delivery to you will be accomplished Monday (your next day after our electronic filing).

Respectfully yours,

Joel E. Dillard

JED:rj

Enclosure

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

Sierra Club moves to supplement the record on the core issue that Alabama Power Company can *share* surplus power supply with other power companies, and thereby *spare* its customers from paying *more than a billion dollars* to build and maintain a large surplus of its own. The parties agree that surplus sharing was and continues to be a viable way to meet customers' needs until the winter of 2023. They dispute its viability thereafter. This motion is prompted by information in the enclosed news reports that is directly relevant to this issue, but that Alabama Power failed to disclose: its parent Southern Company is both the "impetus for" and "prime mover in" the formation of a "regional energy market" to facilitate surplus sharing between power companies in the Southeast.<sup>1</sup> If the Commission is to conduct a meaningful review of the issue of surplus sharing, then, at a minimum, the record should be supplemented with the enclosed news reports. In further support of this motion, Sierra Club states as follows:

1. This case concerns Alabama Power’s petition to build and maintain a large surplus power supply of its own, and to pass all cost responsibility onto its customers. It is undisputed that the Company’s claimed “needs” amount to a *few hours* in the winter when electricity demand may spike due to cold temperatures.<sup>2</sup> Likewise, it is undisputed that for more

<sup>1</sup> Darren Sweeney and Justin Horwath, *Duke Energy, Southern confirm talks on creation of regional energy market*, S&P Global (July 14, 2020) [Ex. 1]; John Downey, *Duke Energy, Southern Co. and others in talks to establish a Southeast energy market*, Charlotte Business Journal (Jul. 14, 2020) [Ex. 2].

<sup>2</sup> Tr. 440:10-12; 442:1-5.

than forty years Alabama Power has met<sup>3</sup> and will continue to meet such needs via surplus sharing with its sister companies.<sup>4</sup> But the Company wants to abandon surplus sharing. Instead it seeks Commission approval of long-term contracts that would lock its customers<sup>5</sup> into paying for a large, *year-round* surplus—at a cost that it does not even attempt to calculate, but that is well north of a billion dollars.<sup>6</sup>

2. Sierra Club intervened and protested the Company’s failure to prove need and cost-effectiveness as required by section 37-4-28 of the Alabama Code.<sup>7</sup> As relevant here, and as detailed in Sierra Club’s post-hearing brief, the Company failed to evaluate continuing its longstanding practice of surplus sharing in and beyond the winter of 2023. Due to that failure, there is no such evaluation and thus no legally-sufficient evidence in the record that the Company’s proposal to abruptly abandon surplus sharing actually is needed or cost-effective.

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<sup>3</sup> Tr. 82:1-14 (Company witness attesting that its last “winter reliability event” was in 1977).

<sup>4</sup> Kelley Depo. 99:15-17; 108:3-19:

Q. So nearly 1,300 megawatts you’re expecting to get from the other retail companies [in 2021]?

A. Yes.

Q. And the following year, is it, again, a similar answer in terms of the size, roughly the size?

A. Yes. Yes, it would be similar for the subsequent years.

<sup>5</sup> Its shareholders are another story. The Company claims it would be “inequitable” for them to shoulder the costs associated with these contracts, because doing so amounts to “cost responsibility for some future event that is both unknown and unknowable.” APC Proposed Order at 47.

<sup>6</sup> Tr. 521:14-522:2 (Company witness confirming that \$1.1 billion estimate is a fraction of the total cost).

<sup>7</sup> See Sierra Club’s Mot. Den. Pet., Mar. 4, 2020; Proposed Order Filed by Int. Sierra Club, May 1, 2020.

3. On June 4, the period for developing evidence and briefing closed.<sup>8</sup>

4. On June 9, the Commission voted to grant Alabama Power's petition, over Sierra Club and other parties' protests.<sup>9</sup>

5. On July 14, Sierra Club received notice for the first time via the enclosed news reports that "for months" the parent Southern Company has been leading the formation of a regional energy market to facilitate surplus sharing between power companies in the Southeast.<sup>10</sup> These news reports quote representatives of Southern Company and other participating companies confirming their efforts to form this market.<sup>11</sup> Moreover, the news reports quote a South Carolina official who was first notified *last year* by power companies in that state: "They have been going on for a while, but recently gelled into some more serious discussions."<sup>12</sup> The aim is "to make it easier for utilities to sell power to each other across the Southeast. This can allow the utilities that might have additional need to purchase wholesale power available from other Southeastern utilities that have excess power available."<sup>13</sup> In other words, in these news reports multiple, credible sources corroborate the fact that the regional energy market is forming

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<sup>8</sup> Besides this motion, there are two other pending motions. *See* Mot. Leave to Reply and Reply of Ala. Power Co., Energy Alabama and GASP Mot. Supp. Record Regarding Ala. Power Co., June 19, 2020.

<sup>9</sup> *See* Press Release, Ala. Pub. Serv. Comm'n (June 9, 2020), ("Until the final order delineating the decision is completed and signed, this docket is considered an ongoing proceeding.").

<sup>10</sup> *See* Ex. 1, Ex. 2.

<sup>11</sup> *See, e.g.*, Ex. 1 ("The voluntary, 15-minute energy wholesale market 'would use technology and advanced market systems to find low-cost, clean and safe energy to serve customers across a wide geographic area,' Southern spokesman Schuyler Baehman told *S&P Global Market Intelligence*. Baehman said the goals of the 'intra-hour energy exchange' include 'lowering costs to customers, optimizing new renewable energy resources, and improving reliability.'")

<sup>12</sup> Ex. 2.

<sup>13</sup> *Id.*

to facilitate surplus sharing in the Southeast.

6. Yet Alabama Power has failed to disclose **any** information on the regional energy market. The omission is stunning. The formation of this market should have been disclosed in discovery, for instance, in response to Energy Alabama and GASP's interrogatory number 37, which asked whether Alabama Power had "explored the possibility of contracting with Georgia Power, or other retail operating companies, for capacity."<sup>14</sup> Furthermore, Alabama Power's disclosure obligation is not limited to discovery; as the petitioner and the subsidiary of one of the country's largest power companies it is uniquely situated and has a commensurate obligation to keep the Commission and parties apprised of changes that are material to its petition under review. Clearly, the formation of the regional energy market to facilitate surplus sharing is material to its petition to abandon surplus sharing. Yet nearly a month after the publication of the enclosed news reports, Alabama Power has yet to fulfill its disclosure obligation.

7. Per Commission Rule 11(F), "[t]he Commission, or the presiding Commissioner or Administrative Law Judge shall entertain all motions and pleadings made or filed in any proceeding which are not specifically covered by [the Commission's Rules of Practice] as may in their or its discretion be deemed proper . . . . All such motions shall be in writing and shall set forth the relief sought and shall be served as any other pleading or answer, except those offered during a hearing."<sup>15</sup>

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<sup>14</sup> The Company's response was evasive and incomplete, stating that "[t]he prospect of a long-term contract for capacity" with such companies "did not arise" in its "solicitation process." But the interrogatory was not limited to long-term contracts or that (undefined) "solicitation process." And precisely because of the short duration of the claimed "needs," which consist of only a few hours in the winter, short-term contract options, for instance, like those the parent Southern Company was exploring via the regional energy market, should have been disclosed. Both the interrogatory and response are enclosed as exhibit 3.

<sup>15</sup> Commission Rule of Practice 11(F) is codified as Alabama Administrative Code Rule 770-X-4-.11(6).

8. This motion conforms with Rule 11(F) and should be granted: it is in writing and properly served, and the relief sought—supplementing the record with the enclosed news reports—is necessary to ensure meaningful review of the core issue of surplus sharing.<sup>16</sup>

Wherefore, Sierra Club respectfully moves for the entry into the record of the two enclosed news reports. Sierra Club also urges the Commission to include in its order all other proper relief to ensure meaningful review of the core issue of surplus sharing.

Respectfully submitted.

*/s/ Joel E. Dillard*

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<sup>16</sup> See *Edmonds v. Bessemer Bd. of Educ.*, 736 So.2d 646, 647 (Ala. Ct. Civ. App. 1999) (granting a motion to supplement the record, on appeal from a Board of Education decision); *Walter v. Eubanks*, 424 So.2d 631, 634 (Ala. Ct. Civ. App. 1982) (exercising its discretion to grant a motion to supplement the record, even after a final opinion had been issued below); *Axiom Res. Mgmt., Inc. v. U.S.*, 564 F.3d 1374, 1381 (Fed. Cir. 2009) (concluding that a motion to supplement is warranted under the federal Administrative Procedure Act if “the existing record is insufficient to permit meaningful review”).

## CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 14<sup>th</sup> day of August, 2020.

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/s/ Joel E. Dillard

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Joel E. Dillard

## EXHIBIT 1



14 Jul, 2020

# Duke Energy, Southern confirm talks on creation of regional energy market

Author **Darren Sweeney, Justin Horwath**

Theme Energy

Duke Energy Corp. and Southern Co. have confirmed the companies are in early discussions with other Southeast utilities on the creation of a regional energy market.

Charlotte, N.C.,-headquartered Duke Energy and Atlanta-headquartered Southern confirmed to *Utility Dive* that they were in talks with other electric utilities exploring a centralized, automated energy imbalance market known as the Southeast Energy Exchange Market, or SEEM. The details of the market were unveiled during a July 13 stakeholder meeting on the North Carolina Clean Energy Plan.

"While we're still early in the learning phase, we're eager to see the kind of benefits a regional energy market might have for our customers, particularly if it helps improve how we can jointly operate growing solar resources on our systems," Duke Energy spokesperson Erin Culbert told S&P Global Market Intelligence.

"Several stakeholders in the Carolinas have expressed interest in an energy market, so when we were approached with the concept, we thought it was a good opportunity to dig in and understand more so we could take it back to regulators and stakeholders for feedback," Culbert said in a July 14 email. "Said another way, we view this evaluation as a response to the stakeholder interest we've been hearing for a few years on a potential energy market so

we can advance these concepts and see if they make sense."

The voluntary, 15-minute energy wholesale market "would use technology and advanced market systems to find low-cost, clean and safe energy to serve customers across a wide geographic area," Southern spokesman Schuyler Baehman told S&P Global Market Intelligence.

Baehman said the goals of the "intra-hour energy exchange" include "lowering costs to customers, optimizing new renewable energy resources, and improving reliability."

"It would allow participants to buy and sell power close to the time electricity is consumed and would give system operators real-time visibility across neighboring electric grids," Culbert said.

Culbert also noted that the potential regional energy market is not a regional transmission organization and does not prevent any of the participants from forming or joining an RTO.

"While the market would share the same principles as an [energy imbalance market, or EIM] ... it's not as granular or costly to set up as an EIM like the Western EIM," Culbert said.

The companies pointed out that "no decisions have been made yet" on the formation of the regional energy market, which would require the appropriate filings with the Federal Energy Regulatory Commission if plans proceed.

The Tennessee Valley Authority also confirmed that it has been involved in discussions about the market's creation.

"TVA is always working to drive more value for our customers. We continually evaluate ways to lower costs, enhance reliability and deliver cleaner energy," TVA spokesman Jim Hopson said. "If we determine that partnering with our neighbors makes sense, we'll certainly take the appropriate steps to describe that more fully for the 10 million people we serve."

Jennifer Chen, senior counsel, federal energy policy for Duke University's Nicholas Institute for Environmental Policy Solutions, said such a market has "the potential to better integrate renewables cost-efficiently."

"The importance for renewables and expanding the footprint over which you're balancing energy is the integration costs," Chen said in a July 14 phone

interview. "So you're avoiding curtailments for renewables and you don't have to procure as much backup."

"The success of an energy imbalance market will really depend on how much the utilities contribute in terms of transmission capacity as well as what they're selling and buying on the energy imbalance market," Chen said.

She added that the two existing and historical energy imbalance markets "are run by entities that are independent of their utility members," the Southwest Power Pool and the California ISO.

"Having an independent entity run the platform helps to ensure fairness and transparency," she said.

The Southern Environmental Law Center, meanwhile, released a statement criticizing the "closed door negotiations" behind SEEM.

"The South's power sector — dominated by large monopolies with not enough accountability or competition — is in need of significant change," Law center senior attorney Frank Rambo said in a written statement. "A fully open wholesale electricity market could produce the efficiencies and competition that would result in cleaner energy and lower power bills, but a plan hatched in secret by the monopoly utilities that have most benefited from the status quo is not a promising vehicle to deliver that kind of change."

Dominion Energy Inc. subsidiary Dominion Energy South Carolina Inc.; Oglethorpe Power Corp.; PPL Corp. subsidiary LG&E and KU Energy LLC; and South Carolina government-owned utility Santee Cooper, known legally as South Carolina Public Service Authority, along with several electric cooperatives in the Southeast, are part of the group evaluating SEEM, according to Duke Energy.

## EXHIBIT 2

EXCLUSIVE: Duke Energy, Southern Co. and others in talks to establish a Southeast energy market

July 14, 2020, CBJ, John Downey

Duke Energy Corp. and as many as 20 other companies are engaged in early talks to create a common Southeastern energy market designed to ease wholesale electricity sales.

The companies include major players like the several utilities of the Southern Co. (NYSE:SO), Dominion Energy Inc.'s electric utility in South Carolina and the Tennessee Valley Authority. It also involves smaller players like state utility Santee Cooper, the N.C. Electric Membership Corp. and the Central Electric Power Cooperative in South Carolina and the N.C. municipal utilities of ElectriCities.

Southern Co. has been the prime mover in this effort to sound out its neighbors about a regional cooperation agreement — similar to the Western Energy Imbalance Market that covers parts of seven western states and western Canada, but less restrictive. Southern and Duke confirmed the early stage talks Tuesday.

"Southern Company is always working to drive more value for our customers. We continually evaluate ways to lower costs, enhance reliability and deliver cleaner energy," says spokesman Todd Terrell. "If we determine that partnering with our neighbors makes sense, we'll certainly take the appropriate steps to describe that more fully for regulators and stakeholders."

Erin Culbert, a spokeswoman at Duke, says, "We've heard from stakeholders interested in energy markets, and we felt it was important to explore it further to be responsive to those questions and see what benefits it could bring to our customers and our operations."

### **Structured markets**

They say no decisions have been made and the talks are still only in the preliminary stages.

"Benefits could include cost savings for customers, better integration of renewables — including fewer curtailments intermittent resources — and potentially increased reliability," Kendal Bowman, Duke's vice president for regulatory affairs told a Monday meeting of stakeholders working on Gov. Roy Cooper's Executive Order 80, designed to create an energy plan to address

climate change in North Carolina.

Such a multi-utility agreement could be a first step in the direction of a structured market in the Southeast. The Southeast has long resisted such regional markets, which are common in various forms in the Northeast, the Midwest and large western states such as Texas and California. Southeastern states have until now generally jealously protected individual state regulation with independent investor-owned utilities operating free of such regional involvement.

Critics say it would only be a baby step. And it might be used to thwart more thoroughgoing market reforms being discussed in at least the Carolinas and Virginia.

And N.C. groups are concerned by what they see as efforts to negotiate a deal among the utilities without involving other stakeholders including renewable energy groups, independent power producers and consumer advocates.

The conversations have been going on in the background for months. It bothered several energy advocacy groups that Monday was the first time Duke and the other N.C. participants had disclosed the discussions to the stakeholder group. For the last several months, these Executive Order 80 stakeholder meetings have been one of the leading forums for the discussion of such reforms in North Carolina.

### **Non-disclosure agreements**

Drew Elliot, the senior government affairs liaison for ElectriCities conceded at the meeting that his company and the other participants had been constrained from discussing the potential agreement.

“I appreciate the work that Duke and some other members of the (utility) group did to kind of talk us through being able to talk about this here without violating that non-disclosure agreement that we signed,” he told the meeting. “Nobody was trying to not be transparent, but there were these parallel things that were happening, and we just happened to be in those together.”

The Carolinas and Virginia are reexamining their utility regulatory structures. Virginia is already a part of the PJM Market regional transmission organization (RTO), a structured market that covers 13 Mid-Atlantic and Midwestern states and Washington, D.C.

Legislators in North and South Carolina are promoting considering structured markets such as an RTO — which can wield significant pricing and competitive power over utilities — to more mild market restructuring such as an energy imbalance market (EIM) that could facilitate real-time wholesale trades of electricity among power utilities and even arrange “day-ahead” markets for more advanced energy wholesale deals.

Elliot was at pains to make clear that no structures had been agreed on yet and no plans have been finalized.

### **Honest effort?**

Bowman echoed that but said the companies are talking about a voluntary market in the Southeast where participating utilities would retain significant independent authority. Some observers are calling what little they have been told about the proposals, an “EIM light.”

Peter Ledford, general counsel of the N.C. Sustainable Energy Association says the closed nature of the negotiations to date raise the specter that some utilities may try to reach agreements that could pre-empt reforms under consideration in the Carolinas.

He says that in months of meetings on the state's clean energy plan, stakeholders have been discussing a range of possibilities for systemic regulatory reform, including efforts to create more competition as a way to allow renewables and other clean energy options to compete in the Southeast's regulated power markets. "So we are trying to figure out if this is an honest move to create more open markets or an effort by the utilities to reach an agreement that could foreclose those conversations," Ledford says.

Bowman sought to allay such fears Monday.

“This is not an RTO nor would it prohibit the ability of North Carolina to form or join an RTO in the future,” she said. “We do not think anything being discussed with this (utility) group in the Southeast will negate any of the important work that we're talking about here.”

And she sought to reassure participants in the meeting that “as we are able to share more details with you, I think we plan to do that.”

Duke's Culbert says the utilities are in the early stages of determining whether a market would be beneficial in the Southeast. She says Duke and the others are committed to providing more information as the issues are clarified. "We

want to operate within the good stakeholder processes we already have going in both Carolinas," she says.

### **'More serious discussions'**

Bowman indicated Duke was invited to participate early this year. Nannette Edwards, executive director of the S.C. Office of Regulatory Staff says she first heard about the discussions last year from Keller Kissam, president of electric operations for Dominion (NYSE:D) in South Carolina, the former S.C. Electric & Gas.

"They have been going on for a while, but recently gelled into some more serious discussions," she says.

Edwards says Santee Cooper more recently let her and other S.C. officials know that it, too, was involved in the negotiations.

In North Carolina, Sam Watson, general counsel of the N.C. Utilities Commission said last week that as far as he knew the commission had not been told about discussions for any regional entity. But in an interview with the Charlotte Business Journal, he pointed out there would likely not be any need for notice to the commission here if the proposals involved only wholesale energy deals. The commission has very limited involvement in wholesale power questions, which are the province of the Federal Energy Regulatory Commission.

The impetus for the regional cooperation talks came from Atlanta-based Southern. That company owns utilities in Georgia, Alabama and Mississippi.

Duke's utilities in North and South Carolina are the only ones involved in the discussions. Duke Energy Florida is not among the utilities talking about the regional agreement. And NextEra Energy, Florida's largest power company, is not involved either.

### **Considerable independence**

Edwards says her understanding of the regional cooperation is that it would involve a very low level of market structure. The utilities involved would retain considerable independence. She likened it to the joint dispatch agreements between Duke Energy Progress and Duke Energy Carolinas that facilitate power sales between plants for the separate utilities.

"It's a little more complicated when you are under common ownership, like with DEC and DEP," she says.

Duke has said those agreements have resulted in considerable savings for



customers at both its utilities.

Edwards says the idea in the discussions is to make it easier for utilities to sell power to each other across the Southeast. This can allow the utilities that might have additional need to purchase wholesale power available from other Southeastern utilities that have excess power available. It could smooth out supply and demand issues related to intermittent renewables such as solar power. It could also help solar producers by allowing sales of their power across the region when their host utility finds it has excess power and would normally curtail solar purchases.

And it could allow utilities to avoid having to put more expensive peaker plants in operation during high demand times if power is available from another Southeast utility at a lower cost.

## EXHIBIT 3

(Excerpted pages from Alabama Power Company's response to Energy Alabama and Gasp's First Set Of Interrogatories and Document Production Requests; other pages deliberately omitted from original 100-page document)

**BEFORE THE  
ALABAMA PUBLIC SERVICE COMMISSION**

<b>ALABAMA POWER COMPANY</b>	)	<b>Docket No. 32953</b>
<b>In re Petition for a Certificate</b>	)	
<b>of Convenience and Necessity</b>	)	

**RESPONSE OF ALABAMA POWER COMPANY  
TO ENERGY ALABAMA AND GASP'S FIRST SET OF INTERROGATORIES AND  
DOCUMENT PRODUCTION REQUESTS**

Alabama Power Company ("Alabama Power" or "Company"), by and through its undersigned counsel, hereby responds to the First Set of Interrogatories and Document Production Requests of Energy Alabama and Gasp in this docket.

**GENERAL OBJECTIONS**

1. Alabama Power objects to the "Instructions" and "Definitions" insofar as they purport to impose requirements on Alabama Power inconsistent with the Rules of Practice of the Alabama Public Service Commission or that are otherwise unreasonably burdensome, cumulative or duplicative.

2. Alabama Power objects to each and every discovery request to the extent they seek information or documents protected by the attorney/client privilege, work product doctrine or other applicable privilege.

3. Alabama Power objects to each and every discovery request to the extent they call for the production, development or performance of analyses, calculations or studies that have not been performed.

**Docket No. 32953**  
**Alabama Power Company's 2019 Petition for a Certificate of Convenience and Necessity**  
**Energy Alabama and Gasp Discovery Request Set Number 1**

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4. Alabama Power objects to each and every discovery request to the extent they seek information and/or documents not within the possession, custody, control or knowledge of Alabama Power.

5. Alabama Power objects to each and every discovery request to the extent they fail to describe the requested information or documents with reasonable particularity, fail to define the terms or are otherwise vague, unreasonably broad, unduly burdensome or lacking in specificity.

6. Alabama Power objects to each and every discovery request to the extent they seek disclosure of documents or information that is unreasonably cumulative or duplicative or that is publicly available.

7. Alabama Power objects to each and every discovery request to the extent they call for the production or identification of information or documents that are not relevant to the subject matter of the proceeding for which Energy Alabama and Gasp have been granted intervenor status or are not reasonably calculated to lead to the discovery of admissible evidence.

8. Alabama Power's responses and objections are based on its understanding of the discovery request as phrased and on information now available to it, as determined after reasonable diligence. Alabama Power reserves the right to amend, modify, or supplement its objections if it obtains additional pertinent information during the course of investigation or discovery.

9. Alabama Power does not waive any protections, rights or privileges by responding to this discovery. All responses stated below incorporate the above stated objections and are provided subject to and without waiving any of the objections stated above. The fact that Alabama Power has not repeated the foregoing objections for each specific discovery request shall not waive any of the above-stated objections.

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**Alabama Power Company's 2019 Petition for a Certificate of Convenience and Necessity**  
**Energy Alabama and Gasp Discovery Request Set Number 1**

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**SELCDR-1 Interrogatory 37**

Please refer to Mr. Kelley's testimony, page 14, lines 1–7, which states: "I would emphasize that Alabama Power is not suggesting, and does not know, what Georgia Power's ultimate plans may be for the Bowen units . . . . Alternatively, these companies could seek to make wholesale sales predicated on their owned capacity." Has Alabama Power explored the possibility of contracting with Georgia Power, or other retail operating companies, for capacity? If not, explain why not.

**Response:**

The prospect a long-term contract for capacity with Georgia Power (or with other retail operating companies) did not arise during Alabama Power's solicitation process. This was not surprising, as any such contracts for excess capacity would be required to be cost-based and not competitive with prevailing market offerings.

Sponsoring Witness: Kelley

**Docket No. 32953**  
**Alabama Power Company's 2019 Petition for a Certificate of Convenience and Necessity**  
**Energy Alabama and Gasp Discovery Request Set Number 1**

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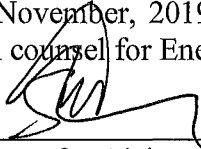
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**Docket No. 32953**  
**Alabama Power Company's 2019 Petition for a Certificate of Convenience and Necessity**  
**Energy Alabama and Gasp Discovery Request Set Number 1**

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of November, 2019, I have served a copy of the foregoing via hand delivery and overnight mail on counsel for Energy Alabama and Gasp.

  
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Attorney for Alabama Power Company