



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

July 11, 2018

Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 950
Montgomery, Alabama 36130

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

Re: Docket No. 32767
Docket No. U-4226

Secretary Thomas:

On behalf of Alabama Power Company ("Alabama Power or "Company"), enclosed for filing are two documents. The first, in Docket No. 32767, is a reply pleading submitted in connection with Alabama Power's motion to dismiss the complaint filed therein. The second is a response to the recent intervention filed in Docket No. U-4226.

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 each filing 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 blue ink, appearing to be "Scott B. Grover", written over a blue line.

Scott B. Grover

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**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

JAMES H. BANKSTON, ET AL.,

DOCKET NO. 32767

Complainants

v.

ALABAMA POWER COMPANY

Respondent

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REPLY OF ALABAMA POWER COMPANY

Alabama Power Company (“Alabama Power” or “Company”), by and through its undersigned counsel, hereby submits this reply to the response of complainants James Bankston, Ralph Pfeiffer, and Gasp, Inc. to the Company’s motion to dismiss their Complaint.

Complainants demonstrate an apparent misunderstanding of the law applicable to their request for relief as well as the substance of the Company’s pleading. For example, they mischaracterize Alabama Power’s motion, repeatedly posturing that Alabama Power is trying to circumvent review or scrutiny of the charges in Rate Rider RGB for firm back-up power service, when it is not. Another example is their erroneously cramped articulation of the filed rate doctrine and its manner of operation before this Commission.¹ Whether the muddle is real or feigned, one thing is clear: there is no merit to Complainants’ claims.²

¹ See Response to Mot., p. 5. *Compare BellSouth Telecomms., Inc. v. APSC*, 987 So.2d 1079, 1086-87 (Ala. 2007) (“The filed rate doctrine provides that where a regulated company has a rate for service on file with the applicable regulatory agency, the filed rate is the only rate that may be charged.” (citations and quotations omitted)).

² Complainants’ response also implies that Rate Rider RGB somehow reflects hostility on the part of Alabama Power to solar or other renewable resources—a suggestion wholly untrue. Rather, as described in the Company’s supporting testimony, the purpose of the charges under Rate Rider RGB is to provide for fixed cost recovery from those customers with interconnected on-site generation who continue to look to the Company for firm back-up power service.

To the extent Complainants challenge the Commission's January 2013 order, that action constitutes a collateral attack on a settled order and must be dismissed.³ To the extent the Complainants seek to challenge the charges for firm back-up power service set forth in Revision Fifth to Rate Rider RGB, such efforts would only become necessary if, as part of an evaluation by the Commission of the Company's proposal of updated charges, the Commission determined the proposal to be inconsistent with the statutory requirements.⁴ In either case, these matters can be addressed in parallel with the Commission's consideration of the Company's proposed modifications to Rate Rider RGB, where Complainants will continue to possess the rights afforded them under the law.

In both the transmittal letter for its motion to dismiss and the motion itself, Alabama Power plainly acknowledged this fact, stating that Complainants could intervene and participate in Docket No. U-4226 and the Commission could then determine how matters should proceed.⁵ The Commission possesses the authority to conduct preliminary inquiries—such as through a comment cycle—before it deems suspension and investigation appropriate.⁶ The Commission also can reject Complainants' claims outright. If, however, the Commission determines a

³ See Mot. to Dismiss, p. 4. Although this appeared to be the point of many of the allegations in the original Complaint, the latest pleading now expressly disclaims any challenge to the Commission's January 2013 order. See Response to Mot., p. 3 ("The Complaint could not be clearer that it is a challenge to Rate Rider RGB itself, not the Commission's Order approving it.").

⁴ Although Complainants may purport otherwise, the original complaint was not the most artful pleading, in terms of legal basis or intent. In any case, Complainants now have made clear, in both their response to Alabama Power's motion to dismiss and in their First Amended Complaint, that the focus of their challenge is the actual charges for firm back-up power service under Rate Rider RGB itself and the manner by which the Company has developed those charges.

⁵ As to their Complaint, the Commission's authority here is not nearly as confined as Complainants pretend. Compare Response to Mot. p. 2 ("The Commission is under a mandatory duty to investigate the matters alleged in the Complaint filed in Docket No. 32767 and to hold a public hearing on those matters.") with Ala. Code § 37-1-83 ("Upon a complaint in writing made against any utility ... that any rate ... in effect or proposed to be made effective is in any respect unfair, unreasonable, unjust or inadequate, or unjustly discriminatory, or unduly preferential ... the commission shall proceed ... to make such investigation as it may deem necessary or appropriate" (emphasis added)).

⁶ See, e.g., Order Establishing Comment Cycle, Docket Nos. U-5024, et al. (June 7, 2011).

sufficient basis to exist to suspend the proposed modifications to Rate Rider RGB for investigation, then the statutory right for hearing would attach.⁷ But mere demand for this procedural course does not entitle Complainants to it unless and until the Commission determines that a sufficient basis for suspension and investigation is warranted.⁸

Buried in Complainants' response is an acknowledgment of this fact.⁹ Alabama Power welcomes consideration of the merits of Complainants' claims in Docket No. U-4226. But where the Complainants presume the validity and legitimacy of their assertions, the Commission need not (indeed, must not) do so, as the law requires satisfaction of a higher standard.¹⁰ For example, the Complainants cannot avoid the evidence that is the sworn testimony submitted by Alabama Power with its modifications to Rate Rider RGB through mere disparagement.¹¹ Rather, Complainants must demonstrate that the charges for firm back-up power service under Rate Rider RGB do not comport with the applicable statutory standards. If Complainants prove that to be the case (through substantial evidence, as opposed to baseless and misinformed criticisms), the Commission is empowered to fix a lawful rate in response.¹²

⁷ See, e.g., *Choctaw Cty. v. APSC*, 368 So.2d 280, 282 (Ala. 1979). Thus, the fact that the proposed modifications are in an informal "U" docket—something that appears to concern Complainants—is of no consequence to the authority of the Commission.

⁸ Complainants cite *South Central Bell Telephone v. APSC*, 425 So.2d 1093 (Ala. 1983), for the proposition that a hearing must be held simply because a complaint has been filed. Under the facts of that case, the Alabama Supreme Court determined that the complainants had effectively been deprived of their hearing right (having attached through the initiation of an investigation by the Commission) due to the inadequacy of proceedings. See *id.*, at 1096-97. As the relevant statutes cited in *South Central Bell* make clear (and consistent with *Choctaw County*, above), a right to hearing is triggered by the commencement of an investigation, or is required before the Commission can direct changes to a filed rate.

⁹ See Response to Mot., p. 6 & n.3.

¹⁰ For example, Complainants themselves cite a law that authorizes the collection of charges for back-up power service from customers with distributed generation facilities 100 kW and smaller, while at the same time asserting that their "central contention" is that the fee is "unjust, unfair, and unreasonably discriminatory". See First Amended Compl., P 44 (citing Ala. Code § 37-4-140) and Response to Mot. pp. 7-8.

¹¹ See Response to Mot., p. 1 ("In Docket No. U-4226, the Company now files allegedly supporting testimony").

¹² See Ala. Code § 37-1-97.

WHEREFORE, in consideration of the foregoing, Alabama Power Company respectfully requests the Commission enter an order dismissing the Complaint insofar as it collaterally attacks the January 2013 order and seeks to challenge charges for firm back-up power service that have been replaced by modifications now pending in Docket No. U-4226. Alabama Power further requests that the Commission treat the First Amended Complaint as having been filed in Docket No. U-4226, and establish a procedural schedule for the pursuit of any discovery or further actions by Complainants that the Commission believes appropriate under the circumstances. In this way, the Commission will be able to determine whether it should suspend the proposed charges for the undertaking of a hearing, in accordance with Title 37 and governing precedent.



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
rrobby@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 11th day of July, 2018.

A handwritten signature in blue ink, appearing to be 'SM', is written above a horizontal line.

OF COUNSEL