

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 205-745-3060

2829 2ND AVENUE SOUTH, SUITE 282
BIRMINGHAM, AL 35233-2838

Facsimile 205-745-3064

May 15, 2020

VIA E-FILE & PRIORITY MAIL

Mr. Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 950
Montgomery, AL 36104

RE: Docket Nos. 32767 and U-4226
James H. Bankston, et al. v. Alabama Power Company

Dear Secretary Thomas:

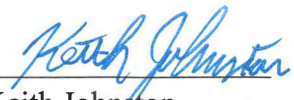
Enclosed please find a *Notice of New Authority* filed on behalf of James Bankston, Ralph Pfeiffer and Gasp, Inc. in the above referenced matter.

Complainants/Intervenors are submitting this filing to the Commission through its e-filing system, consistent with the rules and practices of the Commission. The file size of this document exceeded the size limitations for filing on the Alabama PSC's website; therefore, it is being filed in Parts 1 and 2. Part 2 consists of Exhibit A to the Notice.

The original and one copy of this filing are being delivered to the Commission via overnight mail.

Please call if you have any questions or concerns.

Sincerely,


Keith Johnston
Southern Environmental Law Center

**BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION
MONTGOMERY, ALABAMA**

**JAMES H. BANKSTON, RALPH B.
PFEIFFER, JR.,**
Complainants/Intervenors

GASP, INC.
Complainant/Intervenor

v.

ALABAMA POWER CO.,
Respondent/Petitioner.

Docket No. 32767

Docket No. U-4226

**In re: Rate Rider RGB (Supplementary,
Back-up, or Maintenance Power)**

NOTICE OF NEW AUTHORITY

James Bankston, Ralph Pfeiffer and Gasp, Inc. (“Complainants/Intervenors”) respectfully request that the Alabama Public Service Commission (“PSC” or “Commission”) and the Administrative Law Judge (“ALJ”) in this matter consider a recent Kansas Supreme Court decision bearing on the issues under consideration in the above captioned dockets. Complainants/Intervenors submit this new authority in support of their evidence and filings in this matter.

Background

On April 26, 2018, Complainants/Intervenors filed a Complaint and Petition for Declaratory Judgment and Injunctive Relief alleging that charges assessed against them under Alabama Power Company’s Rate Rider RGB were unfair, unreasonable and unjustly discriminatory. The complaint was assigned to Docket No. 37627. Alabama Power moved to

dismiss the complaint while simultaneously seeking to increase the disputed charges through proposed modifications to the rate rider. The proposed modifications were assigned to Docket U-4226. The parties thereafter submitted pre-filed testimony and engaged in limited discovery. On November 21, 2019, the Commission held a limited hearing to allow for cross-examination of the witnesses who submitted pre-filed testimony. At the hearing's conclusion, the Commission directed the parties to submit proposed orders by December 20, 2019. The Commission has yet to enter a decision on the merits.

On April 3, 2020, the Kansas Supreme Court issued a decision which, in part, directly addresses some of the issues currently before the Commission. *See Ex. A, In the Matter of the Joint Application of Westar Energy, Inc. and Kan. Gas and Elec. Co.*, Case No. 120,436, 460 P.3d 821 (Kan. 2020) ("*Westar Energy*"). The court found that a charge assessed against customer generators constituted price discrimination under Kansas law and as such, was unlawful.

Notice of New Authority

The Commission and the presiding ALJ are allowed broad discretion in determining what may be considered proper evidentiary material to determine a matter. Rules of Practice 11(F) ("The 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 these rules as may in their or its discretion be deemed proper . . .").¹ In light of the broad discretion provided to determine relevant evidence, we believe that this recent decision issued by the Kansas Supreme Court will assist with the Commission and ALJ's determination of this matter.

¹ *See also* Ala. R. App. P.28B. The Alabama Rules of Appellate Procedure allow for a Notice of New Authority if "pertinent and significant authority" comes to light after briefing or oral argument. (2019).

In *Westar Energy*, the utilities sought and obtained approval of a new rate structure (RS-DG) applicable only to residential distributed generation (DG) customers. Like Rate Rider RGB, this new RS-DG rate design imposed a demand charge on DG customers that was not applicable to customers without DG.² Renewable energy advocates challenged the new rate as contrary to Kansas law. Ex. A at 4. Specifically, following passage of the Public Utilities Regulatory Policies Act of 1978 (PURPA), Kansas adopted a law giving effect to PURPA's twin aims of incentivizing consumer generation of electricity using renewable resources and protecting such consumers from price discrimination by incumbent utility monopolies. *Id.* at 7-9. While Alabama has passed no such law, PURPA's protections nevertheless apply here, as all parties to this case recognize. *See* Hr'g Tr. 8:13-20 (Nov. 21, 2019).

The Kansas utilities sought to defend their rate action under a more recent state law. Ex. A at 9. That statute authorizes utilities to apply alternative rate structures to DG customers who began self-generating electricity after 2014. *Id.* The utilities argued that this later legislative enactment took precedence over the anti-discrimination statute. *Id.* The Kansas Supreme Court disagreed, finding no conflict between the statutes: "while the utilities may try to alter the rate structure applicable to DG customers, they must do so within the larger context of a nondiscriminatory price regime." *Id.* at 12.

The Kansas case arose amid the same debate playing out in Alabama and elsewhere, with the utilities arguing that the "ongoing viability of their economic model depends on fixing the inequities created by DG customers not paying their 'fair share.'" *Id.* at 4. As here, the condition giving rise to this state of affairs is the utilities' traditional rate structure, which puts a portion of

² The Kansas utilities' demand charge was a \$3/kW fee in the winter and \$9/kW fee in the summer, based on the amount of a customer's demand. The Capacity Reservation Charge under Rate Rider RGB differs in that it is a flat per kW fee based on the size of a customer's system. The Alabama Power solar customer has even less control of their costs than the similarly situated Kansas customer under the now invalidated RS-DG rate.

fixed costs into the variable energy charge charged to most residential customers. Under such a volumetric rate, lower energy users of any kind—not just those with DG systems—“will necessarily pay a smaller per-unit share of the fixed costs.” *Id.* at 4.³

The court noted that there were “several ways the Utilities could attempt to reduce or eliminate their economic ‘free rider’ problem without creating a regime of price discrimination.” *Id.* at 13. They could, for example, impose a nondiscriminatory time-of-use rate on all customers or charge a flat rate to all customers connected to the grid. What they could not do was engage in price discrimination against the subset of customers who install DG: “The proposed RS-DG rate design violates [Kansas law] because it uses a customer’s DG status as a basis for charging more for the same goods and services than the Utilities charge to non-DG customers.” *Id.* The court therefore reversed decisions by the Court of Appeals and Kansas Corporation Commission affirming rate RS-DG and remanded the case to the Commission for further proceedings consistent with its ruling. *Id.* at 14.

Alabama Power may argue that the Kansas decision should be ignored because it arose under the laws and policies of a different state. The Company has previously pointed to Alabama Code Section 37-4-140(c)(1) to argue that DG customers “are responsible for the cost of services afforded them by the electric supplier, services that include back-up power.” Ala. Power Co. Resp. to Complainants’/Intervenors’ “Notice of New Authority” at 2 (May 31, 2019). It is important to recognize, however, that this statute does not authorize the Company to engage in price discrimination against DG customers. It simply provides that “[t]o the extent a utility

³ Indeed, because volumetric rates incentivize reduced energy consumption, the Kansas court was prompted to ask whether the “free rider” problem identified by the utilities was “a feature of the system rather than a bug.” Ex. A at 4.

purchases electrical energy from any distributed generation facility⁴ . . . [t]he commission shall approve the utility's rates, fees, and charges for services to a distributed generation facility including . . . back-up power" Ala. Code § 37-4-140(c)(1). It further provides that "[t]he commission may not require the utility to allocate such costs to the utility's entire customer base," but shall instead require the DG customer to pay them. *Id.* The statute simply reaffirms principles of cost-based regulation as to DG customers, whereby cost-causers are responsible for the costs they cause the utility to incur on their behalf.

In the case currently before the Commission, the record is clear that customer generators do not impose any additional system costs. The record shows that customer generators are less costly to serve than other customers in the same class, and that their systems' production frees up capacity for use by other customers. Proposed Order filed by Complainants/Intervenors at 19, 23. The record shows that the Capacity Reservation Charge is based solely on the cost recovery decrease (i.e. lost revenues) from customer generation, and not any cost-of-service increase for providing back-up power during unscheduled outages. *Id.* at 26-28. A customer's reduction in usage by *any* means reduces the utility's revenues. Therefore, it is unfair and discriminatory to single out DG solar customers for differential treatment.

Of note too is the legislative history behind Section 37-4-140. As adopted pursuant to the Alternative and Renewable Energy Act of 2008, Act 2008-275, the statute rests on several legislative findings similar to those underlying Kansas' anti-discrimination statute, including that "[t]he development of alternative and renewable energy resources will help to reduce the demand for foreign fuels, promote energy diversity, enhance system reliability, and reduce air emissions" and that "[t]here is a need to assist in the development of market demand that will help expand

⁴ The Capacity Reservation Charge under Rate Rider RGB applies even if the customer does not seek to sell electricity to Alabama Power under Rate PAE. The Capacity Reservation Charge applies if the customer interconnects to the grid.

the use of alternative and renewable energy resources.” 2008 Alabama Laws Act 2008-275. It is inconsistent with these legislative purposes for the statute to be used to assess charges against solar DG customers that have no basis in cost causation principles. PURPA forbids such discrimination in Alabama just as surely as in Kansas.

Like the utilities in Kansas, Alabama Power has other means available to it to address the problem of lost revenues (and any resulting cost-shifting) arising from reductions in customer usage by any means. As the Kansas court noted, the Company could, for example, begin transitioning all residential customers away from standard volumetric energy rates, or the Company could seek to raise customer service charges to better reflect fixed system costs. The Company’s sister utility Georgia Power pursued both such proposals in its most recent rate case, without seeking to impose any separate charges against customer generators. Complainants/Intervenors are not endorsing any particular approach; our point is simply that Alabama Power has non-discriminatory measures available to it to address the problem of lost revenues associated with declining usage, just as the Kansas Supreme Court recognized in *Westar Energy*.

Respectfully submitted this 5th day of May, 2020.

/s/ Clay Ragsdale

Clay Ragsdale (RAG001)
Allison Riley (RIL018)
RAGSDALE LLC.
517 Beacon Parkway W.
Birmingham, AL 35209
Tel: (888)727-1087
clay@ragsdalellc.com
allison@ragsdalellc.com

Attorneys for Complainants/Intervenors James Bankston and Ralph Pfeiffer



Christina Andreen (AND119)

Kurt Ebersbach (EBE007)

Keith Johnston (JOH230)

Southern Environmental Law Center

2829 2nd Avenue South, Suite 282

Birmingham, Alabama 35205

Tel: (205) 745-3060

Fax: (205) 745-3064

candreen@selcal.org

kebersbach@selcga.org

kjohnston@selcal.org

Attorneys for Complainant/Intervenor Gasp, Inc.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been served upon the following, either by hand-delivery, electronic transmission, or by depositing a copy of the same in the United States Mail, properly addressed and postage prepaid on this 5th day of May, 2020.

Dan H. McCrary
Scott B. Grover
Balch & Bingham LLP
P.O. Box 306
Birmingham, AL 35201
Tele. 205-251-8100
dmccrary@balch.com
sgrover@balch.com

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

Daniel Tait
Chief Operating Officer
Energy Alabama
PO Box 1381
Huntsville, AL 35807
dtait@alcse.org



Attorney for Complainant/Intervenor Gasp, Inc.