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December 20, 2019

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:

Per the Chief Administrative Law Judge's directive from the bench at the November 21, 2019, hearing in this matter, enclosed please find the *Proposed Order Filed by Petitioners/Complainants James Bankston, Ralph Pfeiffer and GASP, Inc.* in docket numbers 32767 and U-4226.

Complainants/Intervenors are submitting this filing to the Commission through its e-filing system consistent with the rules and practices of the Commission. The original and one copy of this filing are being delivered to the Commission via priority mail. A service copy is being served to parties of record.

Please call if you have any questions or concerns.

Sincerely,



Keith Johnston
Southern Environmental Law Center

KAJ/lnh

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| JAMES H. BANKSTON, RALPH B. |) | Docket No. 32767 |
| PFEIFFER, JR., |) | |
| Petitioners/Complainants |) | |
| |) | |
| GASP, INC. |) | |
| Petitioner/Complainant, |) | |
| |) | |
| v. |) | |
| |) | |
| ALABAMA POWER CO., |) | Docket U-4226 |
| Respondent/Petitioner. |) | |

**PROPOSED ORDER FILED BY PETITIONERS/COMPLAINANTS JAMES
BANKSTON, RALPH PFEIFFER AND GASP, INC.**

I. INTRODUCTION

James H. Bankston, Ralph B. Pfeiffer, Jr. and Gasp, Inc. (“Petitioners,” also properly “Complainants”) filed a Complaint with the Alabama Public Service Commission (“Commission”) seeking relief from certain charges levied by Alabama Power Company (“Alabama Power” or “the Company”) against customers with non-emergency, on-site generation (“customer generators”) whose systems are interconnected and operating in parallel with the Company’s electrical system. More specifically, Petitioners sought declaratory and injunctive relief from certain surcharges imposed by Alabama Power against customer generators under its Rate Rider RGB (Supplementary, Back-Up, or Maintenance Power) (hereinafter “Rate Rider RGB”). The contested surcharges, which the Company claims are

necessary to recover the costs of providing “firm back-up service” from residential customers, small businesses and schools, appear in Part I.B of Rate Rider RGB. The Part I.B surcharges will be referred to herein as the “Capacity Reservation Charge” and “Alternative Rate RTA Charge.” Petitioners’ Complaint was assigned to Docket No. 32767.

Alabama Power moved to dismiss the Complaint and simultaneously sought to increase the Part I.B surcharges. The proposed increases were assigned to Docket U-4226. Petitioners subsequently amended their Complaint to include claims contesting these proposed modifications and petitioned to intervene in Docket U-4226. The Commission granted Petitioners leave to intervene in Docket U-4226 while ruling that Alabama Power’s Motion to Dismiss would be held in abeyance. The Commission also established an evidentiary cycle allowing Petitioners to develop and present evidence responsive to the evidence submitted by the Company in support of its proposed increases to the surcharges.

Having received evidence and held a hearing, the Commission is now in a position to render its determination in this proceeding. On the basis of the record and governing principles of Alabama and federal law, the Commission finds and concludes as follows:

- 1) The Company has failed to carry its burden to show that the proposed modifications to Parts I.B.1 and I.B.2.a of Rate Rider RGB are reasonable and justified on a cost-of-service basis. The Company is accordingly ordered to withdraw the proposed modifications.
- 2) Petitioners have carried their burden of showing that the surcharges currently assessed against them under Parts I.B.1 and I.B.2.a of Rate Rider RGB are unfair, unreasonable, and unjust in that they lack a cost-of-service basis or other empirical justification and therefore unjustly discriminate against customers making private

investments in on-site generation. Accordingly, Alabama Power's Motion to Dismiss Petitioners' Complaint in Docket No. 32767 is hereby denied.

- 3) The Company is ordered to cease collecting the Capacity Reservation Charge and Alternative Rate RTA Charge under Sections I.B.1 and I.B.2.a. of Rate Rider RGB. The charges are hereby suspended until the Company has demonstrated a quantifiable basis for their assessment under traditional cost-of-service principles, which should include an analysis and full accounting of the benefits of customer-sited solar generation.

II. PROCEDURAL BACKGROUND

On December 20, 2012, Alabama Power filed with the Commission certain proposed revisions to its Rate Rider RGB. By its terms, Rate Rider RGB applies to all customers with non-emergency on-site generation interconnected and operating in parallel with the Company's electrical system. Test. of Natalie Dean on behalf of Ala. Power Co. 3:21-23 [hereinafter Dean Test.]. The rate rider includes the rates, terms and conditions for three services: Supplementary, Back-Up and Maintenance Power. *Id.* at 3:23-4:1. These proposed revisions were filed in Docket U-4226.

A version of Rate Rider RGB has been on file with the Commission since early 1988. *Id.* 5:13-14. However, it was not until the changes proposed on December 20, 2012—the so-called “Revision Fifth”—that Alabama Power sought to assess charges for back-up service against small customer generators taking service under the Company's standard residential tariff (Rate FD – “Family Dwelling”), alternative residential tariff (Rate RTA), standard school tariff (Rate SCH), and small commercial tariff (Rate LPS). Dean Dep. 93:20-94:5; *see also* Dean Test. 5:12-17. Pursuant to Part I.B of the proposed Revision Fifth the Company would, for the first time, assess a “capacity reservation charge” of \$5.00 per kilowatt against these customers for back-up

service. The charges would apply based on the size of the customer's self-generation equipment. For example, a customer with a 4 kW solar array would now owe the Company \$20.00 per month for back-up service (\$240 per year), in addition to fixed and energy charges imposed by the Company on that customer. Hearing Transcript 17:21-18:1 [hereinafter Tr.]. Of the covered customer classes, only the Rate RTA customer could avoid the Capacity Reservation Charge, but only by opting to pay a 70 cent per kilowatt-hour (kWh) charge during the weekday hours of 3:00 to 5:00 p.m. of the summer season (June through September). Rate RTA is a time varying rate that includes a demand charge.

The cover letter accompanying the Company's December 20, 2012 filing made no reference to the proposed new charges. It instead described the revisions merely as "updates" that would "clarify the applicability of the rate rider, while expanding the number of rate options that are eligible to take service under the rider." Letter from Nick C. Sellers, Ala. Power Co. to Water Thomas, Secretary, Ala. Pub. Serv. Comm'n, Rate Rider RGB Supplementary, Back-Up, or Maintenance Power (Docket No. U-4226) and Special Rules Governing the Application of Rate Rider RGB (Docket No. 18126) (Dec. 20, 2012). In addition, it described the revisions as including "updated rate definitions and service options to reflect changes in technology and system costs." *Id.* Other than the cover letter, the Company's filing did not contain any further description or justification for the new charges. The Company's filing also did not include any pre-filed testimony.

The Commission approved the revisions three weeks later on January 10, 2013. Order, Docket Nos. U-4226 and 18126 (Ala. P.S.C. Jan. 10, 2013). There was no hearing and no public testimony received before the Commission approved the new charges, which the Commission's Order made effective with May 2013 billings.

A. Petitioners' Complaint

On April 26, 2018, Petitioners filed a Complaint and Petition for Declaratory Judgment and Injunctive Relief. Petitioners sought relief from the revisions to Rate Rider RGB, alleging that the charges they assess are “unfair, unreasonable, unjust, discriminatory, contrary to the public interest and otherwise unlawful.” Compl. ¶ 49. Petitioners brought their complaint pursuant to Alabama Code §§ 37-1-83 and 37-1-84 and this Commission’s Rule of Practice 9(B). Together, these provisions authorize any affected person to challenge any utility rate, service regulation, classification, practice or service “in effect” that is in unfair, unreasonable, or unjustly discriminatory by filing a complaint with the Commission.

Petitioner James H. Bankston is a resident of Tuscaloosa, Alabama who installed a 1.68 kW solar system on his property in April 2016. Petitioner Ralph Pfeiffer is a resident of Mobile, Alabama who installed a 3.36 kW solar system on his property in April 2017. As Rate FD Alabama Power customers, Petitioners Bankston and Pfeiffer became subject to the Capacity Reservation Charge when they interconnected their systems. Both Petitioners allege that, over the expected thirty-year lives of their solar investments, they expect to pay thousands of dollars in fees to Alabama Power. Compl. ¶¶ 25, 39.

Petitioner Gasp, Inc., (“Gasp”) is a Birmingham-based 501(c)(3) nonprofit organization that describes its mission as seeking to improve the environment, economy, and public health of Alabama. Compl. ¶¶ 5. Gasp works to increase renewable energy opportunities in the state and is an Alabama Power customer. *Id.* at ¶ 6. Gasp submitted affidavits of members who similarly made significant private investments to install solar systems on their properties and, because they remained Alabama Power customers, became subject to the charge. Compl. Exs. 1, 3. Like Petitioners Bankston and Pfeiffer, these affiants allege that the Capacity Reservation Charge will

require them to pay thousands of dollars in fees over the lives of their system, thereby significantly extending the payback period for their investments. *Id.*

Petitioners generally allege that Alabama Power failed to provide sufficient justification for either the \$5.00/kW Capacity Reservation Charge or the 70¢/kWh peak energy Alternative Rate RTA charge. Compl. ¶ 49(a), (b). They allege the Company failed to demonstrate a cost-based need for the charges and that the charges bear no relation to the actual costs to serve customers with on-site solar generation. *Id.* at ¶ 49(c). They allege that Alabama Power has shown no incremental cost to serve self-generating customers that was not adequately recovered through other fixed and variable charges already imposed on them through their existing rates. *Id.* at ¶ 49(f). They allege that Alabama Power failed to evaluate and account for system benefits received from on-site solar generation, and that the Company is unjustly profiting from the charge while unlawfully infringing on customers' right to invest in self-generation on their private properties. *Id.* at ¶ 49(j), (k).

For these and other reasons, Petitioners sought a declaratory ruling that the charges were unfair, unreasonable, unjust, discriminatory and contrary to the public interest, and an injunction ordering the Company to immediately cease collecting the charges. Petitioners' complaint was assigned to Docket No. 32767.

B. Alabama Power's Motion to Dismiss and Filing of Proposed Modifications

On June 15, 2018 Alabama Power moved to dismiss Petitioners' Complaint. Simultaneously, the Company filed in Docket U-4226 additional proposed revisions to Part I.B of the Rate Rider ("Revision Sixth"). The revisions sought to increase the Capacity Reservation Charge to \$5.42/kW¹ and the Alternative Rate RTA Energy Charge to 71¢ /kWh.² The Company

¹ Alabama Power later filed errata testimony lowering the proposed increase by one cent, to \$5.41 per kW.

also filed, for the first time, evidence purporting to justify the charges (both the original charges and proposed increases thereto). This evidence took the form of pre-filed direct testimony by Company's Regulatory Pricing Manager, Natalie Dean, along with several attached exhibits.

In her written pre-filed testimony, Ms. Dean made it clear that Petitioners' Complaint was what prompted the Company's filing to increase the back-up service charges under Rate Rider RGB. Dean Test. 2:11-14. Ms. Dean also stated that, while the charges apply to any form of customer-sited, non-emergency generation, they were developed using solar production data. Solar is the predominant form of self-generation used by current customers, and the form the Company views most likely to continue to be adopted by residential customers. *Id.* at 15:8-11. Ms. Dean's testimony presented the methodology the Company used to calculate the charges proposed in the Revision Sixth, which Ms. Dean asserted is the same methodology used to develop the charges in the Revision Fifth.³ *Id.* at 11:11-13. Ms. Dean testified that the charges were not unjustly discriminatory but designed simply to recover the costs associated with providing back-up service to customers with interconnected, on-site generation. *Id.* at 7:3-5.

As a result of this filing, Alabama Power argued that Petitioners' Complaint should be dismissed as moot. The Company claimed that its filing of the revisions to the specific charges challenged by Petitioners left no justiciable controversy and no relief that could be had by Petitioners with respect to the rates challenged in their Complaint. Alabama Power acknowledged, however, that any dismissal of the Complaint would be without prejudice to the rights of Petitioners to intervene and participate in Docket U-4226 with regard to the Company's proposed modifications to Rate Rider RGB. Ala. Power Co.'s Mot. to Dismiss ¶ 11.

² For the Alternative Rate RTA charge, Ms. Dean in Reply testimony stated that the charge should be raised to 72 ¢/kWh because of a miscalculation on the part of the Company. Natalie Dean Reply Testimony, 23:12-19. However, at the hearing before the Commission, Ms. Dean stated that charge should remain at 71 ¢/kWh. Tr. 8:21-9:9.

³ At the hearing, Ms. Dean testified that, for the Alternative Rate RTA charge, the Company generally followed the same methodology as it used to derive the Capacity Reservation Charge. Tr. 13:20-14:1.

Petitioners subsequently sought leave to intervene in Docket U-4226. Petitioners urged the Commission to suspend the operation of the proposed modifications so that the Commission could investigate their original complaint in Docket No. 32767, for which Petitioners requested a hearing. Petitioners also asked the Commission to fix a time and place for public hearings on the proposed modifications to Rate Rider RGB in Docket U-4226.

Petitioners then filed an Amended Complaint in Docket 32767 wherein they expressly challenged the proposed changes to Rate Rider RGB and incorporated this challenge into their request for relief. Amended Compl. ¶ 58. Petitioners also submitted a Response in Opposition to Alabama Power's Motion to Dismiss. Petitioners asserted that because their Complaint had now been amended to include an express challenge to the proposed changes, there remained a live and justiciable controversy which precluded the dismissal sought by Alabama Power.

In reply, Alabama Power urged the Commission to treat the Petitioners' Amended Complaint as having been filed in Docket U-4226 so that the amended claims challenging the proposed revisions to Rate Rider RGB could be considered in parallel with the Commission's assessment of those revisions. The Company also suggested that the Commission establish a procedural schedule for the pursuit of discovery or any further actions by Petitioners deemed appropriate under the circumstances.

Alabama Power also responded to the Petition to Intervene, stating that it did not oppose Petitioners' intervention in Docket U-4226 or the Commission's consideration of their First Amended Complaint. The Company asserted, however, that Petitioners were not entitled to a suspension and investigation of the Company's filing in Docket U-4226, nor were they entitled to a hearing in connection therewith. Alabama Power also argued that Petitioners were not

entitled to a hearing on their original complaint prior to a hearing on the proposed modifications in Docket U-4226, should the Commission determine to hold one.

On August 23, 2018, the Commission issued a Procedural Ruling holding the Company's Motion to Dismiss in Docket 32767 in abeyance. The Commission also granted Petitioners leave to intervene in Docket U-4226 and established an evidentiary cycle by which Petitioners would be afforded an opportunity to develop and present testimony and evidence responsive to that submitted by Alabama Power. The Company would likewise be able to submit testimony and/or evidence responsive to Petitioners' submissions. The ruling stated that, following the submission of any such testimony and evidence, the Commission would be in a position to properly evaluate a course of action that would best address the matters under consideration.

C. Evidentiary Submissions

Petitioners subsequently served their First Set of Interrogatories and Requests for Production to Alabama Power, to which the Company filed timely responses. Petitioners also noticed and took the deposition of the Company's witness, Ms. Natalie Dean.

On November 13, 2018, Petitioners filed the Direct Testimony of Karl R. Rábago, in both redacted and confidential form, along with several supporting exhibits. Mr. Rábago is an expert with 28 years of experience in the electricity industry and related fields, including extensive experience working in the field of distributed energy resources, a category of energy resources that includes distributed generation, energy efficiency, energy management, energy storage, and other technologies and related services. Direct Test. of Karl R. Rábago on behalf of Intervenors James H. Bankston, Ralph B. Pfeiffer, Jr. and Gasp, Inc. 2:9-21 [hereinafter Rábago Test.]. Mr. Rábago reviewed both the currently effective Rate Rider RGB, as challenged in the Petitioners' original Complaint, and the Company's proposed modifications thereto in Docket U-4226. Mr.

Rábago concluded that the rate rider's charges for back-up service, as currently effective and as proposed to be increased, are unjust and unreasonable. *Id.* at 5:2-5. Mr. Rábago recommended that the Commission order the Company to withdraw Part I.B. of Rate Rider RGB and make several modifications in its approach to customer-owned distributed generation. *Id.* at 5:5-8.

In response, on December 12, 2018, Alabama Power filed the Reply Testimony of Natalie Dean, along with several exhibits (hereinafter Dean Reply Test.). Ms. Dean responded to Mr. Rábago's testimony, and reiterated her belief that the proposed modifications are reasonable.

In addition to the above, the evidence in this proceeding includes responses by Alabama Power to data requests submitted by Commission Staff. Specifically, Staff submitted an initial set of data requests to the Company on June 29, 2018. On June 25, 2019, the Commission issued a Procedural Ruling directing the Company to respond to several supplemental data requests. The ruling granted Petitioners leave to file a reply to the supplemental responses. Alabama Power timely filed responses to both sets of data requests, which are discussed further below.

D. Further Proceedings

On July 12, 2019, the Commission issued a Procedural Ruling permitting the intervention of Energy Alabama, a non-profit organization that describes itself as "representing the interest of the public in Alabama with a mission to accelerate the state's transition to sustainable energy." Energy Alabama Mot. to Intervene at 1. The Commission directed that Energy Alabama must accept the record and procedural posture of the proceeding as they stood at that time. The Commission did, however, grant Energy Alabama leave to reply to any submission filed by Alabama Power in response to the Commission's June 25, 2019, supplemental data requests.

Alabama Power duly filed its responses to the supplemental data requests on July 23, 2019. Petitioners and Energy Alabama filed separate responses thereto on August 20, 2019.

On October 7, 2019, the Commission issued a Procedural Ruling Establishing a Limited Hearing. Noting that the parties had already been provided ample opportunity to introduce evidence supporting their prospective positions, the Commission directed that the hearing be limited to the evidence currently in the record. The Commission instructed the parties to have their witnesses who had previously filed testimony available to sit for cross-examination. The Commission also directed that each witness provide an overview of their previously filed testimony prior to being made available for cross-examination. Prior to the hearing, the Commission granted Alabama Power's request to take the deposition of Mr. Rábago.

The Commission held the limited hearing on November 21, 2019. The Company presented its witness Natalie Dean, who provided an overview of her testimony and was then cross-examined by representatives of Petitioners, Energy Alabama and the Attorney General. Petitioners then presented their witness, Mr. Rábago, who provided a summary of his testimony. Mr. Rábago was not asked questions by the Company following his summary of his testimony. At the conclusion of the hearing, the Commission directed the parties to submit proposed orders by December 20, 2019.

III. LEGAL STANDARDS

Both Alabama and federal law require utilities to provide back-up and supplementary service to customers with on-site generation facilities, such as rooftop solar, who wish to remain connected to the grid. Under Alabama law this requirement arises from the utility's general duty to serve. *See generally* Ala. Code § 37-1-49 ("Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet growth and demand of the territory which it is under the duty to serve."). Under federal law, back-up and supplementary power are services

electric utilities must provide to small power producers, a category that includes customers with on-site solar arrays, who request those services. 18 C.F.R. § 292.305(b)(1)(i) and (ii). While Alabama Power is authorized to charge and recoup costs for such services pursuant to Ala. Code § 37-4-140(c)(1), its rates may not unjustly discriminate against self-generating customers.

A. Alabama Law

Under Alabama Law, “[t]he rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public.” Ala. Code § 37-1-80. “The question of what constitutes just and reasonable rates . . . must be determined in the exercise of a fair, enlightened and independent judgment in the light of all the relevant facts.” *Birmingham Elec. Co. v. Ala. Pub. Serv. Comm’n*, 254 Ala. 140, 146 (1949).

A utility’s rates must be supported by proper evidence. *Ala. Metallurgical Corp. v. Ala. Pub. Serv. Comm’n*, 441 So. 2d 565, 575 (Ala. 1983); *Ala. Power Co. v. Ala. Pub. Serv. Comm’n*, 422 So. 2d 767, 769 (Ala. 1982). An order finding that a rate is just and reasonable is, without supporting evidence, arbitrary. *See Ala. Power Co. v. Ala. Pub. Serv. Comm’n*, 390 So. 2d 1017, 1025 (Ala. 1980) (holding that the Supreme Court must set aside a PSC decision “as being arbitrary as a matter of law, and a denial of due process, when such order is based upon findings without evidence to support them”).

In general, rates charged to customer classes must be based on the cost of providing electric service to each class. *Re: PURPA Rate Design Standards*, Docket 17859, 1981 WL 721422, at 32–33, 37 (Ala. P.S.C. 1981) (stating that “the commission finds that the rates of Alabama Power Company should, to the maximum extent practicable, be based on the cost of providing service” and that “rates charged by an electric utility for each class of customer shall be designed to reflect the costs of providing electric service to such class, to the maximum extent

practicable and equitable.”); *Greater Birmingham Unemployed Committee v. Ala. Gas Corp.*, Docket No. 19674, 1987 WL 257976, at 223–24 (Ala. P.S.C. 1987); *see also Birmingham Elec. Co. v. Ala. Pub. Serv. Comm’n*, 47 So. 2d 455, 460 (Ala. 1949) (stating that rates must be just and reasonable to both the investor and the consumer, and “[t]he investor interest is adequately served if the utility is allowed the opportunity to earn the cost of service” (quoting *Fed. Power Comm’n v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 607 (1942) (Black, J., concurring))).

Rates cannot unjustly discriminate against particular customers or a class of customers. *See* Ala. Code §§ 37-1-97 (requiring that the Commission fix a reasonable rate whenever it finds that an existing rate is unreasonable or unjustly discriminatory); 37-1-83 (requiring the Commission to investigate any rate that “is in any respect unfair, unreasonable, unjust or inadequate, or unjustly discriminatory, or unduly preferential, or constitutes unfair competition . . .”). Unjust and undue discrimination occurs when a rate or charge singles out a particular sub-class of customers for differential treatment when there is no cost-of-service basis for doing so. *See Greater Birmingham Unemployed Committee*, 1987 WL 257976, at 223–24 (finding that low-income customers were not entitled to lower rates because the complainants failed to show that it “costs less to serve low-income customers than other residential customers” or that “low-income customers impose different service characteristics on the system”).

When the Commission finds that an existing rate is unreasonable or unjustly discriminatory, it must “by order fix . . . a reasonable rate . . . to be imposed, observed and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be.” Ala. Code § 37-1-97.

B. Federal Law

Federal standards also govern the rates utilities charge to “small power producers,” a category that includes customer-sited solar installations. Small Power Production & Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, 45 Fed. Reg. 12,214, 12,215 (Feb. 25, 1980) [hereinafter Order No. 69]. As Alabama Power acknowledges, the Company is bound by provisions of the Public Utility Regulatory Policies Act of 1978 (“PURPA”) and its implementing regulations in regard to the rates it may lawfully charge for back-up service. PURPA requires electric utilities to furnish electric energy to customer generators on a nondiscriminatory basis. *Id.* at 12,215. The statute was designed to encourage customer-sited solar generation by removing obstacles to its deployment. One such obstacle was that “some utilities charged discriminatorily high rates for back-up service to . . . small power producers.” *Id.*

To remove that obstacle, PURPA’s implementing regulations require that rates for sales charged by utilities “[s]hall be just and reasonable and in the public interest” and “[s]hall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.” 18 C.F.R. § 292.305(a)(1)(i) and (ii). “Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility’s other customers with similar load or other cost-related characteristics.” *Id.* at (a)(2).

IV. ANALYSIS AND DISCUSSION

The central issue in this case is whether Alabama Power has adequately justified its different treatment of customers who invest in solar or other forms of self-generation on their properties. There is no question that the Rate Rider RGB charges significantly undermine the

value proposition for residential (Rates FD and RTA), small commercial (Rate LPS), and school (Rate SCH) customers who deploy solar. *See* Amended Compl. Exs. 1, 3; *see also* Tr. 26:9-16 (Alabama Power has no reason to dispute Petitioners’ allegations of harm). There is also no question that Alabama Power has the right to charge for its services, including back-up service, on a cost-of-service basis. The question is whether the Company has demonstrated a cost-of-service basis justifying the particular charges assessed, which the Company now proposes to increase, against Petitioners and other customers in these rate classes. The Company not made the necessary showing.

The evidence unequivocally demonstrates that solar customers are *less costly* to serve than customers without solar. Tr. 76:1-4; Dean Test. 18:17-21. The Company seeks to de-emphasize this fact by assuming that rooftop solar systems unexpectedly fail so frequently that the Company must hold substantial capacity in reserve for just those customers. But the record is devoid of any quantifiable basis for the Company’s assumptions about the frequency of such unexpected outages. Dean Dep. 96:9-98:1. Moreover, because the Company makes no intelligible distinction between “supplementary” and “back-up” service, there is substantial danger that the Company is charging twice for the same service.

The record shows that the charges have their basis in lost revenues, not costs to serve. *See* Rábago Test. 17:7-8 (Company’s approach is “to develop a price for back-up power service by reverse engineering an estimate of hypothetical lost revenues.”); Dean Test. 19:3-4 and Revised Ex. ND-6 (basing charge on “annual net unrecovered cost” difference between representative customer profiles). Solar customers cost less to serve because they use less grid-supplied electricity. The resulting lost revenues are not unique to solar, but would accompany reduced customer usage by whatever means, which is the customer’s right to pursue.

The Rate Rider RGB Part I.B. charges are unjust and discriminatory because they single out solar customers and other customer generators for differential treatment without a cost-of-service basis for doing so.

A. How the Charges Impact Solar Customers

At the outset, it is worth describing specifically how the charges impact customers who deploy solar. The Capacity Reservation Charge applies according to the size of the customer's investment; hence a customer with a 4 kW solar array must currently pay a monthly fee of \$20 (or \$21.64 under the proposed increase to \$5.41/kW). In this way, the charge operates as a flat tax on each unit of solar investment. Rábago Test. 11:4-8. Over the thirty-year life of a typical solar installation, the charges add up to a considerable amount. In the example just cited, the customer would pay Alabama Power \$240 per year, which translates to \$7,200 over thirty years. The charge thus significantly eats into the customer's expected savings while lengthening the payback period of their investment.

Of the four rate classes subject to the charge, only one—the Rate RTA customer— can opt to avoid it by agreeing to pay a 70¢/kWh during certain summer season hours (3:00 to 5:00 p.m.). Rate RTA customers are already on a time-varying rate with a demand charge; the Alternative Rate RTA assesses these customers an energy charge more than triple their otherwise applicable rate during the affected hours.

Petitioners Bankston and Pfeiffer and the Gasp affiants are all Rate FD customers. Rate FD is the rate that most of the Company's 1.2 million residential customers are on, and is the rate class the Company used to develop the charges. Tr. 14:2-12. The Capacity Reservation Charge paid by Petitioners and others similarly situated applies on top of the other standard charges embodied in Rate FD. For example, Petitioners pay the same standard customer base charge of

\$14.50 per month as other customers. Tr. 18:14-16. And for each kWh they consume from the grid, Petitioners pay the same standard volumetric energy charge as non-solar customers. Tr. 18:22-19:2.

The Capacity Reservation Charge has nothing to do with Petitioners' actual usage patterns, including whether they fall within the normal variation of usage for the Rate FD class as a whole. Tr. 85:15-17, 88:14-20. The charge does not vary with the level or pattern of the customer's usage, nor is it impacted by the extent to which the customer reduces or contributes to system demand. The result is that two customers—each having a 5 kW system—will pay the same charge even if one is a net consumer during system peak and the other is a net producer (i.e. contributing electrons to the grid) during system peak, and even if both are higher than average consumers of grid-supplied electricity. Tr. 86:15-87:15.

More crucially, the Rate Rider RGB charges have nothing to do with how frequently customer solar systems experience unexpected outages (Dean Dep. 96:1-98:1) – the very event that back-up service is designed to cover. The charges instead rest on an assumption that *all* reductions in solar output at a customer's premises are a form of unscheduled outage. Dean Reply Test. 17:3-5. As discussed further below, this assumption is problematic because it blurs the distinction between true back-up service (the reason for the charges) and supplementary service, which solar customers pay for by paying the same volumetric energy charge as other customers. The charges in Part I.B. apply to the former, but not to the latter. Tr. 64:10-13. As detailed further below, the Company's analysis makes no meaningful distinction between supplementary and back-up service.

B. Solar Penetration in Alabama Power's Service Territory

Before turning to the merits of the Company's analysis, it is important to understand the scale of the problem the Company says it is trying to address. Despite being the predominant form of on-site generation currently used by customers, customer-sited solar penetration in Alabama Power's service territory remains extremely limited. When the rate rider charges were first adopted in May 2013, there were just 79 customer accounts subject to the charge. Tr. 20:2-5. Today, there are only 132 covered customers, and the total combined capacity of their on-site installations is just over 650 kilowatts, compared to a total system capacity for Alabama Power of approximately 13,000 MW. Tr. 21:23–22:10.

The Company apparently did not consider the low penetration of customer-sited solar in its service territory to be a relevant consideration before adopting the charge. Dean Dep. 37:3-11. Nor did the Company look at what other states with higher levels of solar penetration in their service territories were or were not doing to assess charges applicable to solar customer generators. Dean Dep. 37:12-20. The Company adopted the charges even though it had no information that solar customers were driving any specific infrastructure costs relating to interconnection and reliable operation of the grid. Tr. 25:7-12. The Company concedes it has not had to incur any additional capacity costs specifically as a result of solar penetration in its service territory. Dean Dep. 124:16–125:5; Tr. 25:16-19.

The Company also did not perform any independent assessment of the costs and benefits of distributed solar generation before instituting the charges (or proposing to increase them). Tr. 31:19-32:1. The Company was aware of, but did not rely upon, a framework developed by its corporate parent, Southern Company, expressly for that purpose. Tr. 32:17–33:8. The Company concedes that customer-sited solar provides certain system benefits. A customer with solar

reduces system costs when they are able to rely on self-generation during system peaks, which is when the system is most stressed and marginal energy production at its most expensive. Tr. 28:4–30:6. Similarly, the Company acknowledges that to the extent a solar customer is not using capacity during peak times, this frees up capacity for use by other customers. Tr. 30:7-13.

In short, the Company adopted the Rate Rider RGB charges despite miniscule amounts of customer-sited solar in its service territory and without a comprehensive assessment of the costs and benefits of those systems to the grid as a whole. But more importantly, the Company assesses, and now proposes to increase, the charges without any cost-of-service basis.

C. The Company's Cost-of-Service Analysis Shows that Solar Customers are Less Costly to Serve.

The Company defends its charges for back-up power service as “cost-based and supported by a comprehensive analysis undertaken by the Company.” Dean Test. 8:5-6. The problem with this assertion is that the Company's cost of service study shows that solar customers on Rate FD (the only rate class studied) are *less costly* to serve than other customers in the same class.

The Company's analysis developed and then compared two representative customer profiles – one without solar and one with. To produce these profiles, the Company identified current Rate FD customers who had installed solar and looked to their actual usage *prior to* installing on-site generation. Dean Reply Test. 11:1-3. This yielded an indicative load profile for a representative Rate FD customer without solar. The Company then determined what this representative customer's load profile would look like after adopting on-site solar generation. Dean Reply Test. 15:7-8. This was accomplished by using the NREL PVWATTS tool to develop solar production profiles for 1 kW of installed fixed mount rooftop solar in each of the three weather zones representative of the Company's service territory (Birmingham, Montgomery and

Mobile). *Id.* at 15:16-18. The Company weighted these profiles based on residential usage in the three weather zones to produce a single representative 1 kW solar profile. *Id.* at 15:17-18. The Company then reduced the representative Rate FD customer's load profile by the amount of solar production profile, thus yielding a representative solar customer. Finally, the Company assumed a 4.3 kW solar installation to these load profiles. Dean Test. 18:6-13.

What the Company did not do was look to the actual metered net usage of existing Rate FD customers with solar. The Company acknowledges it could have started there and then added back the "expected" hourly usage that had been offset by their on-site solar generation. Dean Reply Test. 12:4-13. This too would have produced a representative profile for a customer without on-site generation. *Id.* But it would also have generated other useful data points. For example, had the Company evaluated actual metered net usage for its Rate FD solar customers, it could have determined what demands those customers place on the system and when. Tr. 39:12–40:3. The Company could also have determined how those customers' net usage, as a class, compared to the usage patterns for the residential class as a whole. Having not made this comparison, the Company conceded that it does not know whether the actual net usage of its solar customers is within the average for the Rate FD class as a whole or is higher or lower than the average. Tr. 88:16-20.

Such a comparison is important because Rate FD is a volumetric energy rate – i.e. its energy charge (in ¢/kWh) is designed to recoup both variable and fixed costs incurred by the Company in connection with the customer's usage. Tr. 40:20–41:1. As a class, residential customers exhibit fairly significant load diversity. Tr. 41:2-5. Rate FD is designed to recover the Company's fixed and variable costs with consideration of that load diversity. Tr. 41:10-14. Had it looked at metered net usage data, the Company may have found that Rate FD solar customers

appear, to the system, like an average or slightly below average customer—in other words, a fairly typical collection of residential customers who need not be assessed additional charges for their usage. Without this comparison, there is no way to give effect to PURPA’s anti-discrimination protections, which require consideration of whether “such rates apply to the utility’s other customers with similar load or other cost-related characteristics.” 18 C.F.R. § 292.305(a)(2).

But even without evaluating these actual usage patterns, the Company’s analysis demonstrated unequivocally that the representative solar customer is less costly to serve. As shown in Exhibit ND-4 to Ms. Dean’s original written direct testimony, the representative solar customer is 2.53 ¢/kWh less costly to serve from a variable energy cost standpoint, and \$129/kW less costly to serve from a fixed capacity cost standpoint. The Company agreed that these savings make the representative customer with solar \$330 less costly to serve than the customer without solar. Tr. 76:1-4.

The Company’s argument is that the fixed cost savings are not real; the savings exist only if the solar customer never required back-up power. Dean Test. 16:12-14. Yet the Company acknowledges that it may not, under PURPA, base its rates for back-up service on the assumption that reductions in electric output by every on-site generator on its system will occur simultaneously, or during system peak, or both. Tr. 49:15-20. To give effect to PURPA’s protections, the Company applied a credit of 35 percent of fixed costs in order to—in its view—reasonably approximate the benefits of customer generator diversity. Dean. Test. 17:6-16. The result of this 35 percent customer diversity credit is that for every 10 kW of on-site solar on its system, the Company asserts that it needs to hold 6.5 kW in reserve. Tr. 46:5-8. The Company concedes, in other words, that it does not need to reserve capacity on a one-to-one basis (Tr.

47:22-48:1)—i.e., 10 kW back-up for every 10 kW of solar—a result the Federal Energy Regulatory Commission (FERC) specifically envisioned when it adopted its PURPA regulations. *See* Order No. 69 at 12,229 (“The Commission believes that a probabilistic analyses of the demand of qualifying facilities will show that a utility will probably not need to reserve capacity on a one-to-one basis to meet back-up requirements.”).

In contrast, for a full requirements customer (i.e. customer without solar) with a peak demand of 10 kW, the Company says it “must be prepared to meet that 10 kW at any time, including during system peak.” Dean Reply Test. 9:17-10:1. Accepting at face value the Company’s argument that the same customer is entitled to a 35 percent capacity credit when they adopt solar, the Company cannot plausibly claim that solar customers are more costly to serve. Under the Company’s analysis, solar customers are, from a fixed costs standpoint, at least 35 percent less costly to serve.

Hence, even accepting the Company’s unreasonable and unsupported assumption that customer solar systems simultaneously fail 65 percent of the time, solar customers, as a class, produce capacity savings. The Company’s position is that for every 10 kW of customer-sited solar, 3.5 kW of system capacity becomes available for other uses. The Company acknowledges that this capacity is available for use by other customers. Tr. 30:8-13.

Asked at the hearing whether the end result of its own analysis was that “the representative customer with solar is \$330 less costly to serve than the customer without solar,” the Company’s response was unequivocal: “Based on this analysis, yes.” Tr. 76:1-4. Because the Company’s own evidence shows that solar customers are less costly to serve than non-solar customers in the same class, there is no cost-of-service justification for charging them *more* than

those other customers. As a result, the back-up service charges are *per se* discriminatory under Alabama and federal law.

D. The 35 Percent Diversity Credit Has No Firm Empirical Basis.

Because solar customers are less costly to serve, the legitimacy of the Company's 35 percent "customer diversity credit" is of secondary importance. But it is worth noting how little empirical support underlies the Company's assertion that 35 percent is the right number to use. The credit figures prominently in the Company's derivation of the Rate Rider RGB charges. A higher assumed percentage would result in a reduced charge. Tr. 59:12-15.

The issue here is the extent to which customer-sited solar systems suffer "unexpected outages" requiring back-up service. PURPA requires "probabilistic analyses of the demand of qualifying facilities" to support rates for back-up service. Order No. 69 at 12,229. There is no evidence that the Company performed such an analysis. The Company says it considered several factors, including customer diversification, the expected annual utilization of the on-site generator and its incremental capacity equivalent. But the Company did not rely on any numerical representation of these factors. Tr. 56:14-19; Dean Dep. 81, 87-90. Instead, the 35 percent credit reflects the Company's exercise of its "informed judgment." Tr. 56:5-6.

The Company points to a 2015 study of distributed solar PV performance data in Alabama by the Electric Power Research Institute ("2015 EPRI Study") as "provid[ing] support for the Company's conclusions regarding the extent to which multiple generators would require full back-up power at the same time." Responses of Ala. Power Co. to Staff's June 25, 2019 PC Supp. Data Requests, No. 5. The Company did not rely on the EPRI Study to develop the Rate Rider RGB charges, nor could it have, as the study was unavailable in 2012. At this point, the data it reports is stale (it was collected in 2011-2013) as well as unverifiable (the equipment used

has been removed from service). Asked by Commission Staff to propose a method and timeframe to replicate the EPRI Study, the Company responded that it would take 30-36 months for deployment and data collection. *Id.* at APC Response to No. 2.

The Company's "judgment" is not an adequate substitute for the "accurate data and consistent system-wide costing principles" required under PURPA for utilities to justify the rates charged to customer generators. Order No. 69 at 12,228; 18 C.F.R. § 292.305(a)(2). Without a cost-of-service basis or other solid empirical support, the charges must be considered unjust and discriminatory. Residential, small commercial and school customers who pursue solar on their properties should not continue to be penalized while the Company works to develop the necessary data.

E. The Company Makes No Meaningful Distinction between Supplementary and Back-Up Service.

PURPA draws a distinction between "supplementary" and "back-up" power, as does Rate Rider RGB itself. In general, supplementary power is the electric energy or capacity that a customer uses "in addition to" that which the customer generates on his own. Tr. 60:1-6. In contrast, back-up power is for "unscheduled outages"—it replaces what the customer would ordinarily generate were his system not down unexpectedly. *Id.* at 60:9-14. As the Company considers it, if a solar installation "is supposed to be producing and it's not producing, that would be back-up power." Dean Dep. 103:16-23; *see also* Tr. 58:1-5.

The contested charges are for back-up service. The Company charges differently for supplementary service under Rate Rider RGB. For supplementary service, the customer pays the otherwise applicable rate, which under the Company's analysis is the Rate FD volumetric energy charge. Tr. 63:6-10. The solar customer on Rate FD thus pays for supplementary service the same way a non-solar customer on the same rate pays for general service, by the kilowatt-hour.

The Company acknowledges that it would be inappropriate to assess the back-up service charges for supplemental service. Tr. 64:10-13. The Company also recognizes the danger of overcharging the customer if no clear analytical distinction is made between the two. Dean Test. 17:17-22.

If supplementary power is *in addition* to what the customer “ordinarily generates,” and back-up power is *to replace* what the customer “ordinarily generates,” it is obviously important to develop a clear conception of how customer-sited solar installations perform in the ordinary course. The PV Watts tool used by the Company to derive solar production data has built-in assumptions regarding weather variances and inverter efficiency. Tr. 66:13-16. The resulting solar production profiles reflect what is *expected* given those variances. Indeed, the Company relied on those outputs to assemble what it *expects* a customer’s load profile to look like after adopting solar. The Company considered the Alabama-specific data from PV WATTS indicative of what a solar installation would “ordinarily generate” over the course of a year for the representative customers used in its analysis. Tr. 67:19-68:4.

Nevertheless, the Company has made it clear that it views back-up power service as “cover[ing] all reductions in on-site generation, including unscheduled outages associated with the absence of sunlight.” Dean Reply Test. 17:3-5. But that would include *expected* deviations, which are the province of supplementary service. The Company’s sweeping conception of back-up service has no support under Alabama law, PURPA or anywhere else.

The Company agrees that an interconnected customer with solar is unlikely to be able to meet all of his needs through self-generation. Tr. 60:22-61:12. A customer’s solar installation will rarely produce up to its nameplate capacity, will produce less or not at all when it’s cloudy, and will not produce at night. Tr. 61:13-62:8. In those incidences, the customer takes

supplemental service from the Company at the full retail rate. Tr. 62:13-63:4. In the case of the Rate FD customer, that means paying a volumetric charge that is designed to cover both the variable and fixed costs associated with his usage. Tr. 63:11-13.

F. The Charges are Based on Lost Revenues.

The Company's analysis shows that the representative solar customer⁴ consumes 5,358 fewer kWh over a year than the representative customer without solar. This results in a revenue shortfall, which the Company calls a "cost recovery difference," of \$609. Dean Test. at Revised Ex. ND-6.⁵ For all of the Company's claims to have conducted a cost-of-service analysis specific to solar customers, it is important to recognize that its analysis really begins here—with the cost *recovery decrease* it believes solar adoption will engender—not any cost *to serve increase* for providing back-up power during unscheduled outages. It is to this difference in cost recovery that the Company proceeds to apply the energy *savings* (2.53 ¢/kWh) and capacity *savings* (35% of \$129/kW) associated with the customer's solar production, which total \$330 annually. *See* Dean Test. at 18:19-21 (referencing "cost of service savings"). Accounting for those benefits as cost *reductions* yields an annual net unrecovered balance \$279, which divided system size (4.3 kW) and 12 months produces a Capacity Reservation Charge of \$5.41 per kW. Dean Test. at Revised Ex. ND-6; *see also* Tr. 76:5-17.⁶

It should be noted that the Company's analysis assumes an entitlement to the 5,358 kWh not purchased by the representative customer. Of course, the Company has no such right. An electric utility has no right to expect any particular level of consumption by any customer. Customers have a right (and typically, an economic imperative) to reduce their electricity

⁴ Here, the Company assumed a 4.3 kW solar array, which it says represents "the average size of on-site generation for Residential customers with interconnection applications on file with Alabama Power." Dean Test. 18: 8-11.

⁵ Revised Ex. ND-6 was included as part of the Company's errata filing on November 5, 2019.

⁶ The Alternative Rate RTA charge proceeds in similar fashion, beginning with an assessment of the energy consumption difference between the two profiles and resulting "cost recovery difference."

consumption. To this end they have multiple available means, only one of which is to spend relatively significant sums installing a rooftop solar array. As the Company acknowledged at the hearing, if a residential customer without solar went from buying 15,000 kWh per year to 10,000 kWh because his kids left for college, the Company could not bill the customer for the difference. Tr. 80:23-81:9. Nor could the Company assess a back-up charge for holding capacity in reserve to serve that customer's needs when his kids return home for the summer. *Id.* at 81:10-16. For the Company to single out customer generators for special charges, when the "cost recovery difference" revealed by its analysis can result in myriad other ways, is to unjustly discriminate against solar customers.

More fundamentally, "lost revenues are not the same thing as cost of service." Notice of Proposal for Decision, *In the matter of the application of DTE Electric Company for authority to increase its rates, amend its rate schedules and rules governing the distribution and supply of electric energy, and for miscellaneous accounting authority*, Case No. U-20162, at 285 (Mich. P.S.C. Mar. 6, 2019) (quoting ELPC's initial brief at 13) (excerpt from this notice is attached as Exhibit C to Pets.' Notice of New Authority). A singular focus on the kWh purchases avoided by the customer's solar production tells us nothing about how often the customer requires back-up service or how much it costs the Company to provide it. The solar customer's reduced usage profile could represent nothing more than the Company's provision of supplemental service, which the customer fully pays for through his monthly bill.

This precise point was illustrated near the conclusion of the evidentiary hearing. The Company agreed that the 10,127 kWh purchased by the representative customer with a 4.3 kW solar array was net of their system's production. Tr. 78:12-18. The Company would not agree, however, that those purchases were "supplemental service." As Ms. Dean testified: "I would say

they're billed under the supplemental service rate, but *to the extent* those kilowatt hours were consumed because of an outage, backup power *could be considered* in that as well.” Tr. 78:19-79:2 (emphasis added). As this testimony reveals, the Company makes no clear distinction between back-up and supplementary service. To base charges for the former on the revenue recovery difference between two hypothetical customer profiles is to risk over-charging solar customers.

Under Alabama law, the Company has the burden to show that the rates charged for its services are cost-based. Under PURPA, the Company has the burden to show that the rates it charges for back-up service are cost-based and do not discriminate against customer generators in comparison to rates for sales to other customers. 18 C.F.R. § 292.305(a)(ii). Because the record shows that solar customers are less costly to serve than other customers, and is devoid of any other empirical basis for assessing charges that significantly undermine the value of these customers' private investments, the Commission concludes that the charges assessed under Part I.B. of Rate Rider RGB are unjust, unlawful and due to be withdrawn.

V. CONCLUSION

For all the foregoing reasons, on the basis of the record and governing principles of Alabama and federal law, the Commission finds and concludes as follows:

- 1) The Company has failed to carry its burden to show that the proposed modifications to Parts I.B.1 and I.B.2.a of Rate Rider RGB are reasonable and justified on a cost-of-service basis. The Company is accordingly ordered to withdraw the proposed modifications.
- 2) Petitioners have carried their burden of showing that the charges currently assessed against them under Parts I.B.1 and I.B.2.a of Rate Rider RGB are unfair,

unreasonable, and unjust in that they lack a cost-of-service basis or other empirical justification and therefore unjustly discriminate against customers making private investments in on-site generation. Accordingly, Alabama Power's Motion to Dismiss Petitioners' complaint in Docket No. 32767 is hereby denied.

3) The Company is ordered to cease collecting the Capacity Reservation Charge and Alternative Rate RTA Charge under Sections I.B.1 and I.B.2.a. of Rate Rider RGB. The charges are hereby suspended until the Company has demonstrated a quantifiable basis for their assessment under traditional cost-of-service principles, which should include an analysis and full accounting of the benefits of customer-sited solar generation.

Respectfully submitted this 20th day of December, 2019.

/s/ Clay Ragsdale

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been served upon the following by electronic transmission on this 20th day of December, 2019.

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