



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

TWINKLE ANDRESS CAVANAUGH, PRESIDENT

JOHN A. GARNER, EXECUTIVE DIRECTOR

JEREMY H. ODEN, ASSOCIATE COMMISSIONER

CHRIS "CHIP" BEEKER, JR., ASSOCIATE COMMISSIONER

**Alabama Power Company,**

Petitioner

Petition: For a certificate of convenience and necessity for: (i) the construction and installation of combined cycle generating capacity at the site of Petitioner's Barry Steam Plant located in Mobile County, Alabama; (ii) the acquisition of existing combined cycle generating capacity in Autauga County, Alabama; (iii) the acquisition of rights and the assumption of payment obligations under a power purchase agreement for the output of combined cycle generating capacity operated in Mobile County, Alabama; and (iv) the acquisition of rights and the assumption of payment obligations under power purchase agreements for the output from five solar photovoltaic and battery energy storage systems, located in Calhoun, Chambers, Dallas, Houston and Talladega Counties; together with all transmission arrangements, structures, substations, and facilities, environmental control measures, facilities or arrangements for the handling, treatment, transportation, delivery and processing of fuel, and any and all other appliances, appurtenances, facilities, rights, equipment, acquisitions, commitments and accounting authorizations necessary for or incident thereto.

Docket 32953

**ORDER DENYING RECONSIDERATION AND REHEARING**

**BY THE COMMISSION:**

**I. Introduction and Background**

On August 14, 2020, the Commission entered an Order (the "Order") in this cause which granted in part and denied in part the September 6, 2019, Petition of Alabama Power Company ("Alabama Power" or the "Company") for a Certificate of Convenience and Necessity seeking authorization to secure

DOCKET 32953 - #2

approximately 2,400 megawatts of additional capacity resources for service reliability.<sup>1</sup> Said Order was issued after many months of extensive discovery, rounds of direct and rebuttal testimony, a full evidentiary hearing and extensive briefing. As discussed at length in the Order, the Commission authorized the Company to proceed with the construction of a new combined cycle unit at the site of the Company's existing Barry Steam Plant, to acquire an existing combined cycle unit, to enter into a purchase power agreement for the capacity and energy output of an existing combined cycle unit, and to pursue up to 200 MW of demand-side management and distributed energy resource programs. The Commission declined to certify a group of planned solar photovoltaic and battery energy storage system ("solar/BESS") projects due to concerns over reliability and dispatchability, directing that projects of this nature be considered in connection with an upcoming request for proposals ("RFP") under Docket No. 32382.<sup>2</sup> On or about September 11, 2020, Southern Environmental Law Center filed a Petition for Reconsideration and Rehearing of the Commission's Order on behalf of Energy Alabama and GASP (collectively, "Energy Alabama/GASP") ("Energy Alabama/GASP's Petition"). On or about September 14, 2020, Sierra Club also filed a Petition for Reconsideration and Rehearing of the Commission's Order entered in this matter ("Sierra Club's Petition").

Alabama Power filed an Answer to the Petitions for Reconsideration and Rehearing of Sierra Club and Energy Alabama/GASP ("Alabama Power's Answer") on September 21, 2020. Although arguing in its answer that the Commission would be justified in striking Sierra Club's Petition as untimely, the Company nonetheless proceeded to set forth arguments which addressed the substance of

---

<sup>1</sup> *In Re: Alabama Power Company*; Docket No. 32953 (August 14, 2020).

<sup>2</sup> See Order, p. 3 n. 2 and p. 54 n. 197.

each of the assertions raised in both Petitions.<sup>3</sup>

Also, on September 21, 2020, Sierra Club filed an Answer to Energy Alabama/GASP's Petition. In said filing, Sierra Club expressed support for Energy Alabama/GASP's Petition and adopted the arguments set forth therein.

On September 25, 2020, Sierra Club filed a Motion for Leave to Answer and Answer to Alabama Power Company's Response to Sierra Club's Petition for Reconsideration and Rehearing which challenged the portion of Alabama Power's Answer asserting that Sierra Club's Petition was untimely. On October 23, 2020, Sierra Club filed a Motion for Leave to Make Discovery Requests to Alabama Power Company and Commission Staff. Alabama Power filed an Objection to that motion on October 28, 2020. No other participants to the proceeding submitted any post-decision filings.

After careful consideration of the matters raised in the Petitions filed by Energy Alabama/GASP and by Sierra Club, the Answer of Alabama Power to those Petitions, the pleadings in this proceeding (including the materials and information referenced therein), the record in this Docket and governing precedent, the Commission concludes that neither Petition raises any argument or issue that requires rehearing or reconsideration. Accordingly, both Petitions for Reconsideration and Rehearing are hereby denied.

## II. Legal Standard

Petitions for rehearing or reconsideration before the Commission are governed by judicial rules and are treated in the same manner as motions for a new trial in the circuit courts of the State of

---

<sup>3</sup> While there is some merit to Alabama Power's argument that Sierra Club did not timely file its Petition because it was submitted after 5:00 p.m. on the filing deadline date, it would not be unreasonable for a filer to interpret the Rules of Practice and the interim electronic filing rule in a manner that would allow such a filing to be timely. Therefore, we decline to strike Sierra Club's Petition as untimely and instead will address the various arguments raised in its Petition.

Alabama.<sup>4</sup> A circuit court may consider the following criteria when considering whether to grant a motion for a new trial: 1) whether the evidence will change the result; 2) whether the evidence has been discovered since the trial; 3) whether the evidence could not have been discovered by due diligence; 4) whether the evidence is material; and 5) whether the evidence is not merely cumulative or impeaching.<sup>5</sup> For the reasons set forth below, we find that neither Energy Alabama/GASP nor Sierra Club have presented any evidence which would justify a grant of their respective petitions.

### III. Energy Alabama/GASP's Petition for Reconsideration and Rehearing

The Petition of Energy Alabama/GASP raises three issues as grounds for reconsideration or rehearing: the effects of the COVID-19 pandemic on the company's future capacity need; the treatment of stranded asset risk; and the rejection of the solar/BESS projects. As noted, Alabama Power filed an Answer that addressed each of the assertions raised by Energy Alabama/GASP. As explained in more detail below, none of the grounds raised by Energy Alabama/GASP merit reconsideration or rehearing, and thus Energy Alabama/GASP's Petition is denied.

Energy Alabama/GASP began by asking this Commission to revisit our decision regarding the potential effects of the COVID-19 pandemic.<sup>6</sup> In so doing, they implicitly concede the correctness of the conclusion in the Order that these effects could not be determined with any reasonable degree of certainty, but seem to suggest that things have now changed and the longer-term impacts have "become clearer."<sup>7</sup> In support of this proposition, Energy Alabama/GASP provided updated pandemic-related statistics. We note, however, that changing data trends shed no meaningful light regarding the demand

---

<sup>4</sup> See *Walker v. APSC*, 297 So. 2d 370, 374 (Ala. 1974), *overruled on other grounds by Ex parte Andrews*, 520 So. 2d 507 (Ala. 1987).

<sup>5</sup> *Clemons v. Howard*, 124 So. 3d 738, 742 (Ala. Civ. App. 2013).

<sup>6</sup> See *Energy Alabama/GASP's Petition*, pp. 5-10.

<sup>7</sup> See *Energy Alabama/GASP's Petition*, p. 5.

for electricity in the 2023-2024 timeframe which this proceeding was particularly focused on.<sup>8</sup> Of more significance are the various materials that are cited in Energy Alabama/GASP's Petitions such as the International Monetary Fund ("IMF") World Economic Outlook Update which include information that actually supports our conclusion that the long-term impacts of the pandemic remain unknown and unknowable rather than undermine that determination.<sup>9</sup> The IMF Outlook relied upon by Energy Alabama/GASP emphasizes the uncertainty surrounding the long term effects of the pandemic due to many underlying considerations which are unpredictable. The IMF in fact warns that "there is a higher-than-usual degree of uncertainty around this forecast." In its full report the IMF explains this uncertainty in much more detail:

Fundamental uncertainty around the evolution of the pandemic is a key factor shaping the economic outlook and hinders a characterization of the balance of risks. The downturn could be less severe than forecast if economic normalization proceeds faster than currently expected in areas that have reopened—for example in China, where the recovery in investment and services through May was stronger than anticipated. Medical breakthroughs with therapeutics and changes in social distancing behavior might allow healthcare systems to cope better without requiring extended, stringent lockdowns. Vaccine trials are also proceeding at a rapid pace. Development of a safe, effective vaccine would lift sentiment and could improve growth outcomes in 2021, even if vaccine production is not scaled up fast enough to deliver herd immunity by the end of 2021.<sup>10</sup>

This pandemic related argument of Energy Alabama/GASP provides no legitimate basis for rehearing or reconsideration. Rather, the materials offered by Energy Alabama/GASP support our conclusions

---

<sup>8</sup> Even if the long-term forecast and capacity need in this proceeding ultimately proves to be somewhat overstated, we did not certify resources equal to the full amount of the asserted need.

<sup>9</sup> See also *Alabama Power's Answer*, pp. 11-12 (discussing all scenarios in the Morgan Stanley Report cited in the Commission's August 14, 2000 Order at p. 25 and the assumptions underlying each).

<sup>10</sup> See *IMF World Economic Outlook Update*, June 2020 (full report), p. 8.

regarding the long-term effects of the pandemic, as reflected in the Order.<sup>11</sup>

Next, Energy Alabama/GASP asked the Commission to revisit the question of stranded cost risk, suggesting that reconsideration is warranted by the current economic burden on customers due to the pandemic.<sup>12</sup> Notably, however, we considered the near-term economic effects of our August 14, 2020 Order and determined they caused no undue burden. Our conclusion in this regard rests on our determination that there is no realistic potential for the newly certificated resources to be rendered unnecessary given their economics relative to existing company resources.<sup>13</sup> Energy Alabama/GASP offered no legitimate reason to rehear or reconsider our conclusion regarding stranded cost risk, and we decline to do so.

Finally, Energy Alabama/GASP seeks rehearing or reconsideration of our determination not to certify the solar/BESS projects as reliability resources, directing instead that projects of that nature be considered in conjunction with an upcoming RFP process in another docket.<sup>14</sup> As noted in Alabama Power's Answer,<sup>15</sup> any issues that Energy Alabama/GASP now seek to raise on rehearing are moot because the contracts for the solar/BESS projects expired by their own terms on July 31, 2020.<sup>16</sup> Given the fact that there is no longer a live controversy,<sup>17</sup> reconsideration or rehearing of any issues related to

---

<sup>11</sup> Prior to the filing of its Petition, Energy Alabama/GASP submitted a post-hearing, supplemental brief regarding the pandemic's impacts on Alabama Power's request for additional capacity. This post-hearing filing was submitted on June 4, 2020, pursuant to a procedural ruling dated May 28, 2020, and is a part of the record in this docket.

<sup>12</sup> See *Energy Alabama/GASP's Petition*, pp. 10-11.

<sup>13</sup> See Order, pp. 44-45.

<sup>14</sup> See *Energy Alabama/GASP's Petition*, pp. 11-13.

<sup>15</sup> See *Alabama Power's Answer*, p. 15.

<sup>16</sup> See, e.g., Direct Testimony of John Kelly, Ex. JBK-3 (Alabama Power Ex. 22), Section 3.5.4 ("[I]f by the APSC Approval Deadline...there is not a Final APSC Approval Order, then this Agreement shall automatically terminate without further action of the Parties. For purposes of this Agreement, 'APSC approval deadline' shall mean July 31, 2020").

<sup>17</sup> See *American Federation of State, City and Municipal Employees v. Dawkins*, 104 So. 2d 827, 830-31 (1958) ("A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned." (citing *Postal Telegraph-Cable Co. v. City of Montgomery*, 69 So. 428 (1915)).

those projects is denied. Even if there were a remaining live controversy regarding the solar/BESS projects, Energy Alabama/GASP presented no newly discovered evidence which meets the criteria for granting a petition for reconsideration or rehearing.

IV. Sierra Club's Petition for Reconsideration and Rehearing

In its Petition, Sierra Club claims that it suffered a denial of “basic due process and First Amendment rights,” and offers three independent grounds in support of that claim. First, Sierra Club alleges that Alabama Power failed to disclose ongoing discussions regarding efforts to form the “Southeast Energy Exchange Market” (“SEEM”), which Sierra Club further alleges is relevant to the instant proceeding because SEEM “could very well address Alabama Power’s alleged needs at a lower cost” than its proposed portfolio of “gas-burning generation.”<sup>18</sup> Second, Sierra Club claims that the Commission relied on “unspecified, non-record evidence” to approve Alabama Power’s Petition and evaluate the possible impact of the pandemic-induced recession on Alabama Power’s capacity needs in the 2023 timeframe and beyond.<sup>19</sup> Finally, Sierra Club asserts that the Commission’s procedural rulings and Media Coverage Plan for the formal hearing in this matter “violated the First Amendment rights of Sierra Club, its members, and the public.”<sup>20</sup> Alabama Power’s Answer addressed each of these assertions.

With respect to Sierra Club’s first argument, it is clear that SEEM is irrelevant to Alabama Power’s reliability-based need for capacity, which was the subject of this proceeding. As demonstrated both in the company’s earlier pleading in response to Sierra Club’s first attempt to inject SEEM into this docket,<sup>21</sup> and again in Alabama Power’s Answer, SEEM contemplates a sub-hourly, voluntary energy

---

<sup>18</sup> See *Sierra Club’s Petition*, pp. 1-2, 8-11.

<sup>19</sup> See *Sierra Club’s Petition*, pp. 2-3, 12.

<sup>20</sup> See *Sierra Club’s Petition*, pp. 3, 13-20.

<sup>21</sup> See *Sierra Club’s Motion to Supplement the Record*, Docket No. 32953 (Aug. 14, 2020) and *Alabama Power Company’s Response to Sierra Club’s Motion to Supplement the Record*, Docket No. 32953 (Aug. 18, 2020).

market, not a capacity market.<sup>22</sup> Moreover, whether Alabama Power is a SEEM participant or not, it must be able to stand on its own in order to reliably meet the needs of its customers and cannot lean on others, a requirement that is consistent with our determination in the Order that the company cannot rely on the capacity of its sister companies to meet the long-term needs of its customers.<sup>23</sup> Accordingly, Sierra Club's arguments involving SEEM do not support rehearing or reconsideration, as it is simply not relevant to this proceeding.

Sierra Club's second due process argument, that the Commission relied on "unspecified, non-record evidence" in addressing the possible impacts of the pandemic-induced recession on the company's future demand, is also without merit. This argument apparently arises from the following determination in our order as emphasized below.<sup>24</sup> From this, Sierra Club asserts various due process violations, including suggestions of ex parte communications and other procedural faults.<sup>25</sup>

All information available to this Commission, including the record in this case, *the data our Staff gathers as part of its routine regulation and oversight of Alabama Power, and materials our Staff customarily relies on to remain informed of such matters*, and our administrative judgment and performance of the statutory duties prescribed by the Legislature, suggests that the long term impacts of the pandemic are not knowable with any reasonable degree of certainty.<sup>26</sup>

Sierra Club's claims reflect a fundamental failure to recognize the breadth of the regulatory authority of the Commission over all aspects of Alabama Power's regulated retail operations.<sup>27</sup> The claims raised by

---

<sup>22</sup> See *Alabama Power's Answer*, pp. 4-6. As demonstrated by the Company, these critical distinctions are apparent for many of the materials Sierra Club appended to its Petition as well as other publicly available information it elected to omit.

<sup>23</sup> See Order, pp. 22-23.

<sup>24</sup> See *Sierra Club's Petition*, p. 5.

<sup>25</sup> See *Sierra Club's Petition*, p. 12. Notably, Sierra Club does not challenge our ultimate conclusion that the long-term effects of the pandemic cannot be determined with any degree of certainty.

<sup>26</sup> See Order, p. 25 (emphasis added).

<sup>27</sup> See e.g. Ala. Code §§37-1-31 & -32.



Sierra Club further appear predicated on a mischaracterization of the Order, our findings with respect to the possible effects of the pandemic, and the basis for our conclusion that the “long-term impacts of the pandemic are not knowable with any reasonable degree of certainty.”

First and foremost, our Order as a whole is predicated on the voluminous record developed in this case, including the testimonial submissions of the parties, the hearing transcript and exhibits, the pleadings of the parties, and the sweeping discovery largely propounded by intervening parties.<sup>28</sup> In addition, the Commission possesses institutional knowledge and expertise necessarily gained in the ordinary course of overseeing all aspects of Alabama Power’s regulated retail operations.<sup>29</sup> It should come as no surprise that the Commission and Staff use this knowledge and expertise as we carry out our regulatory responsibilities.

Our conclusions regarding the uncertainty surrounding the long-term effects of the pandemic were based in part on our assessment of the record compiled in this cause, including the submissions of the parties that referenced publicly available materials exploring the possible impacts of the pandemic on both a short and long-term basis. This information showed a lack of agreement on how the economy would react as a result of the pandemic, with predicted outcomes heavily influenced by what was assumed. Such assumptions included the timing and availability of a vaccine, the timing and number of additional outbreaks of the pandemic and the potential for future government stay-at-home orders or other business restrictions, among others. The information provided by the parties, as well as the data and

---

<sup>28</sup> Sierra Club’s own questioning of Company witnesses during the hearing verified Staff’s possession of, and access to, discovery. *See* Hearing Tr., p. 732, line 5 through p. 733 line 17); *see also id.*, p. 908, line 12 through p. 909, line 9. None of the intervening parties raised objections during the hearing regarding the extent to which the Commission, through its staff, gathered information that might inform its assessment of the company’s certificate petition, (or regarding the fact that it received discovery in the case, consistent with past practice).

<sup>29</sup> *See Illinois Central Railroad Co. v. Thomas Ala. Kaolin Co.*, 153 So. 2d 794, 796 (Ala. 1963) (In rejecting a claim that a substantial and material part of a Commission Order was based upon matter not presented in evidence at hearing, the Court held that the Commission was entitled to rely on institutional knowledge obtained through the exercise of its broad statutory powers and the performance of its inherent duties in arriving at its decision).

information Staff gathers in the ordinary course of its regulatory and oversight functions, continues to reflect this lack of agreement and resulting uncertainty.

Taking all this into account, and given our precedent that we cannot refuse to act because of what might happen in the future,<sup>30</sup> we properly concluded that the uncertainty caused by the pandemic did not warrant further proceedings. This conclusion was based on information supplied by the parties through their pleadings or available on the public domain, and was not obtained in violation of Sierra Club's due process rights. Accordingly, we reject Sierra Club's second argument.

The third argument offered by Sierra Club, that it suffered a denial of its First Amendment and due process rights, requires little discussion. We deny rehearing or reconsideration due to Sierra Club's prior failure to raise such claims in a timely manner. It is well settled law in Alabama that a party cannot proceed through trial on certain issues and later raise an entirely new issue on motion for a new trial when dissatisfied with the results of the original trial.<sup>31</sup> This is particularly true when the post-trial claims involve an alleged violation of constitutional rights.<sup>32</sup> Sierra Club had every opportunity to raise its claim that the Commission's Procedural Rulings and Media Coverage Plan for the formal hearing in this matter "violated the First Amendment rights of Sierra Club, its members, and the public," but failed to do so.<sup>33</sup> Sierra Club instead remained silent, voicing no objection regarding either of the Procedural Rulings setting forth restrictions on the use of social media or the Commission's subsequent action to adopt its Media Coverage Plan.<sup>34</sup> In addition to failing to raise such claims in a timely manner, Sierra Club also fails to explain why reconsideration or rehearing would be an appropriate remedy, instead only offering,

---

<sup>30</sup> See *In Re Certificate of Convenience and Necessity (Barry Steam Plant)*, Docket No. 26115, at p. 5 (Dec. 31, 1997).

<sup>31</sup> See *Alabama Power Co. v. Turner*, 575 So. 2d 551, 553 (Ala. 1991). (internal citations and quotations omitted).

<sup>32</sup> *Id.*

<sup>33</sup> See *Ruling Rescheduling Hearing and Establishing Hearing Procedures* Docket No. 32953 (Feb. 12, 2020); *Procedural Ruling in Response to Motion for Amendment*, Docket No. 32953 (Mar. 6, 2020)

<sup>34</sup> See *Order of Interim Adoption*, Informal Docket U-5329 (Mar. 5, 2020).

without legal support, that such violations would “justify on their own a rehearing of the case.”<sup>35</sup> For these reasons Sierra Club cannot now raise its claim that the Commission’s Procedural Rulings and Media Coverage Plan for the formal hearing in this docket violated the First Amendment rights of Sierra Club, its members, and the public.<sup>36</sup>

V. Sierra Club’s Motion for Discovery

Lastly, we reject Sierra Club’s Motion for Discovery, as filed on October 23, 2020, and sustain Alabama Power’s October 28<sup>th</sup> Objection to such discovery. The discovery deadline in this proceeding ended many months ago and Sierra Club cannot unilaterally elect to resume the discovery process. Sierra Club has no further discovery rights in this proceeding absent a decision to grant rehearing, which for the reasons discussed above we decline to do.

Consistent with the foregoing, the Commission FINDS that neither Sierra Club nor Energy Alabama/GASP have presented in their respective Petitions any reason to reconsider or rehear our Order issued on August 14, 2020, in this cause.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That Energy Alabama/GASP’s Petition for Reconsideration or Rehearing is hereby denied in its entirety.

IT IS FURTHER ORDERED BY THE COMMISSION, That Sierra Club’s Petition for Reconsideration or Rehearing is hereby denied in its entirety.

IT IS FURTHER ORDERED BY THE COMMISSION, That Sierra Club’s Motion for Discovery is denied.

---

<sup>35</sup> *Sierra Club’s Petition*, p. 13.

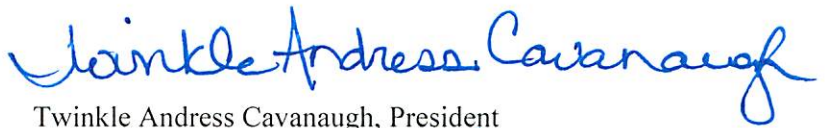
<sup>36</sup> Our denial of rehearing or reconsideration due to the procedural defectiveness of Sierra Club’s claim should in no way be interpreted to suggest that the claim otherwise has merit. *Cf. Casey v. Beeker*, 2020 WL 5268491 (Ala. Sept. 4, 2020).

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

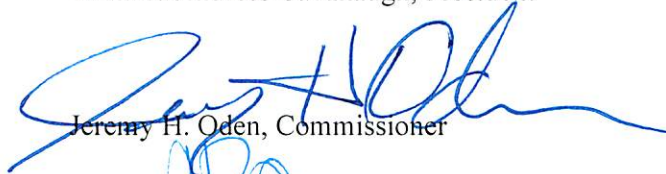
IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 10<sup>th</sup> day of December, 2020.

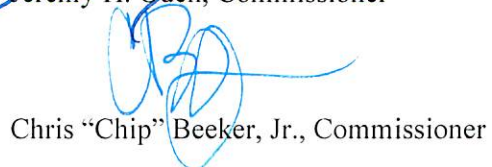
ALABAMA PUBLIC SERVICE COMMISSION



Twinkle Andress Cavanaugh, President

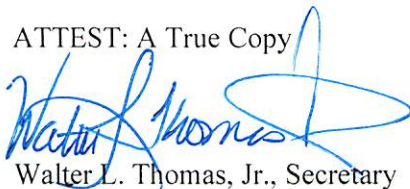


Jeremy H. Oden, Commissioner



Chris "Chip" Beeker, Jr., Commissioner

ATTEST: A True Copy



Walter L. Thomas, Jr., Secretary