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July 6, 2018

Via Electronic Delivery

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

RE: Docket No. 32767
James H. Bankston, *et al.* v. Alabama Power Company

Dear Secretary Thomas:

Enclosed please find a Response in Opposition to Alabama Power Company's Motion to Dismiss filed on behalf of James Bankston, Ralph Pfeiffer and Gasp, Inc. in the above referenced matter.

Please call if you have any questions or concerns.

Sincerely,

Keith Johnston

Keith Johnston
Southern Environmental Law Center

Enclosure
KAJ/npd

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION
MONTGOMERY, ALABAMA

JAMES H. BANKSTON, RALPH B. PFEIFFER, JR.,	)	**Docket No. 32767**
Complainants,	)	
GASP, INC.,	)	
Complainant,	)	
v.	)	
ALABAMA POWER CO.,	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO MOTION TO DISMISS OF ALABAMA POWER COMPANY

Complainants James Bankston, Ralph Pfeiffer, and Gasp, Inc., by and through their undersigned counsel, file the following Response in Opposition to the Motion to Dismiss of Alabama Power Company ("Alabama Power" or "Company") in Docket No. 32767.

Through its motion and accompanying filing of proposed revisions to Rate Rider RGB, Alabama Power doubles down on its unfair and unjustifiable tax on customers who attempt to lower their energy costs with on-site generation. The Company asks the Commission to deny Complainants a hearing while approving an *increase*, in Docket No. U-4226, to the Rate Rider RGB surcharges. The Company, by this procedural maneuvering, seeks to avoid the much-needed scrutiny afforded by the formal complaint process under this docket where the Commission's duty to investigate is mandatory. The Company would rather initiate an informal rate modification review where it can evade scrutiny of the surcharges that Alabama Power would impose on self-generating customers. In Docket No. U-4226, the Company now files allegedly supporting testimony that was notably lacking from its late December 2012 filing in

which these punitive charges were first proposed. This new testimony purports to address the merits of the Complaint in Docket No. 32767 —indeed, the Company states that the Complaint is what prompted its filing—even as the Company takes the position in its Motion to Dismiss that those merits cannot be addressed.

The Commission should reject the Company's procedural gamesmanship. The Commission is under a mandatory duty to investigate the matters alleged in the Complaint filed in Docket No. 32767 and to hold a public hearing on those matters. The Commission's duty to investigate customer complaints is among its core regulatory functions, affording customers a critical protection from the utility's potential abuse of its monopoly power. The Commission's duty and authority to probe allegations of unfair and discriminatory utility behavior is in no way diminished by its prior approval of the rate in question, nor by the passage of time, nor by the lack of formal complaint up to this point. The law is clear that an "affected person" may ***at any time*** file a written complaint alleging that a utility rate, service regulation, classification, practice or service ***in effect*** is unfair, unreasonable, unjust or discriminatory. Upon the making of such filing, "the commission shall proceed . . . to make such investigation as it may deem necessary or appropriate . . . ." Ala. Code § 37-1-83. On this basis alone, the Company's claim of a "collateral attack" on Rate Rider RGB is ill-founded and must be denied.

The Company's mootness argument is no more compelling. The Complaint is not moot for the obvious reason that the Commission has yet to consider and approve the proposed modifications, and the Commission retains the authority to suspend and/or disapprove them. Ala. Code § 37-1-81(b). Absent this Commission's approval, the challenged rate remains in place and Complainants' allegations are ripe for consideration in this docket. Moreover, far from terminating the instant controversy, the proposed modifications in Docket No. U-4226 would exacerbate the adverse effects suffered by Complainants. The testimony accompanying the

filing shows no legitimate cost-of-service basis for either the charges or the proposed increases to them; therefore, Complainants' objections are in no way diminished by the Company's filing. However, as a result of the modifications requested by the Company under Docket No. U-4226, Complainants have amended their Complaint to include the proposed changes, as Alabama law allows them to do. Ala. Code § 37-1-83 (authorizing written complaints against rates in effect or "proposed to be made effective" and requiring Commission investigation of same). Because there remains a live and justiciable controversy, mootness affords no basis for dismissal.

I. The Complaint is a permissible challenge to a rate "in effect" that is unfair, unreasonable and unjustly discriminatory.

Alabama Power's first argument mischaracterizes the Complaint as a "collateral attack" on the Commission's January 2013 Order approving revisions to Rate Rider RGB. The Commission should reject this straw man argument. The Complaint could not be clearer that it is a challenge to Rate Rider RGB itself, not the Commission's Order approving it. This is evident from the very first page: "Specifically, Petitioners *seek relief from revisions to Rate Rider RGB,* which levies surcharges on residential customers, small businesses and schools who install on-site, solar electric generating systems." Compl. at 1 (emphasis added). The Company's mischaracterization even goes so far as to suggest that Complainants seek "retroactive relief." The Complaint contains no such allegation. To the contrary, the Complaint is clear that Complainants seek prospective relief only. *Id.* at 13–14.

Alabama law and the Commission's own rules specifically authorize this type of complaint. The Complaint is brought pursuant to Alabama Code § 37-1-83, which authorizes "any affected person" to file a written complaint alleging that "any rate, service regulation, classification, practice or service *in effect* . . . is in any respect unfair, unreasonable, unjust or inadequate, or unjustly discriminatory . . . ." Ala. Code § 37-1-83 (emphasis added); *see also*

Rules of Practice of the Alabama Public Service Commission, Rule 9 (describing complaint procedure). Upon receipt of such written complaint, "the commission *shall* proceed . . . to make such investigation as it may deem necessary or appropriate . . . ." *Id.* § 37-1-83 (emphasis added). The Alabama Supreme Court has held that the statute "clearly gives the [Commission] a mandatory duty, as well as the authority, to investigate [the matters complained of] once a written complaint is filed." *S. Cent. Bell Tel. Co. v. Ala. Pub. Serv. Comm'n*, 425 So.2d 1093, 1096 (1983). The required investigation, in turn, necessitates "public hearings of the matters under investigation." Ala. Code § 37-1-85; *see also* §§ 37-1-83, -96.

Neither the governing statute nor the Commission's own rules impose any deadline on the filing of a complaint challenging an *existing* rate as unfair, unjust and discriminatory. As long as such a rate is in effect, any affected person may challenge it, and the Commission is then required to investigate and hold a public hearing on the matters under investigation. Were the law otherwise, Alabama Power could subject its customers to unfair and discriminatory rates without any legal recourse even though some such customers were not "affected" at the time that the rate was adopted. Indeed, the Complaint and supporting affidavits show that the individual Complainants and Gasp, Inc.'s affected members did not even have on-site generation in 2013, and hence had no basis to complain about the charge at that time.[1] For example, Complainants Bankston and Pfeiffer did not install their on-site solar systems until April 2016 and 2017, respectively.[2] Compl. ¶¶ 23, 28. Yet in the Company's imagining, Complainants were obligated to file an appeal of the Commission's January 2013 Order or to appeal the rate after it became

[1] It is ironic for Alabama Power to point to the lack of contemporaneous protest when its late December filing and lack of any reference to the new charges in its cover letter seemed carefully calculated to avoid public notice and scrutiny.

[2] Additionally, Gasp member Mark Johnston did not install his on-site solar system until March 2017, Compl. Ex. 1, ¶ 8; Gasp member Teresa Thorne did not install her on-site solar system until September 2015, *id.* Ex. 3, ¶ 8; and Gasp member Charles Scribner did not install his on-site solar system until July 2015, *id.* Ex. 2, ¶ 7.

effective in May 2013, years before they were "affected" by it. The statute imposes no such requirement; instead, the statute limits challenges to persons who are affected and places no restriction on when they may exercise this right.

Alabama Power appears to argue a "filed rate doctrine" basis for dismissal, even though the law is clear that such a defense applies only to judicial proceedings. *See Birmingham Hockey Club, Inc. v. National Council on Compensation Ins., Inc.*, 827 So.2d 73, 78 n.4 (Ala. 2002) ("The filed-rate doctrine provides that once a filed rate is approved by the appropriate governing regulatory agency, it is per se reasonable and is unassailable in judicial proceedings."); *see also* Ala. Code § 37-1-99 (rates and charges fixed by the Commission shall be deemed prima facie reasonable and valid "in any court" wherein the reasonableness or validity thereof is properly drawn into question). The filed rate doctrine does not prevent the Commission from examining whether an existing rate is unjust and discriminatory as applied to some subset of customers. To the contrary, even though a new rate or service regulation becomes effective by operation of law (absent suspension or disapproval by the Commission), it remains "subject . . . to the power of the commission *at any time thereafter* to take any action respecting the same authorized by this title." Ala. Code § 37-1-81 (emphasis added).

Alabama law obligates the Commission to investigate the matters complained of. Ala. Code § 37-1-83 (the commission "shall proceed . . . to make such investigation as it may deem necessary or appropriate."); *id.* § 37-1-85 (the Commission "shall fix a time and place for public hearings of the matters under investigation"). The Commission's mandatory duty to investigate and hear customer complaints stands in contrast to its authority to suspend and investigate proposed rate changes, which is purely discretionary. Ala. Code § 37-1-81(b) ("To enable it to make such investigation as, in its opinion, the public interest requires, the commission, in its discretion, for a period not exceeding six months may suspend the operation of any new schedule

of rates or service regulations filed with the commission."). In fact, in past instances where the Commission has declined to suspend and investigate proposed rate changes, the Commission has directed putative challengers to avail themselves of the complaint procedure available under Alabama Code § 37-1-83 and the Commission's rules. *See, e.g., Procedural Order Denying Petition for Hearing*, Dockets 18117 and 18416 and Informal Docket U-5266, at 4 (May 22, 2018); *see also Airco, Inc. v. Alabama Public Service Comm'n*, 496 So.2d 21, 24 (1986) (where utility sought to extend and continue rate formulae, challengers were not entitled to a public hearing and opportunity to present evidence under Alabama Code § 37-1-81(b) but could have challenged the effectiveness of the rates under Alabama Code § 37-1-83). A complaint about an existing or proposed rate or practice and a proceeding to consider a proposed rate change are different matters, even though the two proceedings may have overlapping issues of law and fact, as is the case here. *See S. Cent. Bell Tel. Co.*, 425 So.2d at 1096–97 (customer complaint alleging inadequacy of service was a different matter requiring a different kind of hearing than utility's proposed rate change). For the sake of administrative efficiency, the Amended Complaint could be heard and considered in connection with the proposed modifications to Rate Rider RGB.[3] But the Company's filing of the proposed rate changes does not, and as a matter of law cannot, relieve the Commission of its duty to investigate and hear the matters alleged in the Complaint in this docket.

A public hearing is not only required but appropriate now that Alabama Power has filed sworn testimony that in multiple places purports to respond directly to allegations contained in the Complaint. Indeed, Ms. Dean acknowledges that the Complaint is what prompted Alabama

[3] Complainants have also requested permission to intervene in Docket U-4226. Complainants urge the Commission to exercise its discretion under Alabama Code § 37-1-81(b) to suspend and investigate the proposed rate modifications. For the sake of administrative efficiency, Complainants would not object to the combining of this Docket and Docket U-4226, provided a hearing is held in which Complainants can air their objections and otherwise exercise their rights as both Complainants and Intervenors.

Power to file the proposed rate modifications and her supporting testimony; none of the "supporting testimony" was made available in 2012 or 2013. Testimony of Company Witness Natalie Dean at 2:11-14; *see also id*. at 11:11-13 (stating that methodology is "the same as that employed" to develop the original $5.00/kW charge). Alabama Power cannot have it both ways—responding to the merits on the one hand, while urging dismissal on the other. The merits must be heard in connection with the Commission's duty to investigate customer complaints and hold a hearing.

II. The Complaint is not moot because the Commission has yet to approve the proposed revisions, and rather than terminate the controversy, Alabama Power exacerbates it.

In its eagerness to avoid the merits of the Complaint, Alabama Power gets ahead of itself. The Company suggests that its *mere filing* of proposed modifications to Rate Rider RGB moots the Complaint. *See* Motion ¶ 10 ("In light of the action taken by the Company, there remains no justiciable controversy and no relief can be had by complainants."). Of course, this ignores the role of the Commission, which by statute has authority to suspend or disapprove of the proposed changes. Ala. Code § 37-1-81(a). Only with direct or default approval would mootness become a consideration, and yet the Company seems to pre-suppose that the Commission will just accept whatever surcharge it wishes to impose on the public.

Moreover, even the Company would concede that mootness does not apply when there remains a justiciable controversy, as is clearly the case here. The Company's filing in Docket U-4226 does not propose to lessen or eliminate the unfair charge; it proposes to *increase* it. The Company seeks to worsen Complainants' plight and make its service territory even more inhospitable to customers seeking to reduce their electrical bills with self-generation. And even though the Company apparently seeks to avoid the merits of the Complaint by filing proposed modifications under Docket No. U-4226, the filing does nothing to resolve Complainants' central

contention; that the fee is unjust, unfair, and unreasonably discriminatory. Indeed, Ms. Dean's testimony confirms that the Company has demonstrated no costs uniquely attributable to customers with on-site generation. The testimony reveals that the Company's basis for the charge is the fact that the customer has used self-generation to reduce their bills. Reduced energy usage does not create costs, and a residential customer may not be charged for simply for using less of the Company's product. If this were the case, the Company could charge customers for any number of voluntary electricity-usage reduction measures, from installing more LED energy efficient light-bulbs to buying a more efficient refrigerator. Or it could assess a fee when a family's children go off to college. Just and reasonable rates cannot lawfully be based on hypothetical costs that the Company has not demonstrated are real.

In short, Complainants' claims in Docket No. 32767 are not moot just because the Company says they are. The Commission has not even addressed the modifications sought under Docket No. U-4226, and the Company should not assume the Commission will approve them as proposed. The Company's post-hoc rationalization and bootstrapping should not be allowed, particularly when the underlying methodology is so obviously and fundamentally flawed. Complainants have the same objections to the proposed modifications as to the existing charges. And of course, Complainants object to such patently unfair and unlawful charges being made *more* punitive. Because the proposed modifications would simply exacerbate the matters complained of, Complainants have amended their Complaint to include objections to the proposed changes. Under Alabama Code § 37-1-83, an affected person may complain that a rate "proposed to be made effective is in any respect unfair, unreasonable, unjust or inadequate, or unjustly discriminatory . . . ." Alabama Power's procedural gymnastics aside, there remains a live and justiciable controversy that this Commission is obligated by law to address. Mootness is therefore no basis for dismissal.

CONCLUSION

For the reasons stated and the authorities cited above, the Public Service Commission should deny Alabama Power Company's Motion to Dismiss the Complaint and Petition for Declaratory Judgment and Injunctive Relief.

Respectfully submitted, this 6th day of July, 2018.

s/ Clay Ragsdale
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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 6th day of July, 2018.

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