

DILLARD, McKNIGHT,
JAMES & McELROY LLP

trial



ELECTRONICALLY FILED

Friday, September 25, 2020

TR2034720

ALABAMA PUBLIC SERVICE COMMISSION

WALTER L. THOMAS, JR., SECRETARY

Joel E. Dillard
David McKnight
Randy James
Elizabeth W. McElroy

VIA OVERNIGHT AND ELECTRONIC DELIVERY

Facsimile
205.271.1108

September 25, 2020

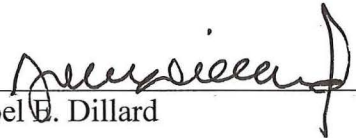
Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 850
Montgomery, AL 36104

**Re: Docket 32953, Sierra Club's motion for leave to answer and answer to
Alabama Power Company's response to
Sierra Club's petition for reconsideration and rehearing**

Dear Secretary Thomas:

Please accept this "hard copy" filing of Sierra Club's motion for leave to answer and answer to Alabama Power Company's response to Sierra Club's petition for reconsideration and rehearing. I have filed this motion electronically today, and am making certain that its overnight delivery to you will be accomplished Monday (your next business day after our electronic filing).

Respectfully yours,


Joel E. Dillard

DILLARD, McKNIGHT, JAMES & McELROY
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Counsel for Sierra Club

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BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

IN RE: Petition for a Certificate of Convenience and Necessity by Alabama Power Company)))
Docket 32953

SIERRA CLUB’S MOTION FOR LEAVE TO ANSWER AND ANSWER TO ALABAMA POWER COMPANY’S RESPONSE TO SIERRA CLUB’S PETITION FOR RECONSIDERATION AND REHEARING

Sierra Club hereby moves for leave to answer¹ and answers one issue in Alabama Power Company’s response to Sierra Club’s petition for reconsideration and rehearing. The issue is the timeliness of Sierra Club’s petition. Such petitions may be filed “*any time* after an order has been made by the Commission,” under section 37-1-105, Code of Alabama.² Alabama Power urges the Commission to nonetheless strike Sierra Club’s petition as an “untimely filing.”³ But as explained below there is no basis in law or fact to do so.

1. The Commission issued its order approving Alabama Power’s petition for a certificate of convenience on August 14, 2020.
2. Sierra Club electronically filed its petition for reconsideration and rehearing on September 14, 2020. The Office of the Commission Secretary accepted the filing and the acceptance is attached as exhibit A. It states: “Internet filing submitted on 9/14/20 is accepted.”
3. Sierra Club also delivered the original and one copy at approximately noon the next day, September 15, 2020. The Office of the Commission Secretary approved by stamping them as received that day, and a copy of the stamped first page is enclosed as exhibit B.
4. In its response, Alabama Power ignores the plain language of section 37-1-105

¹ Ala. Pub. Serv. Comm’n, Rules of Practice, Rule 11 (1999) (allowing motions “not specifically covered” by the Commission’s Rules of Practice).

² Ala. Code § 37-1-105 (emphasis added).

³ Resp. of Ala. Power Co. at 1-2, note 2.

that a petition for rehearing may be filed “any time” after the Commission makes its order.⁴

Alabama Power relies instead on Commission rules that on their face do not establish its reasoning that Sierra Club’s filing was untimely.⁵

5. Specifically, the Company relies on Rules 7(a) and 21(c) of the Commission’s Rules of Practice.⁶ But Rule 7(a) merely states when “the Offices of the Commission” are “open for the transaction of business.”⁷ Likewise, Rule 21(c) merely states that petitions for rehearing “must be filed within thirty (30) days from the date of the final action on the matter for which rehearing or reconsideration is sought, unless an extension is granted by the Commission.”⁸ Neither rule even mentions electronic filing, much less prescribes the requirements for accomplishing such filing in a timely manner, as relevant here.

6. Indeed, as the Commission recently affirmed, entirely different, “temporary” rules adopted in 2005 “have governed the electronic filing of documents since that time.”⁹ Those rules provide in pertinent part as follows:

Any document filed electronically with the Commission via the Internet is deemed to be received by the Commission when it is

⁴ Ala. Code § 37-1-105 (emphasis added).

⁵ “It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation.” Ex parte Crestwood Hosp. & Nursing Home, Inc., 670 So. 2d 45, 47 (Ala. 1995) (citations omitted). As such, the Commission can and should accept Sierra Club’s petition under section 37-1-105 because it was timely filed after the Commission made its order. Sierra Club proceeds to show the timeliness of its petition under Commission rules as well, without conceding that section 37-1-105 controls this issue, and that Sierra Club prevails thereunder.

⁶ Resp. of Ala. Power Co. at 1-2, note 2.

⁷ Ala. Pub. Serv. Comm’n, Rules of Practice, Rule 7(a) (1999).

⁸ Ala. Pub. Serv. Comm’n, Rules of Practice, Rule 21(c) (1999).

⁹ See In re Rules of Practice of the Ala. Pub. Serv. Comm’n, Docket No. 33046, at 1.

received in the PSC Tracking Database as long as the original document and a copy are received by the Commission by 5 p.m. on the next business day. . . .¹⁰

7. As applied here, Sierra Club's indisputably filed its petition on time, on September 14, within 30 days of Commission's August 14 order, which is the final action for which Sierra Club seeks rehearing and reconsideration. The relevant facts are established in exhibits A and B: the Office of the Commission Secretary accepted Sierra Club's electronic filing as "submitted" on September 14, and approved receipt of the original the next day. Neither Alabama Power nor its counsel is empowered to overrule that Office's acceptance and approval of a timely filed pleading.

Wherefore Sierra Club respectfully requests the entry of an order accepting this answer and averring the timeliness of Sierra Club's petition for rehearing and reconsideration.

Respectfully submitted this 25th day of September.

/s/ Joel E. Dillard

Joel E. Dillard

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Telephone: 205.271.1100

Counsel for Sierra Club

¹⁰ Id. (Attachment A at 5) (Attachment A consists of the Commission order of June 27, 2005, in Informal Docket No. C-4882 and the "Temporary Rules of Practice Regarding Filing of Electronic Documents," which are pages 4 and 5 of Attachment A, styled as Appendix A to the order).

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 25th day of September, 2020.

Grover, Scott B.
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Raymond, Philip C.
VP and Comptroller
Alabama Power Company
pcraymon@southernco.com

/s/ Joel E. Dillard
Joel E. Dillard

Exhibit A

Joel Dillard

From: Lawrence, Tashenma <Tashenma.Lawrence@psc.alabama.gov>
Sent: Tuesday, September 15, 2020 1:39 PM
To: Joel Dillard
Subject: PSC Internet Filing Accepted

Importance: High

Internet filing submitted on 9/14/2020 is accepted.

Filing description: Docket No. 32953 Sierra Club Petition for Reconsideration and Rehearing Filing synopsis: Petition seeks rehearing and reconsideration of order granting petition in Docket No. 32953 sought by Alabama Power Company based on new evidence come to light after hearing thereon and entry of the Commission's Order.

Filing status: Approved

Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
P. O. Box 304260
100 North Union Street, Suite 850 (36104) Montgomery, Alabama 36130
334-242-5218
334-242-0509(f)

Exhibit B

DILLARD, McKNIGHT,
JAMES & McELROY LLP

*trial
counsel*

Joel E. Dillard
David McKnight
Randy James

Elizabeth W. McElroy

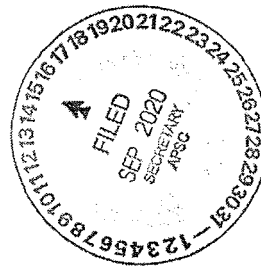
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August 14, 2020

Walter L. Thomas, Jr. Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 850
Montgomery, Alabama 36104



Re: Docket 32953, Sierra Club's Petition for Reconsideration and Rehearing

Dear Secretary Thomas:

Please accept this "hard copy" filing of Sierra Club's Petition for Reconsideration and Rehearing. I have filed this motion electronically today, and will hand deliver the original by courier tomorrow. Thank you for your many professional courtesies.

Respectfully yours,

Joel E. Dillard

JED:rj

Enclosure

dillardmcknight.com

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