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ALABAMA PUBLIC SERVICE COMMISSION

WALTER L. THOMAS, JR., SECRETARY

Joel E. Dillard

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VIA OVERNIGHT AND ELECTRONIC DELIVERY

Facsimile

205.271.1108

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

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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 PETITION FOR RECONSIDERATION AND REHEARING

Sierra Club hereby seeks reconsideration and rehearing of Alabama Power Company's petition for a certificate of convenience and necessity, and of the Commission's order of August 14, 2020, granting the petition. Section 37-4-28, Code of Alabama, requires the merits of such petitions to be decided upon evidence adduced at a hearing, with due process afforded to all participants. But the proceedings in this case, and the Commission's order, fall short of basic due process and First Amendment rights of the parties and the public on three independent grounds:

First, new evidence has come to light that throughout the proceedings Southern Company and its subsidiary Alabama Power have hidden evidence of their ongoing negotiations to form the Southeast Energy Exchange Market (SEEM), a market that could very well address Alabama Power's alleged needs at a lower cost than its billion-dollar proposal to build and acquire almost two gigawatts of gas-burning generation. The Companies' deception renders the Commission's adjudication of this case a hollow exercise. For the many months the parties and the Commission sought discovery from one another, developed evidence, presented testimony, deposed witnesses and conducted cross-examination on the issue of what Alabama Power's needs are, and what cost-effective alternatives are available to meet those needs, the Companies deceived everyone, including the Commission and its Staff, by keeping secret the Companies' ongoing negotiations about a potential lower-cost solution for its alleged needs.

The breadth of the deception and its relevance to the core issues in this case are stunning. Southern Company's and Alabama Power's negotiations contemplated expanding surplus sharing with other utilities in the Southeast. Records of the negotiations—secured through records

requests served on other utility-participants—show that SEEM is being modeled on the Western Energy Imbalance Market, which has been used to meet peak demand—including early morning peak demand that Alabama Power asserts justifies its massive gas expansion in this case—all while saving nearly a billion dollars. As such, discovery and a new hearing are necessary to address the evidence on SEEM that Alabama Power failed to disclose, because this evidence is clearly relevant to contested issues in this case, such as whether Alabama Power actually needs a massive gas expansion to meet peak demand, or whether it can continue and perhaps expand its four-decades-long practice of surplus sharing, as needed, with others, and thereby save money.

Second, the basic due process rights of the parties under Alabama law were undermined by the Commission when it relied on unspecified, non-record evidence to approve Alabama Power's petition, and rejected the request of multiple parties to meaningfully examine and brief the extent to which the coronavirus (COVID)-induced recession has undercut Alabama Power's alleged needs for its massive gas expansion. Specifically, Sierra Club and other parties submitted evidence that the Company's alleged needs might well be obviated by the recession and the resulting collapse in energy demand on its grid. Further, they submitted Alabama Power's admission that it does not know when its demand will recover, and evidence that other utilities surplus generating capacity that is available to meet Alabama Power's alleged needs is only increasing as demand on neighboring grids also collapses. Sierra Club and other parties requested the denial of Alabama Power's petition or at least additional time and process to develop the evidence of the recession's impacts. But those requests were rejected.

Instead, the Commission purported to resolve the issue of the recession's impacts on Alabama Power's alleged needs by reference to unspecified discovery, data from unidentified sources, and other materials in Staff's custody that were not adduced at any hearing, were not

entered into the record, nor were made subject to any examination by the parties. In fact, only the Company appears to be privy to this evidence, as its post-hearing brief notes the evidence is in Staff's custody and not in the record. Clearly, this violates due process of law. If the Commission is to abide by the procedural standards in section 37-4-28, and the ban on *ex parte* argument in Rule 25 of its own Rules of Practice, then other parties should have an opportunity to review and respond to Staff's non-record evidence concerning the recession.

Third, in addition to the above-described due process violations caused by Alabama Power's concealment of critical evidence concerning SEEM and the Commission's reliance on non-record evidence unavailable to other parties concerning COVID, the procedural ruling of February 12, 2020, and the order of interim adoption of its media coverage plan for formal hearings both violated the First Amendment rights of Sierra Club, its members, and the public. In a case of this magnitude—involving the proposed billion-dollar commitment to alter Alabama Power's power supply for decades—it is disconcerting that not only were the parties not afforded due process, but that the public's ability to participate in transparent proceedings was likewise undermined by rules designed to prevent communication about contested issues under review.

BACKGROUND

Section 37-4-28, Code of Alabama, governs this case. It authorizes Commission action on a written application for a certificate of convenience and necessity, like the Company's petition under review.¹ Critically, it conditions Commission action on "a public hearing of all parties interested."² After such hearing, the Commission "may, or may not, in its discretion, issue such a

¹ Petition for a Certificate of Convenience and Necessity, Ala. Power Co., Docket 32953 at 1 (Ala. Pub. Serv. Comm'n Sept. 6, 2019) [hereinafter "Certification Petition"].

² Ala. Code § 37-4-28.

certificate of convenience and necessity, and if issued, may prescribe such conditions upon the issuance as it may deem advisable.”³

Alabama Power has the burden of proof.⁴ Specifically, its burden is to prove that its customers have unmet needs,⁵ and that its proposal is the least-cost means of meeting them. The standard of proof is substantial evidence. The Alabama Supreme Court has held that Commission action must be supported by such evidence,⁶ that is, “evidence adduced at the hearing”⁷ “of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.”⁸ As applied here, a certificate of convenience and necessity may be issued only if the Company carries its burden and supports the issuance with substantial evidence adduced at a hearing.

Alabama Power filed its petition expressly under section 37-4-28 on September 6, 2019. The Commission issued a notice of its review of the petition on September 9, 2019. Subsequent

³ Id.

⁴ Ala. Admin. Code r. § 770-X-4-.15(5) (“Applicant, complainant or petitioner must, except as otherwise provided by law, establish the facts alleged by him as the basis for the relief sought, unless the party against which the complaint or petition is directed admits the same.”).

⁵ The Company’s proposal has also been referred to as the “proposed expansion,” “proposed resource additions,” and “portfolio of resources.”

⁶ Ala. Gas Corp. v. Wallace, 308 So. 2d 674, 678 (Ala. 1975) (holding there “[was] substantial evidence in the certified record to affirm the order of the Commission.”). See Purolator Courier Corp. v. Ala. Pub. Serv. Comm’n, 514 So. 2d 832, 836 (Ala. 1987) (holding the Commission’s order was “not supported by the substantial weight of the evidence.”);

⁷ “It must be true that when an administrative body is authorized to act only after hearing, its action must be based upon findings supported by the evidence adduced at the hearing. When an order is based upon findings without evidence to support them . . . the order is arbitrary [sic] as a matter of law and a denial of due process and under the foregoing statute must be set aside by the court.” Ala. Pub. Serv. Comm’n v. S. Bell Tel. & Tel. Co., 42 So. 2d 655, 666–67 (Ala. 1949).

⁸ Von Sury v. Kuehn, 51 So. 3d 311, 315 (Ala. 2010). See also Ala. Code § 12-21-12(d).

procedural orders granted intervention to Sierra Club and other interested parties, and provided for discovery and a hearing in March of this year.

The Southeast Energy Exchange Market and the recession induced by the coronavirus pandemic were not addressed at the hearing in March. But, as discussed further below, they have been the subject of limited briefing since the close of the hearing. It is upon this limited briefing and unspecified discovery, data, and other materials in Staff’s custody that the Commissioners dismissed further inquiry into the recession while deciding the merits of the Company’s petition in the order issued on August 14.

Post-hearing briefs in the form of proposed orders were due on May 1.⁹ That same day, Sierra Club, Energy Alabama, and Gasp jointly moved for supplemental briefing and a briefing schedule to address the relevant implications of the pandemic. Alabama Power filed a response in opposition on May 5. Yet Alabama Power’s proposed order itself briefly discussed the pandemic and acknowledged that the Commission would be “remiss” not to consider it.¹⁰ The Company nonetheless declined to update the forecasts underlying its petition, asserting that “the long-term impacts of the pandemic are not knowable with any reasonable degree of certainty.”¹¹ It cited “[a]ll information available to this Commission, including the record in this case, the data [Commission] Staff gathers as part of its routine regulation and oversight of Alabama Power, and materials [Commission] Staff customarily relies on to inform its and [the Commission’s] administrative judgment and performance of the statutory duties prescribed by the Legislature.”¹²

⁹ Procedural Ruling (Apr. 14, 2020).

¹⁰ Post-Hr’g Br. of Ala. Power Co. at 25 (May 1, 2020).

¹¹ Ibid.

¹² Id. at 24-25 (emphasis added).

The Commission subsequently denied Sierra Club's and other parties' requests to meaningfully examine the recession's impact on Alabama Power's alleged needs through, among other things, updated forecasts and briefing, but allowed the intervening parties one week to file five pages of supplemental briefing.¹³ Sierra Club filed its supplemental brief on June 4 demonstrating why the Commission should have either denied the Company's petition or delayed a decision on the merits for six months, when the parties would have greater clarity on the scope and duration of the recession's impacts.

The day after the deadline for supplemental briefs, on June 5, Staff submitted its recommendation to grant the Company's petition.¹⁴ Staff's submittal consisted of a single page, without any mention of the recession or SEEM, or any explanation of Staff's analysis.

Two business days later, at its June 9 meeting, the Commissioners voted unanimously to approve Staff's recommendation. They also did not mention the recession or SEEM. Nor did they offer any contemporaneous explanation of their analysis.

Approximately one month later, in mid-July, news reports that Southern Company was leading negotiations to form SEEM first surfaced. Sierra Club served records requests on other utility-participants in the SEEM negotiations, and while Sierra Club waited for the records to be released, it filed a motion to supplement the record in this case with two such news reports on August 14, explaining that SEEM should be reviewed because it is directly relevant to the core issues in this case.¹⁵

¹³ Procedural Ruling (May 28, 2020).

¹⁴ Memorandum from Commission Legal Division to Commissioners, *Agenda – June 9, 2020 Commission Meeting* (June 5, 2020), available for download at <https://www.pscpublicaccess.alabama.gov/pscpublicaccess/Commission/CommissionMeetingDetailsPage.aspx?meetingId=71d1ddca-9afa-4913-a194-d14f5ec06d04>.

¹⁵ Sierra Club incorporates by reference its pending motion to supplement the record.

Meanwhile, as discussed further below, throughout June, July, and August, the COVID pandemic continued to rapidly escalate, particularly in Alabama and across the Southeast. Hundreds of thousands of people became infected, tens of thousands died, and the economic recovery has been much slower than initially expected as millions continue to be added to the unemployment roster on a weekly basis.

On August 14, the Commissioners issued their written order granting the Company's petition. Remarkably, they adopted almost verbatim the Company's proposed order. Regarding the recession as noted, the Commissioners agreed with the Company to forgo further inquiry. They also agreed to rest this decision on unspecified discovery, data, and other materials in Staff's custody:

. . . [C]onsistent with past practice, the Company provided copies of its responses to the interrogatories and document production requests to Commission Staff for its review and consideration

All information available to this Commission, including the record in this case, the data [their] Staff gathers as part of its routine regulation and oversight of Alabama Power, and materials [their] Staff customarily relies on to remain informed of such matters, and [their] 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.¹⁶

Whatever the referenced discovery, data, and materials are, it is clear from the text of the order that they were not adduced at the hearing in March or otherwise entered in the record, they were never subjected to critical analysis by the parties to the case, nor to cross-examination—indeed the documents the Commission relied upon were never even specifically identified for the parties beyond the generalized statement above.

¹⁶ Order at 5, 25.

Alabama courts also recently rejected claims that the Commission’s media policies violated state law, leaving the First Amendment implications of those policies unresolved and ripe for rehearing in the context of this case.

LEGAL STANDARD FOR RECONSIDERATION AND REHEARING

Sierra Club seeks reconsideration and rehearing under Rule 21 of the Commission’s Rules of Practice and section 37-1-105, Code of Alabama. Rule 21 allows petitions for reconsideration or rehearing to be filed within 30 days from the date of the final action on which reconsideration or rehearing is sought. Regarding “matters of law,” such a petition “must state fully the legal propositions involved and cite the authorities therefor.” For “new evidence to be offered on a rehearing,” “the nature and purpose of the evidence must be briefly stated, and it must not appear to be merely cumulative.” If the Commission finds that a hearing for additional testimony is justified, it will set a hearing date and “give consideration to the record in the light of such additional testimony and render its decision and order thereon.”¹⁷

Likewise, section 37-1-105 allows interested persons to seek rehearing on any matter determined in a Commission order. It also provides that the Commission must grant and hold such rehearing within 60 days of the filing date of a petition for rehearing.¹⁸

GROUND FOR RECONSIDERATION AND REHEARING

I. Basic due process and several procedural requirements under Alabama law require discovery and a hearing to develop evidence on the Southeast Energy Exchange Market that it is undisputedly relevant but that Alabama Power concealed.

As noted, throughout these proceedings Alabama Power never notified the Commission or the parties of its ongoing efforts to form SEEM, much less fulfilled its disclosure obligations during discovery or at any other point since discovery closed and SEEM negotiations continued.

¹⁷ Rules of Practice 21.

¹⁸ Ala. Code § 37-1-105.

In particular, in the discovery context, Rule 26(e)(2) of the Alabama Rules of Civil Procedure requires a party to “seasonably amend its prior responses if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made, or (B) knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.”¹⁹

Here, Alabama Power had a Rule 26(e)(2) disclosure obligation regarding SEEM because Sierra Club and other parties conducted rigorous discovery on Alabama Power’s alleged needs and cost-effective alternatives available to meet the same. Sierra Club’s very first interrogatory, for instance, asked Alabama Power to “[i]dentify any and all documents and facts that support or bear on the Company’s claim in [its p]etition paragraph 2 that the proposed resource additions are ‘necessary and appropriate.’”²⁰ The Company’s response did not mention SEEM. The response therefore was incorrect because it was incomplete when made,²¹ or it was no longer true and failure to amend the response amounted to knowing concealment by January²² or February²³ of this year, because, as discussed further below, during that period Southern Company, Alabama Power, and other utilities committed to deeper discussion and entered a non-disclosure agreement to negotiate SEEM in secret. In any event, Alabama Power had a clear disclosure obligation because Alabama Power knew or should have known that SEEM could very well

¹⁹ Ala. R. Civ. P. 26(e)(2).

²⁰ Sierra Club’s first set of interrogatories and document production requests to Alabama Power of October 25, 2019, are on file with the Commission and posted in docket 32953.

²¹ See Ala. R. Civ. P. 37 (in discovery in civil actions, “evasive or incomplete answer is to be treated as a failure to answer”).

²² Exhibit 2-3.

²³ Exhibit 2-4 at 14.

address its alleged needs to meet peak demand in early winter mornings at a lower cost than its massive gas expansion. Indeed, participating utilities lauded such markets precisely because they can meet early morning demand peaks and reduce costs.²⁴

Moreover, when the Company finally did respond to Sierra Club's motion to supplement the record in late August, it did not dispute SEEM's relevance to the contested issues in this case. Instead it made arguments about how the Commission should weigh SEEM. However, due process of law and, specifically, the hearing requirement in section 37-4-28 entitles the parties to gather information via discovery and, so informed, to offer and examine evidence at a hearing. The declaration of Sierra Club expert Rachel Wilson, attached as Exhibit 1, sets forth the nature and purpose of the evidence that would be offered upon rehearing, with the caveat that precisely because Southern Company and Alabama Power kept SEEM negotiations secret, and records requests in other jurisdictions are still pending, only limited information concerning SEEM is publicly available at this time. Sierra Club reserves the right to supplement its proposed evidence after completing discovery.

In addition to the news reports from mid-July on file with the Commission, records of SEEM negotiations are now being released by utility-participants in those negotiations. Such records include those the utility Santee Cooper produced in early September²⁵ showing the following key facts:

- Southern Company has led discussions with several utilities in the Southeast to form a regional wholesale market where surplus power can be bought and sold starting in

²⁴ Exhibit 2 is a composite exhibit consisting of the record request through which records of SEEM negotiations were secured (exhibit 2-1), the cover letter accompanying the first production of responsive records (exhibit 2-2), and selected records from the production (exhibits 2-3 – 2-11). See exhibits 2-10 and 2-10A for the records of utu.

²⁵ Exhibit 2-1.

January 2022.²⁶

- SEEM negotiations began in earnest at least as early as January 2020, when utility-participants formed a committee to establish a “long-term governance structure” for SEEM.²⁷
- While discovery in this case was ongoing, Southern Company and Alabama Power (through Southern) signed a non-disclosure agreement on February 12, 2020, to keep the negotiations secret.²⁸
- Utility-participants to SEEM negotiations identified the existing Western Energy Imbalance Market as a model and they shared reports that it has already saved a billion dollars and helped meet “morning and evening peaks” in California.²⁹
- They also cite favorably the Western EIM members’ efforts “to leverage the EIM structure as much as it possibly can as a means to gaining the benefits you get from being in an RTO [regional transmission organization] but without the hassle, cost, and loss of control.”³⁰

In short, these are records of SEEM negotiations created or exchanged by utility-participants including Southern Company acting on behalf of Alabama Power. These records show the scope, duration, and goals of the negotiations. These records also corroborate other evidence cited in Ms. Wilson’s testimony, such as the government and academic studies, that the new market structure Southern Company, Alabama Power, and other utilities are all committed to forming could very well address Alabama Power’s alleged needs at a lower cost than its billion-dollar proposal to build and acquire almost two gigawatts of gas-burning generation.³¹

²⁶ Exhibit 2-3.

²⁷ Exhibit 2-3.

²⁸ Exhibit 2-4 at 14.

²⁹ Exhibit 2-10, 2-10A.

³⁰ Exhibit 2-10, 2-10A.

³¹ See especially Ex. 1 ¶¶ 7-13.

II. Basic due process and several procedural requirements under Alabama law likewise require the other parties to have a meaningful opportunity to review and respond to the unspecified, non-record evidence that both the Commission and Alabama Power relied on to dismiss the impacts of the recession.

The basic due process rights of the parties under Alabama law were undermined by the Commission when it relied on unspecified, non-record evidence to approve Alabama Power's petition, and rejected the request of multiple parties to meaningfully examine and brief the extent to which the coronavirus (COVID)-induced recession has undercut Alabama Power's alleged needs for its massive gas expansion. Specifically, Sierra Club and other parties submitted evidence that the Company's alleged needs might well be obviated by the recession and the resulting collapse in energy demand on its grid. Further, they submitted Alabama Power's admission that it does not know when its demand will recover, and evidence that other utilities surplus generating capacity that is available to meet Alabama Power's alleged needs is only increasing as demand on neighboring grids also collapses. Sierra Club and other parties requested the denial of Alabama Power's petition or at least additional time and process to develop the evidence of the recession's impacts. But those requests were rejected.

Instead, the Commission purported to resolve the issue of the recession's impacts on Alabama Power's alleged needs by reference to unspecified discovery, data from unidentified sources, and other materials in Staff's custody that were not adduced at any hearing, were not entered into the record, nor were made subject to any examination by the parties. In fact, only the Company appears to be privy to this evidence, as its post-hearing brief notes the evidence is in Staff's custody and not in the record. Clearly, this violates due process of law. If the Commission is to abide by the procedural standards in section 37-4-28, and the ban on *ex parte* argument in Rule 25 of its own Rules of Practice, then other parties should have an opportunity to review and respond to Staff's non-record evidence concerning the recession.

III. Violation of First Amendment rights must be redressed.

A. Legal background

In addition to the procedural flaws in these proceedings identified above, the Commission's interim media policy, its final media policy, and the procedural ruling of February 10, 2020, in this case violated the First Amendment rights of Sierra Club and its members, and undercut their ability, and the ability of the public, to participate in and understand the issues active in this case and protect their interests. These violations of fundamental constitutional rights prejudiced the ability of the public, and of Sierra Club's membership, to effectively participate in the proceeding and justify on their own a re-hearing of the case.

More specifically, as reflected in the attached declaration, on February 12, 2020, the Commission adopted a procedural order governing these proceedings, captioned "Ruling Rescheduling Hearing And Establishing Hearing Procedures," that broadly held that "parties shall not engage in the use of social media to communicate or make representations regarding any subject related to the proceedings herein during the course of the hearing." On March 5, 2020, the Commission issued another order, titled "Order of Interim Adoption," that also governed the CPCN docket. Among other things, the Order of Interim Adoption provided that:

People must request advance approval, five days before any hearing, to broadcast, record or photograph any formal hearings of the Commission;

Such approval had to be secured in writing from all parties and attorneys;

That any such approval could be rescinded at the request of any party, witness, attorney, Commissioner, or presiding Administrative Law Judge, for any reason, at which point the broadcast, recording or other such photography must immediately cease.

That broadly prohibited any live audio or video broadcasting of hearings, and any social media updating, from the hearing room, although at the discretion of the Commission it may be permitted from overflow rooms; however at the request, for any reason, of any party, witness, attorney, Commissioner, or presiding judge, for any reason, such recording must cease; and

Prohibiting any digital devices from being used by anyone except for attorneys in the hearing room.³²

Four days later, on March 9, 2020, and, pursuant to the media coverage plan, out of time to request approval to record or broadcast the hearing -- the Commission commenced the hearing on the Company's petition. The Commission did not livestream the hearing or set up an overflow room with seats. As a result, only people who could travel to and gain access to the hearing room could follow along with the proceeding. And for those Sierra Club members and members of the public who had traveled from across the state to observe the hearing, once the room was at capacity, they were excluded. And, indeed, there were not enough seats in the hearing room for all of the interested members of the public and media to attend the hearing and as a result people were turned away without any other means to understand what was happening, as social media and livestreaming were broadly prohibited.

People inside the hearing room were precluded from using their phones to check a text, broadcast or record the proceedings for the benefit of those who could not find seats, and the Commission stationed a security guard at the back of the hearing room who intervened even when audience members quietly checked their phones. Members of the public, including Sierra Club members, were ejected from the hearing room when they attempted to inform the public using their phones.

³² See Order of Interim Adoption at ¶¶ 3,[1] 4,[2] 14,[3] 15[4] and 18[5] of the Media Coverage Plan.

Sierra Club has been very active in informing their members, activists, and the general public as to the operations of Commissions across the country, and regulated utilities like APC. Indeed, with respect to these proceedings docket, Sierra Club had intended to broadcast live updates to keep its members and the public informed about evidence being submitted and the testimony of witnesses. It also intended to keep the media apprised of the hearing as it progressed. Sierra Club's plans in this regard were prohibited by the orders of the Commission. Instead, Sierra Club was relegated to issuing press releases and blog posts after the hearing was concluded.

B. Legal argument

1. The First Amendment, by way of the Fourteenth Amendment, applies to the State of Alabama, and thus the Commission, as a state government agency

The U.S. Constitution is the “supreme Law of the Land,” and “[i]t is emphatically the province and duty of the judicial department to say what the law is.” U.S. Const. art. VI; Marbury v. Madison, 1 Cranch 137, 177 (1803). “It follows that the interpretation of the Fourteenth Amendment enunciated by this Court ... is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing U.S. Const. art. VI, § 2). Since 1925, the Supreme Court has held that the First Amendment’s free speech and press clause applies to the states by way of the Fourteenth Amendment. Gitlow v. People of the State of New York, 268 U.S. 652, 666 (1925); see Cent. Hudson Gas v. Pub. Serv. Comm’n, 447 U.S. 557, 561 (1980); Freedman v. State, 197 A.2d 232, 234 (1964); rev’d on other grounds, 380 U.S. 51, 85 (1965); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

2. The February 12, 2020 Order and Paragraphs 3, 4 and 18 of the Commission media coverage plan constituted an unconstitutional prior restraint on speech and violated the First Amendment

The Act of Recording Commission Proceedings Is Protected Speech Under the First Amendment. The Supreme Court has held that conduct can be a form of protected speech. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982) (holding that giving speeches is protected by the First Amendment); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (“This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.”). Nonverbal conduct is protected by the First Amendment when the speaker has “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” Spence v. Washington, 418 U.S. 405, 410-411 (1974). In Blackston v. Alabama, the Eleventh Circuit found that prohibiting plaintiffs from filming a public committee violated their First Amendment rights. 30 F.3d 117, 120 (11th Cir. 1994).

The conduct of recording a Commission meeting is also constitutionally protected speech. When exercising one’s right to record a public meeting, such as a Commission meeting, one is engaged in “[a]n intent to convey a particularized message,” and being that such message is in the form of a video recording, there is a strong “likelihood [...] that the message would be understood by those who viewed it.” See Spence, 418 U.S. at 410-411. When the Commission outright prohibits such protected speech—which it did in these proceedings—the Commission clearly violates the First Amendment. See Blackston, 30 F.3d at 120.

Laws requiring the receipt of licenses before one can engage in protected speech, and providing state governmental officials with “arbitrary power or an unfettered discretion” over whether to award such licenses, are considered “prior restraints.” See Cox v. State of New

Hampshire, 312 U.S. 569, 766 (1941). A prior restraint on pure speech can be justified only if the speech to be forbidden threatens a constitutional value even more precious than the First Amendment. Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996); see also Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

Paragraph 3 of the Commission media coverage plan requires that “[p]ersons desiring to broadcast, record or photograph formal hearings of the Alabama Commission [] make a timely written request to the Secretary [...] at least five (5) days before the date of the formal hearing for which coverage is requested.” This effectively establishes a licensing system.

The February 12, 2020, procedural ruling and the media coverage plan improperly accorded the Commission unfettered discretion over whether to grant licenses, and in fact as applied to the CPCN case, prohibited such licenses, and this power was extended to Alabama Power as well, the Commission created an unconstitutional prior restraint. Neither the February 12, 2020 Order, nor Paragraphs 3 and 18 of the Commission media coverage plan provided state officials with any standard or rational dictating when or why to grant licenses, and in the context of the CPCN proceeding, they functioned to prohibit First Amendment activity. Indeed, the media coverage plan allowed the Commission to deny a license to record, broadcast or photograph proceedings at any time, for apparently any reason, and by creating a 5 day time window to seek a license 4 days before the CPCN proceeding, it precluded the license entirely. Moreover, even had the Commission granted this license, Paragraph 18 authorized Commissioners, Administrative Law Judges and Alabama Power to revoke this license at any time, for any reason. Even more problematically, Paragraph 18 required the Commission to revoke licenses provided to persons or media outlets upon the request of any party, attorney or

witness, which can occur at any time, for any reason. Thus, the Commission media coverage plan is a prior restraint on speech.

3. Even if the Commission’s media coverage plan were not a prior restraint providing the Commission with unfettered discretion, it would be an unconstitutional time, place, and manner restriction.

If a court were to consider the Commission’s media coverage plan and conclude it is not a prior restraint, the media coverage plan would be classified as a time, place and manner regulation on speech, because it limits when persons or media outlets may engage in protected speech without restricting the content of that speech. See, e.g., Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984); Grayned v. City of Rockford, 408 U.S. 104 (1972).

“[R]egulations of the time, place, and manner of expression” are constitutional only when they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). The burden would be on the Commission to show that the prior restraint on speech in Paragraphs 3 and 18 of the media coverage plan is supported by a significant government interest, which the Commission failed to do so in this case. Preventing disruption in public proceedings could constitute a significant interest, but Paragraph 2 protects that particular interest, whereas Paragraphs 3 and 18 do not. Paragraphs 14 and 15 of the Commission media coverage plan unreasonably limit alternative avenues of communication, thus failing the fourth prong of the Perry test. Paragraph 14 prohibits certain types of recording (that are otherwise allowed under Ala. Code § 36-25A-6). Paragraph 15 prohibits the use of any devices that would be technologically capable of not only communication, but also the recording allowed under Ala. Code § 36-25A-6.

4. The unreasonableness of paragraphs 3, 4, 14, 15 and 18 is clearly apparent when contrasted with the commissions' media rules in Mississippi and Georgia, states that regulate other Southern Company subsidiaries

The Georgia Commission does not place any restrictions on the use of electronic devices inside a hearing room; members of the media, including print, radio and television, are allowed inside the hearing room with equipment; parties to the case are not allowed to block or otherwise stop any person or media outlet from recording or reporting from inside the hearing room; the Georgia Commission does not place any restriction on the use of social media by any person or media outlet present at a Commission hearing or meeting; the Georgia Commission rules do not require anyone to seek pre-approval.

The Mississippi Commission livestreams all of its meetings, including formal hearings, on YouTube. The Mississippi Commission prominently displays on its website the ability for visitors to watch hearings live, and its YouTube channel allows visitors to watch any previous meeting or hearing of the Commission. The Mississippi Commission does not place any restrictions on the use of electronic devices inside a hearing room for any type of meeting; members of the media, including print, radio and television, are allowed inside the hearing room with equipment. Parties to the case are not allowed to block or otherwise stop any person or media outlet from recording or reporting from inside the hearing room. The Mississippi Commission does not place any restriction on the use of social media by any person or media outlet present at a Commission hearing or meeting.

The Mississippi Commission has published a "Ratepayer Bill of Rights," which states, "Ratepayers shall have the right to view or listen to Mississippi Commission hearings and docket calls that are held in the Commission's Courtroom via the Internet." [3] The Mississippi Commission rules do not require anyone wishing to broadcast, record or photograph hearings to

seek pre-approval. Indeed, a survey of the rules from other state commissions demonstrates that the draconian rules adopted by the Alabama Commission are not reasonable, nor narrowly tailored.

CONCLUSION

In this case, the Commission's overly-restrictive media policy compounded the prejudice caused by Southern Company's and Alabama Power's concealment of evidence, and the utilization by the Commission of extra-record evidence that undermined an objective and transparent process. Sierra Club requests a rehearing. If a rehearing is denied, then in the very least the Commission should condition its approval upon Alabama Power carrying the financial risk that any of the generation assets it seeks to acquire becoming stranded assets.

Respectfully submitted this 14th day of September.

/s/ Joel E. Dillard

Joel E. Dillard

DILLARD, McKNIGHT, JAMES & McELROY
2700 Highway 280
Suite 110 East
Birmingham, Alabama 35233
Telephone: 205.271.1100

Counsel for Sierra Club

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 14th day of September, 2020.

Grover, Scott B.
Attorney
Roby, Riley
Attorney
Laurie, Robin
Attorney
McCrary, Dan H
Attorney
sgrover@balch.com
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VP and Comptroller
Alabama Power Company
pcraymon@southernco.com

/s/ Joel E. Dillard
Joel E. Dillard

Exhibit # 1

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

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

DECLARATION OF RACHEL S. WILSON

I. INTRODUCTION

1. My name is Rachel S. Wilson. I am a Principal Associate at Synapse Energy Economics, Inc. My business address is 485 Massachusetts Avenue, Suite 3, Cambridge, Massachusetts 02139.

2. My direct testimony in this proceeding was submitted on behalf of Sierra Club on December 4, 2019. My curriculum vitae, summarizing my experience and listing past testimony, was Exhibit RSW-1 attached to my direct testimony.

3. I was asked by counsel for the Sierra Club to provide a brief overview of the proposed Southeast Energy Exchange Market (SEEM), recently announced by Southern Company and a number of other utilities in the Southeast region, and to discuss its relevance to Alabama Power Company's Petition for a certificate of convenience and necessity (CCN) to build and acquire a combined 1,896 megawatts (MW) of gas-fired generating units.

II. SOUTHERN COMPANY WAS INVOLVED IN SEEM NEGOTIATIONS DURING THE CCN PROCEEDING

4. Southern Company announced in July 2020 that it had been discussing the creation of a Southeast energy imbalance market with a number of other utilities in the region, including Tennessee Valley Authority, Louisville Gas & Electric/Kentucky Utilities,

1 Duke Energy, and Dominion Energy, among others.¹ This market would be called the
2 Southeast Energy Exchange Market (SEEM), and would be a voluntary, enhanced 15-minute
3 energy wholesale market in which participants could buy and sell power. Participants
4 anticipate that the SEEM would begin operations in January 2022.²

5 5. Discussions about this new market began at least seven months prior to the
6 announcement of SEEM. In January 2020, a partnership committee was formed to develop a
7 long-term governance structure for the project.³ A nondisclosure agreement prevented the
8 participating utilities from publicly discussing “a possible arrangement involving rate-based
9 joint dispatch, energy imbalance, or similar arrangement for short-term energy sales.”⁴ This
10 agreement was signed by Adrienne Collins, representing “Southern Company Services, Inc.,
11 as agent for Alabama Power Company, Georgia Power Company, Mississippi Power
12 Company” on February 12, 2020.

13 6. Alabama Power filed a Petition on September 6, 2019 requesting a certificate of
14 convenience and necessity for the new Barry 8 combined cycle unit, the acquisition of the
15 Central Alabama Generation Station, an existing combined cycle unit, and approval of a
16 power purchase agreement for the output from the existing combined cycle Hog Bayou unit,
17 for a total of 1,896 MW. These resources were intended to meet a projected peak deficit
18 occurring in 2023. A public hearing was held from March 9, 2020 to March 11, 2020. At no
19 point in direct testimony, responses to interrogatories, or during the public hearing did any
20 witnesses from Alabama Power or Southern Company Services indicate that Southern

¹ See Exhibit 2-11

² *Southeast electric providers to create advanced energy exchange platform*. Pages from Binder of All SEEM Records (pp 1-2).pdf.

³ *Southeast electric providers to create advanced energy exchange platform*. Pages from Binder of All SEEM Records (pp 1-2).pdf.

⁴ See Exhibit 2-4

1 Company was in discussions to implement a regional energy imbalance market beginning in
2 January 2022. Rather, the companies were engaged in secret negotiations to develop a market
3 in which participants could buy and sell energy during peak periods over a much wider
4 region than is currently encompassed by the IIC that governs purchases and sales between
5 Southern Company operating companies.

6 **III. ENERGY IMBALANCE MARKETS PROVIDE ENERGY SHARING**

7 **DURING PEAK HOURS**

8 7. There is much evidence that well designed wholesale energy markets like SEEM
9 can provide benefits to ratepayers, including reduced cost of power, increased reliability,
10 reduced emissions through increasing renewable energy integration, and enhanced system
11 operations.⁵ A larger geographic region contains a greater quantity and variety of generation
12 resources, leading to increased efficiency of dispatch that results in cost savings to
13 customers. Dispatching over a larger region, as opposed to a single utility service territory,
14 also allows for the capture of temporal diversity benefits across both load (e.g., sub-regions
15 peaking at different times) and supply (e.g., output in different periods from different
16 resource types, such as seen with complementary solar and wind output patterns during day
17 and night, respectively). A Duke University study of the Southeast found that these
18 conclusions hold for this region as well; larger systems have a wider variety of generating
19 resources, contributing to increased flexibility while also reducing the need for flexible

⁵ For example, see: “2018 MISO Value Proposition” at <https://www.misoenergy.org/about/miso-strategy-and-value-proposition/miso-value-proposition/>; “Western EIM Benefits Report: Fourth Quarter 2018” at <https://www.westerneim.com/Pages/About/QuarterlyBenefits.aspx>; “PJM Value Proposition” at <https://www.pjm.com/about-pjm/~media/about-pjm/pjm-value-proposition.ashx>.

1 services, and even out variation in wind and solar resources.⁶ Wider east-west footprints
2 spanning different time zones (like the proposed SEEM) smooth daily peak loads for the
3 utilities that operate in the energy market.⁷

4 8. Experience from the Western Energy Imbalance Market (EIM) demonstrates that
5 a sub-hourly energy trading market can help utilities meet peak demand. President for
6 Government Relations at Berkshire Hathaway Energy, Jonathan Weisgall, is quoted as
7 saying: “Generally, EIM entities are helping with the over-supply problem in California by
8 absorbing the excess energy in the solar hours and helping meet California’s morning and
9 evening peaks.”⁸ The existence of the Western EIM has also improved operational awareness
10 and the market’s ability to anticipate changes in loads and resources, which has strengthened
11 system reliability.⁹

12 9. The California Independent System Operator (CAISO) submitted comments
13 before the New Mexico Public Service Commission in a docket studying the benefits of
14 Public Service Company of New Mexico (PNM) joining the Western EIM. CAISO describes
15 the benefits that accrue to PNM as a result of coordinated operations with transmission
16 service providers in the Pacific Time Zone that have later peak load periods. CAISO states
17 that “the ISO’s peak „net load” (i.e. peak load that occurs after solar has ramped off the
18 system) can be three hours later in the day than the time when PNM experiences its peak

⁶ Chen, Jennifer. March 2020. *Evaluating Options for Enhancing Wholesale Competition and Implications for the Southeastern United States*. Nicholas Institute for Environmental Policy Solutions at Duke University. Available at: https://nicholasinstitute.duke.edu/sites/default/files/publications/Evaluating%20Options%20for%20Enhancing-Wholesale-Competition-and-Implications-for-the-Southeastern-United-States-Final_0.pdf

⁷ Id.

⁸ Utility Dive. June 3, 2020. *The 3 key challenges to expanding the West’s real-time energy market to day-ahead trading*. See Exhibit 2-10A

⁹ Letter from EIM Participants to Chair Linvill and EIM Governing Body. September 16, 2019. Shared by Emily Felt from Duke Energy with SEEM participants on June 5, 2020. See Exhibit 2-10B

1 load. This means PNM can benefit from inexpensive, external supply when it must serve its
2 peak load and make economic sales to other areas after it has met its daily peak.”¹⁰ In
3 California and the Southwest, the rapid increase in solar resources has led to an “oversupply”
4 situation, in which the system frequently has too much renewable energy, without adequate
5 customer demand to use it. CAISO also states that PNM can benefit from this oversupply
6 condition to meet its peak load requirements in a cost-effective manner.¹¹ Evidence indicates
7 that SEEM participants did a detailed study of the benefits of the new imbalance market prior
8 to committing to the joint partnership, and that this study showed substantial reliability and
9 economic benefits.¹² The results of this study have yet to be shared, however.

10 **IV. ENERGY MARKETS CAN HELP MEET PEAK DEMAND AT A LOWER** 11 **COST**

12 10. In the experience of the Balancing Authority of Northern California, one of the
13 participants in the Western EIM, most of the benefits of membership in the market derive
14 from avoided costs, meaning that the public power utilities in the area do not have to turn on
15 their higher-cost generators to meet peak demand when lower-cost resources are available.¹³
16 The CEO of Colorado Springs Utilities has stated that as the industry moves to a low-carbon
17 future, participation in the Western EIM allows the utility to “complete our resource

¹⁰ Comments of the California Independent System Operation Corporation Before the New Mexico Public Regulation Commission. *In the Matter of a Commission Investigation into the Feasibility of Public Service Company of New Mexico Becoming a Member of the Southwest Power Pool*. Case No 17000261-UT. Available at: http://www.aiso.com/Documents/Nov21_2017_Comments_NewMexicoPRCNOI-PublicServiceCo_NM_BecomingMember_SPP_17-00261-UT.pdf.

¹¹ Id.

¹² *Southeast electric providers to create advanced energy exchange platform*. Pages from Binder of All SEEM Records (pp. 1-2).pdf

¹³ <https://www.publicpower.org/periodical/article/seat-trading-table-public-power-and-energy-imbalance-markets>

equation” and means that it does not need to build additional peaking generation.¹⁴ Evidence from the utilities operating in the Western EIM demonstrates that utilities are using the market to purchase energy from neighboring utilities to meet peak demand, and avoiding both operation of high-cost resources as well as the construction or acquisition of new resources. An article from Bloomberg, shared by Southern Company with other SEEM participants on July 14, 2020, describes the proposed SEEM and states that “An energy market would enable them to take advantage of power from neighboring solar and wind facilities rather than having to build back-up capacity to make up for shortfalls. That alone could generate millions of dollars in cost savings.”¹⁵ Alabama Power, operating in the SEEM market with utilities in Kentucky, Tennessee, and the Carolinas in addition to the other Southern Company operating companies, could potentially use purchases from these neighbors to meet a portion of its own peak need at a lower cost than building or purchasing 1,896 MW in new capacity.

11. On June 5, a representative from Duke Energy shared a link to the article in which Weisgall’s quote appears, along with commentary on the article that “For what it’s worth, it appears to me that the Western EIM member utilities are trying to leverage the EIM structure as much as it possibly can as a means to gaining the benefits you get from being in an RTO but without the hassle, cost, and loss of control. Smart move.”¹⁶

¹⁴ Egan, John. July 15, 2020. *A seat at the trading table: Public power and the energy imbalance markets*. American Public Power Association. Available at: <https://www.publicpower.org/periodical/article/seat-trading-table-public-power-and-energy-imbalance-markets>.

¹⁵ Bloomberg. *Southern Co. Among Utility Giants in Talks to Form Power Market*. See attached Exhibit 2-11

¹⁶ See Exhibit 2-10

1 **V. CONCLUSION**

2 12. The existing Western EIM is similar in structure to the SEEM project being
3 proposed in the Southeast by Southern Company and others. The experience of the Western
4 EIM demonstrates that the geographic and resource diversity that occurs over a larger region
5 adds flexibility, smooths variations in renewable energy output, and allows participating
6 utilities to draw on the resources from neighboring utilities to meet their own peak demand.
7 Alabama Power proposed 1,896 MW of new and existing gas-fired resources to meet a
8 projected resource need in 2023. The intention of the SEEM participants is to bring that
9 market online by January 2022. The existence of such a market at the time that Alabama
10 Power is projecting a resource need is certainly germane to the decision of whether to grant
11 the requested certificate of convenience and necessity. The Alabama Public Service
12 Commission is tasked with the decision as to whether Alabama Power's proposal is the least-
13 cost resource or set of resources; however, Alabama Power never identified SEEM as a
14 potential option and certainly never provided any analysis as to the amount that these
15 transactions might contribute to reducing the Company's peak demand.

16 13. SEEM participants cite the various benefits from the Western EIM as an example
17 of the types of benefits that might be achieved by an energy imbalance market in the
18 Southeast. One of those benefits is the ability to purchase power from neighbors during peak
19 hours. It is reasonable to conclude that SEEM could address at least a portion of the winter
20 morning energy need in Alabama, and potentially do so at a lower cost than what Alabama
21 Power has proposed in its Petition. Alabama Power's concealment of evidence that it was
22 negotiating the SEEM while it was seeking the Commission's approval to add 1,896 MW of
23 gas denied the Commission and all parties the ability to render an informed decision on

1 whether Alabama Power's proposal was in fact least cost and in the public interest when
2 compared to other options.

3 14. I declare under penalty of perjury that the foregoing is true and correct.

4
5 

6
7 _____
Rachel S. Wilson

Exhibit # 2-1



Daniel Tait <taitd@energyandpolicy.org>

Records Request - Southern Energy Imbalance Market - 20200714

Daniel Tait <taitd@energyandpolicy.org>

Tue, Jul 14, 2020 at 9:38 PM

To: "Whitley, Lindsey" <LINDSEY.WHITLEY@santecooper.com>

Cc: "Varner, Ivy" <cookie.varner@santecooper.com>

Bcc: [REDACTED]

Hi Lindsey,

Pursuant to the South Carolina Freedom of Information Act, I hereby request the following on behalf of the Energy and Policy Institute.

All electronic records containing the following keywords:

- Imbalance
- EIM
- Southern Energy Imbalance Market
 - This may be referred to by an acronym SEEM or SEIM.
- Nanette

Responsive records should include, without limitation, emails (sent, received, BCC, and CC), email attachments, text messages, encrypted messages (such as Signal and/or WhatsApp etc.), messaging apps (such as Slack, Trello and/or Asana etc.), file storage systems (including cloud-based systems such as Accellion, Microsoft One Drive, Google Drive, and/or Dropbox etc.), minutes or notes of meetings, PowerPoint or other similar presentations, and any other electronic records.

The custodians of these records are:

- Mark Bonsall
- Charles Duckworth
- Thomas Curtis
- Kenneth Lott
- Pamela Williams
- Mollie Gore

The timeframe of this public records request is between January 1, 2020 and July 13, 2020.

This request should search agency accounts and any personal accounts used for agency business.

Please include any administrative assistant(s) and chiefs of staff that may report to the named individual.

The requested documents will be made available to the general public, and this request is not being made for commercial purposes.

You may exclude news articles, press clippings, and duplicate records.

In the event that there are fees, I would be grateful if you would inform me of the total charges in advance of fulfilling my request. I would prefer the request filled electronically or USB drive if not.

Thank you in advance for your anticipated cooperation in this matter.

Regards,
Daniel

--

Daniel Tait

Research and Communications Manager
Energy and Policy Institute

9/13/2020

Energy & Policy Institute Mail - Records Request - Southern Energy Imbalance Market - 20200714

(256) 303-7773

taitd@energyandpolicy.org

Exhibit # 2-2



Amber Daniels
Attorney
Office of General Counsel
(843) 761-7029
Amber.daniels@santeecooper.com

September 3, 2020

Transmittal Via E-mail Only

Daniel Tait
Energy and Policy Institute
taitd@energyandpolicy.org

Re: Freedom of Information Act Request dated and received on July 14, 2020
Our File No.: FOIA 2020032

Dear Mr. Tait:

The non-exempt, responsive documents to your above referenced Freedom of Information Act request are made available to you via the secure file transfer site, Box.com. Separate from this letter, you will receive an e-mail from Box.com with the link to the responsive documents.

Santee Cooper has determined certain information responsive to your request is exempt from disclosure. Specifically, Santee Cooper redacted information containing: (1) trade secrets and competitive information pursuant to S.C. Code Ann. § 30-4-40(a)(1); (2) information of a personal nature which disclosure thereof would constitute an unreasonable invasion of personal privacy pursuant to § 30-4-40(a)(2); (3) matters specifically exempted from disclosure pursuant to § 30-4-40(a)(4), and (4) attorney work-product and correspondence pursuant to § 30-4-40(a)(7).

Payment in full for the cost to search, retrieve, and redact the responsive records (\$170.00) was received on August 4, 2020. No additional payment is owed and we are closing our file for this request. Your access to these documents will terminate 30 days from the date of production. If you should need additional time to review or retrieve them, please let me know.

Sincerely,

A handwritten signature in blue ink that reads 'Amber Daniels'.

Amber Daniels

NOTICE: OBTAINING OR USING PUBLIC RECORDS FOR COMMERCIAL SOLICITATION DIRECTED TO ANY PERSON IN THIS STATE IS PROHIBITED PURSUANT TO S.C. CODE ANN. § 30-2-50.

Exhibit # 2-3

Southeast electric providers to create advanced ~~bilateral market~~ energy exchange platform

New high-tech system to lower costs for consumers, optimize renewable energy resources and improve grid reliability, ~~resilience~~

A group of energy companies serving electricity customers across a wide geographic region in the southeastern U.S. have joined together to create a centralized, region-wide, automated intra-hour energy exchange with the goal of lowering costs to customers, optimizing new renewable energy resources, and improving reliability and resilience of the grid. The partnership of companies involved will seek approval from the Federal Energy Regulatory Commission to begin operations in January of 2022.

The Southeast Energy Exchange Market (SEEM) -- whose founding members include Associated Electric Cooperative Inc., ~~ElectriCities of North Carolina, Inc.,~~ Dominion Energy South Carolina, Duke Energy Carolinas, Duke Energy Progress, Georgia System Operations Corporation, Georgia Transmission Corporation, LG&E and KU Energy, MEAG Power, Oglethorpe Power Corp., PowerSouth, Santee Cooper, Southern Company, and TVA -- is a 15-minute energy market, the first of its kind in the southeastern U.S. ~~SEEM, that~~ will use technology and advanced market systems to automatically find low-cost, clean and safe energy to serve customers across XX states from Virginia to Georgia to Tennessee (if that's the westernmost state) ~~across a wide geographic area.~~

The new SEEM platform will facilitate sub-hourly ~~bi-lateral~~ bilateral trading allowing participants to buy and sell power close to the time the energy is consumed, utilizing ~~leftover unused~~ transmission available in real time. The exchange is an extension of ~~the~~ existing bi-lateral ~~market operations~~ and will provide operators more visibility across neighboring grids.

The result will be enhanced grid reliability and cost savings for ~~participants approximately XX million electric customers, while improving the~~ as well as improved integration of rapidly expanding renewable energy resources ~~which are expanding rapidly in the southeast,~~ leading to a cleaner, greener, more robust grid.

Before committing to the joint partnership, SEEM participants performed a detailed study ~~and the results that~~ showed ed significant economic, environmental and reliability benefits to all participants.

A partnership committee was established in January 2020 to develop a long-term ~~independent~~ governance structure involving. ~~This group established a structure by which~~ an independent body of representation from across the region. (Name of governing body) has been delegated authority for decision-making related to XXXXX. The committee formalized the governance framework in a charter, which was approved on (DATE, 2020).

Comment [MG1]: The energy industry will understand this, but if we're also using this release in mainstream media we need a little more common language I think

Comment [MG2]: Love this!

Comment [MG3]: This is out of alphabetical order...

Comment [MG4]: Can we share estimated annual savings for the whole group? I know we'll be asked that question. I don't know when we'll break down anticipated savings by utility, but think we can at least provide the aggregate projection...

Importantly, SEEM participants maintain local control of their generation and transmission assets and participation in any bilateral transaction is voluntary. Many of the member companies operate within state guidelines and directives so having full control over their respective generation and transmission resources is an important governing requirement.

####

Exhibit # 2-4

From: [Starks, Sandra](#)
To: [Duckworth, Charlie](#)
Cc: [Botelho, Crystal](#)
Subject: RE: Project BEST NDA Fully Executed 2020-03-24.pdf
Date: Wednesday, April 1, 2020 12:08:23 PM
Attachments: [Project BEST NDA Fully Executed 2020-03-24.pdf](#)

Charlie,

I have added the signature page to the Project Best NDA Fully Executed attachment. Let me know if you require anything else. Thanks!

Sandra R. Starks

Assistant Corporate Secretary

SANTEE COOPER

1 Riverwood Drive, Moncks Corner, SC 29461

Mailing Address: P.O. Box 2946101, Moncks Corner, SC 29461

☎p: (843) 761-4092 | 📠f: (843) 761-7037 | ✉️ sandra.starks@santeecooper.com

From: Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>
Sent: Wednesday, April 01, 2020 11:41 AM
To: Starks, Sandra <sandra.starks@santeecooper.com>
Cc: Botelho, Crystal <crystal.botelho@santeecooper.com>
Subject: FW: Project BEST NDA Fully Executed 2020-03-24.pdf

Sandra,

Will you please attach the signature page you just completed for me to this email?

From: Black, Noel W. <NWBLACK@southernco.com>
Sent: Tuesday, March 31, 2020 5:39 PM
To: Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>
Cc: Demko, Christopher Hale <CHDEMKO@southernco.com>
Subject: [EXTERNAL SENDER] Project BEST NDA Fully Executed 2020-03-24.pdf

WARNING: This e-mail is from an external sender. Use caution when opening attachments and clicking links.

Charlie,

Great discussing Project BEST with you today!

Page 14 of the .pdf is a blank Exhibit B for new party signature. Sign and send back to Chris Demko cc'd on this note. I need to share with the other members and confirm there are no issues.

We will get you all the presentations, rosters, and other materials on the project and the study Friday.

My best, Noel

WARNING!

This e-mail message originated outside of Santee Cooper.

Do not click on any links or open any attachments unless you are confident it is from a trusted source.

If you have questions, please call the Technology Service Desk at Ext. 7777.

MUTUAL NONDISCLOSURE AGREEMENT

THIS MUTUAL NONDISCLOSURE AGREEMENT (“Agreement”) is entered into by and between all parties included in Exhibit A (individually, **“Party”** and collectively, **“Parties”**). This Agreement is effective as of the date signed by the last signatory hereto (**“Effective Date”**).

BACKGROUND

The Parties intend to have discussions regarding a possible arrangement involving rate-based joint dispatch, energy imbalance, or similar arrangement for short-term energy sales (the **“Initiative”**). Parties may disclose or receive proprietary or confidential information, and each Party will have certain obligations as the **“Recipient”** or the **“Discloser”** of that information as described below. (**“Recipient”** and **“Discloser”** shall include a Party’s affiliate when an affiliate receives or discloses Protected Information.) The Parties are entering this Agreement to protect Discloser’s information. Accordingly, for value received, the Parties mutually agree as follows:

TERMS AND CONDITIONS

- 1. Definition. “Protected Information”** means tangible or intangible non-public and/or proprietary business information and data that is owned by, controlled by, or in the possession of Discloser or any of its affiliates that is treated as confidential, proprietary, or otherwise not subject to public disclosure and whether or not so marked, including, without limitation, technical, business, marketing, financial, operations, personnel and customer information, know-how, inventions, trade secrets, computer programs, databases, network architecture, and third party confidential information. Protected Information also includes any documents, notes, or other materials that contain, reflect, or are generated from any Protected Information.
- 2. Purpose of Disclosure.** Discloser provides the Protected Information to Recipient for the purpose of entering into discussions that may lead to a potential business relationship. Recipient will use the Protected Information only in connection with such purpose and will make no other use of the Protected Information without the express prior written consent of Discloser. In no event shall the disclosure of Protected Information be deemed to mean that any right, title or interest therein has transferred to the Recipient other than a license to use the Protected Information solely in connection with such purpose. Such license grant shall expire upon the termination of this Agreement or the Discloser and/or Recipient deciding not to pursue such collaboration, whichever occurs earlier.
- 3. Treatment of Protected Information.** Recipient agrees to exercise reasonable efforts, consistent with the efforts Recipient exercises to protect information of its own that it regards as confidential (but in no case less than a reasonable standard of care) to keep in confidence and not disclose to unauthorized persons any Protected Information. Recipient will only disclose Protected Information to its affiliates, officers, members, directors, employees (full time, part time, temporary, or leased), representatives, agents, advisors, legal counsel, consultants, and current or potential lenders, investors, contractors, and subcontractors (**“Representatives”**) who have a need to know consistent with the purpose described in Section 2; provided, however, any such Representative must be required to maintain the confidentiality of any Protected Information disclosed to it. Recipient will only use Protected Information in connection with its performance of this Agreement or as expressly authorized by this Agreement. The following information will not be considered Protected Information: (i) information legally obtained without restriction from a third party that is not under any obligation of confidentiality with respect to such information; (ii) information publicly available other than through fault or negligence of Recipient; and (iii) information developed or reverse engineered by or for Recipient independently of and without use of Protected Information.
- 4. Legally Required Disclosures.** Unless prohibited by law, Recipient will (i) promptly notify Discloser in writing of any legal process served on Recipient or Representatives for the purpose of obtaining Protected Information and (ii) permit Discloser adequate time and control to exercise its legal options to prohibit or limit disclosure. In the event that any disclosure is required, Recipient or Representatives must furnish only that portion of Protected Information that is legally required and must exercise its best efforts to obtain a reliable assurance that confidential treatment will be accorded Protected Information that is disclosed.

5. Enforcement. Recipient recognizes that unauthorized use or disclosure of Protected Information may give rise to irreparable injury to Discloser for which monetary damages may be inadequate and that Discloser may seek and obtain injunctive relief against the breach or threatened breach of Recipient's obligations under this Agreement, in addition to any other legal remedies that may be available to Discloser.

6. Addition of New Parties. Additional parties sharing the Parties' mutuality of interest in the Initiative can join this Agreement with the agreement of all then-existing Parties and must sign an agreement in substantially the form attached hereto as Exhibit B to be bound by the terms of this Agreement. Such added Parties may not amend this Agreement in whole or in part without the prior signed, written consent of all then-existing Parties.

7. Term and Termination. The term of this Agreement will begin as of the Effective Date and will terminate one (1) year thereafter. Notwithstanding the foregoing, Recipient's obligation to treat Protected Information confidentially will survive for three (3) years from the termination of this Agreement, and, with regard to trade secrets, for so long as such items remain trade secrets under applicable law. Upon Discloser's written request after the expiration or termination of this Agreement, Recipient must return to Discloser or destroy, at Discloser's discretion, all Protected Information; except such Protected Information that is automatically stored on a computer archival system in the ordinary course of Recipient's business or as may be required to be retained by applicable law.

8. General Disclaimer/No Joint Venture. Nothing in this Agreement will obligate Discloser to disclose to Recipient any particular information or enter into any business, commercial, financial, or procurement relationship or transaction nor will it be construed as creating any joint venture, teaming agreement, partnership, or other formal business organization or agency arrangement.

9. Warranty Disclaimer. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NO PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES WITH REGARD TO THE PROTECTED INFORMATION, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT, OR ACCURACY OR COMPLETENESS.

10. Miscellaneous. By choice of the Parties, all disputes that relate to the execution, interpretation, construction, performance, or enforcement of this Agreement and the rights and obligations of the Parties will be governed by the laws of the State of Delaware. No Party may assign this Agreement without the express written consent of all other Parties. This Agreement will inure to the benefit of and be binding upon the respective successors and permitted assigns of the Parties, if any. No waiver, termination, or discharge of this Agreement or any of the terms or provisions hereof, will be binding upon any Party unless confirmed in writing. The unenforceability or invalidity of any provision of this Agreement will not affect the validity or enforceability of the remaining provisions thereof, but such remaining provisions will be construed and interpreted in such a manner as to carry out fully the intent of the Parties. This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior or contemporaneous negotiations, promises, representations, or agreements, either written or oral, of any Party in connection therewith. No Party may modify this Agreement, except by a writing signed by all other Parties.

[SIGNATURES ON FOLLOWING PAGE]

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: [Signature]
Name: Brian Prestwood
Title: SUP, Gen. Counsel & CCO
Date: 2-11-20

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.


ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA,
acting by and through its Board of Water, Light and
Sinking Fund Commissioners d/b/a Dalton Utilities

By: 
Name: William McDaniel
Title: Director of Energy Services
Date: 2/12/2020

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent
for Alabama Power Company, Georgia Power
Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

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ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: P. Xanthakos
Name: Pandelis Xanthakos
Title: VP – Electric Transmission
Date: 02/06/2020

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

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ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____


DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: 
Name: ALEX GLENN
Title: SVP, State & Federal Legal Support
Date: February 7, 2020

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

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ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____


DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: 
Name: Keith Porterfield
Title: VP, Chief Legal and Compliance Officer
Date: 2/10/2020

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: Keith T. Daniel
Name: KEITH T. DANIEL
Title: SVP, TRANSMISSION POLICY
Date: 2/11/2020

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
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Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

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ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA,
acting by and through its Board of Water, Light and
Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY LLC

By: Lonnie E. Belke
Name: Lonnie E Belke
Title: COO
Date: 2/12/20

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

**SOUTHERN COMPANY SERVICES, INC., as agent
for Alabama Power Company, Georgia Power
Company, Mississippi Power Company**

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____


LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: 
Name: Steven M. Jackson
Title: SVP and COO
Date: 02/10/2020

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

POWERSOUTH ENERGY COOPERATIVE

By: Ken Clarke
Name: Ken Clarke
Title: Energy Resources Supv.
Date: 02/07/2020

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

EXHIBIT A

Each Party has caused this Agreement to be executed by its respective duly authorized representative on the date entered below.

ASSOCIATED ELECTRIC COOPERATIVE, INC.

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA TRANSMISSION CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

CITY OF DALTON, GEORGIA, acting by and through its Board of Water, Light and Sinking Fund Commissioners d/b/a Dalton Utilities

By: _____
Name: _____
Title: _____
Date: _____

LG&E AND KU ENERGY, LLC

By: _____
Name: _____
Title: _____
Date: _____

DOMINION ENERGY SOUTH CAROLINA, INC.

By: _____
Name: _____
Title: _____
Date: _____

MUNICIPAL ELECTRIC AUTHORITY OF GEORGIA

By: _____
Name: _____
Title: _____
Date: _____

DUKE ENERGY CORPORATION

By: _____
Name: _____
Title: _____
Date: _____


POWERSOUTH ENERGY COOPERATIVE

By: _____
Name: _____
Title: _____
Date: _____

GEORGIA SYSTEM OPERATIONS CORPORATION

By: _____
Name: _____
Title: _____
Date: _____

SOUTHERN COMPANY SERVICES, INC., as agent for Alabama Power Company, Georgia Power Company, Mississippi Power Company

By: 
Name: Adrienne Collins
Title: SVP Power Delivery
Date: 02/12/2020

TENNESSEE VALLEY AUTHORITY

By: _____
Name: _____
Title: _____
Date: _____

TENNESSEE VALLEY AUTHORITY

By: 

Name: Aaron Melda

Vice President,
Title: Transmission Operations & Power
Supply

Date: 02/06/2020

EXHIBIT B

FORM OF UNDERSTANDING PURSUANT TO THE MUTUAL NONDISCLOSURE AGREEMENT

On behalf of Santee Cooper, I Charles B. Duckworth,
hereby certify that (1) I have read the Mutual Nondisclosure Agreement pertaining to the Initiative, (2) I am
authorized to enter into this undertaking agreement on behalf of Santee Cooper, and
(3) Santee Cooper agrees to comply with the Agreement in all respects as a new Party thereto.

Signature: 
Name: Charles B. Duckworth
Title: Deputy CEO & Chief of Planning and Innovation Officer
Date: April 1, 2020

EXHIBIT B

FORM OF UNDERSTANDING PURSUANT TO THE MUTUAL NONDISCLOSURE AGREEMENT

On behalf of NC Electric Membership Corporation, I James B. Wilkins,
hereby certify that (1) I have read the Mutual Nondisclosure Agreement pertaining to the Initiative, (2) I am
authorized to enter into this undertaking agreement on behalf of NC Electric Membership Corporation, and
(3) James B. Wilkins agrees to comply with the Agreement in all respects as a new Party thereto.

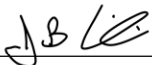
Signature: 
Name: James B. Wilkins
Title: Director Portfolio and Resource Optimization
Date: March 2, 2020

EXHIBIT B

FORM OF UNDERSTANDING PURSUANT TO THE MUTUAL NONDISCLOSURE AGREEMENT

On behalf of North Carolina Municipal Power Agency Number 1, I Matthew E. Schull, hereby certify that (1) I have read the Mutual Nondisclosure Agreement pertaining to the Initiative, (2) I am authorized to enter into this undertaking agreement on behalf of North Carolina Municipal Power Agency Number 1, and (3) North Carolina Municipal Power Agency Number 1 agrees to comply with the Agreement in all respects as a new Party thereto.

Signature: _____



Name: _____

Matthew E. Schull

Title: _____

Chief Operating Officer

Date: _____

March 4, 2020

EXHIBIT B

FORM OF UNDERSTANDING PURSUANT TO THE MUTUAL NONDISCLOSURE AGREEMENT

On behalf of Cylethorpe Power Corporation, I Annalisa H. Bloodworth hereby certify that (1) I have read the Mutual Nondisclosure Agreement pertaining to the Initiative, (2) I am authorized to enter into this undertaking agreement on behalf of Cylethorpe Power Corporation and (3) Cylethorpe Power Corporation agrees to comply with the Agreement in all respects as a new Party thereto.

Signature:



Name:

Annalisa H. Bloodworth

Title:

SVP & General Counsel

Date:

2/28/2020

Exhibit # 2-5

From: [Duckworth, Charlie](#)
To: [Bonsall, Mark](#)
Subject: FW: Joining project B.E.S.T
Date: Monday, April 6, 2020 12:55:43 PM

This cost is for us to get involved with Southern and Dominion (and many others) in discussions to form an EIM. Not the best time to spend, I know, but given the potential for savings I'd suggest we go ahead. Let me know if you concur.

From: PANDELIS XANTHAKOS <pandelis.xanthakos@dominionenergy.com>
Sent: Monday, April 6, 2020 9:39 AM
To: Black, Noel W. <NWBLACK@southernco.com>; Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>
Cc: Lushington, Martha A. <mlushing@southernco.COM>
Subject: [EXTERNAL SENDER] RE: Joining project B.E.S.T

WARNING: This e-mail is from an external sender. Use caution when opening attachments and clicking links.

Hello Noel and Charlie,

I have spoken to Chip from Guidehouse (Navigant) and his incremental cost to add Santee Cooper into the study is \$15K. From an equity standpoint, I think his number is fair because it is proportionate to what DESC is paying and our companies are about the same size. For further comparison, he added \$25K when NCEMC, Electricities, and Oglethorpe were added (individually and collectively they are all smaller than our two companies).

Unless directed otherwise he will direct bill Santee Cooper, so we need to let him know if something else is desired.

LX

From: Black, Noel W. <NWBLACK@southernco.com>
Sent: Saturday, April 4, 2020 11:36 AM
To: Lushington, Martha A. <mlushing@southernco.COM>; CHARLIE.DUCKWORTH@santeecooper.com
Cc: PANDELIS XANTHAKOS (DESC Trans Distribution - 7T) <pandelis.xanthakos@dominionenergy.com>
Subject: [EXTERNAL] Re: Joining project B.E.S.T

Thx Martha!

Charlie call anytime if you need anything.

Lee thx for your work on the study and getting Charlie that figure!

My best, Noel
202-578-8377

Get [Outlook for iOS](#)

From: Lushington, Martha A. <mlushing@southernco.COM>
Sent: Friday, April 3, 2020 4:53:55 PM
To: CHARLIE.DUCKWORTH@santeecooper.com <CHARLIE.DUCKWORTH@santeecooper.com>
Cc: Black, Noel W. <NWBLACK@southernco.com>; PANDELIS XANTHAKOS
<pandelis.xanthakos@dominionenergy.com>
Subject: Joining project B.E.S.T

Charlie,
Great to have you on board, can you send along your secondary principal for the Project? Please also let me know who your assignments are for each committee and any other employees you'd like to have on the project. As you can see for the roster I will need their names, titles, email addresses and preferred phone numbers. As was discussed with Noel the Joint-Study is underway. There will be an incremental cost for adding Santee to the study. Lee will you communicate that cost with Charlie with you as soon as you have it from Navigant?

Thanks,

Martha Lushington

Southern Company | Administrative Assistant: Governmental Affairs
601 Pennsylvania Avenue NW | Suite 800 S | Washington D.C 20004
W: 202-261-5022 | Email: mlushing@southernco.com

CONFIDENTIALITY NOTICE: This electronic message contains information which may be legally confidential and or privileged and does not in any case represent a firm ENERGY COMMODITY bid or offer relating thereto which binds the sender without an additional express written confirmation to that effect. The information is intended solely for the individual or entity named above and access by anyone else is unauthorized. If you are not the intended recipient, any disclosure, copying, distribution, or use of the contents of this information is prohibited and may be unlawful. If you have received this electronic transmission in error, please reply immediately to the sender that you have received the message in error, and delete it. Thank you.

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If you have questions, please call the Technology Service Desk at Ext. 7777.

Exhibit # 2-6

From: [Duckworth, Charlie](#)
To: [Wagner, Chris](#)
Subject: FW: Project Best
Date: Monday, April 6, 2020 2:23:00 PM
Attachments: [image001.jpg](#)

Charlie Duckworth
Deputy CEO & Chief of Planning
1 Riverwood Drive, Moncks Corner, SC 29461
Mailing Address: P.O. Box 2946101, Moncks Corner, SC 29461
(p: [REDACTED])



From: Mark Anderson <MAAnderson@teainc.org>
Sent: Monday, April 6, 2020 2:14 PM
To: Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>; Watson, Marty <marty.watson@santeecooper.com>
Cc: Curtis, Tom <thomas.curtis@santeecooper.com>; Jamie Mahne <jmahne@teainc.org>
Subject: [EXTERNAL SENDER] Project Best

WARNING: This e-mail is from an external sender. Use caution when opening attachments and clicking links.

Good afternoon Charlie, Marty and Tommy,

This morning, during a call with Sr. VP & COO Steve Jackson at MEAG, he mentioned that Santee Cooper has signed documents to start moving down a path for Project Best, the Energy Imbalance Market in the southeast.

I wanted to let you know that TEA has been working with MEAG since early March to help them move forward during the process.

TEA plans to help MEAG in several different ways, from data modeling, governance, MEAG's role in the marketplace, transmission analysis, tagging and market design.

The TEAm includes, Desi Middleton (currently Santee's modeling guru), Matthew Johnson, Director of East Operations (he has extensive knowledge of market design for EIM's out west and SPP), Yohan Sutjandra (Mgr of Transmission Analytics – data guru too), Christine Farley (Portfolio Mgr) and me. TEA wants to extend this knowledge and help Santee too.

There have been numerous documents that have been passed around, including the Florida Cost Based Broker System (FCBBS) by-laws, member agreements and governance documents. TEA has extensive knowledge of the FCBBS, as one of the founding members (Christine Farley was a past president), and prior to my time at TEA, I was involved with the formation of the FCBBS and subsequent platform, webMarket, an OATI product.

TEA would like to help Santee integrate and participate, especially since there is a very quick timeline. TEA signed an NDA with MEAG, and can do so with Santee. TEA plans on participating on calls, ask questions and review documents. We would like to do this for Santee as well.

If there is a call that we can set up with your team, let me know.

While MEAG's and Santee's willingness and outcomes might be different, TEA can bifurcate our market design and structure to best suit Santee's system. But, there will be a lot of overlap. It might even be prudent to have a call between MEAG, Santee, and TEA to strategize market design and governance. In the end though, TEA will tailor its recommendations to suit your needs.

Let me know how TEA can help.

Thanks,

Mark

Mark Anderson | The Energy Authority | Client Services Manager

p: [REDACTED] | e: manderson@teainc.org

[REDACTED]

WARNING!

This e-mail message originated outside of Santee Cooper.

Do not click on any links or open any attachments unless you are confident it is from a trusted source.

If you have questions, please call the Technology Service Desk at Ext. [REDACTED].

Exhibit # 2-7

From: [Duckworth, Charlie](#)
To: [Bonsall, Mark](#)
Subject: Southern
Date: Friday, March 27, 2020 2:09:00 PM

We had a good discussion with them today. Relative to the Act 95 process they like and weren't surprised by our plan. They believed from the start no one would have a better path forward.

Based on the discussion my read of the best opportunities for working together are:

1. Market power purchases. They've already responded to our RFP but there's some work to be done on what they've proposed – needs to be improved upon which we told them (and they said they were willing to work with us)
2. Mobile CT's/generation. Within a week they're going to run down what's possible.
3. CC unit in '27. There's interest on their part but it's not pressing from a time perspective.
4. Demand side options. Significant potential that they can help (from my perspective). They also said they'd connect me with TVA who has/is dealing with issues similar to what we have with the Coops on this subject.
5. Power pool and energy trading services.
 - a. They are going to provide us a draft deal on a product designed to help us integrate more solar (something they've developed for others)
 - b. They are working with others on an EIM market (this was behind the comment I made to you about hearing Dominion was involved) and they want me to become a part of that development group.

I did talk with John about nuclear/Westinghouse per our conversation yesterday. He understood immediately and said he would take the issue up the chain.

Charlie

Exhibit # 2-8

From: [Wagner, Chris](#)
To: [Budreau, Vicky](#); [Duckworth, Charlie](#); [Poston, Mike](#); [Watson, Marty](#); [Wagner, Chris](#)
Subject: Re: [EXTERNAL SENDER] New Participant - Central Coop
Date: Sunday, April 19, 2020 7:43:55 PM

Vicky,

This is the Energy Imbalance Market study group that you and I discussed on Friday. We don't have a whole lot of information at this point but I will keep you and Mike in the loop as things progress.

Thanks,

Chris

On April 19, 2020 at 16:07:41 EDT, Budreau, Vicky <vicky.budreau@santeecooper.com> wrote:

Charlie, I'm not familiar with this group. Can you please bring me up to speed?

From: Duckworth, Charlie
Sent: Sunday, April 19, 2020 11:20 AM
To: Poston, Mike; Budreau, Vicky; Watson, Marty; Wagner, Chris
Subject: Fwd: Re: [EXTERNAL SENDER] New Participant - Central Coop

----- Forwarded message -----

From: Jim C. Lamb <jlamb@CEPCI.ORG>
Date: April 19, 2020 at 10:58:02 AM EDT
Subject: Re: [EXTERNAL SENDER] New Participant - Central Coop
To: Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>

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Thanks. Not sure about our level of involvement but I hope to observe and learn.

Sent from my iPhone

On Apr 19, 2020, at 7:01 AM, Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com> wrote:

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Jim,

Look forward to having you involved.

Charlie

----- Forwarded message -----

From: Black, Noel W. <NWBLACK@southernco.com>
Date: April 17, 2020 at 9:34:43 AM EDT
Subject: [EXTERNAL SENDER] New Participant - Central Coop
To:
cmcgeeney@aeci.org,rclark@aeci.org,wmcdaniel@dutil.com,pandelis.xanthakos@dominionenergy.com,james.landreth@dominionenergy.com,Alex.Glenn@duke-energy.com,Nelson.peeler@duke-energy.com,John.verderame@duke-energy.com,mschull@electricities.org,dbarnes@electricities.org,paul.turner@gasoc.com,keith.daniel@gatrans.com,lonnie.bellar@lge-ku.com,jennifer.keisling@lge-ku.com,[Jackson, S. \(MEAG\) <sjackson@meagpower.org>](mailto:Jackson,S.(MEAG)<sjackson@meagpower.org>),[Easterlin, Edward \(MEAG\) <eeasterlin@meagpower.org>](mailto:Easterlin,Edward(MEAG)<eeasterlin@meagpower.org>),Charlie.Bayless@NCEMCS.com,lori.clardy@opc.com,[Holt, Lori \(OPC\) <lori.holt@opc.com>](mailto:Holt,Lori(OPC)<lori.holt@opc.com>),[Clarke, Ken \(Power South\) <ken.clarke@powersouth.com>](mailto:Clarke,Ken(PowerSouth)<ken.clarke@powersouth.com>),[Hattaway, Tim \(Power South\) <tim.hattaway@powersouth.com>](mailto:Hattaway,Tim(PowerSouth)<tim.hattaway@powersouth.com>),[Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>](mailto:Duckworth,Charlie<CHARLIE.DUCKWORTH@santeecooper.com>),[Wagner, Chris <chris.wagner@santeecooper.com>](mailto:Wagner,Chris<chris.wagner@santeecooper.com>),[Black, Noel W. <NWBLACK@southernco.com>](mailto:Black,NoelW.<NWBLACK@southernco.com>),[Collins, Adrianne <ACOLLINS@southernco.com>](mailto:Collins,Adrianne<ACOLLINS@southernco.com>),Apmelda@tva.gov,Ergrau@tva.gov

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All- We have gotten requests from Central Electric Power Coop to join the Project Best initiative discussions. Attached is their signed NDA exhibit. Consistent with the NDA, we need to agree to their addition. In order to make this process more manageable, please let me know by Wednesday 4/22 if there are any concerns with Central Coop joining. If I don't hear any concerns, we will agree to admit these parties.

Please let me know if there are any questions.

Noel Black

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<Central Project BEST Signature Page 041620.pdf>

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Exhibit # 2-9

From: [Duckworth, Charlie](#)
To: [Wagner, Chris](#)
Subject: FW: Project BEST: Santee Cooper operations interview
Date: Wednesday, April 22, 2020 2:28:00 PM
Attachments: [image001.jpg](#)
Importance: High

Chris,

Will you please respond on my behalf?

Charlie Duckworth
Deputy CEO & Chief of Planning
1 Riverwood Drive, Moncks Corner, SC 29461
Mailing Address: P.O. Box 2946101, Moncks Corner, SC 29461
(p: [REDACTED])



From: Heilbrun, Caroline <CHeilbrun@crai.com>
Sent: Wednesday, April 22, 2020 2:07 PM
To: Duckworth, Charlie <CHARLIE.DUCKWORTH@santeecooper.com>
Cc: DesLauriers, David <DDesLauriers@crai.com>; Ralph Luciani <Ralph.Luciani@guidehouse.com>
Subject: [EXTERNAL SENDER] Project BEST: Santee Cooper operations interview
Importance: High

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Dear Mr. Duckworth,

My name is Caroline Heilbrun, and I am an Energy Analyst with Charles River Associates. CRA is working with Guidehouse to evaluate the potential formation of an Energy Imbalance Market in the southeast region. My colleagues and I on the CRA/Guidehouse team are currently gathering participant-specific cost estimates from Operations representatives of other prospective EIM members.

We noticed that our Project BEST e-mail roster does not include an Operations representative from Santee Cooper. These representatives are usually Managers or Directors of Transmission, Resource Operations, Bulk Power, Operations Interface, or similar. We would like to collect incremental EIM startup cost values from Santee Cooper. Would you be willing to speak with our team about this matter, or could you provide contact information for an Operations representative?

We conduct our informational interviews via Skype, and they are occurring this week and next-

Project BEST is moving quickly. If you would like to speak with us, please reply to this message with a preferred date and 60-minute time slot. We will reply with a cost tracking template and a Skype invitation. On calls, we tend to review the template broadly line-by-line together, and then each interviewee circles back with senior management to confirm value ranges.

Thank you very much, and I look forward to hearing from you,

Sincerely,
Caroline Heilbrun

Caroline Heilbrun
Analyst, Energy



200 Clarendon Street
Boston, MA 02116-5092



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Exhibit # 2-10

From: [Gore, Mollie](#)
To: [Felt, Emily](#); [ZUNDRA GREEN](#); [JONATHAN YARBOROUGH](#); [ERIC BOOMHOWER](#); [Penland, Geoffrey](#)
Cc: [Culbert, Erin](#); [Mosier, Ryan](#); [Claunch, Chuck](#); [Wells, Tiger](#); [Davidson, Hilary](#)
Subject: RE: B.E.S.T. project discussion (S.C.)
Date: Tuesday, June 9, 2020 1:12:00 PM

Thanks Emily for these and for your explanation/discussion on last week's call – it has all been very helpful...

Mollie

Mollie Gore
Corporate Communications Director
Santee Cooper
843-761-7093 (o)

www.santeecooper.com
www.facebook.com/santeecooper
www.twitter.com/santeecooper

From: Felt, Emily <Emily.Felt@duke-energy.com>
Sent: Friday, June 5, 2020 5:25 PM
To: ZUNDRA GREEN <zundra.green@dominionenergy.com>; JONATHAN YARBOROUGH <jonathan.yarborough@dominionenergy.com>; ERIC BOOMHOWER <eric.boomhower@dominionenergy.com>; Gore, Mollie <mollie.gore@santeecooper.com>; Penland, Geoffrey <geoff.penland@santeecooper.com>
Cc: Culbert, Erin <Erin.Culbert@duke-energy.com>; Mosier, Ryan <Ryan.Mosier@duke-energy.com>; Claunch, Chuck <Chuck.Claunch@duke-energy.com>; Wells, Tiger <Tiger.Wells@duke-energy.com>; Davidson, Hilary <Hilary.Davidson@duke-energy.com>
Subject: [EXTERNAL SENDER] RE: B.E.S.T. project discussion (S.C.)

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Another good, recent article on the Western Energy Imbalance Market or “Western EIM.” <https://www.utilitydive.com/news/the-3-key-challenges-to-expanding-the-vests-real-time-energy-market-to-day/578390/>

Perspective: the Southeast EEM (Energy Exchange Market) is going to walk before it can run. The Southeast EEM will run on software that automates energy trades every 15 minutes (as opposed to manual trades every hour like we do right now). The Western EIM is up and running. It's a couple years ahead of us and is currently set up to trade every 5 minutes. This article describes how the Western EIM is headed in the direction of even more sophistication. For what its worth, it appears to me that the Western EIM member utilities are trying to leverage the EIM structure as much as

it possibly can as a means to gaining the benefits you get from being in an RTO but without the hassle, cost, and loss of control. Smart move.

Also, see the joint letter that Western EIM member utilities wrote when they started to lay the groundwork for expanding the functions of the Western EIM; it's powerful. We might want to consider our own letter (signed by heads of each of the SC participating utilities) when the time is right:

<http://www.caiso.com/Documents/PublicCommentLetter-EIMEntites-EDAM-Sep16-2019.pdf#search=edam>

Emily Felt | Director, State Energy Policy | Duke Energy Corporation

-----Original Appointment-----

From: ZUNDRA GREEN <zundra.green@dominionenergy.com>

Sent: Thursday, June 4, 2020 1:18 PM

To: ZUNDRA GREEN; JONATHAN YARBOROUGH; ERIC BOOMHOWER; Felt, Emily;
mollie.gore@santeecooper.com; geoff.penland@santeecooper.com

Subject: B.E.S.T. project discussion (S.C.)

When: Friday, June 5, 2020 1:30 PM-2:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Skype Meeting

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Exhibit # 2-10A



DEEP DIVE

The 3 key challenges to expanding the West's real-time energy market to day-ahead trading

Customer savings and streamlined emissions cuts can come from the Buffett-backed west-wide market plan



Herman K. Trabish

By [Herman K. Trabish](#)
Published June 3, 2020

POST

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Utilities and stakeholders in Western states, seeing important benefits in their real-time energy market, are working toward expanding to a regional day-ahead collaboration that could hold much bigger benefits.

The voluntary Energy Imbalance Market (EIM) was launched by PacifiCorp, a subsidiary of Warren Buffett's Berkshire Hathaway Energy (BHE), and the California Independent System Operator (CAISO) in November 2014 to optimize real time dispatch, according to CAISO. It has generated \$919 million in reduced energy costs and other benefits. Now, driven by new Western state renewables and zero emissions mandates, the 11 active participants and 9 new applicants are pushing to expand it to day-ahead trading.

"Generally, EIM entities are helping with the over-supply problem in California by absorbing the excess energy in the solar hours and helping meet California's morning and evening peaks," BHE Vice President for Government Relations Jonathan Weisgall told Utility Dive. With a day-ahead energy market, "those reductions in emissions and cost savings could be significantly increased" by optimizing dispatch from limited real-time trading to almost the entire Western energy market.

Western utilities and power providers from Canada to the Mexican border and from the Rockies to the Pacific are working on this voluntary Extended Day-Ahead Market (EDAM). It would expand optimized dispatch and delivery from 5% of the power flows in Western electricity markets to almost 100%.

While there are few apparent declared opponents to the plan, stakeholders must address the three key challenges of the proposed market — its governance, transmission charges across jurisdictions, and guarantees among participants that they will meet their obligations. A first straw proposal is due in early July from CAISO working groups that will suggest the first possible solutions for the West's diverse stakeholders.

Who, what, why?

Policymakers across the West have rejected efforts by CAISO to organize a formal regional market that would have eliminated cost barriers among the West's 38 balancing areas where individual jurisdictional entities optimize their own

dispatch. California leaders primarily sought to protect the state from federal regulation while other Western leaders have been concerned with protecting their state's interests from California.

"But every state west of the Rockies except Wyoming now has a 100% renewables or zero emissions mandate or a utility with an agreement moving it in that direction," BHE's Weisgall said.

BHE subsidiary PacifiCorp "has achieved customer benefits in the EIM, but rising renewables penetrations represent new levels of variability," Weisgall added. "The greater resource diversity available through the EDAM will allow utilities optimal dispatch flexibility to meet that increased variability with cost savings for customers."

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The EIM would continue to serve the entities' real time needs. The EDAM, which would reduce barriers for its voluntary participants in the much larger day-ahead market, is being explored through EIM committees and CAISO working groups by most of the EIM entities.

"This evolution of the wholesale market can have even more benefits by optimizing transactions on a day-ahead basis and more cost-effectively integrating higher levels of renewables."

Brad Albert

VP for Resource Management, APS

"Layered on top of the EIM," its "day-ahead hourly trading" could add "incremental benefits" like increased customer savings, CAISO Vice President for Market Quality and California Regulatory Affairs Mark Rothleder told a participant group last October.

Leading opponents of previous full regionalization proposals do not oppose EDAM, they told Utility Dive. Sierra Club Beyond Coal Campaign State Strategies Director Bill Corcoran, Marc Joseph, an attorney who represents labor groups, and Matthew Freedman, an attorney with ratepayer advocacy group The Utility Reform Network, agree there is potential value in the plan.

Many details of an organized electricity market, like price bidding and clean energy and greenhouse gas emissions credits, will be settled later. Questions of governance, shared transmission and resource sharing must come first, the EIM entities have decided.

A 2016 study showed a full regional marketplace could potentially deliver savings of \$1.5 billion per year from optimized dispatch, shared transmission costs and reduced reserve needs, Brattle Group Principal Hannes Pfeifenberger, who led the study, told Utility Dive. The EDAM benefits would likely "not be as much as those estimated by the 2016 study, but would be more than those from today's EIM," he said. The EIM delivered \$296.9 million in benefits in 2019.

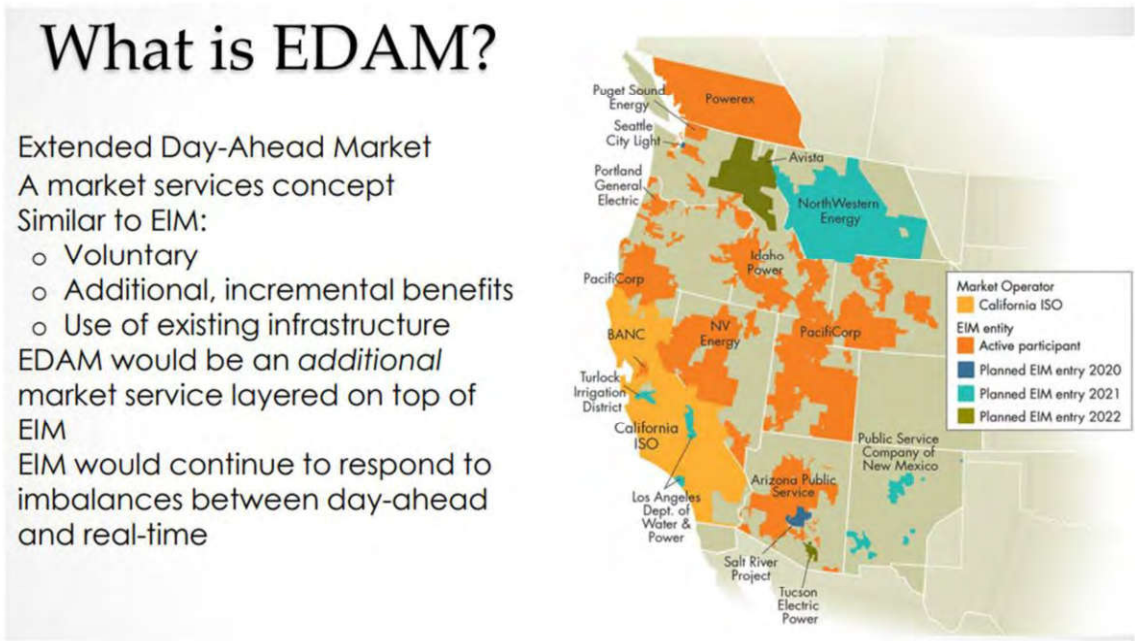
EIM participants see significant potential benefits in a day-ahead market.

"It is a huge opportunity for Idaho to share its hydro if it is valued appropriately," Commissioner Kristine Raper of the Idaho Public Utilities Commission (IPUC) told Utility Dive. "There is value to be gained in answering those kinds of complicated questions."

Arizona Public Service (APS) has already seen benefits in the EIM, APS Vice President for Resource Management Brad Albert agreed. "This evolution of the wholesale market can have even more benefits by optimizing transactions on a

day-ahead basis and more cost-effectively integrating higher levels of renewables."

The first task before would-be EDAM participants is resolving the governance question.



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<http://www.caiso.com/InitiativeDocuments/Presentation-ExtendedDay-AheadMarketFeasibilityAssessmentUpdate-EIMEntities-Oct3-2019.pdf>, Slide 2

Governance

In 2015, a Transition Committee made up of investor-owned utility (IOU), private provider, regulatory, and advocacy group representatives created the EIM governance framework. To broaden representation, they established a Governing Body, a Body of State Regulators and a Regional Issues Forum.

"Both California's IOUs and other participants were concerned governance would not protect their needs," CAISO Board of Governors member Dave Olsen recalled. "But the Transitional Committee created a structure that allows the CAISO Board to delegate authority to the EIM Governing Body in a way that satisfied both."

To design EDAM governance, participants are working through the Governance Review Committee (GRC) created by the EIM Governing Body and the CAISO Board, Olsen told Utility Dive.

"There were changes made to accommodate the EIM and changes are now being contemplated to move EDAM forward," California attorney Tony Braun, who was a member of the EIM Transition Committee and is a member of the GRC, told Utility Dive.

To move from the EIM's real-time market to day-ahead regional trading, changes will likely be necessary in CAISO's day-ahead market rules, an October 2019 CAISO issue paper reported. But the EIM Governing Body's authority, under which the Transitional Committee built EIM protections, does not extend to day-ahead market rules.

A possible fix would address the fact that EDAM is fundamentally about expanding the EIM to include day-ahead market participation, the CAISO paper reported. CAISO management proposed that its Board approve a "joint authority" structure under which "all aspects of EDAM market design" would be approved only if both the EIM Governing Body and the CAISO Board assent.

"I wouldn't be a part of the GRC process if I didn't think that there was a path forward ... I started out as a skeptic, but I am impressed with EIM governance."

Kristine Raper
Commissioner, Idaho Public Utilities Commission

EDAM "is being driven by EIM entities who see benefits in the optimized use of resources," former EIM Governing Body Chair Doug Howe, who is also a former New Mexico utility commissioner and currently Director of Western Grid Group, told Utility Dive.

To create governance that protects the interests of California and non-California

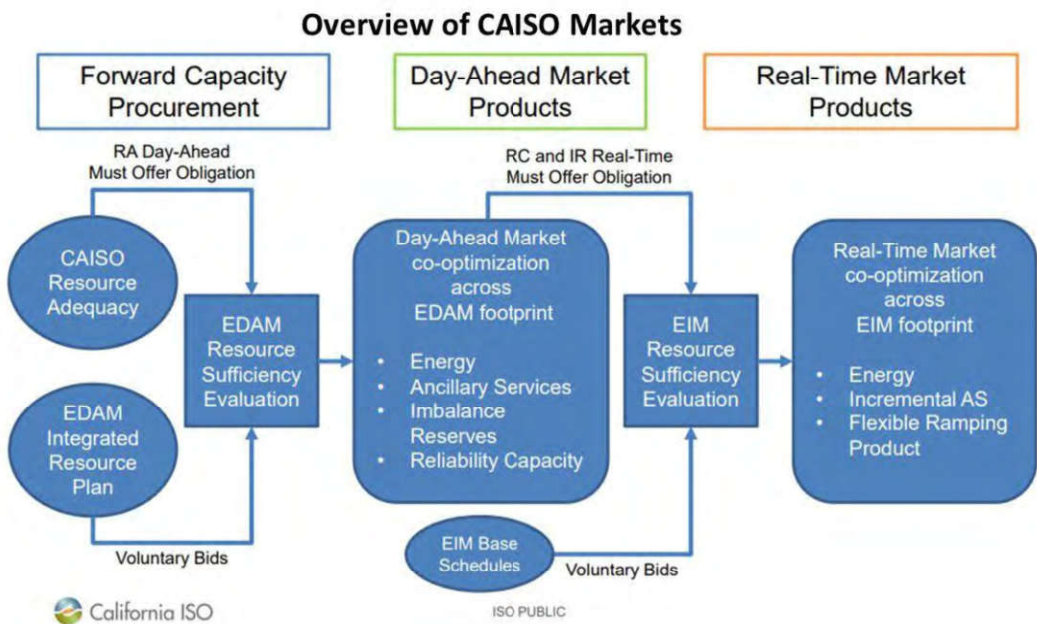
interests, it is important to distinguish between the authorities of CAISO, which is specific to California's jurisdiction, and the EIM and the EDAM, which would be multi-jurisdictional.

One solution for EDAM could be a governance framework like the EIM Transitional Committee developed, with adjustments for a larger market and more participants, Howe said. "If an initiative or a proposal would not happen but for the real time market, it goes to the EIM Governing Body first and then to the CAISO Board, but if it applies to the wider day-ahead marketplace, it goes to the CAISO Board first."

It is "reasonable" that the EIM Governing Body have primary authority, IPUC Commissioner Raper, a GRC member, agreed. But with more participants and resources like the EIM has and EDAM would have, "it has become complicated to know where the bright line is between what is limited to the EIM and what affects the market as a whole."

She is, however, optimistic about resolving challenges confronting EDAM. "I wouldn't be a part of the GRC process if I didn't think that there was a path forward," she said. "I started out as a skeptic, but I am impressed with EIM governance."

The GRC's straw proposal for EDAM governance is scheduled to be announced in early July, according to CAISO. It is also expected to address two other big questions: How to compensate transmission owners and how to set standards for resource sufficiency.



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Transmission charges

A big question is how EDAM participants will pay for transmission. EIM entities have used only available transmission at no charge. The much larger day-ahead market will require much more transmission capacity and some form of shared compensation that does not make the traded energy prohibitively expensive.

EDAM will depend on electricity delivered through transmission often built decades ago and operated by transmission owners who depend on revenues from charges to system users. The 5% of the region's energy flows in the EIM have been transferred on unused transmission provided at no charge, without exceeding transfer capacity limits.

EDAM could include almost all of the region's energy flows, which means a big leap in scale and new issues for transmission owners.

To EDAM stakeholders, the priorities for transmission charge design are maximizing use of existing transmission on a voluntary basis without disrupting existing scheduling and contracts, [CAISO's February workshop summary reported](#). EDAM should also "support efficient transmission investment" without

interfering with local control and planning, the summary said.

"The sticky points will be around the voluntary participation of the transmission owners. EDAM could push voluntary participation to its limits."

Doug Howe

Director, Western Grid Group

To EDAM entities, the priority is also that "planning and operational control" remain "unchanged," the summary said. There must also be a balance between "recovery of transmission costs and compensation for transmission utilization" in a way that facilitates and is compatible with existing market transactions.

Discussions to replace differences with compromises are ongoing.

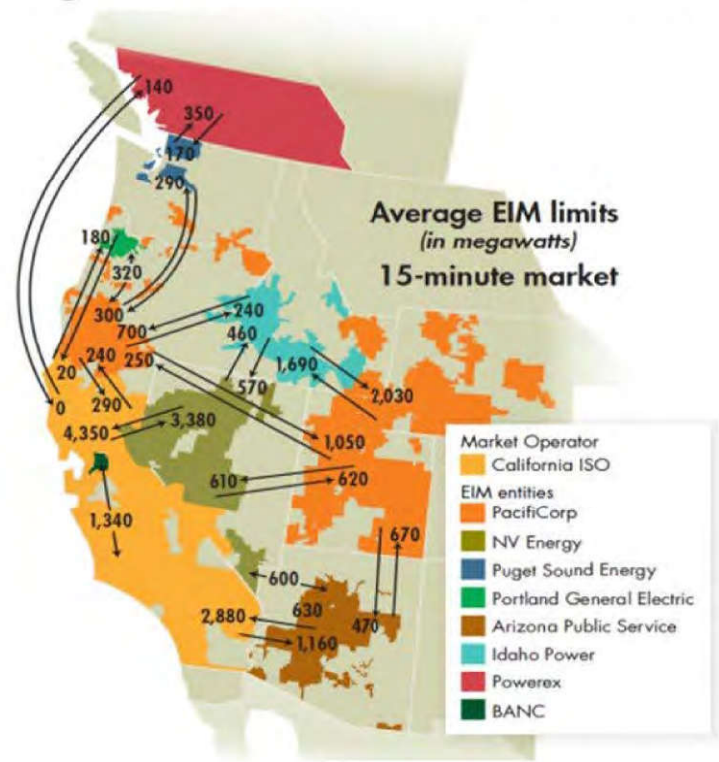
For some transmission owners, the EDAM's benefits will outweigh the transmission revenue losses, former EIM Governor Howe said. But it is unlikely all participants will be satisfied with any final proposal. "The sticky points will be around the voluntary participation of the transmission owners. EDAM could push voluntary participation to its limits."

For APS, which owns transmission assets, "there is a lot of ground to cover on the transmission charge issue" and on "transmission owners' open access obligations," Albert acknowledged. "We're trying to move something complicated ahead because it will benefit our customers, but it will not be easy."

Because entities are aware of the "substantial potential benefits" from EDAM, they are likely to resolve differences on allocation of transmission costs and benefits, Howe, Albert and others said. One approach outlined by Howe and Albert is a small energy charge for each use of the transmission system that is cumulatively enough to provide the needed revenues to transmission owners for the use of their infrastructure but not enough to impede energy trading.

How to share reliability obligations raises similar questions, stakeholders told Utility Dive.

Average EIM Transfer Limits Q3 2019



Permission granted by California Independent System Operator Corporation
<http://www.caiso.com/Documents/2019FourthQuarterReportonMarketIssuesandPerformance.pdf#search=DMM%20quarter%20report>, page 68, Fig. 2.7

Resource sufficiency

In order for large-scale energy trading between jurisdictions to work, participants must be confident that those committing generation to the day-ahead market have sufficient resources to meet those commitments.

Resource sufficiency is the term used by EDAM entities to represent that commitment. It is different from resource adequacy, which is each state's responsibility to maintain its own reliability, CAISO Governor Olsen stressed. "Absolute transparency will be needed to ensure that each participant has sufficient resources and no one entity is leaning on another for reliability."

Rules that guarantee sufficiency are likely to create "tension points" between them on how resource sufficiency is assessed because it also "goes to the larger issue of the EDAM as voluntary," former EIM Governor Howe said.

Each balancing area's responsibility to meet its own reliability needs and each state's control of its own integrated resource planning to manage reliability are CAISO stakeholders' top priorities for resource sufficiency in any region-wide extended day-ahead energy trading market, [a February CAISO Staff resource sufficiency workshop found](#). Leaving resource adequacy procurements and transmission planning to local regulatory authorities are also priorities.

"[I]f we start with the proposition that a correctly designed market can be broadly beneficial, we owe it to ourselves to work hard to solve these problems. And they can be solved."

Tony Braun

Attorney and member, Governance Review Committee

Transparently meeting individual resource adequacy obligations and maintaining local control of planning are priorities for the entities, too, [participants in the February resource sufficiency workshop agreed](#). Resources made available to other balancing areas must be "real and capable of performing," and market operations must make resource sufficiency "simple and workable" and prevent "leaning on EDAM for reliability."

A utility may obtain significant savings and emissions reductions by committing to not run a fossil fuel unit and buying lower cost renewables from another state bid into the next day's market, APS's Albert said. "A lot of value can be unleashed like that if it is clear we can rely on those bids. But reliability is something that we will not compromise."

Resolving the resource sufficiency debate requires "aligning all participants'

approaches to reliability," he added. "That means synchronizing the adequacy of our portfolios and day-ahead dispatch commitment decisions and transparently communicating business practices across the West."

The CAISO working groups are developing solutions which may be part of the July straw proposal.

When?

None of the advocates see EDAM in operation in the near term.

Though CAISO's first straw proposal is expected in early July, it is taking on "the hard stuff first," former EIM Governor Howe said. "The EIM showed the benefits to be gained and the next step is EDAM, but it is not going to happen fast."

The straw proposal will be followed by stakeholder comments, Governance Review Committee member Braun said. The committee's recommendation to EIM and CAISO Governors on governance will likely come in Q1 2021, he added.

"There's not a bright line for when EDAM will be needed," he said. Resolving market design differences takes time, and it will take time to implement that market design, "but if we start with the proposition that a correctly designed market can be broadly beneficial, we owe it to ourselves to work hard to solve these problems. And they can be solved."

Update: *An earlier version of this article said the first straw proposal for an Extended Day Ahead Market was due June 15. That timeline has been pushed back to early July.*

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Exhibit # 2-10B

September 16, 2019

Chair Linvill and EIM Governing Body:
Chair Olsen and Board of Governors:

The Western Energy Imbalance Market (EIM) has been a significant step toward achieving coordinated, efficient trading that was envisioned since early discussions to bring centralized markets to the West began over twenty years ago. We are pleased to have been a part of this endeavor, which has resulted in significant cost savings and more efficient integration of renewable resources across the EIM footprint. The CAISO's leadership and partnership on EIM to achieve these benefits for consumers is recognized and appreciated.

After careful assessment, we believe that it is time to take the next incremental step toward market expansion and consider formation of an Extended Day-Ahead Market, or EDAM, that would potentially facilitate day-ahead unit commitment and optimization across the EIM footprint.

The issues to be resolved to make EDAM a reality should not be underestimated. Governance structures must be considered that reflect the new market design and the legitimate interests that all within the broader market footprint will have in the operation and rules of the day-ahead market. In addition, it is likely EDAM will need to include a test to ensure that all participating Balancing Authorities are not leaning on neighbors to meet their continued reliability obligations. How transmission costs are addressed will also require consideration because, unlike EIM, EDAM transactions will more greatly affect transmission service revenues of participating transmission service providers. Furthermore, properly accounting for greenhouse gas emission obligations across different jurisdictions will be essential to deliver the potential efficiencies of the market while respecting state policy prerogatives.

To that end, the EIM Entities identified in this letter have developed the accompanying Principles and Elements document that outlines some of our thinking on which issues should be addressed as part of a market design stakeholder process. We recognize that these issues and more will require thorough evaluation in a stakeholder process, and approval by the Federal Energy Regulatory Commission. We are eager to begin and actively engage in that process.

Ultimately, the EDAM must work for a broad market footprint that includes CAISO and other Balancing Authority Areas in the West. We do not view this process as a “build it and they will come” exercise; only by shaping the EDAM design to be realistic, built upon known advantages of the EIM, and in recognition of the needs of the broader West, can the design hope to attract the broad participation needed to reap the potential benefits of the new market.

The EIM Entities look forward to building upon the EIM partnership we have enjoyed with the development of an EDAM that will bring even greater benefits to Western consumers.

Arizona Public Service Co.

Avista Corp.

Balancing Authority of Northern California

Idaho Power

Los Angeles Water & Power

NV Energy

NorthWestern Energy

PacifiCorp

Portland General Electric

Powerex Corp.

Public Service Company of New Mexico

Puget Sound Energy

Seattle City Light

Salt River Project

**Extended Day-Ahead Market
Principles and Elements
of the EIM Entities**

Background

- The introduction of the Western Energy Imbalance Market (EIM) in 2014 was a significant step in the development of wholesale energy markets in the West, and marked a major paradigm shift from the typical bilateral trading that occurs outside of the California Independent System Operator (CAISO) markets towards a regional organized market framework.
- The voluntary EIM has enabled participants to reduce costs for their customers, and advanced environmental objectives by providing a means to more effectively deploy resources in real-time in response to changing system conditions. EIM has also brought intangible benefits that have strengthened system reliability through improved operational awareness and the market's ability to anticipate changes in loads and resources.
- While successful, the EIM is generally limited to the relatively small pool of potential transactions that can be arranged in real-time using the residual capabilities of resources that are largely committed further in advance, according to each participant's individual operating practices. Most participants rely on the day-ahead market timeframe to make the majority of their resource commitment decisions, to finalize arrangements for natural gas or other fuels, and to execute short-term wholesale energy transactions.
- Therefore, the exploration of a voluntary, extension of EIM to a regional day-ahead market (EDAM) presents a significant opportunity to build off the success of the EIM and to pursue additional economic and environmental benefits for market participants and their respective customers in regions across the West. EDAM should extend the voluntary approach that has been successful in attracting participants to the EIM and be designed to meet the needs of the CAISO and EIM entities across the region.
- The EDAM Feasibility Assessment identified a range of potential aggregate gross benefits of \$119 to \$227 million annually, if the market is able to attract broad participation across the West. The Feasibility Assessment, however, is merely a directional indicator of possible aggregate benefits, and relies on the market's ability to attract broad participation across the West. It is neither a precise estimate of aggregate benefits, nor does it inform whether there is a positive business case for each individual EIM Entity to participate in EDAM. Further, it does not identify the extent to which

economic and environmental benefits may be reduced should only a limited number of EIM Entities elect to participate in EDAM.

- The EIM Entities therefore emphasize that there is not yet a commitment to move forward with implementing EDAM. Rather, the EIM Entities wish to work with the CAISO and stakeholders to develop a comprehensive market design proposal that will allow the EIM Entities to evaluate their own individual expected benefits and costs associated with participation in a potential EDAM.
- An appropriate governance framework with oversight and structure tailored to the goals of EDAM is critical to ensuring that a multi-state day-ahead market is designed and operated in a manner that serves the interests of consumers, market participants, and regulators across the EDAM footprint.
- In addition to governance, there are several critical market design topics - including resource sufficiency, transmission access and compensation, price formation, and greenhouse gas program application - that have the potential to greatly impact not only the magnitude of total regional benefits that may be achieved, but also the distribution of those benefits between and among participating EIM Entities and the CAISO. Only after all key market design choices have been determined, through a comprehensive stakeholder process, can each party perform its own individual evaluation of its potential *net benefits* and whether EDAM provides a market platform to move forward.
- The EIM Entities agree that any new market design must consider impacts to grid reliability. EDAM is no different and must be designed in such a manner to not degrade reliability and if possible, create ways to enhance it. Features such as resource sufficiency requirements, better transmission utilization and reduced renewable curtailment will support this requirement.
- The EIM Entities recognize that developing a workable and equitable EDAM, as an optional, incremental addition to the EIM, will be a challenge. We hope to build upon attractive elements of the EIM to enable this next incremental step forward. A successful regional day-ahead market should allow voluntary entry and ongoing participation from a diverse mix of EIM Entities across the West and bring additional benefits to the existing customers of CAISO services.
- Although EDAM presents an opportunity to build from the success of the EIM, the core design elements of EDAM must be considered carefully and not simply extended from the EIM or from the CAISO's existing day-ahead market design. Key market design choices must effectively balance a variety of potentially competing interests and priorities, ultimately providing an opportunity for participation in a well-functioning

September 16, 2019

competitive market. This can only be achieved through a comprehensive evaluation and resolution of numerous critical market design topics through a robust stakeholder process. The EIM Entities welcome the opportunity to work with stakeholders and the CAISO in this endeavor.

1. Governance and Oversight

- An appropriate Governance structure tailored to the goals of EDAM is critical to ensuring that a multi-state day-ahead market is designed and operated in a manner that serves the interests of consumers, market participants, and regulators across the EDAM footprint. The potential size and importance of a regional day-ahead market and its impact on the broader wholesale energy marketplace cannot be understated. Unlike the EIM, with its relatively small pool of real-time transactions, an EDAM could ultimately facilitate a vast amount of short-term energy transactions, representing a much larger share of the resources and loads across the west, while also potentially reducing existing bilateral market activity and opportunities.
- EIM Entities, their customers, CAISO market participants, and applicable state regulators must have confidence in a sufficiently independent governance and oversight structure that is able to represent and balance a diverse range of interests and priorities covering the scope of the day-ahead and real-time market consistent with applicable law.
- The current structure and delegated authority model for the EIM Governing Body provides a logical framework on which to build governance for a broader Day-Ahead Market. The CAISO has commenced a stakeholder process to explore improvements to EIM governance. Consistent with its charter, the Governance Review Committee should also examine oversight of the EDAM.
- The EIM Entities also wish to consider options that would establish an independent market expert to provide additional perspective on the complex and technical issues that the EDAM governing body would oversee. An independent market expert would supplement existing market monitoring and surveillance by providing a fresh and independent perspective to market design and operations, reporting directly to the EDAM governing body. This independent market expert would be particularly important in providing insight, guidance and technical support to the EDAM governing body on critical market design issues and market outcomes that may impact the distribution of benefits between different regions and/or market participants.

2. Resource Sufficiency

- Participation in the EDAM should not modify state or local control over long-term resource adequacy planning and integrated resource planning, or any other aspect of state or local generation planning and certification.

- A key design principle of the EIM design is that each entity must be able to stand on its own and not lean on the market footprint as a whole, before being granted the opportunity to trade and reap mutual efficiencies. The EIM Entities envision a day-ahead resource sufficiency (RS) test to promote system reliability by ensuring all participants in the EDAM footprint are held to a common standard that measures whether they have each secured sufficient energy, capacity, flexibility, and supporting transmission to meet a variety of potential real-time needs, with a high level of confidence.
- A well designed day-ahead RS framework with a sufficiently high standard is vital for two reasons:
 - First, an important benefit of EDAM is to achieve cost savings through a more efficient day-ahead commitment of generating units, including the displacement of internal unit commitments within one Balancing Authority Area (BAA) when more economic resources can be committed in other BAAs instead. For this reason, it is imperative that EDAM transactions can be relied upon to meet firm load without any elevated risk of curtailment due to resource shortfalls in other BAAs within the EDAM footprint.
 - Second, RS ensures fairness by preventing EDAM participants from “leaning” on the capacity and/or flexibility investments made by other EIM Entities and other regions, without explicitly compensating and contracting for it, while providing each entity with equitable access to diversity benefits.
- As it is developed, an RS test should measure whether each entity has taken sufficient steps ahead of the day-ahead market timeframe to ensure it has access to sufficient resources to serve its demand and balance its system, and be consistently applied to all participants.

3. Transmission

- Outside of CAISO, transmission customers generally take service under an Open Access Transmission Tariff (OATT) at rates that are defined by the transmission provider providing service over its facilities – an approach that is very different from transmission service within the CAISO BAA that is made available through the day-ahead and real-time markets, and for which costs are recovered using a transmission access charge applied to all load and export schedules.
- The EIM Entities believe that the EDAM must respect this existing framework. EIM Entities will continue as a Balancing Authorities and transmission providers with

responsibility to ensure reliability in their BAA and to administer their respective OATT (as may be voluntarily modified to facilitate EDAM services). Moreover, the EDAM transmission design should be reasonably compatible with existing market transactions through all market timeframes for purchases and sales, allow for continued participation in reserve sharing groups, and fully respect long-term transmission ownership rights.

- Participation in EDAM by either California or non-California utilities does not modify any existing processes for transmission planning or transmission siting. Regional and interregional transmission planning will continue under the established planning regions. EDAM may help inform transmission investment decisions, but these processes will continue independent of EDAM.
- Designing an effective EDAM transmission framework that is compatible with existing practices is a challenging task. On the one hand, many of the increased benefits of a centralized market depend on the ability for the market software to efficiently seek out economic transactions – an effort that can be impeded by a lack of available transmission and excessively high transmission “hurdle” rates. On the other hand, eliminating all “hurdle” rates can create risks of reducing the revenues Transmission Service Providers (TSPs) rely on to recover the fixed costs of their transmission facilities, of creating “winners and losers” resulting from material transmission cost shifts between transmission customers, market participants, and regions, or of simply leading to less transmission being made available to the EDAM in the first place.
- The EIM Entities believe that there are, and urge exploration of, at least two frameworks to make available transmission to EDAM:
 - 1) Potential contribution of transfer capability by the EIM Entities as transmission providers: Incremental transfer capability provided directly by the TSP itself. In this case, the transmission provided is effectively a “new” sale of transmission service by the TSP rather than an allocation of existing rights for use in EDAM. This category of transmission would therefore be subject to some incremental and potentially uniform transmission rate across the EDAM footprint that would be respected within the market optimization and distributed to the TSPs providing the incremental transmission service.
 - 2) Voluntary contribution of transfer capability by OATT transmission rights holders: Conceptually similar to the “Interchange Rights Holder” approach in EIM, OATT transmission customers should be able to voluntarily contribute those rights to EDAM in exchange for receiving a fair allocation of congestion rents on the applicable path based on EDAM prices. Such contributions should include

transmission that the EIM Entities may use to meet EDAM RS requirements, or other transmission rights that the rights holder may choose to voluntarily make available to support additional EDAM transactions.

4. Price Formation

Like most markets, the majority of short-term energy transactions in the West are executed on a day-ahead basis. A successful EDAM is likely to result in EIM Entities replacing a substantial portion of their existing day-ahead bilateral transactions with EDAM transactions. Furthermore, the impact of day-ahead price formation practices extends well beyond the settlement of day-ahead transactions themselves: they also form the typical reference prices used in valuing and settling forward contracts. Accordingly, correct price formation practices are of critical importance.

- The price formation practices must result in just, reasonable, and equitable price signals that are acceptable to both buying and selling market participants across the footprint. Prices that are inefficiently depressed or elevated will result in material and inappropriate shifts in value between buyers and sellers, and between those regions with surplus energy, capacity, flexibility, or preferred environmental attributes and those regions that rely on short-term market purchases to displace higher-cost internal resources and/or balance their systems. Any price formation choices that are either inefficient or result in material inequities can limit the prospects for attracting broad regional support for an EDAM.
- CAISO, the EIM Entities, and stakeholders must carefully evaluate a variety of options and industry best practices related to price formation, particularly given that the CAISO's current approach to dispatch bids and calculate energy prices in the CAISO's existing financial day-ahead energy market (and its inclusion of virtual supply) differs from the prices for firm, capacity-backed energy products that characterize the bilateral day-ahead market in the rest of the west.
- The CAISO day-ahead market currently co-optimizes energy and ancillary services (e.g., capacity products). In addition, the CAISO has already initiated an exploration of modifications to its existing day-ahead market. This discussion will now need to take place in the context of a broader regional day ahead market and the diverse interests and priorities across the west.
- An evaluation of price formation options for EDAM should include:

- An exploration of fast-start pricing, including examination of the current approaches in western bilateral markets, CAISO markets, and other RTOs/ISOs.
- An exploration of scarcity and shortage pricing measures, including examination of approaches in western bilateral markets, CAISO markets, and other RTOs/ISOs.

5. Greenhouse Gas

- The EDAM framework for treatment of environmental attributes should be evaluated from a fresh perspective. EDAM should assign proper accountability through the accurate allocation of the costs and/or benefits associated with greenhouse gas emissions or environmental attributes preferred by individual jurisdictions. Failure to do so creates the potential for inefficient dispatches, improper resource attribution, and inappropriate shifts in GHG-related compensation from clean suppliers to emitting resources and energy marketers.
- Jurisdictions that have not adopted a greenhouse gas pricing policy should not be improperly affected, directly or indirectly, by carbon policies adopted by other jurisdictions.
- Renewable and non-emitting resources outside of jurisdictions with greenhouse gas programs should not be unfairly disadvantaged compared to renewable and non-emitting resources inside jurisdictions with greenhouse gas programs.
- Furthermore, the potential scope of greenhouse gas programs is likely to expand beyond California's borders as carbon policies are implemented or contemplated in a growing number of jurisdictions. The EDAM GHG framework must therefore be compatible with the policies of multiple jurisdictions, even if the specific regulations vary.

6. Conclusion

The EIM Entities look forward to engaging with the CAISO and stakeholders in the EDAM stakeholder process. This will be a significant and complex undertaking that could have profound consequences for the western wholesale electric market. The EIM has demonstrated the ability of an organized market in the west to achieve savings for customers. A properly structured EDAM can be an important, incremental means to capture additional environmental and economic benefits.

Exhibit # 2-11

From: [Gore, Mollie](#)
To: [Duckworth, Charlie](#); [Poston, Mike](#); [Bonsall, Mark](#); [Penland, Geoffrey](#)
Subject: FW: Bloomberg
Date: Tuesday, July 14, 2020 8:01:00 PM

Bloomberg article...

Mollie Gore
Corporate Communications Director
Santee Cooper
843-761-7093 (o)

www.santeecooper.com
www.facebook.com/santeecooper
www.twitter.com/santeecooper

From: Terrell, Todd A. <TATERREL@southernco.com>
Sent: Tuesday, July 14, 2020 6:45 PM
To: Culbert, Erin <Erin.Culbert@duke-energy.com>; Wilkinson, Joe <jwilkinson@AECL.org>;
wmcdaniel@dutil.com; jonathan.yarborough@dominionenergy.com; ERIC BOOMHOWER
<eric.boomhower@dominionenergy.com>; Bennett, Dani <Dani.Bennett@duke-energy.com>;
Sauer, William <William.Sauer@duke-energy.com>; craig.heighton@gatrans.com; Drew Elliot
<delliot@electricities.org>; Collins, Natasha <Natasha.Collins@lge-ku.com>; Paul Warfel
<pwarfel@meagpower.org>; baynard.ward@powersouth.com; alreagan@tva.gov; Buddy Eller
(beller@tva.gov) <beller@tva.gov>; dlego@meagpower.org; Gore, Mollie
<mollie.gore@santeecooper.com>; Penland, Geoffrey <geoff.penland@santeecooper.com>; Felt,
Emily <Emily.Felt@duke-energy.com>; Sherrod Jr, Vanzell Demetrius
<VDSHERRO@SOUTHERNCO.COM>
Subject: [EXTERNAL SENDER] Bloomberg

WARNING: This e-mail is from an external sender. Use caution when opening attachments and clicking links.

Southern Co. Among Utility Giants in Talks to Form Power Market

- Dominion, Duke also participating in early-stage discussions
- Shift would boost clean energy and could lower power bills

By Gerson Freitas Jr. and Mark Chediak
(Bloomberg) --

U.S. power giants including Southern Co., Dominion Energy Inc. and Duke Energy Corp. are in talks to form a wholesale electricity market covering most southeastern states in a bid to cut costs and trade renewable energy.

The group's plan is to create an automated energy exchange, with prices set every 15 minutes, according to four of the companies participating. The talks, involving at least 14 utilities, are still in early stages, but the effort is already being called the Southeast Energy Exchange Market, or Seem, according to Southern.

The move comes as utilities are spending billions of dollars to boost clean energy capacity, slash emissions and comply with regional climate mandates. An energy market would enable them to take advantage of power from neighboring solar and wind facilities rather than having to build back-up capacity to make up for shortfalls. That alone could generate millions of dollars in cost savings.

“Southern Co. is always working to drive more value for our customers,” said company spokesman Schuyler Baehman. “If we determine that partnering with our neighbors makes sense, we’ll certainly take the appropriate steps to describe that more fully for regulators and stakeholders.”

Forming a regional market would constitute a shift for the utilities, which have resisted forming a competitive wholesale market like ones that have been developed in the Northeast and California. While the initiative being contemplated by Southern and Duke would be the first of its kind in the Southeast, it would be voluntary and allow the utilities to maintain control over their grids and generation capacity planning -- similar to one covering western states, called the Western Energy Imbalance Market.

“A new wholesale power market would be aimed at lowering the overall price of power,” said Bloomberg Intelligence analyst Kit Konolige. Because of how the utilities are regulated, lower power prices would be passed onto customers but wouldn’t have direct advantages for shareholders, he added.

The market would allow utilities from Georgia to North Carolina to Kentucky to buy and sell electricity close to the time it’s consumed while giving system operators real-time visibility across neighboring grids.

“While we’re still early in the learning phase, we’re eager to see the kind of benefits a regional energy market might have for our customers,” said Duke Energy spokeswoman Erin Culbert. “Several stakeholders in the Carolinas have expressed interest in an energy market, so when we were approached with the concept, we thought it was a good opportunity to dig in and understand more.”

Tennessee Valley Authority and Santee Cooper also confirmed they’re participating in the talks.

“We’re still in the early stage of looking at potential benefits,” Santee Cooper spokeswoman Mollie Gore said.

Dominion Energy’s South Carolina unit, Associated Electric Cooperative Inc., and Dalton Utilities are involved in discussions as well, according to Southern Co.

Dominion, Associated Electric and Dalton didn’t immediately reply to a request for comment. The talks were first reported by the Charlotte Business Journal.

While such a market would result in cleaner energy and lower power bills, the Southern Environmental Law Center, an environmental group, said more transparency is needed on the discussions. “A plan hatched in secret by the monopoly utilities that have most benefited from the status quo is not a promising vehicle to deliver that kind of change,” said senior attorney Frank Rambo.

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If you have questions, please call the Technology Service Desk at Ext. 7777.

Exhibit # 3

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

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

DECLARATION OF STEPHEN STETSON

1 1. I, Stephen Stetson, am a resident of Montgomery, County of Montgomery, State
2 of Alabama, and do hereby certify, swear or affirm under the penalty of perjury that I am
3 competent to give this declaration based on my personal knowledge, and that the following
4 statement is true and correct to the best of my knowledge.

5 2. I am the senior campaign representative for Sierra Club’s Beyond Coal Campaign
6 in Alabama, Georgia and Mississippi.

7 3. Sierra Club is the nation’s oldest and largest grassroots environmental nonprofit.
8 It is registered with the Alabama State Secretary and, thus, authorized to conduct nonprofit
9 activities in Alabama on behalf of more than 4,000 Sierra Club members who live and buy
10 electric service in this state. As relevant here, Sierra Club’s activities include participating in
11 electric utility proceedings consistent with its mission to explore, enjoy, and protect the wild
12 places of the earth; to practice and promote the responsible use of ecosystems and resources;
13 to educate and enlist humanity to protect and restore the quality of the natural and human
14 environment, and to use all lawful means to carry out these objectives. Likewise, Sierra Club
15 seeks to participate in this proceeding, especially to protect the interests of its Alabama
16 members who buy electric service from the Company, and who live, work, and recreate near
17 the power plants and related facilities under review.

1 4. On September 6th, 2019, Alabama Power Company (APC) filed the “Petition for
2 a Certificate of Convenience And Necessity”, which was lodged in the Alabama Public
3 Service Commission (PSC) as Docket 32953.

4 5. On September 27th, 2019, Sierra Club intervened in Docket 32953.

5 6. On October 9, 2019, the Commission entered a scheduling order governing the
6 CPCN docket.

7 7. On February 12, 2020, the PSC adopted a procedural order governing the CPCN
8 docket, captioned “Ruling Rescheduling Hearing And Establishing Hearing Procedures,” that
9 broadly held that “parties shall not engage in the use of social media to communicate or make
10 representations regarding any subject related to the proceedings herein during the course of
11 the hearing.” Ex. A. The procedural order governing the CPCN docket captioned “Ruling
12 Rescheduling Hearing And Establishing Hearing Procedures” negatively impacted the Sierra
13 Club and its members by unfairly restricting the Sierra Club’s ability to participate in this
14 proceeding and fulfill its responsibility to its members. Social media plays a critical role in
15 the Sierra Club’s ability to inform its members and encourage them to participate in
16 processes that are critical to fulfilling Sierra Club’s responsibilities and goals. Members
17 depend on social media coordinated by the Sierra Club to follow hearings and other
18 proceedings. These events are difficult for members to attend in person, as events like these
19 happen during the workday and oftentimes far from where members live. Many members
20 follow important events through livestreams and live updates coordinated by Sierra Club
21 staff such as myself. Live updates play a critical role in allowing the Sierra Club to inform its
22 members. Live updates allow the Sierra Club to be more precise and more engaging with the
23 information it shares with its members than through content that is not released live. While I

1 had planned to give live updates on the hearing proceedings every hour of every day during
2 the hearing, because of the rules listed under this procedural order, I was not able to
3 coordinate a livestream of this hearing for members to follow, nor was I able to provide live
4 updates to keep Sierra Club members informed and engaged.

5 8. On March 5, 2020, the PSC issued another order, titled “Order of Interim
6 Adoption,” Exhibit B, that also governed the CPCN docket. Among other things, the Order
7 of Interim Adoption provided in relevant part:

- 8 a. “Persons desiring to broadcast, record, or photograph formal hearings of the
9 Alabama Public Service Commission must make a timely written request to the
10 Secretary of the Alabama Public Service Commission (the “Secretary”) at least
11 five (5) days before the date of the formal hearing for which coverage is
12 requested. A form for such purpose is attached to this Media Coverage Plan as
13 Exhibit A. The Secretary shall then seek to obtain written consent to media
14 coverage from the parties and attorneys involved in the formal hearing as
15 provided in paragraph 4.”¹
- 16 b. “Written consent from the parties and attorney shall be obtained on a form
17 provided by and filed with the Secretary, a copy of which is attached as Exhibit B
18 to this Media Coverage Plan. When a party’s or an attorney’s written consent to
19 media coverage has been filed with the Secretary, duplicate consent forms for that
20 party or attorney shall not be required for different formal hearings in the same
21 case.” *Id.*

¹ Alabama Public Service Commission. *Media Coverage Plan* (2020). Available at:
<https://tinyurl.com/y7y5uqde>.

- 1 c. "Any party, witness, attorney, Commissioner or presiding Administrative Law
2 Judge may request a cessation of coverage. In such event, the presiding
3 Administrative Law Judge will require the recording and broadcasting to cease."
- 4 d. "No live audio or video broadcasting or social-media updates of formal hearings
5 are permitted from inside the hearing room. At the discretion of the Secretary, or
6 the Bench, such activity may be permissible in overflow rooms or in other public
7 areas adjacent to the room where the formal hearing is being conducted."
- 8 e. "Digital devices may not be used in the hearing room while formal hearing is in
9 session except by attorneys appearing before the Court and their supportive staff."

10 9. On March 9, 2020, the PSC commenced the CPCN hearing in Docket 32953. The
11 PSC did not livestream the hearing or set up an overflow room with seats. As a result, sitting
12 in the hearing room was the only opportunity for members of the public to follow the
13 proceedings they traveled from across the state to observe.

14 10. There were not enough seats in the hearing room for all of the interested members
15 of the public and media to attend the hearing and people were turned away. The February 12,
16 2020 order, in combination with the issuance of the Order of Interim Adoption constituted a
17 broad gag order by the PSC that prohibited: a) Any use of social media, such as Facebook,
18 Instagram, email, text, or Twitter, from "communicat[ing] or [making any] representations
19 regarding any subject related to the proceedings herein during the course of the hearing"
20 from any location, not just a hearing room; and b) prohibited any other form of
21 communication at all, even beyond social media, that might use any digital device, or that
22 might otherwise attempt to broadcast or record live the hearing itself.

1 11. People inside the hearing room were precluded from using their phones to check a
2 text, broadcast or record the proceedings for the benefit of those who could not find seats,
3 and the PSC stationed a security guard at the back of the hearing room who intervened even
4 when audience members quietly checked their phones.

5 12. The procedural order governing the CPCN docket captioned “Order of Interim
6 Adoption”, as well as the decisions the PSC made in carrying out the hearing also negatively
7 impacted the Sierra Club and its members by unfairly restricting the Sierra Club’s ability to
8 participate in this proceeding and fulfill its responsibility to its members. Prohibition of live
9 audio broadcasting, video broadcasting, social media updates, and digital devices prevented
10 the Sierra Club from organizing a live broadcast and prevented me from providing live
11 updates to Sierra Club members on social media, activities which, as previously mentioned,
12 are critical to the goals of the Sierra Club and its obligations to its members.

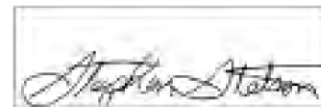
13 13. This procedural order also negatively impacted the Sierra Club’s ability to inform
14 its members in other ways. The Sierra Club often relies on photographs to engage its
15 members in issues important to the organization and its goals. Because I was unable to use
16 my phone and take photographs during the hearing, I was unable to illustrate the visual
17 layout, context, and dynamic of the room, which all would have contributed to the education
18 and engagement of Sierra Club members.

19 14. The Sierra Club invests considerable energy in encouraging local media outlets to
20 report on hearings and events important to its goals and responsibilities. The Sierra Club also
21 invests resources in informing reporters on key issues like utility regulation, so that reporters
22 can better educate both the public and our members. While the Sierra Club was able to reach
23 out to reporters, the implementation of the written request process described above made it

1 difficult for reporters we worked with to attend and bring digital devices crucial to their
2 reporting. Reporters unable to use digital devices could not record audio of the hearing,
3 hampering their ability to take notes quickly and accurately. As a former reporter, I can say
4 so. The Sierra Club relies on reporters to keep members informed.

5 15. The PSC's decision to not provide an overflow room severely impacted the Sierra
6 Club's ability to act on its responsibility to inform its members and pursue Sierra Club goals
7 with allies. The Sierra Club made considerable effort to encourage members and ally groups
8 to attend this hearing. The importance of the hearing and details to attend were discussed
9 among members of the Alabama Chapter's Executive Committee, who in turn disseminated
10 that information to members and other ally groups. The Sierra Club also sent written
11 messages about the hearing to members. I gave a presentation to the Mobile Bay Area Group,
12 an organization allied with us on this case, to encourage its members to attend. The
13 importance of this hearing was echoed by other environmental groups and advocacy
14 organizations around the state. The limited seating availability brought on by the PSC's
15 decision to not provide an overflow room meant that members and allies critical to the Sierra
16 Club's goals were not able to attend the hearing. Some members and allies who wanted to
17 attend the hearing were turned away for lack of sufficient seating.

18 16. As a result of the order issued by the PSC, Sierra Club's First Amendment rights
19 were violated, and the ability of its members to participate in the hearing, or to understand
20 the issues at play in the hearing through the communications of the Club and other press
21 avenues, was precluded.



Stephen Stetson

Exhibit # 4

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

In Re:)	
)	
)	
MEDIA COVERAGE PLAN)	
FOR FORMAL HEARINGS)	Informal Docket U-5329
OF THE ALABAMA PUBLIC)	
SERVICE COMMISSION)	
)	

COMMENTS SUBMITTED BY GASP, ENERGY ALABAMA, AND SIERRA CLUB

I. Introduction

Good governance requires transparent proceedings and well-informed citizens. While many states’ public service commissions livestream their proceedings,¹ Alabama proposes to do so only when Alabama Power Company (hereinafter “Alabama Power”), the Commissioners, Administrative Law Judge, and all other parties, witnesses and attorneys consent to such livestreaming, with no limits on when or why that consent can be withheld. Moreover, Alabama proposes that Alabama Power, and any other party, witness or attorney, be able to rescind the ability to livestream at any point during the hearing, for any reason. The Media Coverage Plan is not only unconstitutional and unlawful, but also contravenes the *public*-facing and *public*-serving role of Alabama’s *Public Service Commission* (hereinafter “PSC”).

Both the First Amendment to the U.S. Constitution and the Alabama Open Meetings Act prohibit the Alabama PSC from unilaterally deciding—or delegating to parties, witnesses or

¹ As just some examples, public service commissions in Connecticut, Florida, Georgia, Maryland, Massachusetts, Mississippi, New York, Rhode Island, South Carolina, Virginia and West Virginia all livestream their hearings.

attorneys the decision—whether persons or media outlets are licensed to record hearings, as well as the power to revoke that license at will.

The PSC Media Coverage Plan also makes for bad policy, as it penalizes Alabama Power customers who cannot attend hearings in person—possibly because they cannot afford to travel to Montgomery, take multiple days off of work to attend a hearing, or physically fit into an overcrowded hearing room. When APC’s most recent public hearing began on March 9, 2020, the hearing room did not have enough seats, or even enough standing room, to accommodate all of the members of the public who wanted to attend. Customers who care enough about their utility’s expansion plans to travel to the PSC’s offices in Montgomery should have a right to hear the ostensibly public proceedings taking place there.

In many ways, utilities’ proceedings are already far less open and transparent in Alabama than in neighboring states. For example, Alabama Power conducts its Integrated Resource Plan (“IRP”) process privately, while the nearby states of Georgia, North Carolina, South Carolina, Mississippi, Virginia and West Virginia, among other states, have open and public IRP processes. Alabama Power—in contrast with utilities in Georgia, Mississippi, North Carolina, South Carolina, Virginia, West Virginia and other states—regularly raises its rates without holding public hearings on rate increases. When Alabama Power does appear before the PSC, such as in its March 2020 hearing, the PSC does not provide individual members of the public with any opportunities to speak or submit questions or comments for consideration. In contrast, individuals are permitted to voice their views during hearings before public service commissions in Florida, Georgia, Mississippi, North Carolina, South Carolina, Virginia and West Virginia, among other states.

Gasp, Energy Alabama and Sierra Club (hereinafter “Commenters”) provide the following Comments on the Alabama PSC Media Coverage Plan (hereinafter the “Media Coverage Plan”).

II. Background on Commenters

Energy Alabama is a 501(c)(3) nonprofit organization representing the interests of the public in Alabama with a mission to accelerate the state’s transition to sustainable energy. Energy Alabama recognizes the clear benefits of sustainable energy, which include lowering energy bills for residents of the State of Alabama, boosting Alabama’s economy, and reducing Alabama’s use of fossil fuels.

Energy Alabama has an interest in, has intervened in, and has actively participated in proceedings before the Alabama PSC, including, but not limited to, Docket 32953 and Docket U-4226. Therefore, Energy Alabama is directly affected by the PSC Media Coverage Plan. Energy Alabama was blocked from communicating (using devices such as smartphones, tablets or laptop computers) during the formal public hearings for Docket 32953 held March 9-11, 2020 with its legal counsel, other staff members of the organization, and the organization’s members. This infringement impeded Energy Alabama’s ability to represent its members’ interests and consequently led to a weakening of the record in Docket 32953.

Gasp is a 501(c)(3) nonprofit health advocacy organization with a mission to advance healthy air and environmental justice in Alabama. Gasp strives to reduce air pollution and to educate the public on the health risks associated with poor air quality in order to secure the right of Alabamians to breathe clean air. Gasp brings this action on behalf of itself and its members.

Gasp has an interest in and has actively participated in proceedings before the Alabama

PSC, including, but not limited to, Docket 32953 and Docket U-4226. Therefore, Gasp is directly affected by the PSC Media Coverage Plan. Gasp was blocked from communicating (using devices such as smartphones, tablets or laptop computers) during the hearing with its legal counsel, other staff members of the organization, and the organization's members during the formal public hearings for Docket 32953 held March 9-11, 2020. This infringement impeded Gasp's ability to represent its members' interests and consequently led to a weakening of the record in Docket 32953.

Sierra Club, the nation's largest and oldest environmental nonprofit organization, aims to improve environmental quality for its many members who live, recreate, work and purchase electricity in Alabama. Sierra Club recently participated in a hearing in Docket 32953 before the Alabama PSC. As occurred with Energy Alabama and Gasp, Sierra Club's ability to communicate was restricted during that hearing, and its members were similarly prevented from communicating with counsel. Thus, Sierra Club is directly affected by the PSC Media Coverage Plan.

III. The PSC Media Coverage Plan Is Not a “Reasonable” Rule under the Alabama Open Meetings Act Because It Is Unconstitutional and Contravenes the Common Practices Adopted by Alabama’s Sister States

The Alabama Open Meetings Act provides that “the deliberative process of governmental bodies shall be open to the public during meetings, as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state laws or statutes, all meetings of a governmental body shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the

requirements of Section 36-25A-3.” Ala. Code § 36-25A-1. The Open Meetings Act also states that “a meeting of a governmental body, except while in executive session, may be openly recorded by any person in attendance by means of a tape recorder or any other means of sonic, photographic, or video reproduction provided the recording does not disrupt the conduct of the meeting. The governmental body may adopt *reasonable* rules for the implementation of this section.” Ala. Code § 36-25A-6 (emphasis added).

Title 37 of the Alabama Code establishes the PSC as “consisting of a president and two associates who shall be competent persons and qualified electors of this state.” Ala. Code § 37-1-1. Title 37 of the Alabama Code also references the need for the public information officer of the PSC to give advance notice of public meetings. *See* Ala. Code § 37-1-8. The Alabama PSC is subject to the Open Meetings Act, as it is a “commission[] of the executive or legislative department of the state” and “expend[s] or appropriate[s] public funds.” Ala. Code § 36-25A-2(4). Additionally, because the PSC is subject to the Open Meetings Act, any person may record a meeting of the PSC in a non-disruptive manner, and the PSC may adopt only *reasonable* rules for recordings of its meetings. *See* Ala. Code § 36-25A-6 (emphasis added).

Commenters specifically object to Paragraphs 3,² 4,³ 14,⁴ 15⁵ and 18⁶ of the Media

² “Persons desiring to broadcast, record, or photograph formal hearings of the Alabama Public Service Commission must make a timely written request to the Secretary of the Alabama Public Service Commission (the “Secretary”) at least five (5) days before the date of the formal hearing for which coverage is requested. A form for such purpose is attached to this Media Coverage Plan as Exhibit A. The Secretary shall then seek to obtain written consent to media coverage from the parties and attorneys involved in the formal hearing as provided in paragraph 4.” Alabama Public Service Commission, *Media Coverage Plan* (2020) available at <https://tinyurl.com/y7y5uqde>.

³ “Written consent from the parties and attorney shall be obtained on a form provided by and filed with the Secretary, a copy of which is attached as Exhibit B to this Media Coverage Plan. When a party’s or an attorney’s written consent to media coverage has been filed with the Secretary, duplicate consent forms for that party or attorney shall not be required for different formal hearings in the same case.” *Id.*

Coverage Plan. We contend the Media Coverage Plan is not a reasonable rule for recording the PSC's meetings because: (1) the Media Coverage Plan is an unconstitutional prior restraint on speech; (2) even if it were not a prior restraint on speech, the Media Coverage Plan would be an unconstitutional time, place and manner restriction; and (3) the Media Coverage Plan deviates from neighboring states' rules regarding public meetings. Sections IV, V and VI of this Comment discuss these three points in greater detail.

IV. Paragraphs 3, 4 and 18 of the PSC Media Coverage Plan Constitute an Unconstitutional Prior Restraint on Speech

A. The First Amendment, by Way of the Fourteenth Amendment, Applies to the State of Alabama, and Thus the PSC, a State Government Agency

The U.S. Constitution is the "supreme Law of the Land," and "[i]t is emphatically the province and duty of the judicial department to say what the law is." U.S. Const. art. VI; *Marbury v. Madison*, 1 Cranch 137, 177 (1803). "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court ... is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Cooper v. Aaron*, 358 U.S. 1, 18 (1958)

[1] "Any party, witness, attorney, Commissioner or presiding Administrative Law Judge may request a cessation of coverage. In such event, the presiding Administrative Law Judge will require the recording and broadcasting to cease." *Id.*

⁴ "No live audio or video broadcasting or social-media updates of formal hearings are permitted from inside the hearing room. At the discretion of the Secretary, or the Bench, such activity may be permissible in overflow rooms or in other public areas adjacent to the room where the formal hearing is being conducted." *Id.*

⁵ Digital devices may not be used in the hearing room while formal hearing is in session except by attorneys appearing before the Court and their supportive staff." *Id.*

⁶ "Any party, witness, attorney, Commissioner or presiding Administrative Law Judge may request a cessation of coverage. In such event, the presiding Administrative Law Judge will require the recording and broadcasting to cease." *Id.*

(citing U.S. Const. art. VI, § 2).

Since 1925, the Supreme Court has held that the First Amendment's free speech clause applies to the states by way of the Fourteenth Amendment. *Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925); *see Cent. Hudson Gas v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980); *Freedman v. State*, 197 A.2d 232, 234 (1964); *rev'd on other grounds*, 380 U.S. 51, 85 (1965). The liberty of the press, and of speech, is within the liberty safeguarded by the Fourteenth Amendment's due process clause from invasion by state action. The Supreme Court found it was impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guarantee of fundamental rights of person and property. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931); *Gitlow*, 268 U.S. at 666. According to the U.S. Supreme Court, the "power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured." *Olson*, 238 U.S. at 708.

As discussed in greater detail above, because the Alabama PSC is an agency of the State of Alabama, and the First Amendment applies to the State of Alabama, the Alabama Public Service cannot unlawfully restrict speech protected by the First Amendment.

B. The Act of Recording PSC Proceedings Is Protected Speech Under the First Amendment

The Supreme Court has held that conduct can be a form of protected speech. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933–34 (1982) (holding that giving speeches is protected by the First Amendment); *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment."). Nonverbal conduct is protected by the

First Amendment when the speaker has “[a]n intent to convey a particularized message . . . and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” *Spence v. Washington*, 418 U.S. 405, 410-411 (1974). In *Blackston v. Alabama*, the Eleventh Circuit found that prohibiting plaintiffs from filming a public committee violated their First Amendment rights. 30 F.3d 117, 120 (11th Cir. 1994).

The conduct of recording a PSC meeting, which is protected by statute in Alabama, is also constitutionally protected speech. When exercising one’s right to record a public meeting, such as a PSC meeting, one is engaged in “[a]n intent to convey a particularized message,” and being that such message is in the form of a video recording, there is a strong “likelihood [...] that the message would be understood by those who viewed it.” *See Spence*, 418 U.S. at 410-411. If the PSC were to outright prohibit such protected speech—which it does not do, despite dancing close to that line—the PSC would clearly violate the First Amendment. *See Blackston*, 30 F.3d at 120. Regardless, the Media Coverage Plan, as it is currently written, would violate the First Amendment by serving as an unconstitutional prior restraint on speech.

C. Paragraphs 3, 4 and 18 of the PSC Media Coverage Plan Create a Prior Restraint on Speech That Violates the First Amendment

Laws requiring the receipt of licenses before one can engage in protected speech, and providing state governmental officials with “arbitrary power or an unfettered discretion” over whether to award such licenses, are considered “prior restraints.” *See Cox v. State of New Hampshire*, 312 U.S. 569, 766 (1941). The U.S. Supreme Court subjects prior restraints to very strict scrutiny, and has held that “[a]ny prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity.” *Keefe*, 402 U.S. at 419 (quoting another

source) (internal quotation marks omitted). A prior restraint on pure speech can be justified only if the speech to be forbidden threatens a constitutional value even more precious than the First Amendment. *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (“It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”). The *Freedman* principle prohibits states from requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right to free expression. *Freedman v. Maryland*, 380 U.S. 51, 58-61 (1965).

Paragraph 3 of the PSC Media Coverage Plan requires that “[p]ersons desiring to broadcast, record or photograph formal hearings of the Alabama PSC [] make a timely written request to the Secretary [...] at least five (5) days before the date of the formal hearing for which coverage is requested.” This effectively establishes a licensing system; in order to engage in the protected expression of recording PSC meetings, persons and media outlets must receive advance permission to do so.

Because the Media Coverage Plan improperly accords the PSC unfettered discretion over whether to grant licenses, a power that the PSC proposes to extend to Alabama Power as well, it operates as a prior restraint. Neither Paragraphs 3 nor 18 of the PSC Media Coverage Plan provides state officials with any standards dictating when or why to grant licenses. Instead, the

Media Coverage Plan allows the PSC to deny a license to record, broadcast or photograph proceedings at any time, for apparently any reason. Even after the PSC has granted this license, Paragraph 18 authorizes Commissioners, Administrative Law Judges and Alabama Power to revoke this license at any time, for any reason. Even more problematically, Paragraph 18 requires the PSC to revoke licenses provided to persons or media outlets upon the request of any party, attorney or witness, which can occur at any time, for any reason. Thus, the PSC Media Coverage Plan is a prior restraint on speech.

There is a heavy presumption against the constitutional validity of prior restraints of expression, and the PSC failed to meet its burden of showing justification for the imposition of such a restraint. *See Keefe*, 402 U.S. at 419. The U.S. Supreme Court has indicated very few scenarios that justify a prior restraint. In *Near v. Minnesota*, the Chief Justice indicated three exceptions to the rule of no prior restraint: when the nation is at war, obscenity and sedition. *Near*, 283 U.S. at 716. Clearly, the PSC cannot show that it has a substantial interest in protecting against any of these concerns through Paragraphs 3 or 18 of its Media Coverage Plan. Accordingly, the PSC could not meet its burden of proof that Paragraphs 3 and 18 are supported by a significant government interest.

Moreover, the Plan runs afoul of the *Freedman* principle. Paragraph 3 clearly requires persons, who otherwise have the right to record under Ala. Code § 36-25A-6, to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of free expression. *Freedman*, 380 U.S. at 58-61. Even if a request five days in advance of a formal hearing in which a person or media outlet wanted to exercise its right to record a public meeting were reasonable, Paragraph 3 creates additional procedures. The form in Exhibit A is

not cumbersome; however, that such a request must also be consented to by a “party” or an “attorney involved in the formal hearing” is clearly both cumbersome and time-consuming—and problematically, purports to extend to third parties the authority to unlawfully restrain speech. Approval by the Secretary allows for the “uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official.” Surely the additional requirement of consent from a “party” or an “attorney” would constitute “an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.” *Shuttlesworth*, 394 U.S. at 151 (quoting another source) (internal quotation marks omitted). Accordingly, Paragraph 3 of the PSC Media Coverage Plan clearly violates the *Freedman* principle, which further illustrates it is an unlawful prior restraint on speech.

Because there is a heavy presumption that prior restraints on speech violate the First Amendment, and because the First Amendment applies to the State of Alabama, Paragraphs 3 and 18 of the PSC Media Coverage Plan are profoundly concerning to Commenters. Commenters feel strongly that Paragraph 3 and 18 constitute an unlawful prior restraint on speech. We think it highly unlikely that Paragraphs 3 and 18 of the PSC Media Coverage Plan can be justified by saying that a person’s right to record a public meeting should be forbidden because it threatens a constitutional value even more precious than the First Amendment. *See Procter & Gamble Co.*, 78 F.3d at 226-27 (stating that national security and Sixth Amendment concerns failed to justify a prior restraint). Certainly, the Commission’s proposed media plan does not identify any such constitutional value. Accordingly, we urge the PSC to eliminate Paragraphs 3 and 18 of the PSC Media Coverage Plan in their entirety.

V. Even If the PSC Media Coverage Plan Were Not a Prior Restraint Providing the PSC with Unfettered Discretion, It Would Be an Unconstitutional Time, Place and Manner Restriction

If a court were to consider the PSC's Media Coverage Plan and conclude it is not a prior restraint, the Media Coverage Plan would be classified as a time, place and manner regulation on speech, because it limits when persons or media outlets may engage in protected speech without restricting the content of that speech. *See, e.g., Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

"[R]egulations of the time, place, and manner of expression" are constitutional only when they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The burden would be on the PSC to show that the prior restraint on speech in Paragraphs 3 and 18 of the Media Coverage Plan is supported by a significant government interest. While the term "significant" is not defined, it is difficult to imagine the PSC's interest in allowing parties, attorneys and witnesses to unilaterally prevent reporting of its proceedings would be deemed significant. The PSC cannot be deemed to have an interest in maintaining the privacy of its public meetings, as the PSC is undisputedly a public forum. Preventing disruption in public proceedings could constitute a significant interest, but Paragraph 2 protects that particular interest, whereas Paragraphs 3 and 18 do not.

Paragraphs 14 and 15 of the PSC Media Coverage Plan unreasonably limit alternative avenues of communication, thus failing the fourth prong of the *Perry* test. Paragraph 14 prohibits

certain types of recording (that are otherwise allowed under Ala. Code § 36-25A-6). Paragraph 15 prohibits the use of any devices that would be technologically capable of not only communication, but also the recording allowed under Ala. Code § 36-25A-6. Representatives from Gasp, Energy Alabama and Sierra Club were unable to communicate with their attorneys during the formal public hearings for Docket 32953 held in March 2020, as a result of Paragraph 15. Further, although the prohibited activity in Paragraph 14 may be allowed in an “overflow room,” the Secretary has unfettered discretion over whether to allow such activity. The Media Coverage Plan imposes restrictions in Paragraphs 3, 4 and 18 on “broadcast[ing], record[ing] or photograph[ing]” public meetings. Commenters contend that the restrictions in Paragraphs 14 and 15 unreasonably and unconstitutionally limit the channels of communication that could serve as alternatives to broadcasting, recording or photographing the PSC’s meetings. Thus, even if the PSC Media Coverage Plan were not an unconstitutional prior restraint, it would fail the *Perry* test for regulations on the time, place and manner of expression.

VI. The Unreasonableness of Paragraphs 3, 4, 14, 15 and 18 Is Clearly Apparent When Contrasted with the PSCs’ Media Rules in Mississippi and Georgia, States That Regulate Other Southern Company Subsidiaries

A. The Georgia PSC Does Not Place Any Restrictions on the Use of Social Media or Electronic Devices in Hearing Rooms, and Livestreams All of Its Meetings

The Georgia PSC livestreams all of its meetings, including formal hearings, on the internet.⁷ The Georgia PSC prominently displays on its website the ability for visitors to watch hearings live and to watch any previous meeting or hearing of the PSC.

⁷ See *Livestream*, Georgia Public Service Commission, <http://livestream.com/psc> (last visited May 14, 2020).

Further, the Georgia PSC does not place any restrictions on the use of electronic devices inside a hearing room for any type of meeting. Members of the media, including print, radio and television, are allowed inside the hearing room with equipment. Parties to the case are not allowed to block or otherwise stop any person or media outlet from recording or reporting from inside the hearing room.

The Georgia PSC does not place any restriction on the use of social media by any person or media outlet present at a PSC hearing or meeting. The Georgia PSC rules do not require anyone wishing to broadcast, record or photograph hearings to submit a form in advance (much less is there an added condition of requiring further approval from “parties and the attorney” involved in the hearing).

B. The Mississippi PSC Does Not Place Any Restrictions on the Use of Social Media or Electronic Devices in Hearing Rooms, and Livestreams All of Its Meetings

The Mississippi PSC livestreams all of its meetings, including formal hearings, on YouTube.⁸ The Mississippi PSC prominently displays on its website the ability for visitors to watch hearings live, and its YouTube channel allows visitors to watch any previous meeting or hearing of the PSC.

The Mississippi PSC does not place any restrictions on the use of electronic devices inside a hearing room for any type of meeting. Members of the media, including print, radio and television, are allowed inside the hearing room with equipment. Parties to the case are not allowed to block or otherwise stop any person or media outlet from recording or reporting from inside the hearing room. The Mississippi PSC does not place any restriction on the use of social

⁸ See *Mississippi Public Service Commission*, YouTube, http://www.youtube.com/channel/UCh7aLORd63J2_xhIp9uqKHQ (last visited May 14, 2020).

media by any person or media outlet present at a PSC hearing or meeting.

The Mississippi PSC has published a “Ratepayer Bill of Rights,” which states, “Ratepayers shall have the right to view or listen to Mississippi PSC hearings and docket calls that are held in the PSC’s Courtroom via the Internet.”⁹ The Mississippi PSC rules do not require anyone wishing to broadcast, record or photograph hearings to submit a form in advance (much less is there an added condition of requiring further approval from “parties and the attorney” involved in the hearing).

C. Given That the Alabama PSC Media Coverage Plan Is More Restrictive than the Rules Issued by PSCs That Regulate Other Southern Company Subsidiaries, Paragraphs 3, 4, 14, 15 and 18 Are Unreasonable and Due to Be Revised

As is discussed in Sections IV and V of this Comment, Paragraphs 3, 4, 14, 15 and 18 of the Media Coverage Plan are unreasonable due to multiple constitutional issues. Moreover, the Media Coverage Plan is unreasonable because Georgia and Mississippi’s PSCs do not have any requirements to request to record public meetings (or a second layer of approval of such requests by parties and their attorneys).

Further, where one could reasonably assume some level of communication or coordination goes on between PSCs and PUCs across the country, and Alabama PSC Commissioners have the same ability to access the internet as Commenters who located the Georgia and Mississippi PSC rules, it is unclear why the Alabama PSC has chosen to create a much more restrictive Media Coverage Plan. Given that Mississippi and Georgia impose none of the restrictions complained of in this Comment—namely, requiring requests to record public

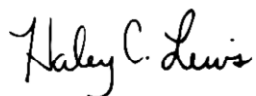
⁹ See *Bill of Rights*, Mississippi Public Service Commission, <http://www.psc.ms.gov/exec-sec/rights> (last visited May 14, 2020).

meetings, and restricting digital devices in the hearing room—it is clear that the Alabama PSC Media Coverage Plan is unreasonably restrictive. This issue is compounded by the fact that the Alabama PSC, unlike the Georgia and Mississippi PSCs, does not broadcast a livestream of its meetings. Taken together, Paragraphs 3, 4, 14, 15 and 18 are not reasonable, and thereby violate § 36-25A-6 of the Alabama Open Meetings Act. We suggest that these paragraphs be removed in their entirety.

VII. Conclusion

Under Alabama law, persons are afforded the right to openly record public meetings of state agencies, including the PSC. With this Media Coverage Plan, the PSC is attempting to exercise its right to implement rules regarding a person's right to record its public meetings. However, Commenters contend that the PSC neglected to implement *reasonable* rules, as the state statute requires. Moreover, Paragraphs 3, 4 and 18 create an unlawful prior restraint on speech that infringes on not only the statutory rights of people wishing to record PSC meetings, but also their First Amendment rights. Additionally, given that PSCs in Georgia and Mississippi have no such similar restrictions, the PSC Media Coverage Plan is further shown to be unreasonable. As such, Commenters urge the PSC to eliminate Paragraphs 3, 4, 14, 15 and 18 in their entirety from the PSC Media Coverage Plan.

Respectfully submitted this 15th day of May, 2020.



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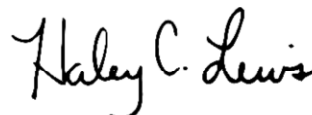
Appendix: Comparing Alabama PSC Media Coverage Plan to Other States' Policies

	State											
Process	AL	CT	FL	GA	MA	MD	MS	NC	NY	SC	VA	WV
Livestream public PSC meetings		✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Allow use of digital devices by public and/or media during PSC meetings		✓	✓	✓	N/A	✓	✓	✓	N/A	✓	✓	✓
Allow public comment at PSC hearings or through formal comment process		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Hold (or are moving toward) public IRP (or state variant)			✓	✓	N/A	N/A	✓	✓	N/A	✓	✓	✓
Hold public PSC hearings for rate increases		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, a copy of Gasp, Energy Alabama, and Sierra Club's Comments on the Media Coverage Plan for Formal Hearings of the Alabama Public Service Commission was served upon the following by electronic mail, electronic submission and/or placing a copy of same in the United States Mail, postage prepaid to:

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
P.O. Box 304260
100 North Union Street
Suite 950
Montgomery, AL 36130-4260

A handwritten signature in black ink that reads "Haley C. Lewis". The signature is written in a cursive, flowing style.

Attorney for Gasp

Exhibit # 5

	State											
Process	AL	CT	FL	GA	MA	MD	MS	NC	NY	SC	VA	WV
Livestream public Commission meetings		✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Allow use of digital devices by public and/or media during Commission meetings		✓	✓	✓	N/A	✓	✓	✓	N/A	✓	✓	✓

