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VIA OVERNIGHT AND ELECTRONIC DELIVERY

trial



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ALABAMA PUBLIC SERVICE COMMISSION

WALTER L. THOMAS, JR., SECRETARY

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October 23, 2020

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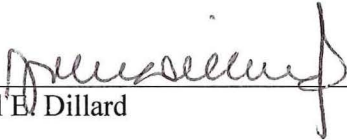
Walter L. Thomas, Jr., Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 850
Montgomery, AL 36104

Re: Docket 32953, Sierra Club's motion for leave to make discovery requests to Alabama Power Company and Commission Staff

Dear Secretary Thomas:

Please accept this "hard copy" filing of Sierra Club's motion for leave to make discovery requests and discovery requests to Alabama Power Company and Commission Staff. I have submitted this filing electronically today, and am making certain that its overnight delivery to you will be accomplished Monday (your next day after our electronic filing).

Respectfully yours,


Joel E. Dillard

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BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

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

SIERRA CLUB’S MOTION FOR LEAVE TO MAKE DISCOVERY REQUESTS AND DISCOVERY REQUESTS TO ALABAMA POWER COMPANY AND COMMISSION STAFF

Sierra Club hereby moves for leave to make discovery requests and encloses its requests to Alabama Power Company and Commission Staff for two sets of critical documents. As shown below, these documents should have already been produced. They still can and should be produced to afford the Commission the opportunity to render an informed decision in this case, with due process afforded to all participants.

BACKGROUND

1. There continue to be two core issues for the Commission to resolve upon evidence adduced at a hearing—whether Alabama Power truly needs its billion-dollar gas expansion, and whether this expansion truly is least cost and prudent, or whether Alabama Power can continue and perhaps expand its four-decades-long practice of surplus-sharing with others to serve its customers at a lower cost.
2. Because Sierra Club and other parties filed petitions for a rehearing of these core issues on September 11 and 14, the Commission must hold such a rehearing within 60 days, by November 13, per section 37-1-105, Code of Alabama.
3. The documents Sierra Club seeks are relevant to the core issues to be reheard, and responsive to previous discovery requests, as discussed in Sierra Club’s petition for a rehearing, and reiterated below.
4. One set of documents concerns Southern Company’s and Alabama Power’s ongoing negotiations to form the Southeast Energy Exchange Market (SEEM), a regional market

to expand surplus-sharing, that is, buying and selling surplus power on an as-needed basis. These documents were clearly responsive to previous discovery requests, but were never produced by Alabama Power, as Alabama Power had signed a non-disclosure agreement and conducted such negotiations in secret during the pendency of this case. In fact, Alabama Power does not deny that it hid its SEEM negotiations from the Commissioners, Staff, and other parties.

5. The other set of documents are from Staff and expressly relied on by the Commissioners to dismiss further inquiry into the impacts of the coronavirus-induced recession on Alabama Power's alleged needs. These documents were never adduced at a hearing, were never entered into the record, nor were subject to examination by the parties. In fact, Alabama Power does not deny that it alone is privy to these documents, and that they were only identified in general terms in its post-hearing brief and the Commission's order on the merits.

APPLICABLE LEGAL STANDARD

6. When the Commission holds the rehearing as required by section 37-1-105, it must do so consistent with its other statutory duties, including (1) its duty to collect and make publicly available the information that is "necessary to a full knowledge of [Alabama Power's] business and affairs," per section 37-1-32,¹ and (2) its duty to act on the evidence that is adduced

¹ The statute states:

The Public Service Commission shall have general supervision of all persons, firms and corporations operating utilities mentioned in this title, shall inquire into the management of the business and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such utilities as often as may be necessary to keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this title, and any other law or laws, with the

at a hearing, per section 37-2-48.² The rehearing is also subject to the Commission’s *Rules of Practice*, the *Alabama Rules of Evidence*, and the *Alabama Rules of Civil Procedure*.³

DISCUSSION

7. At the outset of this case, Alabama Power pinpointed surplus-sharing’s direct relevance to the core issues before the Commission: Alabama Power cited its historically proven ability to meet power demand at a lower cost by relying on a broader pool of power supply than the generating units it directly owns or controls, including in particular generating units owned or controlled by Alabama Power’s parent company, Southern Company.⁴ Further, Alabama Power acknowledged that it can and will rely on that broader pool of generation to cost-effectively meet electricity demand until at least 2023.⁵ But Alabama Power also claimed that its billion-dollar gas expansion is “necessary and appropriate” thereafter.⁶

orders of the commission, and with the charter and franchise requirements. *It shall assemble and keep on file, available for the use of the public, full statistics on the foregoing, as well as on all other matters or things connected with such utilities as is necessary to a full knowledge of their business and affairs.*

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

² Ala. Code § 37-4-28 (authorizing Commission action only after a hearing); *see also Ala. Pub. Serv. Comm’n v. S. Bell Tel. & Tel. Co.*, 42 So. 2d 655, 666–67 (Ala. 1949) (“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.”).

³ Ala. Code § 37-1-105 (authorizing Commission to hold a rehearing subject to rules it prescribes). The Commission’s website provides notice that “[e]xcept where noted to the contrary in the Commission’s *Rules of Practice*, the Commission generally adheres to the *Alabama Rules of Evidence* as well as the *Alabama Rules of Civil Procedure* in the conduct of proceedings.” <http://psc.alabama.gov/Legal/LegalMain.htm>.

⁴ *See, e.g.*, J. Kelley Direct Test. at 4-5.

⁵ *See, e.g.*, J. Kelley Direct Test., Ex. JBK-1, at 33 (APC H’rg Ex. 20).

⁶ Ala. Power Co. Pet. for Certificate and Convenience at 2.

8. Sierra Club and other parties subsequently made discovery requests for the basis for Alabama Power's claim that its proposed gas expansion is necessary and appropriate, as opposed to continuing and perhaps expanding its practice of surplus-sharing.⁷

9. Only much later, after the three-day evidentiary hearing, after post-hearing briefing, and after the Commission voted on the merits of Alabama Power's proposed gas expansion, news reports surfaced that Alabama Power and its sister and parent companies have been secretly negotiating an even broader power pool—SEEM—that Alabama Power could draw upon to meet its alleged need at even lower costs. As reflected in Sierra Club's expert witness' testimony filed with Sierra Club's petition for a rehearing, the subject matter of Alabama Power's secret negotiations are directly relevant to the core issues in this case,⁸ and as noted the negotiations are also responsive to previous discovery requests.

10. In addition, the coronavirus has induced a recession in this country. Because the recession's impacts have been significant and protracted, including specifically less electricity demand on Alabama Power's grid and neighboring grids,⁹ Sierra Club and others urged the Commission to inquire further into the recession's impacts on Alabama Power's alleged needs to

⁷ As discussed in Sierra Club's motion to supplement the record and its petition for a rehearing, previous discovery requests broadly sought the facts and documents that support or bear on Alabama Power's claim. Clearly, the SEEM negotiations are responsive; it was not possible or necessary for requesters to specifically refer to those *secret* negotiations that Alabama Power hid from them. *See, e.g.*, J. Kelley Depo. 121:4-127:22; 129:3-22 (stating inquiry into further surplus-sharing was "impractical" and not done by Alabama Power); *see also* R. Wilson Test. 7-11 (questioning sufficiency of Alabama Power's inquiry into further surplus-sharing); J. Pollock Test. at 11-13 (same); Sierra Club's Motion to Deny Petition (same).

⁸ *See* Sierra Club Pet. for Reconsideration and Rehearing, Ex. 1.

⁹ For example, the U.S. Energy Information Administration reported that by this summer demand in Southern Company's service area had dropped by 12% relative to an average of the four prior years. *See* http://www.eia.gov/realtime_grid/knownissues/xls/SOCO.xlsx.

own and control more power supply. However, Staff's recommendation and the Commission's order dismissed such further inquiry based on unspecified discovery, data, and other documents in Staff's custody. But whatever those materials were, they were not properly before the Commissioners, because as noted they were never adduced at a hearing, were never entered into the record, nor were subject to examination by the parties; only Alabama Power has been privy to those documents.

11. Sierra Club and others have sought a rehearing to include, among other things, the secret SEEM negotiations and the recession's impacts.

12. When the Commission holds the rehearing it will consider "new evidence" that "must not appear to be merely cumulative," per Rule 21(A) of its *Rules of Practice*. If "justified," it will also allow "the introduction of additional testimony," per Rule 21(B) of its *Rules of Practice*.

13. Meanwhile, discovery requests may be made "within a reasonable period of time from the filing of testimony and a reasonable time before the hearing," per Rule 16 of the Commission's *Rules of Practice*. Such discovery should "appear[] reasonably calculated to lead to the discovery of admissible evidence," per Rule 26(b)(1) of the *Alabama Rules of Evidence*. Relevant evidence is generally admissible, per Rule 402 of the *Alabama Rules of Civil Procedure*. And relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," per Rule 401 of the *Alabama Rules of Evidence*.

14. The law recited above fully supports the discovery of the SEEM- and recession-related documents, because these documents are new evidence, and are directly relevant to core

issues in this case.¹⁰ Specifically, the recession-related documents are relevant, as the Commissioners' relied on them and cited them in their order on the merits,¹¹ but no other party has had access to these documents. Likewise, the SEEM-related documents are responsive to previous discovery, and relevant as reflected in Sierra Club's expert witness testimony filed with its petition for a rehearing,¹² but neither the Commissioners, nor Staff, nor any other party has had the opportunity to review these documents.

Wherefore, Sierra Club requests the entry of an order granting it leave to make discovery requests, and directing Alabama Power and Staff¹³ to answer the enclosed requests.

Respectfully submitted this 23d day of October.

/s/ Joel E. Dillard

Joel E. Dillard

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Counsel for Sierra Club

¹⁰ This discovery is also timely. The Commission has not yet issued a notice of when it will hold a rehearing. Presumably it will do so by the statutory deadline of November 13, 2020. The intervening three weeks are sufficient for such narrow discovery.

¹¹ *In re Alabama Power Company*, Docket No. 32953, 5, 25 (Aug. 14, 2020).

¹² *See* Sierra Club Pet. for Reconsideration and Rehearing, Ex. 1.

¹³ Rule 27(D) of the Commission's *Rules of Practices* allows access to Commission documents and specifies that "[i]nformation relating to an active proceeding must be procured through the regular processes for hearings."

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 23th day of October, 2020.

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/s/ Joel E. Dillard
Joel E. Dillard

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

IN RE: Petition for a Certificate of)
Convenience and Necessity by) Docket No. 32953
Alabama Power Company)

SIERRA CLUB'S DOCUMENT PRODUCTION REQUESTS
TO ALABAMA POWER COMPANY

Sierra Club hereby serves document production requests on Alabama Power Company under Rule 16 of the Commission's *Rules of Practice*, Rules 33 and 34 of the *Alabama Rules of Civil Procedure*, and sections 37-4-28 and 37-1-105, *Code of Alabama*.

INSTRUCTIONS

1. Responses should be provided to Sierra Club within ten (10) days of service of Sierra Club's document production requests.
2. Requests for Sierra Club to clarify any portion of these document production requests should be made in writing within three (3) days of service.
3. If the Company becomes aware of any information that would change its initial responses, the Company should provide Sierra Club with copies of that information along with amended responses to reflect the change.
4. Responses should identify and include copies of any and all underlying calculations, analyses, assumptions, or studies. Specifically, all such calculations, analyses, assumptions, or studies should be provided in an unlocked and PC-compatible form, with formulas, links, cells, formatting, metadata, and any other original features assisting in calculation left intact. Any and all documentation or instructions for the use of the material so provided should be included. To the extent that the form requested is not available, information should be provided in the form that most closely matches what has been requested.

5. Responses should state the name, address, and relationship to the Company (e.g., title) of the person responsible for preparing each discovery response.

6. The singular shall include the plural and vice versa; the terms “and” and “or” shall be both conjunctive and disjunctive; and the term “including” means “including without limitation.”

7. All responses should be provided to Sierra Club’s local counsel and its representative:

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Representative of Sierra Club

DEFINITIONS

8. “You,” “your,” “APC,” “Alabama Power,” “Company” means Alabama Power Company, its employees, and its authorized agents.

9. “Document” means any written, recorded, or graphic matter, however produced or reproduced, including but not limited to correspondence, e-mails, telegrams, contracts, agreements, notes in any form, memoranda, diaries, voice recording tapes, microfilms, microfiche, pictures, data processing cards or discs, computer tapes and other computer-generated and stored information or database, work papers, calendars, minutes or meetings or any other writings or graphic matter, including copies containing marginal notes or variations of

any of the foregoing, now or previously in the Company's possession.

10. "Petition" means Alabama Power Company's petition for a certificate of convenience and necessity dated September 6, 2019, under review in this case.

11. "Proposed resource additions" means the supply resources listed in Petition paragraphs 3 to 6 and the demand resources listed in Petition paragraph 7, namely the 200 MW in additional demand-side management and distributed energy resource programs.

DOCUMENT PRODUCTION REQUESTS

1. Produce all documents that refer to or otherwise relate to the formation of the Southeast Energy Exchange Market (SEEM), also known as "project BEST" and the "Southeast Energy Imbalance Market." Please exclude news reports since July 14, 2020, that refer to SEEM.

2. Produce all documents reflecting communication with Staff about the coronavirus-induced recession, including but not limited to the recession's impacts on Alabama Power's alleged needs for the proposed resource additions.

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 23d day of October, 2020.

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/s/ Joel E. Dillard
Joel E. Dillard

BEFORE THE ALABAMA PUBLIC SERVICE COMMISSION

IN RE: Petition for a Certificate of Convenience and Necessity by Alabama Power Company)) Docket No. 32953

SIERRA CLUB'S DOCUMENT PRODUCTION REQUEST
TO COMMISSION STAFF

Sierra Club hereby serves document production request on Commission Staff under Rules 16 and 27(D) of the Commission's *Rules of Practice*, Rules 33 and 34 of the *Alabama Rules of Civil Procedure*, and sections 37-4-28 and 37-1-105, *Code of Alabama*.

INSTRUCTIONS

1. Responses should be provided to Sierra Club within ten (10) days of service of Sierra Club's document production requests.
2. Requests for Sierra Club to clarify any portion of this document production request should be made in writing within three (3) days of service.
3. If Staff becomes aware of any information that would change its initial responses, Staff should provide Sierra Club with copies of that information along with amended responses to reflect the change.
4. Responses should identify and include copies of any and all underlying calculations, analyses, assumptions, or studies. Specifically, all such calculations, analyses, assumptions, or studies should be provided in an unlocked and PC-compatible form, with formulas, links, cells, formatting, metadata, and any other original features assisting in calculation left intact. Any and all documentation or instructions for the use of the material so provided should be included. To the extent that the form requested is not available, information should be provided in the form that most closely matches what has been requested.

5. The singular shall include the plural and vice versa; the terms “and” and “or” shall be both conjunctive and disjunctive; and the term “including” means “including without limitation.”

6. All responses should be provided to Sierra Club’s local counsel and its representative:

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Representative of Sierra Club

DEFINITIONS

1. “You,” “your,” and “Staff” means the Staff of the Alabama Public Service Commission and its authorized agents.
2. “Document” means any written, recorded, or graphic matter, however produced or reproduced, including but not limited to correspondence, e-mails, telegrams, contracts, agreements, notes in any form, memoranda, diaries, voice recording tapes, microfilms, microfiche, pictures, data processing cards or discs, computer tapes and other computer-generated and stored information or database, work papers, calendars, minutes or meetings or any other writings or graphic matter, including copies containing marginal notes or variations of any of the foregoing, now or previously in your possession.
3. “Petition” means Alabama Power Company’s petition for a certificate of

convenience and necessity dated September 6, 2019, under review in this case.

4. “Proposed resource additions” means the supply resources listed in Petition paragraphs 3 to 6 and the demand resources listed in Petition paragraph 7, namely the 200 MW in additional demand-side management and distributed energy resource programs.

DOCUMENT PRODUCTION REQUESTS

1. Produce all documents that Staff has referred to or relied on in its review of the coronavirus-induced recession, including but not limited to those documents that Staff referred to or relied on to recommend approval of the proposed resource additions without further inquiry by the Commission into the recession’s impacts. Please include any and all documents of communication with Alabama Power concerning the same.

CERTIFICATE OF SERVICE

I certify that the foregoing has been served on the following this 23d day of October, 2020.

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