

178 FERC ¶ 61,048
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Alabama Power Company

Docket No. ER22-476-000

ORDER ACCEPTING TARIFF REVISIONS

(Issued January 21, 2022)

1. On November 24, 2021, Alabama Power Company, on behalf of the Members¹ of the Southeast Energy Exchange Market (SEEM), submitted revisions to the SEEM Agreement under section 205 of the Federal Power Act (FPA)² and Part 35 of the Commission's regulations³ to "stand by the commitments" they previously made in the proceeding to establish SEEM.⁴ As discussed below, we accept the proposed revisions, effective November 25, 2021, as requested.

I. Background

2. On February 12, 2021, the Members filed the SEEM Agreement (and certificates of concurrence thereto), which sets forth the framework for a new voluntary electronic trading platform designed to facilitate bilateral trading in the Southeast and market access

¹ For purposes of this order, each of the following are a Member and, collectively, are the Members: Alabama Power Company, Georgia Power Company, and Mississippi Power Company; Associated Electric Cooperative, Inc. (AECI); Dalton Utilities; Dominion Energy South Carolina, Inc. (Dominion Energy SC); Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (together, Duke); Louisville Gas & Electric Company (LG&E) and Kentucky Utilities Company (KU) (and LG&E and KU Services Company and LG&E and KU Energy LLC, when acting as the agent or representative of LG&E/KU) (collectively, LG&E/KU); North Carolina Municipal Power Agency Number 1 (NCMPA Number 1); PowerSouth Energy Cooperative (PowerSouth); North Carolina Electric Membership Corporation (NCEMC); and Tennessee Valley Authority (TVA).

² 16 U.S.C. § 824d.

³ 18 C.F.R. pt. 35 (2021).

⁴ Transmittal at 2.

to currently unused transmission capacity.⁵ On October 12, 2021, due to Commission inaction, the SEEM Agreement and associated certificates of concurrence became effective by operation of law.⁶ Each Member that is also a transmission service provider filed revisions to its transmission tariff to offer zero-charge transmission service to accommodate SEEM transactions (Non-Firm Energy Exchange Transmission Service or NFEETS), which the Commission accepted in an order issued on November 8, 2021.⁷

II. Filing

3. The Members state that they submit the proposed revisions to “stand by the commitments” they made in the proceeding to establish SEEM that were not previously included in the tariff records, and therefore did not go into effect by operation of law.⁸ In particular, the Members made commitments in response to two Commission staff deficiency letters, which they now propose to effectuate through the proposed revisions to the SEEM Agreement. The Members also submit several additional ministerial and administrative revisions to the SEEM Agreement both to reflect the use of defined terms, and to provide for administrative efficiency during the initial implementation period of SEEM prior to market launch and operations. According to the Members, these revisions either have been previously identified and supported by the Members in their previous submissions or are ministerial in nature and are necessary to facilitate the initial implementation of SEEM. The Members state that these amendments are proposed as a package, and as such, are not severable from each other.⁹

4. Specifically, the Members propose to revise the SEEM Agreement to effectuate the weekly submission of confidential market data to the Commission via a new Appendix D.¹⁰ The Members explain that this information is comparable to the information that independent system operators and regional transmission organizations (ISOs/RTOs) provide under Order No. 760, but adjusted for the different market design

⁵ *Id.*; see also *id.*, attach. B, Revised SEEM Agreement, at 1.

⁶ *Ala. Power Co.*, Notice, Docket No. ER21-1111-002, et al. (issued Oct. 13, 2021) (October 13 Notice).

⁷ *Duke Energy Progress LLC*, 177 FERC ¶ 61,080 (2021).

⁸ Transmittal at 6.

⁹ *Id.*

¹⁰ *Id.* at 6-7.

of SEEM.¹¹ The Members propose to provide this information with respect to all transactions within SEEM, regardless of whether the parties to the transaction are jurisdictional. However, the Members note that submission of data related to non-jurisdictional entities is voluntary in conjunction only with the participation of such entities in SEEM. As such, the Members request the Commission expressly confirm that submission and receipt of such data does not and will not affect the jurisdictional status of non-jurisdictional Members in any way. Additionally, the Members request the Commission affirm that, akin to the information submitted by ISOs/RTOs in response to Order No. 760, the data submitted by the SEEM Administrator to the Commission will remain non-public, and subject to FOIA Exemption 4.¹²

5. The Members also propose revisions to the SEEM Agreement to clarify and increase the transparency surrounding the Market Auditor's functions and roles.¹³ Specifically, the Members propose to require the Market Auditor to respond to information requests from SEEM participants, the Commission, the North American Electric Reliability Corporation, state commissions in the SEEM region, TVA's Inspector General, and other applicable regulators within 30 days of receipt of any such request, where reasonable, and to simultaneously post any such responses to the SEEM website. The Members note that participant-specific information and Critical Energy Infrastructure Information will not be posted to the SEEM website.¹⁴ The Members explain that such information will be redacted from any document or information that is posted and unredacted copies will be confidentially available to the Commission upon request. The Members also propose revisions to avoid conflicts with this new requirement and to ensure that other documents, such as participant complaints and reports, are also posted to the SEEM website.¹⁵ The Members further propose to revise the participant agreement to clarify that SEEM participants will not provide information posted in the confidential section of the SEEM website to any marketing function employee.¹⁶

¹¹ *Id.* at 7 (citing *Enhancement of Elec. Mkt. Surveillance & Analysis through Ongoing Elec. Delivery of Data from Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 760, 139 FERC ¶ 61,053, at PP 34-36 (2012)).

¹² *Id.*

¹³ *Id.* at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 9-10.

¹⁶ *Id.* at 10.

6. Additionally, the Members propose to modify the SEEM Agreement to address any remaining concerns over unauthorized use of neighboring transmission systems.¹⁷ The Members explain that each Participating Transmission Provider already posts its methodology for calculating Available Transfer Capability (ATC) on its open-access same-time information system (OASIS). To clarify that there must be sufficient ATC along each of the relevant Participating Transmission Provider's systems for any match to occur, the Members propose to revise the SEEM Agreement to require that each Participating Transmission Provider commit to following its posted methodology in making its reports of ATC to the SEEM system. The Members explain that this revision will ensure that there is no match that exceeds the most limiting element along the contract path. The Members also propose corresponding revisions to clarify the timing of ATC information submitted by Participating Transmission Providers and to more clearly require the SEEM Algorithm to honor ATC limits.

7. With regard to the standard of review provision in the SEEM Agreement, the Members explain that, currently, changes to any portion of the SEEM Agreement are subject to the *Mobile-Sierra*¹⁸ public interest standard of review.¹⁹ The Members propose to revise the standard of review provision in the SEEM Agreement to apply the ordinary just and reasonable standard of review rather than the currently effective *Mobile-Sierra* public interest standard to the "more public-facing features of the S[EEM] Agreement, such as the Market Rules[.]" while retaining the *Mobile-Sierra* "public interest standard for a limited set of provisions that provide Members with regulatory certainty about the extent of their commitments under [the] agreement."²⁰ The provisions to which the *Mobile-Sierra* public interest standard of review will no longer apply include: 87 of the 102 defined terms; section 1.2 (Rules of Construction); Article 2 (Establishment of SEEM and Administration); section 3.1 (Member compliance); section 3.3 (Participant Criteria); section 3.4 (Participating Transmission Providers); section 3.5 (Member Standard of Conduct); Article 5 (Operating Committee); section 6.3 (SEEM Agent resignation and removal); section 6.4 (SEEM Agent and vendor contracts); section 6.5 (SEEM Agent liability and indemnity); section 8.1 (Governmental Entity jurisdiction); section 8.2 (Filing With and Approval or Acceptance by Governmental Entities); section 8.3 (Participating Transmission Provider tariff amendments); section 8.4 (Effective Date and SEEM Commencement Date); section 8.5 (Withdrawal of proposed membership); section 10.1 (Transparency; Confidentiality); section 10.2 (Auditing); section 11.1

¹⁷ *Id.* at 12-14.

¹⁸ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra*).

¹⁹ *Id.* at 14-16.

²⁰ *Id.* at 14.

(Referencing Market Rules); section 11.3 (Auditing SEEM System); Article 13 (Representations and Warranties); section 16.2 (Transfer of Interest in Agreement); section 16.3 (Relationship of Parties); section 16.4 (Third Party Beneficiaries) (except section 16.4.1); section 16.6 (Other Agreements); section 16.7 (Further Assurances); section 16.8 (Notices); section 16.10 (Headings); section 16.11 (Applicable Law); section 16.12 (Entire Agreement); section 16.13 (Counterparts); section 16.14 (Waiver of Jury Trial); section 16.15 (Special Provisions Related to Implementation of the Agreement); Exhibit A (Names and Addresses of the Members); Appendix A (Form of Participant Agreement); Appendix B (SEEM Market Rules); and Appendix D (Information Provided to FERC and Market Auditor).²¹ Under the proposal here, any changes to the remaining provisions will continue to be subject to the *Mobile-Sierra* public interest standard of review, as is the case under the currently effective SEEM Agreement.²²

8. Moreover, the Members propose revisions to the SEEM Agreement to clarify that the Market Auditor will verify that the SEEM system complies with the participant-specific constraints and generally applicable constraints.²³ The Members also propose revisions to the Market Rules to state that, when running the algorithm, randomization will be used if a heuristic is required to resolve ties or ambiguities.²⁴ The Members further propose revisions to the Market Rules to correct a scrivener's error that resulted in the omission of an important limitation on a SEEM participant's ability to run and review reports available in SEEM.²⁵ Specifically, SEEM participants will be able to run reports that are redacted to only show information related to that participant.

9. The Members also propose to revise the Market Rules to clarify the Administrator's authority to maintain configuration parameters and to avoid confusion about whether the Administrator is permitted to change those parameters (it is not).²⁶

²¹ *Id.* at 15; *see also id.*, attach. B, Revised SEEM Agreement.

²² These include 15 defined terms, Member criteria, governance, appointment of the SEEM Agent, budgeting and cost responsibility, inter-related and inter-dependent provisions and withdrawal, release of liability, no fiduciary duties, equitable relief, reliability obligations, dispute resolution, defaults, confidentiality, public utility status of Members, no reliance interest on NFEETS, no dedication of facilities, amendments, form of joinder agreement to add new Members, and SEEM Agent scope. Transmittal at 15.

²³ *Id.* at 16-17.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The Members additionally propose to revise the Market Rules to add certain information to the monthly informational report that will be posted by the SEEM Administrator.²⁷ The Members state that the information proposed for inclusion in the monthly report is similar to what is provided in the newly proposed Appendix D submissions (described above), except that some of the information will be subject to a four-month time lag and masking to remove the identities of specific SEEM participants.²⁸ The Members believe that providing this information publicly, masked and subject to a time lag as appropriate, will strike the appropriate balance between transparency into SEEM operations and protecting participant identities and other commercially sensitive information.

10. The Members propose to add a new section to the participant agreement appended to the SEEM Agreement, which states that SEEM participants with Market-Based Rate authority granted by this Commission acknowledge that they must provide complete, accurate, and not misleading information in any communication with the SEEM Administrator or the Market Auditor relating to participation in SEEM.²⁹ The Members also propose to revise the definitions of Market Auditor and SEEM Administrator to state that neither the Market Auditor, nor the SEEM Administrator may be, or be affiliated with, a Member, participant, the SEEM Agent, or the SEEM Administrator.³⁰

11. With regard to complaints with the Market Auditor, the Members propose two clarifications that ensure that all participants will have notice of when the SEEM Membership Board chooses not to act on a complaint, allowing an entity that files a complaint with the Market Auditor to be assured of the timeline the Board will apply in deciding whether to investigate the complaint, and if not satisfied, to be able to file a complaint with the Commission under FPA section 206.³¹ The Members propose revisions to the SEEM Agreement to clarify that, within 60 days of receiving a complaint from the Market Auditor, the Board must post to the SEEM website either: (1) a determination as to whether an investigation into the complaint will be opened; or (2) a notice that the Board requires more time to determine whether to investigate the complaint.

12. In addition to the above commitments that the Members previously made in the proceeding to establish SEEM, the Members state that they determined that additional

²⁷ *Id.* at 18.

²⁸ *Id.* at 19.

²⁹ *Id.* at 20.

³⁰ *Id.* at 21.

³¹ *Id.* at 22-23.

specific revisions are necessary to be in effect prior to SEEM launch and operations and during the initial implementation period only.³² First, the Members propose to revise the definition of “Member(s)” to more clearly define the timeline under which entities that are included in Appendix A to the SEEM Agreement but have not yet joined as Members may join under expedited procedures following the implementation of these revisions. Second, the Members propose revisions to deal specifically with the implementation period, defined as the period between October 12, 2021, through January 30, 2022.³³ The Members explain that these revisions will allow for: (1) initial budgeting outside the normal budgeting process (which would have been on a compressed timeline given the October 13 Notice and the SEEM Agreement’s October 30th timeline); (2) a Member to request an Alternate Member’s Net Energy for Load Value for the initial budget (in parallel with section 7.3.1(a) applicable to all subsequent budgets); and (3) a modified timeline for the Annual Meeting of Members for 2021. The Members state these revisions will allow a Member who joins under the expedited procedures to be included in the Net Energy for Load Vote and be appropriately accounted for in the voting process. Additionally, the Members explain that these revisions permit the SEEM Secretary to serve the limited informational receipt and delivery responsibilities of the SEEM Administrator until a SEEM Administrator is chosen.³⁴ The Members note that, with the exception of the revision to allow the SEEM Secretary to receive notices on behalf of the SEEM Administrator until they are selected, these provisions sunset by January 30, 2022.³⁵ Further the Members state that several clarifying edits were identified while preparing the filing and therefore they propose to: make ministerial revisions to sections 4.1.5(d), 7.2.2, and 10.1; provide a definition of the term “Southeast EEM Website;” and incorporate defined terms throughout the SEEM Agreement.³⁶

13. The Members request waiver of the Commission’s prior notice requirements to allow the amendments to the SEEM Agreement to become effective November 25, 2021, one day after the date of filing.³⁷ The Members state that good cause exists to grant waiver because doing so would allow the new revisions, and in particular the revisions to

³² *Id.* at 23.

³³ *Id.* at 23-24.

³⁴ *Id.* at 24-25.

³⁵ *Id.* at 26.

³⁶ *Id.* at 26-27.

³⁷ *Id.* at 27; *see also* 18 C.F.R. §§ 35.2(f), 35.3(a)(1).

cost allocation provisions, to become effective prior to the incurrence of vendor costs, which are expected to start being incurred as early as December 2021.

III. Notice of Filing and Responsive Pleadings

14. Notice of the filing was published in the *Federal Register*, 86 Fed. Reg. 68,246 (Dec. 1, 2021), with interventions and protests due on or before December 15, 2021.

15. Timely motions to intervene were filed by: Cooperative Energy; Missouri Joint Municipal Electric Utility Commission; Duke; American Municipal Power, Inc.; Alabama Municipal Electric Authority; NCEMC; AECl; the City of Orangeburg, South Carolina; Dominion Energy SC; NCMPPA Number 1; LG&E/KU; PowerSouth; MEAG Power; Georgia Power Company and Mississippi Power Company; North Carolina Sustainable Energy Association; Sustainable FERC Project and Natural Resources Defense Council; Southeast Public Interest Groups;³⁸ Solar Energy Industries Association; Advanced Energy Economy; Advanced Energy Buyers Group; and Clean Energy Buyers Association.

16. Comments were filed by Clean Energy Coalition.³⁹ On January 13, 2022, out-of-time comments were filed by Public Interest Organizations (PIOs).⁴⁰

17. On December 21, 2021, the Members filed an answer to Clean Energy Coalition's comments.

A. Comments

18. Clean Energy Coalition argues that the SEEM Agreement presents risks that the Members will have market power and does not prevent any Member from withholding

³⁸ Southeast Public Interest Groups include: Energy Alabama; GASP, Inc.; Sierra Club; Vote Solar; Georgia Interfaith Power and Light; South Carolina Coastal Conservation League; Southface Energy Institute, Inc.; and Partnership for Southern Equity.

³⁹ Clean Energy Coalition includes: Solar Energy Industries Association; Advanced Energy Economy; Advanced Energy Buyers Group; and Clean Energy Buyers Association.

⁴⁰ PIOs include: Energy Alabama, Sierra Club, South Carolina Coastal Conservation League, GASP, Southern Alliance for Clean Energy, Southface Energy Institute, Inc., Vote Solar, Georgia Interfaith Power and Light, Partnership for Southern Equity, North Carolina Sustainable Energy Association, Sustainable FERC Project, and Natural Resources Defense Council.

the newly created NFEETS to specific SEEM participants with virtually no Commission oversight.⁴¹ Further, Clean Energy Coalition asserts that the SEEM Agreement authorizes the Members to exclude competitors for a significant period of time by delaying, or refusing the execution of an Enabling Agreement, which is a precondition for entering into transactions in SEEM.⁴²

19. Clean Energy Coalition contends that the proposed revisions to the SEEM Agreement can only rehabilitate the SEEM Agreement if the revisions include a pool-wide Open Access Transmission Tariff (OATT), demonstrate a lack of market power, or propose measures sufficient to mitigate the market power of the Members.⁴³ Clean Energy Coalition explains that the Commission's regulations require members of a loose power pool—like SEEM—to have a joint OATT on file “to remedy undue discrimination and mitigate market power.”⁴⁴ Clean Energy Coalition notes that the Members have not adopted a pool-wide OATT and the proposed revisions neither demonstrate a lack of market power nor provide any measures to mitigate the Members' market power and discipline their ability to set the prevailing price. Clean Energy Coalition argues that the SEEM Agreement relies on the prevailing price in the marketplace as the final measure of just and reasonable rates and the revisions do not remedy this alleged fatal flaw.⁴⁵

20. Clean Energy Coalition asserts that the SEEM Agreement's lack of protections against the potential exercise of market power combined with the lack of enforceable transaction reporting seriously harms the public interest and the proposed revisions do not cure the identified deficiencies or render the SEEM Agreement just and reasonable.⁴⁶

⁴¹ Clean Energy Coalition Comments at 4.

⁴² *Id.* at 5.

⁴³ *Id.*

⁴⁴ *Id.* (quoting *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,655 (1996) (cross-referenced at 75 FERC ¶ 61,080), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

⁴⁵ *Id.* at 5-6.

⁴⁶ *Id.* at 12.

According to Clean Energy Coalition, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) has explained that if the Commission's "ability to monitor the market or gauge the 'just and reasonable' nature of the rate is eliminated," then effective regulation is removed.⁴⁷ Clean Energy Coalition notes that the Ninth Circuit went on to explain that "[w]ithout the required filings, neither [the Commission] nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all."⁴⁸ Clean Energy Coalition argues that the court's rationale is directly applicable to SEEM because the Commission has not issued a merits order with respect to the SEEM Agreement and the imposition of the *Mobile-Sierra* public interest standard of review severely limits the Commission's ability to engage in a meaningful way with the SEEM Agreement in the future. Clean Energy Coalition further argues that because the SEEM Agreement does not provide a means to gauge the just and reasonable nature of rates produced by the SEEM Algorithm, "[p]ragmatically, under such circumstances, there is no fi[l]ed tariff in place at all."⁴⁹

21. Clean Energy Coalition claims that, while the Commission's normal "monitoring capabilities, enforcement authority, and ability to institute an FPA section 206 action" could allow for sufficient post-approval monitoring, here, the Commission is hamstrung by the SEEM Agreement's application of the *Mobile-Sierra* public interest standard of review to future changes; in addition, Clean Energy Coalition argues that the existing statutory provisions against undue discrimination are insufficient to protect customers and market participants.⁵⁰ According to Clean Energy Coalition, the proposed revisions to the SEEM Agreement do not alter this and do not otherwise provide the Commission with a means to satisfy its oversight duties or enable the Commission to order the Members to revise the SEEM Agreement if abuses of market power are detected. Clean Energy Coalition acknowledges that the Members commit to provide the Commission with data outlined in Appendix D to the SEEM Agreement, but Clean Energy Coalition states that it is not clear whether the Commission will review or assess the data it receives.⁵¹ Therefore, according to Clean Energy Coalition, the proposed revisions do

⁴⁷ *Id.* at 13 (quoting *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1016 (9th Cir. 2004) (*Lockyer*)).

⁴⁸ *Id.* (quoting *Lockyer*, 383 F.3d at 1016).

⁴⁹ *Id.* (quoting *Lockyer*, 383 F.3d at 1016; *Cal. ex rel. Harris v. FERC*, 784 F.3d 1267, 1273 (9th Cir. 2015) (*Harris*)).

⁵⁰ *Id.* at 7 (quoting Chairman Glick Statement at P 11).

⁵¹ *Id.* at 7-8.

not provide for enforceable transaction reporting and are not sufficient to establish the SEEM Agreement as a lawful filed rate.⁵²

22. Additionally, Clean Energy Coalition argues that the Commission is not prohibited from remedying the alleged deficiencies in the SEEM Agreement, including ordering the Members to adopt a pool-wide OATT.⁵³ Clean Energy Coalition contends that the SEEM Agreement does not meet the standards of a lawful filed rate and failing to correct a “set of discriminatory rules that may only be amended or otherwise influenced by a small cohort of Members” is contrary to the Commission’s statutory duty.⁵⁴

23. Turning to the standard of review, Clean Energy Coalition argues that the proposed revisions do not cure the unlawful application of the *Mobile-Sierra* public interest standard to future changes to the SEEM Agreement.⁵⁵ According to Clean Energy Coalition, while narrowing the application of the *Mobile-Sierra* public interest standard from changes to any provision of the SEEM Agreement to the specific enumerated provisions, as proposed, is directionally positive, the proposed revision to the standard of review provision does not fully rehabilitate the alleged unlawful *Mobile-Sierra* application in the SEEM Agreement.⁵⁶ Clean Energy Coalition asserts that the narrowed application of the *Mobile-Sierra* public interest standard continues to “make it more difficult for third parties or even the Commission to mount legitimate challenges in the future to the justness and reasonableness” of the SEEM Agreement.⁵⁷ Clean Energy Coalition also states that the provisions in the SEEM Agreement that are subject to the *Mobile-Sierra* public interest standard include terms that were “arrived at by horizontal competitors with a common interest to exclude future competition.”⁵⁸ Clean Energy Coalition explains that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has made clear this circumstance “will remove a provision from the ambit

⁵² *Id.* at 8.

⁵³ *Id.*

⁵⁴ *Id.* (quoting Commissioner Clements Statement at P 26).

⁵⁵ *Id.*

⁵⁶ *Id.* at 8-9.

⁵⁷ *Id.* at 9 (quoting Chairman Glick Statement at P 11).

⁵⁸ *Id.*

of *Mobile-Sierra*.”⁵⁹ According to Clean Energy Coalition, any claim that the proposed revisions will remove the Members’ exclusive control over the SEEM platform or the Market Rules is false, and therefore the proposed revisions do not correct the unlawful application of the *Mobile-Sierra* public interest standard.⁶⁰

24. Clean Energy Coalition further argues that the proposed revisions to the standard of review provision fail to establish that the *Mobile-Sierra* presumption can be lawfully invoked because the SEEM Agreement is a tariff that is generally applicable to all Members and participants, was not negotiated on an individualized basis,⁶¹ and was not “the product of adversarial negotiations between sophisticated parties pursuing independent interests.”⁶² Clean Energy Coalition claims that the Commission recently held that “if negotiating parties have a common economic interest in the outcome of the negotiations, their bargaining is not arm’s length.”⁶³ According to Clean Energy Coalition, neither the participants nor the potential future Members of SEEM were allowed to negotiate the SEEM Agreement’s terms and both participants and potential future Members will be required to accept the SEEM Agreement “as-is” without the benefit of any negotiations regarding its content. As such, Clean Energy Coalition continues, because the SEEM Agreement will extend to Members, potential future Members, and participants, it is undoubtedly a document containing terms of general applicability that “do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations” and the proposed revisions do not save the allegedly unlawful application of the *Mobile-Sierra* public interest standard.⁶⁴

25. PIOs state that, while they appreciate the modest improvements to transparency and narrowed application of *Mobile-Sierra* protection in the revised SEEM Agreement, the revisions do not address PIOs’ concerns about market power, governance, non-discriminatory access, lack of an independent market monitor, and impacts on

⁵⁹ *Id.* (quoting *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 80 (D.C. Cir. 2016) (*Oklahoma Gas*)).

⁶⁰ *Id.* at 10.

⁶¹ *Id.* at 11 (citing *Basin Elec. Power Coop.*, 172 FERC ¶ 61,221 (2020)).

⁶² *Id.* (quoting *Oklahoma Gas*, 827 F.3d at 80).

⁶³ *Id.* (quoting *Tri State Generation & Transmission Ass’n, Inc.*, 171 FERC ¶ 61,202, at P 47 (2020) (*Tri State*)).

⁶⁴ *Id.* at 11-12 (quoting *Tri State*, 171 FERC ¶ 61,202 at P 47).

consumers.⁶⁵ PIOs argue that their protest in the proceeding to establish SEEM raised fundamental flaws with the SEEM Agreement that remain unaddressed by the revisions to the SEEM Agreement that the Members propose here.⁶⁶ PIOs argue that application of the *Mobile-Sierra* public interest standard to even a subset of provisions in the SEEM Agreement, as proposed, fails to safeguard the interests of future SEEM participants. Further, according to PIOs, the Members “failed to ‘carr[y] their burden in showing that their proposal . . . strikes the necessary balance of interests’” because the Members did not justify the application of the *Mobile-Sierra* public interest standard to each enumerated provision.⁶⁷ PIOs also contend that the revised SEEM Agreement violates Order No. 888’s open access mandate and Order No. 888-A’s requirements for loose power pools.⁶⁸ PIOs further allege that the SEEM Agreement—even with the proposed revisions—continues to create opportunities for SEEM Members and participants to unduly restrict their competitors’ access to transmission.⁶⁹ Additionally, PIOs argue that, while the Members claim that SEEM will produce substantial benefits, the benefits analysis relied upon has serious methodological flaws and lacks sufficient modeling detail.⁷⁰ Moreover, PIOs assert that it is uncontested that NFEETS will erode non-firm point-to-point revenues resulting from customers switching from non-firm transmission service to NFEETS and will therefore shift costs to firm point-to-point and network transmission customers.⁷¹ According to PIOs, shifting costs from the Members and participants to non-participants violates cost causation. Finally, PIOs claim that NFEETS is not “consistent with or superior to” the *pro forma* OATT for many reasons.⁷²

⁶⁵ PIOs Comments at 1-2.

⁶⁶ *Id.* at 2.

⁶⁷ *Id.* (quoting *ISO New Eng. Inc. v. New Eng. Power Pool*, 106 FERC ¶ 61,280, at P 131 (2004)).

⁶⁸ *Id.* at 2-3.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.* at 3-4.

⁷¹ *Id.* at 4.

⁷² *Id.* (citing *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, at P 3 (2006); Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,734 n.434; 18 C.F.R. § 35.28(c)(1)).

B. Answer

26. The Members argue that the scope of review of this proceeding is limited to determining whether the proposed revisions to the SEEM Agreement are just and reasonable, and, therefore, Clean Energy Coalition's continued attempts to relitigate settled matters must be rejected.⁷³ The Members state that there is no option here to revisit the unchanged portions of the SEEM Agreement, which is a filed rate subject to the protection of the filed rate doctrine.⁷⁴ The Members explain that, after admitting that the proposed revisions improve the SEEM Agreement, Clean Energy Coalition focuses almost exclusively on undisguised collateral attacks on the SEEM Agreement. According to the Members, Clean Energy Coalition's arguments that the proposed revisions fail to make the SEEM Agreement just and reasonable is not the standard for proposed revisions to a filed rate and the cases to which Clean Energy Coalition cites to attempt to broaden the Commission's review are inapposite.⁷⁵ The Members argue that under longstanding Commission precedent applicable to proposals by utilities to amend their own filed rates under FPA section 205, attacks against unchanged portions of the filed rate are beyond the scope of the proceeding.⁷⁶

IV. Discussion**A. Procedural Matters**

27. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,⁷⁷ the notices of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

28. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits an answer to a protest unless otherwise ordered by the decisional authority.⁷⁸ We will

⁷³ Members Answer at 1-2.

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 2-3 (citing *Upper Missouri G. & T. Elec. Coop.*, 174 FERC ¶ 61,019 (2021); *Basin Elec. Power Coop.*, 172 FERC ¶ 61,221; *Oklahoma Gas*, 827 F.3d 75; *Lockyer*, 383 F.3d 1006; *Harris*, 784 F.3d 1267).

⁷⁶ *Id.* at 3 (citing *PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,201, at P 40 (2006)).

⁷⁷ 18 C.F.R. § 385.214 (2021).

⁷⁸ *Id.* § 385.213(a)(2) (2021).

accept the Members' answer because it has provided information that assisted us in our decision-making process.

B. Substantive Matters

29. For the reasons discussed below, we accept the Members' proposed revisions to the SEEM Agreement, effective November 25, 2021,⁷⁹ as we find them to be just and reasonable and not unduly discriminatory or preferential.

30. As a threshold matter, Clean Energy Coalition and PIOs raise concerns that pertain almost entirely to the filed rate and not to the proposed revisions before us in this proceeding. Although the Commission did not issue an order accepting the SEEM Agreement, the SEEM Agreement went into effect by operation of law⁸⁰ and is, therefore, the rate on file.⁸¹ What is pending before us in this proceeding are certain proposed revisions to that currently effective rate, filed pursuant to FPA section 205.⁸² The justness and reasonableness of the existing provisions of the SEEM Agreement to which the Members do not propose revisions in this proceeding is not pending before us. Thus, arguments that alleged deficiencies in the SEEM Agreement are not remedied by the proposed revisions⁸³ are beyond the scope of this proceeding.

⁷⁹ We grant the Members' request for waiver of the Commission's 60-day prior notice requirement. *See* 18 C.F.R. § 35.11; *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁸⁰ *See* October 13 Notice.

⁸¹ The Commission issued an order accepting each SEEM transmission service provider's proposed revisions to its transmission tariff to offer NFEETS, in which the Commission addressed several of the arguments PIOs repeat in their comments in this proceeding. *See Duke Energy Progress LLC*, 177 FERC ¶ 61,080 at PP 40-46, 62-74.

⁸² *See Neb. Pub. Power Dist. v. FERC*, 957 F.3d 932, 943 (8th Cir. 2020) (recognizing that "courts have made it clear that [the Commission] 'restricts itself to evaluating the confined proposal'" and "[t]herefore, [the Commission] 'need only find the proposed rates to be just and reasonable.'" (citations omitted)); *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) ("When acting on a public utility's rate filing under section 205, the Commission undertakes 'an essentially passive and reactive role' and restricts itself to evaluating the confined proposal.") (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

⁸³ *See, e.g.*, Clean Energy Coalition Comments at 2-3, 8; PIOs Comments at 1-5.

31. Turning to the merits, we find that the proposed revisions to the SEEM Agreement are just and reasonable and not unduly discriminatory or preferential. The proposed revisions are intended to improve the transparency of SEEM to the public and to the Commission, and to establish safeguards to ensure SEEM operates as intended. In this manner, the revisions reasonably balance providing the Commission and the public with increased transparency regarding the market, against the need to safeguard transmission information and commercially sensitive information. The additional data to be made available under the proposed revisions will give the Commission greater visibility into market behavior in SEEM than that afforded by the original proposal.

32. While Clean Energy Coalition argues that “[t]he SEEM Revisions do not render the SEEM Agreement a lawful filed rate,”⁸⁴ this argument misunderstands the scope of the Commission’s review in this proceeding. Contrary to Clean Energy Coalition’s position, we need not find that the proposed revisions provide for “mitigation measures, enforceable transaction reporting, and other features”⁸⁵ that would ensure the other portions of the SEEM Agreement, not before us here, are just and reasonable. Rather, our task is only to assess whether the filed amendments, including the provision of data, are just and reasonable. We find that they are. We agree with the filing parties that the data provided by the Members to the Commission, including the public posting of reports, responses to market regulator inquiries and complaints to the Market Auditor, will increase transparency.⁸⁶ Further, in response to Clean Energy Coalition’s contention that “it is not clear whether [the Commission] will review or assess the data it receives”⁸⁷ we confirm that the Commission plans to review and assess this data, as part of its ongoing monitoring and surveillance of market transactions and market participant activity, to monitor wholesale electricity market transactions executed through SEEM. We also confirm that the weekly data submission will not affect the status of non-jurisdictional entities, and that the Commission will treat the information as non-public, subject to FOIA Exemption 4.⁸⁸

33. We further disagree with Clean Energy Coalition that the Ninth Circuit’s decisions in *Lockyer* and *Harris* are directly applicable to SEEM. To the extent that Clean Energy Coalition points to these cases to challenge the justness and reasonableness of the

⁸⁴ Clean Energy Coalition Comments at 13.

⁸⁵ *Id.*

⁸⁶ Transmittal at 8-9, 22.

⁸⁷ Clean Energy Coalition Comments at 8.

⁸⁸ 5 U.S.C. § 552(b)(4) (FOIA exemption for “trade secrets and commercial or financial information”).

existing provisions of the SEEM Agreement to which the Members do not propose revisions in this proceeding, those arguments are beyond the scope of this proceeding.⁸⁹ Those cases are also inapposite. In those cases, the Commission found that certain utilities violated reporting requirements associated with their market-based rate authority, but the Commission declined to impose refunds.⁹⁰ The filing here is unrelated to reporting requirements associated with market-based rate authority. Instead, the Members now voluntarily propose to provide additional information and transparency surrounding SEEM, which will increase the Commission's ability to monitor SEEM.

34. We find that the proposed clarifying revisions regarding the SEEM Administrator and Market Auditor, the protection of neighboring systems, and the restrictions placed on Market-Based Rate holders are just and reasonable as they provide additional information to SEEM participants. We find the remaining ministerial revisions appropriate.

35. We also find just and reasonable the Members' proposal to change the standard of review applicable to certain provisions of the SEEM Agreement from the *Mobile-Sierra* public interest standard to the ordinary just and reasonable standard. As noted above, our review is limited to the proposed changes to the filed rate. We are not reviewing anew the application of the *Mobile-Sierra* public interest standard to the provisions of the SEEM Agreement to which it will continue to apply. Accordingly, arguments about the portion of the standard of review provision that the Members do not propose to change are beyond the scope of this proceeding.

36. Here, the Members propose to change the standard of review applicable to certain provisions from the *Mobile-Sierra* public interest application of the just and reasonable standard to the ordinary just and reasonable standard.⁹¹ We find that it is appropriate to accept application of the ordinary just and reasonable standard of review to changes to certain provisions, as proposed here. Indeed, no party argues otherwise. We find that applying the just and reasonable standard to the proffered provisions will permit the Commission to revise those provisions without meeting the public interest standard, also facilitating the Commission's ability to ensure that rates remain just and reasonable and not unduly discriminatory or preferential.

⁸⁹ *E.g.*, Clean Energy Coalition Comments at 13.

⁹⁰ *Lockyer*, 383 F.3d at 1010; *see also Harris*, 784 F.3d at 1273 (reviewing the Commission's decision on remand and finding that "predicating the 'just and reasonable' inquiry required under [section] 205 on accumulation of market power under the hub-and-spoke test, [the Commission] insulated sellers from liability for reporting violations and thereby ran afoul of the FPA").

⁹¹ Transmittal at 14-15.

Docket No. ER22-476-000

- 18 -

The Commission orders:

The proposed revisions are hereby accepted for filing, effective November 25, 2021, as requested, as discussed in the body of this order.

By the Commission. Chairman Glick is concurring with a separate statement attached. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Power Company

Docket No. ER22-476-000

(Issued January 21, 2022)

GLICK, Chairman, *concurring*:

1. I concur in today's order. This proposal narrows the application of the *Mobile-Sierra* public interest standard to only certain provisions of the Southeast Energy Exchange Market (Southeast EEM) Agreement. In so doing, it will help ensure that the Commission can fulfill its responsibility to protect customers and market participants in the Southeast by allowing the Commission to remedy any unjust and unreasonable or unduly preferential or discriminatory conditions, should they arise in the Southeast EEM.¹

2. I write separately to reiterate my view that applying the *Mobile-Sierra* public interest presumption to *any* provisions of the Southeast EEM Agreement is contrary to well-established Commission precedent.² That precedent dictates that, absent extraordinary circumstances not present here, the *Mobile-Sierra* presumption applies to a contract “*only* if the contract has certain characteristics that justify the presumption.”³ By contrast, *Mobile-Sierra* does not apply to “generally applicable” contractual provisions, such as those contained in the Southeast EEM agreements. These provisions bind not only the parties to the contract, but also any prospective future signatories, who would be stuck with these provisions with limited, if any, room for negotiation.⁴ This “take it or

¹ Statement of Chairman Glick, Docket Nos. ER21-1111, *et al.*, at P 11 (Oct. 20, 2021).

² *Id.* at PP 2, 10.

³ *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 182 (2013) (emphasis added); *see also Devon Power*, 137 FERC ¶ 61,073, at P 37 (2011) (“The Commission will accept a more stringent application of the statutory ‘just and reasonable’ standard only when the applicant can demonstrate compelling circumstances, such as those found in this proceeding, that merit such protection from challenges.”).

⁴ *See, e.g., Arizona Pub. Serv. Co.*, 148 FERC ¶ 61,012, at P 4 (2014) (contrasting settlement rates that apply only to parties to the settlement with another settlement involving generally applicable rate schedules that apply to any entity for open access service); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 187 (stating that the Commission’s conclusion that right of first refusal provisions at issue created generally

leave it” dynamic places future participants in a position “that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption.”⁵ As such, application of the *Mobile-Sierra* presumption is inappropriate and inconsistent with our precedent.

3. Aside from the *Mobile-Sierra* issue, I also agree that the proposed revisions to the Agreement to regularly provide transaction data to the Commission and to increase transparency are just and reasonable and not unduly discriminatory or preferential. I applaud the filing parties for standing by their previous commitments on transparency.⁶ Shining the light of transparency on the Southeast EEM will help protect market participants and consumers in the region, and will enhance the Commission’s ongoing vigilance against potential fraudulent or manipulative conduct. Guarding against market manipulation remains one of the core obligations vested in the Commission by Congress.

For these reasons, I respectfully concur.

Richard Glick
Chairman

applicable requirements was “bolstered by the fact that any new PJM Transmission Owner would have to accept these provisions as-is, with limited room for negotiation”); *ISO New England Inc.*, 150 FERC ¶ 61,209, at P 185 (2015); *Sw. Power Pool, Inc.*, 145 FERC ¶ 61,137, at P 9 (2013).

⁵ *ISO New England Inc.*, 150 FERC ¶ 61,209, at P 185.

⁶ Statement of Chairman Glick, Docket Nos. ER21-1111, *et al.*, at P 13 (Oct. 20, 2021).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Power Company

Docket No. ER22-476-000

(Issued January 21, 2022)

CLEMENTS, Commissioner, *concurring*:

1. I agree with the decision to accept the proposed Tariff changes because, as explained in the Commission's decision, the scope of our review is limited to the amendments proposed in this proceeding. When considering these changes alone and not the broader lawfulness of the SEEM Agreement and Open Access Transmission Tariffs into which they are integrated, they are just and reasonable.¹ I concur, however, to clarify that the proposed amendments do not cure the underlying fundamental flaws with the Southeast Energy Exchange Market (SEEM) Agreement, as incorporated into the relevant SEEM Members' Open Access Transmission Tariffs (OATT).

2. As I expressed in my Fair Rates Act Statement on the Commission's inaction on the SEEM Agreement,² and in my dissent to the Commission's order accepting the OATT revisions incorporating the SEEM Agreement,³ the SEEM Agreement and the OATTs incorporating it are unduly discriminatory, unjust and unreasonable. Most critically, the SEEM Agreement violates Order No. 888's core requirements by imposing unduly discriminatory barriers to accessing a new transmission product offered by the SEEM Members. Among other infirmities, SEEM was also proposed without adequate analysis or mitigation mechanisms to ensure that market power will not be exercised and manipulation will not occur.⁴ Also, as highlighted by Chairman Glick, the SEEM

¹ I note that it would be a different circumstance if the Filing Parties were putting forth these revisions in place of existing Tariff provisions designed to enable the Commission to adequately carry out its oversight duties. If that were the case, and if the proposed deletions eliminated tariff provisions that were necessary to ensure the original rate was just and reasonable, then the Commission would have to assess the newly proposed provisions in light of whether they adequately replaced the deleted provisions. Today's order does not address that future potential circumstance.

² *Alabama Power Company*, Docket No. ER21-1111-002, Statement of Comm'r Clements, October 20, 2021 (FRA Statement).

³ *Duke Energy Progress, LLC*, 177 FERC ¶ 61,080 (2021) (Clements, Comm'r, dissenting).

⁴ FRA Statement at PP 42-51.

Agreement inappropriately provides the *Mobile-Sierra* standard of review for broadly applicable provisions, contrary to well-established Commission precedent.⁵ Further, the *Mobile-Sierra* public interest standard is not appropriate for provisions that protect a common interest of the Filing Parties, such as provisions granting them preferential rights over non-Members.⁶

3. None of the amendments accepted herein cure any of these underlying infirmities with SEEM,⁷ nor does my concurrence with today's order indicate my approval of that broader market construct.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

⁵ Chairman Glick Concurrence at PP 2-3.

⁶ See *ISO New England Inc.* 143 FERC ¶ 61,150 at PP 168-69 (2013) (finding that the *Mobile-Sierra* presumption did not apply to right of first refusal provisions, which “arose in a negotiation aimed at protecting a common interest among competing Participating Transmission Owners,” in contrast to “circumstances in which the Commission can presume that the resulting rate is the product of negotiations between parties with competing interests”).

⁷ I acknowledge that today's order accepts the SEEM Members' proposal to change the standard of review applicable to certain provisions of the SEEM Agreement to the ordinary just and reasonable standard. This is an improvement. However, the filed rate continues to inappropriately provide for application of the *Mobile-Sierra* standard to a number of generally applicable provisions within the SEEM Agreement.

Document Content (s)

ER22-476-000.docx.....1