

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

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

Alabama Power Company	Docket Nos.	ER21-1111-003
Dominion Energy South Carolina, Inc.		ER21-1112-003
Louisville Gas and Electric Company		ER21-1114-003
Duke Energy Carolinas, LLC		ER21-1116-003
Duke Energy Progress, LLC		ER21-1117-003
Georgia Power Company		ER21-1119-003
Kentucky Utilities Company		ER21-1120-003
Mississippi Power Company		ER21-1121-003
		(Not Consolidated)

ORDER REJECTING REHEARING REQUESTS AS UNTIMELY

(Issued December 10, 2021)

1. On February 12, 2021, as amended on June 7, 2021, and August 11, 2021, Southern Company Services, Inc., as agent for Alabama Power Company, filed, pursuant to section 205 of the Federal Power Act (FPA)¹ and section 35.12 of the Commission's regulations,² the Southeast Energy Exchange Market (Southeast EEM) Agreement on behalf of itself and the other prospective members (collectively, Filing Parties) of the Southeast EEM. Additionally, on February 12, 2021, as amended on June 7, 2021, and August 11, 2021, seven prospective Southeast EEM members submitted certificates of

¹ 16 U.S.C. § 824d.

² 18 C.F.R. § 35.12 (2021).

concurrence to the Southeast EEM Agreement. Pursuant to section 205 of the FPA, in the absence of Commission action on or before October 11, 2021, the proposed Southeast EEM Agreement and concurrences became effective by operation of law.³ On November 12, 2021, Clean Energy Coalition⁴ and Public Interest Organizations (PIOs)⁵ (jointly, Rehearing Parties) each filed requests for rehearing pursuant to sections 205(g) and 313(a) of the FPA.⁶ As explained below, we reject the rehearing requests as untimely.

I. Background

2. On February 12, 2021, Filing Parties filed, pursuant to section 205 of the FPA, the Southeast EEM Agreement and seven prospective Southeast EEM members submitted certificates of concurrence to the Southeast EEM Agreement (collectively, the Filings). Filing Parties requested an effective date of May 13, 2021, 90 days after they submitted the Filings to the Commission.

3. On May 4, 2021, Commission staff issued a letter informing Filing Parties that the Filings were deficient and requesting additional information (May 4 Deficiency Letter). On June 7, 2021, Filing Parties submitted a response to the May 4 Deficiency Letter (June 7 Deficiency Response), amending the Filings. Filing Parties requested an effective date of August 6, 2021, 60 days after they submitted the June 7 Deficiency Response to the Commission.

4. On August 6, 2021, Commission staff issued a letter informing Filing Parties that the Filings, as amended in the June 7 Deficiency Response, were deficient and requesting further information (August 6 Deficiency Letter). On August 11, 2021, Filing Parties submitted a response to the August 6 Deficiency Letter (August 11 Deficiency Response), further amending the Filings. Filing Parties requested an effective date of

³ See Alabama Power Co., Notice, Docket No. ER21-1111-002, et al. (issued Oct. 13, 2021) (Notice) (became effective by operation of law).

⁴ Clean Energy Coalition consists of: Advanced Energy Economy; the Advanced Energy Buyers Group; Renewable Energy Buyers Alliance; and the Solar Energy Industries Association.

⁵ PIOs consist of: 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; Georgia Conservation Voters; Partnership for Southern Equity; North Carolina Sustainable Energy Association; Sustainable FERC Project; and Natural Resources Defense Council.

⁶ 16 U.S.C. §§ 824d(g), 825l(a).

October 12, 2021, 62 days after they submitted the August 11 Deficiency Response to the Commission.⁷

5. On October 13, 2021, the Secretary of the Commission issued the Notice, stating: “[p]ursuant to section 205 of the FPA, in the absence of Commission action on or before October 11, 2021, the proposed Southeast EEM Agreement and concurrences thereto became effective by operation of law.”⁸ The Notice further stated “the effective date of the proposed tariff sheets is October 12, 2021, as reflected in these tariff sheets.”⁹ The Notice explained that “[t]he Commission did not act on the proposed Southeast EEM Agreement and concurrences thereto because the Commissioners [were] divided two against two as to the lawfulness of the change.”¹⁰

II. Rehearing Requests and Alternatives

6. On November 12, 2021, Rehearing Parties each filed requests for rehearing. Clean Energy Coalition requests rehearing, or in the alternative clarification, of “the Notice” and states that the 60-day prior notice period under FPA section 205(d)¹¹ “expired on or before October 12, 2021.”¹² Clean Energy Coalition specifically alleges that the Notice is arbitrary and capricious and lacks reasoned decision-making.¹³ Similarly, referring to the Notice as “the Order,”¹⁴ PIOs request rehearing on the basis that “the Order” violates Commission policy and precedent and is arbitrary and capricious.¹⁵

⁷ Although Filing Parties stated that the requested effective date was 60 days after the August 11 Deficiency Response, it was actually 62 days thereafter.

⁸ Notice at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 16 U.S.C. § 824d(d).

¹² Clean Energy Coalition Request for Rehearing at 1-3.

¹³ *Id.* at 8, 14, 20, 22.

¹⁴ PIOs Request for Rehearing at 2 n.3.

¹⁵ *Id.* at 4, 14-15.

7. Clean Energy Coalition requests that, in the event the Commission does not grant rehearing, the Commission provide certain clarifications related to the role and function of the Southeast EEM.¹⁶ PIOs request that, in the alternative to rehearing, the Commission set the issues raised in PIOs' request for rehearing and those to be raised in subsequent, planned requests for rehearing on the Commission's November 8, 2021 order accepting filings related to the Southeast EEM proposal¹⁷ for a paper hearing with a technical conference before briefing.¹⁸

III. Discussion

8. For the reasons explained below, we reject the rehearing requests as untimely, decline to address Clean Energy Coalition's alternative motion for clarification, and reject PIOs' alternative request for a paper hearing with a technical conference.¹⁹

9. Given that the Commission has not previously explained in an order the proper calculation of the deadline for rehearing requests following the failure of the Commission to act within the time period prescribed by section 205(d) of the FPA, we take this opportunity to do so. Applying that calculation to these circumstances and as identified in the October 13, 2021 Notice, we find that the Commission had until the end of the day on October 11, 2021, to issue an order pursuant to section 205(d) in this proceeding. Because rehearing requests therefore were due no later than November 10, 2021—30 days after October 11, 2021—and because both rehearing requests were filed on November 12, 2021, we must reject both rehearing requests as untimely.

10. Pursuant to section 205(g)(1), it is the Commission's "failure to issue an order accepting or denying the change" prior to the expiration of the statutory period established in section 205(d) that is deemed to be an "order" for which parties may seek rehearing under section 313(a).²⁰ Thus, the "failure to issue an order accepting or

¹⁶ Clean Energy Coalition Request for Rehearing at 23-25.

¹⁷ *Duke Energy Progress, LLC*, 177 FERC ¶ 61,080 (2021) (November 2021 OATT Order).

¹⁸ PIOs Request for Rehearing at 15.

¹⁹ We note that Filing Parties submitted a motion for leave to answer and answer on November 29, 2021. We do not address that pleading given that it responds to the rehearing requests that are being rejected as untimely. We similarly do not address Rehearing Parties' December 3, 2021 joint answer to Filing Parties' November 29, 2021 motion for leave to answer and answer.

²⁰ Section 205(g)(1) of the FPA provides: "[I]f the Commission permits the 60-day period established [in section 205(d) of the FPA] to expire without issuing an order

denying the change” under FPA section 205(g)(1) is the day that the statutory period established in section 205(d) expires.

11. Section 205(d) allows filings to take effect by operation of law “after 60 days’ notice,” meaning filings may take effect on the 61st day after filing. Applicants may also propose that a filing take effect on a date certain that is more or less than the requisite 60 days’ notice, consistent with the Commission’s regulations implementing section 205(d).²¹ If the Commission does not issue an order accepting or denying the filing by the *later* of the day prior to the effective date or the 60th day after the filing is made, the requested tariff changes go into effect by operation of law. Therefore, the statutory period for Commission action established in section 205(d) expires on the later of the day prior to the effective date or the 60th day after the filing is made.

12. After the filing has taken effect by operation of law, the utility’s proposal becomes the filed rate. In this case, that occurred in the first moments of October 12, 2021 as requested by Filing Parties. For that reason, the Commission can no longer issue an order pursuant to section 205(d) accepting or denying the filing, as there is no longer a section 205(d) filing pending before the Commission. The Commission under section 205(d) cannot retroactively invalidate the rate that was already on file as of the first moments of October 12, 2021, as such action would violate the bar on retroactive ratemaking.²² Nor could the Commission issue an order under section 205(d) that applied only prospectively. After the point at which a rate goes into effect, the Commission may change the filed rate in response to a timely request for rehearing, as discussed below, pursuant to FPA section 206 or a new section 205 filing in a new proceeding, but its

accepting or denying [a rate] change because the Commissioners are divided two against two as to the lawfulness of the change . . . or if the Commission lacks a quorum . . . the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of [section 313(a) of the FPA]” 16 U.S.C. § 824d(g)(1).

²¹ See *id.* § 824d(d); 18 C.F.R. § 35.3; *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 6 & n.9 (2010).

²² See *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1226 (D.C. Cir. 2018) (“The [FPA] also empowers the Commission to fix or change rates and charges, but only prospectively. When a utility wishes to alter the rates it charges, it must provide sixty-days’ notice to the Commission The Commission may waive the sixty-day notice requirement for good cause, but the Commission has no authority under the Act to allow retroactive change in the rates charged to consumers.”) (citing 16 U.S.C. §§ 824d(d), 824e(a)); see also *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (finding that “the Commission itself has no power to alter a rate retroactively”).

opportunity to act in this proceeding pursuant to section 205(d) has passed. The time calculation rules established in 18 C.F.R. § 385.2007(a)(2) cannot and do not operate to extend the statutory deadline for Commission action pursuant to section 205(d).²³

13. This interpretation is consistent with how the Commission “acts” on section 205 filings for which there is both a quorum and a majority: Under those circumstances, the Commission issues any order “accepting or denying” the filing by the later of the day prior to the effective date or the 60th day after the filing is made.²⁴

14. Under section 313(a) of the FPA, any party “aggrieved by an order issued by the Commission . . . may apply for a rehearing within thirty days after the issuance of such order.”²⁵ Accordingly, where a filing takes effect under the circumstances described in

²³ As the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has explained, the statutory notice period (then 30 days, and now 60 days) “is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power.” *Ind. & Mich. Elec. Co. v. FPC*, 502 F.2d 336, 341 (D.C. Cir. 1974). In that case, the court found that a Commission regulation requiring “a *de facto* rate filing 60 days in advance of the effective date” “unlawfully extend[ed] the statutory waiting period for utilities by 30 days.” *Id.* Accordingly, the court vacated a Commission order, issued pursuant to that regulation, purporting to suspend a rate filing after the close of the statutory notice period. *Id.*

²⁴ If the FPA section 205(d) statutory deadline falls on a weekend or holiday, the Commission’s general practice is to issue the order by the preceding business day. *E.g.*, *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056 (2021) (issuing order on Friday, July 30 accepting tariff revisions with an effective date of Sunday, August 1); *Cal. Indep. Sys. Operator Corp.*, 157 FERC ¶ 61,252 (2016) (issuing order on Friday, December 30 accepting tariff revisions with an effective date of Sunday, January 1). This is the Commission’s general practice because a filing can go into effect on a weekend or holiday if the statutory period established in section 205(d) expires on a weekend or holiday. Although the Commission is not open on weekends or holidays, 18 C.F.R. § 375.101(c), there is no prohibition on the Commission acting on a day that it is typically closed, *see, e.g.*, *City of Hastings, Minn.*, 125 FERC ¶ 61,287 (2008) (on Saturday, December 13, 2008, granting applicants’ license to install two hydrokinetic turbines).

²⁵ 16 U.S.C. § 825l(a); *see Granholm ex rel. Mich. Dep’t of Nat. Res. v. FERC*, 180 F.3d 278, 280-81 (D.C. Cir. 1999) (stating that neither the court nor the Commission retains “any form of jurisdictional discretion” to ignore the mandatory “petition-for-rehearing requirement”) (internal citations omitted); *New England Power Generators Ass’n, Inc. v. FERC*, 879 F.3d 1192, 1197-98 (D.C. Cir. 2018) (finding the court lacked

FPA section 205(g)(1), the 30-day time period for seeking rehearing starts running on the day after the last day that the Commission could have taken action by “issuing an order accepting or denying the change.”²⁶

15. In this case, Filing Parties requested a specific effective date of October 12, 2021, meaning that the statutory period established in section 205(d) expired on October 11, 2021. As explained above, a filing goes into effect by operation of law if the Commission does not issue an order accepting or denying the filing within the statutory period.²⁷ Again, as it applies to this matter, this means that the Commission had until the end of the day on October 11, 2021, to issue an order and could not have waited to act on October 12, 2021, as the Filings had already taken effect as of the first moments of October 12, 2021.²⁸ The October 13, 2021 Notice plainly states: “in the absence of Commission action on or before October 11, 2021,” the day immediately preceding Filing Parties’ proposed effective date, the Filings became effective by operation of law.²⁹ Thus, the Commission’s “failure to issue an order” on October 11, 2021, which under section 205(g)(1)(A) is “an order” subject to rehearing, occurred on October 11, 2021.

16. Per the above discussion, the rehearing requests were due no later than November 10, 2021—30 days after the “order” in question, which is deemed to have been issued on October 11, 2021 per section 205(g)(1)(A). Both rehearing requests were

jurisdiction to consider a party’s objections to a Commission order because the party had not sought rehearing of that order in accordance with section 313(a) of the FPA).

²⁶ 16 U.S.C. § 824d(g)(1).

²⁷ See *Fla. Power & Light Co. v. FERC*, 617 F.2d 809, 817 (D.C. Cir. 1980) (explaining that the statutory deadline for Commission action under FPA section 205(d) falls “within” the statutory notice period and holding that the Commission acted within the statutory “limit” notwithstanding clerical error).

²⁸ See *supra* P 12.

²⁹ Notice at 2.

filed November 12, 2021.³⁰ As a result, we must reject both rehearing requests as untimely.³¹

17. Clean Energy Coalition requests that, in the event the Commission does not grant rehearing, the Commission provide certain affirmative clarifications. In the absence of an order acting on the Filings, we find there is nothing to be clarified.

18. As for PIOs' alternative request for a paper hearing with a technical conference, because we reject PIOs' rehearing request as untimely, we cannot set the issues PIOs raise therein for paper hearing. Issues to be raised in subsequent requests for rehearing of the November 2021 OATT Order are outside the scope of this proceeding, which is limited to the Southeast EEM Agreement and concurrences thereto. We therefore reject PIOs' alternative request.

The Commission orders:

Clean Energy Coalition's and PIOs' requests for rehearing, including any alternatives, are rejected, as discussed in the body of this order.

By the Commission. Commissioner Phillips is not participating.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

³⁰ While both rehearing requests state that they seek rehearing of the Notice, the Notice is not a Commission "order" for which rehearing is available. *See Public Citizen v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) (stating "the Notices describing the effects of [the Commission's] deadlock are not reviewable orders under the FPA").

³¹ The D.C. Circuit has stated that the 30-day deadline for seeking rehearing is "as much a part of the jurisdictional threshold as the mandate to file for a rehearing," and cannot be waived by the courts or the Commission. *See, e.g., Cities of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (citing *Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978)); *see also Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001) (noting the court's "independent obligation" to raise this issue *sua sponte* even if the Commission did not).