

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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|--------------------------------------|------------|---------------|
| Alabama Power Company | Docket No. | ER21-1111-002 |
| Dominion Energy South Carolina, Inc. | | ER21-1112-002 |
| Louisville Gas and Electric Company | | ER21-1114-002 |
| Duke Energy Progress, LLC | | ER21-1115-000 |
| Duke Energy Carolinas, LLC | | ER21-1115-001 |
| | | ER21-1115-002 |
| Duke Energy Carolinas, LLC | | ER21-1116-002 |
| Duke Energy Progress, LLC | | ER21-1117-002 |
| Louisville Gas and Electric Company | | ER21-1118-002 |
| Georgia Power Company | | ER21-1119-002 |
| Kentucky Utilities Company | | ER21-1120-002 |
| Mississippi Power Company | | ER21-1121-002 |
| Alabama Power Company | | ER21-1125-000 |
| | | ER21-1125-001 |
| | | ER21-1125-002 |
| Dominion Energy South Carolina, Inc. | | ER21-1128-002 |

STATEMENT OF COMMISSIONER CHRISTIE

(Issued October 20, 2021)

1. The Southeast Energy Exchange Market (Southeast EEM or SEEM) proposal meets the standard for approval under section 205 of the Federal Power Act (FPA).¹ The

¹ 16 U.S.C. § 824d (2018).

opposition to this proposal stems from one core issue: the goal of many interest groups to force the Southeastern states into a Regional Transmission Organization (RTO) or at least into a halfway-house to an RTO now, with full submission later.² The decision whether these states should join an RTO, however, is for their own elected policy-makers to make, not this Commission. All that we are asked to do in this case is determine whether the SEEM proposal meets the section 205 standard. For the reasons set forth below, it does and I would have voted to approve.

2. On February 12, 2021, as amended on June 7, 2021³ and August 11, 2021,⁴ Southern Company Services, Inc., as agent for Alabama Power Company, filed the

² Chairman Glick shares the goal of creating a Southeastern RTO: “From my perspective, utilities and other stakeholders in this region should be working to establish an RTO/ISO in the Southeast for the benefit of consumers and to promote grid reliability.” Statement of Chairman Glick regarding Southeast EEM at P 1. Nonetheless, he acknowledges that “I believe that much of the Southeast EEM proposal arguably satisfies the Section 205 standard.” *Id.* at P 2. Chairman Glick would have voted against the Southeast EEM proposal based on the *Mobile-Sierra* issue. *Id.* at P 2; *contra infra* at P 20. Commissioner Clements would use this proceeding to impose RTO-type governance structures on the Southeast EEM. Statement of Comm’r Clements regarding Southeast EEM at P 41 (“For example, the Filing Parties could remedy these infirmities by: (1) creating the option for non-LSE Participants to become Members if they make the necessary financial commitment, like in the WEIS; and (2) creating a process for non-Member Participants and other *stakeholders, such as states* or consumer groups, to provide complaints and concerns on Southeast EEM proposals, also like in the WEIS.” (emphasis added)). I note that states are not just “stakeholders” but are sovereign authorities which have long exercised regulatory power over the utilities in the Southeast and would be stripped of much of their regulatory authority if the Southeastern states were forced into a federally-regulated RTO. Being allowed to attend stakeholder meetings and make complaints to RTO management is small consolation to the states for losing much of their regulatory ability to ensure their consumers receive reliable power at the lowest practical cost. As noted below, *not a single* state utility commission filed in opposition to the SEEM proposal. *See infra* at P 19.

³ On May 4, 2021, Commission staff issued a deficiency letter to Filing Parties informing them that the February 12, 2021 Filings were deficient and requesting additional information (May 4 Deficiency Letter). On June 7, 2021, Filing Parties submitted a response to that letter (June 7 Deficiency Response), amending the February 12, 2021 Filings.

⁴ On August 6, 2021, Commission staff issued a deficiency letter to Filing Parties informing them that the February 12, 2021 Filings, as amended in the June 7 Deficiency

Southeast EEM Agreement on behalf of itself and the other prospective Members (collectively, Filing Parties) of the Southeast EEM,⁵ pursuant to section 205 of the FPA and section 35.12 of the Commission's regulations.⁶ Also on February 12, 2021, as amended on June 7, 2021 and August 11, 2021, seven prospective Southeast EEM Members submitted certificates of concurrence to the Southeast EEM Agreement and four prospective Participating Transmission Providers in the Southeast EEM filed revisions to their respective open access transmission tariffs (OATTs) to incorporate Non-Firm Energy Exchange Transmission Service (NFEETS).⁷

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 February 12, 2021 Filings.

⁵ As of February 12, 2021, the following entities constitute the prospective Members of the Southeast EEM: Alabama Power Company, Georgia Power Company, and Mississippi Power Company (collectively, Southern Companies); Associated Electric Cooperative, Inc.; Dalton Utilities; Dominion Energy South Carolina, Inc.; Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (collectively, Duke Energy); Louisville Gas and Electric Company and Kentucky Utilities Company (collectively, LG&E/KU); North Carolina Municipal Power Agency Number 1; PowerSouth Energy Cooperative; North Carolina Electric Membership Corporation; and Tennessee Valley Authority (each a Member and collectively, the Members). *See, e.g.,* Southern Companies, Docket No. ER21-1111, February 12, 2021 Transmittal (Southeast EEM Transmittal) at 1 and n.1. In addition, the following entities participated in the creation of the Southeast EEM and, as of February 12, 2021, are in the process of or are contemplating seeking the necessary approvals to execute the Southeast EEM Agreement and become Members: Georgia System Operations Corporation; Georgia Transmission Corporation; Municipal Electric Authority of Georgia; Oglethorpe Power Corporation; and South Carolina Public Service Authority. *See, e.g., id.*

⁶ 18 C.F.R. § 35.12 (2020).

⁷ *See* Duke Energy, Tariff Filing, Docket Nos. ER21-1115-000 (filed Feb. 12, 2021), ER21-1115-001 (filed June 7, 2021), and ER21-1115-002 (filed Aug. 11, 2021); LG&E/KU, Tariff Filing, Docket Nos. ER21-1118-000 (filed Feb. 12, 2021), ER21-1118-001 (filed June 8, 2021); ER21-1118-002 (filed Aug. 11, 2021); Southern Companies, Tariff Filing, Docket Nos. ER21-1125-000 (filed Feb. 12, 2021), ER21-1125-001 (filed June 7, 2021), and ER21-1115-002 (filed Aug. 11, 2021); Dominion Energy SC, Tariff Filing, Docket Nos. ER21-1128-000 (file Feb. 12, 2021), ER21-1128-

3. In the event the Commission does not act on a filing made pursuant to FPA section 205 within the 60-day period established therein “because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum,” FPA section 205(g)(1)(B) requires each Commissioner to “add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.”⁸ This statement complies with the statute.⁹

4. In sum, I would have voted to accept the Southeast EEM proposal as a package. As I set forth in greater detail below, the filings unquestionably meet the statutory criteria for acceptance under section 205 and should have been approved by majority vote of this Commission. In fact, I would have voted to approve the Southeast EEM proposal as a package within the deadline of August 6, 2021 created by the May 4 Deficiency Letter.¹⁰

* * *

5. The Southeast EEM proposal facilitates and enhances interaction among entities in the purchase and sale of energy across a 10-state footprint involving 160,000 MW of generating capacity and approximately 640 TWh of load.¹¹ The algorithm proposed by the Southeast EEM to be run by an independent administrator, will match 15-minute “split-the-savings” energy exchanges, subject to available transmission. Moreover, the proposal for the NFEETS transmission service will, subject to availability, provide zero-cost, non-firm transmission by using *otherwise unused* transmission capacity. NFEETS will also encourage transactions between geographically distant trading partners that may otherwise have been uneconomic.¹²

001 (filed June 8, 2021), ER21-1128-002 (filed Aug. 11, 2021).

⁸ 16 U.S.C. § 824d.

⁹ *Id.*

¹⁰ The Commission does not vote on whether to issue a deficiency letter. Accordingly, no vote of the Commission was taken on whether to issue the August 6 Deficiency Letter – issued on the deadline for an order to be issued for the Southeast EEM proposal or for the proposal to go into effect by operation of law – and which, in my view, sought information that was already in the record or unnecessary to making a decision on the proposal.

¹¹ *See, e.g.*, Southeast EEM Transmittal at 4.

¹² *See generally* Southeast EEM Transmittal, attach. D, Pope Aff. ¶ 22 (explaining

6. The proposal acts to enhance the existing bilateral market in the Southeast and benefits the participants. It will increase efficiency, liquidity, transparency, and competition in the Southeast bilateral market and better utilize existing transmission capacity in the region. The filing estimates that the benefit will be approximately \$40 million in market-wide savings per year relative to the status quo bilateral market.¹³ Importantly, benefits of the proposal will flow to consumers. I would have found that the proposal package meets the standards for the Commission's acceptance of them under FPA section 205 as they are just and reasonable and not unduly discriminatory or preferential.

7. In reaching this conclusion, I have considered the various protests and comments in these dockets. Specifically, I have considered that certain protestors and commenters criticize and express concern with different elements and aspects of the Southeast EEM proposal. I do not agree with them. Indeed, as set forth below, it is obvious that many of the criticisms and complaints are direct or veiled attacks on this Southeast EEM proposal not because of what it is, but because of what it is not: an RTO or a halfway-house to an RTO, which is what many of the critics clearly want.¹⁴

8. For purposes of this statement, I touch generally on certain of the briefed criticisms. For example, certain protestors argue that the Southeast EEM will unjustly exclude entities like public interest organizations, independent power producers, and large-scale commercial and industrial customers from becoming Members and engaging in governance¹⁵ and assert that the Southeast EEM's management authority will be

that the Southeast EEM matching tool will lead to lower transaction costs by arranging 15-minute trades across a broad geographic area).

¹³ See, e.g., Southeast EEM Transmittal at 11 (citing Southeast EEM Transmittal, attach. E-1); *id.* at 32-33.

¹⁴ See *infra* at PP 17-18 and n.32.

¹⁵ See, e.g., Advanced Energy Economy, Advanced Energy Buyers Group, Renewable Energy Buyers Alliance, and Solar Energy Industries Association (collectively "Clean Energy Coalition") March 15, 2021 Comments (Clean Energy Coalition March 15 Comments) at 15-24; 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 (collectively "PIOs") March 15, 2021 Limited Protest and Comments at 30-32 (PIO's March 15 Limited Protest); Public Citizen March 15, 2021 Protest (Public Citizen March

concentrated only among load serving entities (LSEs) creating a lack of independent governance, imbalanced decision-making and uncompetitive outcomes.¹⁶ They further allege that the decision-making authority will be in the hands of the three largest utilities and that together these allegations create a lack of independence in governance from the proposed market participants that is unjust, unreasonable, and unduly discriminatory.¹⁷ I would have found that Southeast EEM is designed to *enhance, not modify*, the existing bilateral nature of energy transactions in the Southeast. Much of the criticism raised here appears to reflect disappointment that this proposal does not create an RTO. As I set forth herein, such criticism is misplaced and any expectation that RTO or RTO-esque structures can or should be forced on this region through FERC action has no basis in law or policy. I therefore would have found these aspects of the Southeast EEM meet section 205 standards and I would have accepted them.

9. The arguments that the Southeast EEM should be required to have an independent market monitor suffer from the same infirmity.¹⁸ While I certainly agree that an independent market monitor is essential to oversee more complex and multi-faceted RTO markets, once again, this is *not* a proposal to create a new RTO market nor should FERC force these applicants into an RTO or RTO-type construct. Thus, the lack of a market monitor in the Southeast EEM not only does not make this proposal unjust and unreasonable, but the request for the imposition of a market monitor in the Southeast EEM again reflects an agenda of forcing these states into an RTO or RTO-type construct, despite the obvious benefits to consumers of the enhancement of the bilateral trading construct that is proposed in the Southeast EEM. Moreover, the monitoring and auditing

15 Protest) at 2-3; Southern Renewable Energy Association (SREA) March 15, 2021 Comments (SREA March 15 Comments) at 3-5; Voltus, Inc. March 15, 2021 Protest (Voltus March 15 Protest) at 3-4.

¹⁶ *See, e.g.*, PIOs March 15 Limited Protest at 31-32; Public Citizen March 15 Protest at 2-3.

¹⁷ *See, e.g.*, Carolinas Clean Energy Business Association (CCEBA) March 15, 2021 Comments (CCEBA March 15 Comments) at 2; Clean Energy Coalition March 15 Comments at 17-20; PIOs March 15 Limited Protest at 28-32, 39; Advanced Energy Economy, Advanced Energy Buyers Group, and the Solar Energy Industries Association (collectively, “Clean Energy Coalition II”) June 28, 2021 Response to June 2021 Response to Delinquency Letter (Clean Energy Coalition II June 28 Response to Delinquency Letter) at 5-6.

¹⁸ *See, e.g.*, SREA March 15 Comments at 5; PIOs March 15 Limited Protest at 32-34; Clean Energy Coalition March 15 Comments at 7-8.

proposed in these filings and the combined roles of the Auditor and the Administrator make for a just and reasonable proposal under section 205 that facilitates bilateral trading which already can and does occur in the current market.

10. Again, related to the same agenda of imposing an RTO on the Southeast, protestors argue that the benefits of the Southeast EEM have been misstated, overstated or unproven.¹⁹ First, any claim in this record that an RTO would provide “more” benefits than those offered by the Southeast EEM is purely speculative and unpersuasive. The issue of RTO benefits versus costs and disadvantages, in terms of both reliability and consumer protection, are complex and multi-faceted. Second, the only proposal before the Commission is the Southeast EEM and under section 205 the Commission’s analysis is limited to whether this proposal is just and reasonable and not whether some other proposal is more just or more reasonable.²⁰ That said, I would have voted that the proposal meets section 205 standards.

11. There is also disagreement over the application of the *Mobile-Sierra*²¹ public interest presumption as the standard of review.²² In response to the May 4 Deficiency Letter, the Filing Parties suggested that they would limit application of the *Mobile-Sierra* presumption to provisions, including: membership criteria; governance; roles, responsibilities, and scope of the Agent; budgeting and cost allocation; severability; withdrawal; release and liability; equitable relief; reliability obligations; dispute resolution; defaults; confidentiality; public utility status of Members; no reliance on NFEETS; no dedication of facilities; amendments; and the agreement for new Members

¹⁹ See, e.g., PIOs March 15 Limited Protest at 42; Clean Energy Coalition March 15 Comments at 8, 27-34; American Forest & Paper Association March 15, 2021 Comments at 13-14.

²⁰ See, e.g., *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (finding that, when determining whether a proposed rate was “just and reasonable,” as required by the FPA, the Commission properly did not consider “whether a proposed rate schedule is more or less reasonable than the alternative rate designs”).

²¹ *United Gas Pipe Line Co. v. Mobile Sierra Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

²² See, e.g., Clean Energy Coalition June 28 Delinquency Letter Response at 7-9; Solar Energy Industries Association August 23, 2021 Protest at 3-6.

to join.²³ As set forth more fully below, I would have found application of the *Mobile-Sierra* standard appropriate under the standard itself.

12. Several protestors raise concerns regarding the (i) public availability and quality of data related to the energy exchange as it relates to the ability to monitor the Southeast EEM for exercises of market power and market manipulation²⁴ and (ii) the independence and transparency of the Administrator and Auditor roles and the Membership Board's control over those roles.²⁵ I would have found, however, that the Southeast EEM proposal strikes a balance between (i) providing the Commission with appropriate information to monitor the Southeast EEM for the exercise of market power and market manipulation and providing the public with sufficient information to understand the Southeast EEM's performance and (ii) protecting confidential and commercially sensitive information. In addition, under the proposal, the roles and responsibilities of the Administrator and Auditor are set forth clearly and, as I noted above, their combined roles add to a just and reasonable proposal. As a result, I again would have found the proposal to be just and reasonable and not unduly discriminatory or preferential on these points as well.

13. A number of protestors claim that a high barrier is created to participation in Southeast EEM by its participation requirements and that those barriers may limit the services Participants can offer or access to NFEETS.²⁶ Among the concerns expressed in this regard are the limitation of participation to entities within the territory defined by the Southeast EEM and the three-counterparty rule regarding enabling agreements. Once again, I would have found the proposal to be just and reasonable and not unduly discriminatory and preferential as to these issues. For example, as the Filing Parties explain, these requirements are necessary to ensure the technical feasibility of the Southeast EEM. The Filing Parties note that it is not technically feasible at this time to

²³ June 7 Deficiency Response at 40-41.

²⁴ See, e.g., Voltus March 15 Protest at 5; CCEBA March 15 Comments at 2 (citing Clean Energy Coalition March 15 Comments at 18-22); PIOs March 15 Limited Protest at 36-37.

²⁵ See, e.g., PIOs March 15 Limited Protest at 37-38, 40-41; Public Citizen March 15 Protest at 3; Clean Energy Coalition March 15 Comments at 24-25; R Street Institute March 15, 2021 Comments at 5.

²⁶ See, e.g., Voltus March 15 Protest at 4-5; SREA March 15 Comments at 4; Environmental Defense Fund March 15, 2021 Comments at 7-8; PIOs March 15 Limited Protest at 50.

allow entities outside the territory to participate in the Southeast EEM, for example, because “transactions involving the use of transmission outside of the Territory. . . would require the coordination of e-Tags with non-NFEETS providers in the less-than-20 minute timeframe required, which is not possible at this time.”²⁷ Moreover, as I have noted, this proposal represents an enhancement to a bilateral system in which enabling agreements are not unusual and therefore represent the continued use of an existing mechanism.

14. Some commenters claim that a lack of a market power analysis of the Southeast EEM is a concern and, for example, makes the Southeast EEM proposal incomplete.²⁸ I similarly would have found the proposal just and reasonable as to this point because there is no new product introduced which would require a new market power analysis.

15. In addition, concerns are expressed over NFEETS, including the potential of undue discrimination to entities with firm transmission rights and that NFEETS acts as a discount to transmission. Further, some protestors argue that the Southeast EEM creates a loose power pool and therefore must allow open membership to comply with the Commission’s open access requirements established in Order Nos. 888 and 888-A.²⁹ Again, I would have found the proposal just and reasonable and not unduly discriminatory or preferential. First, there is no discount to transmission; otherwise unused non-firm transmission is to be used in NFEETS and it is made available only after all other transmission customers make their transmission reservations.³⁰ Second, the proposal does not meet the requirements for creating a loose power pool established by Order No. 888-A.³¹

16. The Commission is obligated to rule on *only the proposal before it*, not some hypothetical version that some may claim would have been better in some ways, in effect, more just and reasonable. It is a truism that to meet the 205 standard, a proposal does not have to be the best of all conceivable proposals, only good enough to meet the 205

²⁷ Filing Parties March 30 Answer at 44.

²⁸ *See, e.g.*, Clean Energy Coalition March 15 Comment at 27.

²⁹ *See, e.g., id.* at 9-14; PIOs March 15 Limited Protest at 6-13; CCEBA March 15 Comments at 2; *see also* Advanced Energy Economy, Advanced Energy Buyers Group, Renewable Energy Buyers Alliance (collectively, Clean Energy Customers) August 23, 2021 Comments at 4-5.

³⁰ Southeast EEM Transmittal at 24-25.

³¹ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 31,235.

standard; the Southeast EEM proposal clearly is and I would have accepted that proposal under section 205 as it meets the applicable legal standard.

17. As I noted above, much of the opposition to and criticism of the Southeast EEM Agreement follows a common theme: that the Southeast EEM Agreement falls short of creating a new Southeastern RTO or falls short of laying the foundation that would lead to such a new Southeastern RTO.³² Many of the comments or protests to this proposal seek to force RTO-type governance structures and procedures on the SEEM proposal.

³² See, e.g., PIOs March 15 Limited Protest at 63-64 (encouraging the Commission to engage in a technical conference to determine, *inter alia*, the benefits of RTOs and ISOs over the Southeast EEM and whether instituting the Southeast EEM would “impede or delay” market reform in the Southeast and concluding “The Commission has an opportunity to exercise its authority to establish a foundation for wholesale market reform in the Southeast. This foundation, instead of being fashioned by the self-interest of the long-time monopoly utilities in the region, would enable the competitive procurement of clean energy and hold down costs for customers in a manner that reflects the views of the many public and private entities that have so much at stake in how the Southeast’s electricity system evolves.”); Voltus Protest March 15 at 6 (“Part of the question is whether utilities can set up a bilateral trading structure that largely benefits themselves – with only pass through consumer benefits – without even discussing an RTO structure. Given this – and the CLEAN Future Act’s proposal that all public utilities place their transmission under the control of an RTO or ISO – Voltus proposes FERC convene a joint conference with the relevant electric retail regulatory authorities (RERRAs) in the involved states to explore the benefits and costs of establishing an RTO/ISO in the Southeastern U.S.” (footnote omitted)); SREA March 15 Comments at 2 (SREA “supports the development of an independent organized energy market in the South. While the Southeastern Energy Exchange Market. . .is a step towards better market efficiency, we are concerned that this step will become a stumbling block on the longer journey towards true market reform”); Clean Energy Coalition March 15 Comments at 32-33 (“If only one state in the SEEM footprint were to participate in an RTO, that decision alone is projected to have greater customer benefit than all of the utilities’ participation in SEEM is claimed to have. If the Southeast were to band together to create a new RTO, the potential benefits could total in the hundreds of billions by 2040. The Clean Energy Coalition encourages the SEEM Filing Entities and the Commission to think more ambitiously than the proposal offered in these proceedings, given the tremendous upside to true regional market integration.” (footnotes omitted)); Clean Energy Coalition II June 28 Response Delinquency Letter at 4-5 (“Evidence is mounting that a robust and economically efficient competitive regional wholesale market in the Southeast would provide significant benefits to the region, well above the benefits projected by the SEEM Members to be realized through the SEEM Proposal. In addition

18. The advocacy by various intervening interest groups for FERC to use this proceeding to impose an RTO or proto-RTO structures misses a key point: the decision whether to form a new RTO in the states covered by this proposal is a policy decision that is ultimately for the *elected policy-makers in those states* to make, *not* for FERC to impose. If some want to claim that consumers would do better in an RTO than in the state-regulated models prevalent in these Southeastern states – an open question, to say the least – we can certainly have that debate, but it is for another forum. This proceeding is about one question only: whether the Southeast EEM proposal meets the section 205 standard. Answer, as set forth above: *it does*.

19. Claims that the Southeast EEM proposal will actually harm consumers are specious – part of the campaign to force these states into an RTO-type structure – particularly in view of data indicating that consumers in the states represented in the Southeast EEM footprint³³ already enjoy average retail rates lower than the national average retail rate under their existing state regulatory frameworks.³⁴ Notably, *not a single* state utility commission expressed opposition to this proposal.

to the joint section 209 hearing proposed above, the Commission should convene a technical conference amongst itself, its staff, SEEM members, and stakeholders to facilitate a moderate discussion regarding comprehensive market reform in the Southeast. The Clean Energy Coalition is confident that such a technical conference would reveal that the benefits associated with establishing a true electricity market in the Southeast (be they economic, reliability-based, or environmental) far outweigh the costs. The Commission should not let this be the end of the matter.” (footnotes omitted)); Clean Energy Customers Comments August 23 at 5-6 (“[T]he Commission can, and should, do more to encourage an inclusive conversation about the future of wholesale markets developments in the Southeast. Now is the time to convene a forum by which stakeholders, including state regulators and policy makers, can begin establishing a collaborative process to consider the costs and benefits of more robust competitive markets in the Southeast. By broadly soliciting input from stakeholders and establishing a technical conference separate and apart from this docket the Commission can allow consideration of all relevant facts and circumstances, including by stakeholders most impacted. The Commission has an important role to play in ensuring that this conversation moves forward and can use its convening tools to ensure that the views of states and consumers on the future of the region’s wholesale market are heard and considered.”).

³³ Southeast EEM Transmittal at 5.

³⁴ See <https://www.eia.gov/electricity/state/>. Information compiled by the Energy Information Administration (EIA), the statistical and analytical agency within the U.S.

20. The *Mobile-Sierra* issue provides no basis to vote against the Southeast EEM. A grant of *Mobile-Sierra* status to the provisions remaining after the Filing Parties voluntarily withdrew their request for such status from the *majority* of the Agreement's provisions, as was proffered in response to the May 4 Deficiency Letter,³⁵ should have been approved. So, all the provisions, including those withdrawn in the Response to the May 4 Deficiency Letter, will now receive *Mobile-Sierra* protection as requested in the original filings. While I was prepared to vote on August 6 to approve the filings with the proffered *Mobile-Sierra* withdrawals, I see no reason or basis to differentiate among them at this point. The real issue here, however, is not hidden in the weeds of legal minutiae over how to interpret our past precedent concerning application of *Mobile-Sierra*, which is muddled at best even before considering the question of how those precedents line up with judicial opinions. The *Mobile-Sierra* issue does not exist in a hermetically sealed vacuum in this case, and it is unrealistic to pretend that it does. Refusal to grant any *Mobile-Sierra* protection even to the remaining provisions after the proffered withdrawal – when we could have – empowers those interests opposing the Southeast EEM by making it easier for these opponents to attack and undermine the Southeast EEM in a later section 206 proceeding at this Commission.³⁶ The Filing Parties' request for

Department of Energy, exists concerning average retail rates in the various states. I consulted EIA's figures for 2019, the last full year before the pandemic may have had some impact on data. While I understand that adjustments can be made to the average retail rates published in EIA's reports, I accept the data for what they are, averages both national and state-specific. The average retail rate for the United States in 2019 was 10.54 cents/kWh. *Id.* The 2019 average retail rate for each of the states reflected in the Southeast EEM proposal's footprint is lower. *See id.*; *see also*, Southeast EEM Transmittal at 5.

³⁵ *See, e.g.*, June 7 Deficiency Response at 41 (noting that “[m]ost of the Southeast EEM Agreement” would not have been subject to the *Mobile-Sierra* presumption under the June 7 Deficiency Letter Response, including the Market Rules).

³⁶ Commissioner Clements foresees future section 206 complaints against SEEM, and lists the potential allegations: “Applying the *Mobile-Sierra* standard would therefore *inappropriately make any future challenge* to the justness and reasonableness of the Southeast EEM Agreement *more difficult*. This is particularly problematic here *given the concerns with undue discrimination, governance, market power, and manipulation that the proposal presents.*” Comm’r Clements Southeast EEM Statement at P 7 (emphasis added). Chairman Glick also raises the prospect of just such future attacks: “Applying the *Mobile-Sierra* presumption in these circumstances will *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 Southeast EEM.” Chairman Glick Southeast EEM

Mobile-Sierra protection against such future attacks on the contractual provisions should have been granted because – once again – this is *not* an RTO, *not* a halfway-house to an RTO, but simply a contractual arrangement for utilities in the Southeast to engage in bilateral trading.

21. In sum, the Southeast EEM application clearly meets the standard to be approved under section 205 and I would have voted to approve. It is sad that this proposal, which offers undeniable benefits to consumers both in terms of reliability and lower costs, could not command at least three votes.

22. Now to turn to a procedural issue. On October 13, 2021, a Notice was issued in eight of the above-referenced dockets as the Commission could not issue an order due to a 2-to-2 division among the Commissioners. In that Notice, the filings related directly to Southeast EEM Agreement – but *not* those four related to the OATT revisions which were always part of the Southeast EEM proposal package – were confirmed to have gone into effect by operation of law.

23. Regardless of legal arguments related to the Notice’s exclusion of the four OATT filings from approval by operation of law, as a matter of procedural fairness the OATT revisions could and should have been accepted with a simple order issued by this Commission. I would have voted for such an order, which I strongly believe would have been appropriate given the way the Southeast EEM proposal has been managed and handled by the Commission.³⁷

24. The Filing Parties stated that the filings across these dockets were made *as a package*.³⁸ After changes in the effective date necessitated by two deficiency letters, the Filing Parties selected October 12, 2021 as an effective date for all of the filings.³⁹ The

Statement at P 11 (emphasis added).

³⁷ See, e.g., *supra* at n.10.

³⁸ See Southern Companies, Docket No. ER21-1125, February 12, 2021 Transmittal at 3 (“The Southeast EEM filings are a package. Commission action on all filings is necessary so that Southern Companies and other Southeast EEM Members can have the regulatory certainty they need to move forward with any significant additional Southeast EEM financial commitments to bring this enhanced market to fruition for the benefit of customers as quickly as possible.”); see, e.g., Dominion South Carolina, Docket No. ER21-1128, February 12, 2021 Transmittal at 3; Duke Progress & Duke Carolinas, Docket No. ER21-1115, February 12, 2021 Transmittal at 3; LG&E/KU, Docket No. ER21-1118, February 12, 2021 Transmittal at 3.

³⁹ Southern Companies, Docket No. ER21-1111, August 11 Deficiency Response

Secretary issued a Combined Notice that reflected that each of the filings was made under section 205(d) and again confirming a 60 day clock.⁴⁰ Southern Companies noted that they followed guidance that the filings needed to be made in multiple dockets⁴¹ and that the OATT revisions should bear a date in eTariff of 12/31/9998 as the transmission revisions should only go into effect at a later date when the service was established under the market structure approved by the Commission.⁴² In sum, the Filing Parties spoke clearly through their filings about their intentions, the reasons the filings were made through multiple dockets, what sources they relied on to make their filings and that these multiple filings were all related and part of the *same* package.

25. There can be no credible argument that the Filing Parties did not at all times act in good faith as they navigated the Commission rules, protocols and technical requirements for making all of these filings. This is especially true since neither of the two deficiency letters noted any issue or potential concern with respect to the manner in which the OATT filings were made and given that they were all part of the same package. It follows that inaction by the Commission on these filings due to a lack of a majority should have resulted in *all* dockets being treated as a *package* by publishing a Notice that the entire package was effective by operation of law or, and preferably, simply issuing the necessary order accepting the OATT filings as of October 12, 2021, the date the rest of the filings went into effect by operation of law.

at 9.

⁴⁰ February 12, 2021 Combined Notice of Filing #1 and February 12, 2021 Combined Notice of Filing #2 describing each docket as filed under 205(d).

⁴¹ See Southeast EEM Transmittal at 3 (defining the Tariff Filings, Concurrence Filings and the Agreement Filings collectively as the Southeast EEM Filings and stating that “eTariff requirements mandate that each of the Southeast EEM Filings have its own docket. . . .”)

⁴² See, e.g., Southern Companies, Docket No. ER21-1125, February 12, 2021 Transmittal at 12, n.39 (citing Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings at 10 (last updated on Nov. 14, 2016) (“If the effective date is not known at the time of the filing, such as the effective date is contingent on FERC approval, the closing of a plant sale, etc., the date of 12/31/9998 must be used.”)).

26. As I stated, regardless of the arguments both legal and equitable, however, there is a readily available cure. We can and should issue the appropriate technical order accepting the OATT revision filings, and we should do so promptly. I would have voted for such an order.

Mark C. Christie
Commissioner

Document Content(s)

FINAL 10-20-21 CHRISTIE SEEM STATEMENT.docx.....1