

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Power Company	Docket Nos.	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

(Issued October 20, 2021)

STATEMENT OF JAMES P. DANLY

1. I submit this statement in accordance with section 205(g)(1)(B) of the Federal Power Act (FPA).¹ I voted to approve the proposal.

¹ 16 U.S.C. § 824d(g)(1)(B). In October 2018, the America's Water Infrastructure Act became law. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765 (2018). That Act included provisions from the Fair Ratepayer Accountability,

2. I provide this statement to explain why the entire Southeast Energy Exchange Market (Southeast EEM) proposal² in all twelve root dockets went into effect by operation of law and not merely the subset of dockets included in the Commission's October 13, 2021 Notice.³ Excluding those dockets from the notice may create the false impression that the proposed tariff revisions in those dockets did not also go into effect by operation of law. To the contrary, every filing, in every related docket has now been accepted.⁴ As discussed below, the Commission's deficient notice is just one more in a

Transparency, and Efficiency Standards Act (the Fair RATES Act) amending FPA section 205 to treat inaction by the Commission that allows a rate change to take effect as an order for purposes of rehearing and judicial review. America's Water Infrastructure Act § 3006.

² Members of the Southeast EEM are: Alabama Power Company (Alabama Power), Georgia Power Company (Georgia Power), and Mississippi Power Company (Mississippi Power) (collectively, Southern Companies); Associated Electric Cooperative, Inc. (AECI); Dalton Utilities (Dalton); Dominion Energy South Carolina, Inc. (Dominion Energy SC); Duke Energy Carolinas, LLC (DEC) and Duke Energy Progress, LLC (DEP) (together with DEC, 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); Power South Energy Cooperative (PowerSouth); North Carolina Electric Membership Corporation (NCEMC); and Tennessee Valley Authority (TVA) (each a Member and collectively, the Members). Other entities that have participated in the creation of the Southeast EEM and 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 (GSOC); Georgia Transmission Corporation (GTC); Municipal Electric Authority of Georgia (MEAG Power); Oglethorpe Power Corporation (An Electric Membership Corporation) (Oglethorpe); and South Carolina Public Service Authority (Santee Cooper).

³ October 13, 2021 Notice. Dockets included were *Ala. Power*, Docket No. ER21-1111-002; *Dominion Energy SC*, Docket No. ER21-1112-002; *LG&E*, Docket No. ER21-1114-002; *DEC*, Docket No. ER21-1116-002; *DEP*, Docket No. ER21-1117-002; *Ga. Power*, Docket No. ER21-1119-002; *KU*, Docket No. ER21-1120-002; *Miss. Power*, Docket No. ER21-1121-002. Dockets excluded were *Ala. Power*, Docket No. ER21-1125-002, et al.; *Dominion Energy SC*, Docket No. ER21-1128-002, et al.; *Duke*, Docket No. ER21-1115-002, et al.; *LG&E*, Docket No. ER21-1118-002, et al.

⁴ See, e.g., *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) (recognizing that an agency's authority runs to it as "an entity apart from its members, and it is its institutional decision—none other—that bear legal

line of improper procedural maneuvers that have unjustifiably delayed the establishment of this market and delayed the issuance of a merits order by half a year.

3. I also explain why the Southeast EEM proposal is just and reasonable and not unduly discriminatory or preferential and should have been approved in full by the Commission in an order on the merits.

I. Southeast EEM Proposal

4. On February 12, 2021, Southern Company, as agent for Alabama Power, on behalf of itself and other Members of the Southeast EEM, submitted the Southeast EEM Agreement, part of a unified package of proposals to establish a new, voluntary electronic trading platform designed to facilitate bilateral trading in the Southeast, provide access to unused transmission capacity and increase liquidity and competition.⁵ The Southeast EEM Agreement and related filings, including concurrences thereto⁶ and related open access transmission tariff (OATT) revisions to establish Non-Firm Energy Exchange Transmission Service,⁷ were submitted in twelve related dockets. As the Southeast EEM Members explained: “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.”⁸ The Southeast EEM

significance.”); *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (“[A]ctions of the Commission shall be determined by a majority vote of the members present.” (quoting 42 U.S.C. § 7171(e))).

⁵ *See, e.g., Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 2.

⁶ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal; *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal; *DEC*, Docket No. ER21-1116-000, February 12, 2021 Transmittal; *DEP*, Docket No. ER21-1117-000, February 12, 2021 Transmittal; *Ga. Power*, Docket No. ER21-1119-000 Transmittal; *KU*, Docket No. ER21-1120-000, February 12, 2021 Transmittal; *Miss. Power*, Docket No. ER21-1121-000 Transmittal.

⁷ The four OATT dockets are: *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal; *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal; *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal; *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal.

⁸ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 3;

Agreement requires all Members that are transmission service providers amend their tariffs to provide Non-Firm Energy Exchange Transmission Service (NFEETS).⁹ The Members of the Southeast EEM submitted their OATT revisions, in the four dockets excluded from the October 13 Notice, because they signed the Southeast EEM Agreement.¹⁰ As they noted, the “eTariff requirements mandate that each of the Southeast EEM Filings have its own docket[.]”¹¹ The Commission’s notices of filing

Dominion Energy SC, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 3; *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 3; *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 3. These are the four OATT dockets. See *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2 n.5 (“In addition to Southern Companies, Dominion Energy South Carolina, DEC, and LG&E are each filing amendments to their transmission tariffs, some of which are joint OATTs, to add [Non-Firm Energy Exchange Transmission Service] (“Tariff Filings,” together with the Agreement Filing and the Concurrence Filings, the “Southeast EEM Filings”).”); see also *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3 (defining the Tariff Filings, Concurrence Filings and the Agreement Filings as the Southeast EEM Filings).

⁹ See Southeast EEM Agreement, § 3.2.1 (“To be a Member of the Southeast EEM, an entity must be: (i) a Load Serving Entity located in the Territory; (ii) an association, Cooperative or Governmental Utility that is a Load Serving Entity located in the Territory; or (iii) an association, Cooperative or Governmental Utility created for the purpose of providing service that includes Energy to a Cooperative or governmental Load Serving Entity (or the Load Serving Entities being served by an association, Cooperative or Governmental Utility) located in the Territory. *The Tariff of any Member who provides transmission service must contain Non-Firm Energy Exchange Transmission Service provisions for those Energy Exchanges that seek to utilize such Member’s transmission system.*”) (emphasis added); see also *id.* § 3.1 (“Each Member shall comply with all applicable rules, policies, guidelines, or other standards or requirements set forth in this Agreement and as may otherwise be required by the Membership Board or applicable Law.”).

¹⁰ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2; *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 2; *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 2; *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 2.

¹¹ See, e.g., *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3 (“eTariff requirements mandate that each of the Southeast EEM Filings have its own docket”); *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2 (“eTariff requirements mandate that each of the Southeast EEM Filings

properly designated all twelve filings as FPA section 205(d) rate filings in accordance with FPA section 205(d) and the related filing codes that were used.¹² They used the effective date of 12/31/9998¹³ as required.¹⁴ The Southeast EEM proposal was submitted

have its own docket”).

¹² Filing Code 10 was used for the February 12, 2021 filings, and Filing Code 180 was used for the deficiency responses. The eTariff Rules Table (as published on April 20, 2018) denotes filings under these codes as having a 60-day statutory deadline with a date range of April 2010 to an inactive date of 12/31/9998. ETariff Filing Rules Listing (Apr. 20, 2018), available at <https://www.ferc.gov/sites/default/files/2020-05/Type%20of%20Filing%20Rules%20Table.pdf>. The Commission routinely accepts filings with a filing party’s commitment to submit an informational filing once the commencement of service date is known.

¹³ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 3, 11-12, 12 n.36, 14 (requesting acceptance of the proposed OATT changes on May 13, 2021 to be effective as of commencement of service and using 12/31/9998 in accordance with the implementation guide); *Dominion Energy SC*, Docket No. ER21-1128-000 February 12, 2021 Transmittal at 3, 11-12, 11 n.36, 14; *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 3, 12-13, 12 n.39, 15; *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 3, 12-13, 12 n.38, 15.

¹⁴ *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* at 10 (last updated on Nov. 14, 2016), available at <https://www.ferc.gov/sites/default/files/2020-05/implementation-guide.pdf> (“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.*”) (emphasis added). See *N. Y. Indep. Sys. Operator, Inc.*, Docket No. ER21-892-000 (Mar. 10, 2021) (delegated letter order) (accepting tariff revisions 54 days after filing on January 15, 2021; requesting acceptance within the 60-day statutory period, a waiver of the Commission’s 120 days prior notice requirement, and a flexible effective date with tariff sheets filed as effective 12/31/9998); see also *Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,160 (2021) (accepting tariff revisions 60 days after filing on March 26, 2021, which requested the Commission issue an order by May 25, 2021 and included an effective date of 12/31/9998 as part of the tariff records; accepting the proposed tariff revisions to be effective no later than June 15, 2021 as requested); *Tri-State Generation & Transmission Ass’n, Inc.*, 171 FERC ¶ 61,202 (2020) (accepting protested rate filing 60 days after it was filed with 12/31/9998 for its eTariff effective date); *Gulf Power Co.*, Docket No. ER21-240-000 (Dec. 17, 2020) (delegated letter order) (accepting the Service Agreement for Network Integration Transmission Service under Gulf Power’s OATT 49 days after filing on October 29, 2020 requesting an effective date of 12/31/9998).

by the filing parties on February 12, 2021, with a requested acceptance date 90 days after filing, or May 13, 2021, to allow 30 days for comments and 60 days for Commission action.¹⁵

II. Procedural Issues

A. Deficiency Letters

5. Rather than issue an order on the merits, Commission staff embarked upon a series of procedural maneuvers that significantly delayed approval of the Southeast EEM proposal. These began with the issuance of a first (and arguably justifiable) deficiency letter.¹⁶ The original last day for Commission action (LDA)¹⁷ was May 12, 2021. The First Deficiency Letter was issued on May 4, 2021, just over a week in advance of the deadline.¹⁸ The filing parties' response to the First Deficiency Letter was filed on June 7, 2021.¹⁹ That submission reset 60-day statutory clock to August 6, 2021. In their first deficiency letter response, the filing parties requested "that the Commission accept the

¹⁵ See, e.g., *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3-4 ("The Southeast EEM Members respectfully request that the Commission accept the Southeast EEM Agreement to become effective May 13, 2021, 90 days after this filing [W]e respectfully request that the Commission establish a comment period of thirty days As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still provide the Commission 60 days to act upon the Southeast EEM Filings after comments are received."). See attachment A for similar statements in other dockets.

¹⁶ The first deficiency letter issued on May 4, 2021 requested information related to market power, market manipulation, and market oversight. May 4, 2021 Deficiency Letter, Docket Nos. ER21-1111-000, ER21-1112-000, ER21-1114-000, ER21-1115-000, ER21-1116-000, ER21-1117-000, ER21-1118-000, ER21-1119-000, ER21-1120-000, ER21-1121-000, ER21-1125-000, ER21-1128-000 (delegated order) (First Deficiency Letter).

¹⁷ The Commission's LDA is an internal control to identify the last date upon which the Commission must act on a filing with a statutory deadline before the filing goes into effect by operation of law.

¹⁸ See First Deficiency Letter.

¹⁹ See *Ala. Power*, Docket Nos. ER21-1111-001, et al., First Deficiency Response (June 7-8, 2021). The deficiency response was filed in certain of the dockets after the 5 p.m. deadline on June 7, 2021, so it is dated June 8, 2021 in those dockets.

Southeast EEM Agreement, *and the related filings in these unconsolidated dockets . . . to become effective on August 6, 2021.*”²⁰

6. That deficiency letter was then followed by a second, indisputably frivolous deficiency letter which Commission staff issued on August 6, 2021.²¹ That would have again reset the 60-day statutory clock, this time to October 11, 2021, a federal holiday. In their second deficiency letter response, the filing parties requested that the “Commission accept the Southeast EEM Agreement, *and the related filings in these unconsolidated dockets . . . to become effective on October 12, 2021.*”²²

7. Altogether, those deficiency letters extended by five months the acceptance by operation of law on October 12, 2021 of a filing that was originally submitted on February 12, 2021 with a requested acceptance date of May 13, 2021.

8. I am concerned that the Commission staff, who work under the supervision of the Chairman, improperly employed deficiency letters issued under delegated authority to unlawfully toll the time for Commission action. The First Deficiency Letter requested information related to market power, market manipulation and market oversight. I concede that this first deficiency letter could be argued to have been a legitimate request for more information, though I do not consider any of the information requested or received to have been necessary to rule on whether the submission satisfied the requirements of FPA section 205. But even if the first deficiency letter were a legitimate exercise of staff’s delegated authority, deficiency letters should not be issued lightly because they work a circumvention of the FPA’s clear direction that rate proposals go into effect (or must be affirmatively accepted or rejected) in 60 days.

9. The Second Deficiency Letter is another matter entirely. It failed to identify any deficiency or solicit any information that any Commissioner could have required to determine whether the proposal before us is just and reasonable. As detailed below,

²⁰ First Deficiency Response at 43 (emphasis added).

²¹ The second deficiency letter, issued on August 6, 2021, requested information related to Standards of Conduct and affiliate restrictions, access to redacted and confidential information, the Administrator, including information already in the record. August 6, 2021 Deficiency Letter, Docket Nos. ER21-1111-001, ER21-1112-001, ER21-1114-001, ER21-1115-000, ER21-1115-001, ER21-1116-001, ER21-1117-001, ER21-1118-001, ER21-1119-001, ER21-1120-001, ER21-1121-001, ER21-1125-000, ER21-1125-001, ER21-1128-000, ER21-1128-001 (delegated order) (Second Deficiency Letter).

²² *Ala. Power*, Docket Nos. ER21-1111-002, et al., Second Deficiency Response, at 9 (Aug. 11, 2021) (emphasis added).

review of the record demonstrates—beyond dispute—that the Second Deficiency Letter requested information that *was already in the record*. In reply, the filing parties swiftly submitted responses to the Second Deficiency Letter’s three questions three business day after its issuance, on August 11, 2021, five days earlier than the established due date of August 16, 2021. In their response, the filing parties again requested expedited Commission action on or before September 10, 2021; no Commission order issued. The last LDA was October 11, 2021, roughly *five months* later than the original requested effective date.

10. Requiring filing parties to restate information already in the record can hardly constitute the identification of a deficiency in the parties’ filing and if the filing is not deficient, then it must be ruled upon within the statutorily-imposed 60-day time limit. We *know* that the requested information was already available to the Commission. For two of the three questions in the Second Deficiency Letter, the filing parties’ response consisted of little more than citations to their original filing and to their First Deficiency Response.²³ As to the third question, while the filing parties did not simply cite to their earlier submissions (perhaps to avoid the appearance of insolence?), the information sought there was also already in the record. The third question asked that the filing parties “[p]lease clarify whether the Administrator similarly *will not be a Member, Participant, Agent, or affiliate* of those entities.”²⁴ All²⁵ of this was already known to the Commission—it was included in the original February 12, 2021 filing in which the filing parties describe the various entities’ roles, stating that the “Southeast EEM Administrator” “[w]ill be an independent third party contracted to operate the Southeast EEM; *will not be a Member, Participant, Agent, or Auditor.*”²⁶ Worst of all, the

²³ See Second Deficiency Response at 3-7 & nn.4-9 (regarding the response to the first question) (citing First Deficiency Response, Attach. A, Proposed Revisions to Southeast EEM Agreement, Market Rules, §§ VI.D.6, VI.A, VI.D, 2.5, III; *id.* at 7-8 & n.10 (regarding the response to the second question) (citing First Deficiency Response, Attach. A, Proposed Revisions to Southeast EEM Agreement, Participant Agreement, § 6.0).

²⁴ Second Deficiency Letter at 4 (emphasis added).

²⁵ While the term “affiliate” was not specifically included in the initial filing, the words “*independent third party*” do appear in describing the Administrator. *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 18 (reflecting that the Southeast EEM Administrator “[w]ill be an independent third party contracted to operate the Southeast EEM; will not be a Member, Participant, Agent, or Auditor.”) A deficiency letter question on this point was not warranted given the lack of ambiguity in the filing parties’ initial submission.

²⁶ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 18

inclusion of this question could not have been an oversight—the Second Deficiency Letter actually *cited the page* at which the filing parties included this information in their transmittal letter.²⁷

11. To the extent to which there was any deficiency at all in this case, it is entirely the Commission's, in particular, its failure to timely act on a complete and well-pleaded section 205 filing. The issuance of deficiency letters is a practice employed for many years at the direction of many different Chairmen. I have sparingly directed the issuance of deficiency letters myself.²⁸ But the fact that a practice has been employed for years does not make it legal and its abuse can never be acceptable. As in the case of the Commission's past practice of granting rehearing for the purposes of further consideration (AKA tolling orders) to delay the consideration of section 205 filings, the use of deficiency letters as a tolling mechanism violates the Federal Power Act's clear statutory timeline. Given the court's sharp rebuke in *Allegheny Defense Project v. FERC (Allegheny)*, should this new tolling practice ever be challenged, it cannot be expected to withstand judicial scrutiny. As the court in *Allegheny*²⁹ noted, "Commissioner Glick has called the process enabled by the Commission's tolling orders 'fundamentally unfair'"³⁰ I agree.

(emphasis added).

²⁷ Second Deficiency Letter at 4 n.7 (citing Filing Parties February 12 Filing, Transmittal at 16-18).

²⁸ See, e.g., *PJM Interconnection, L.L.C.*, Docket No. ER21-278-000, Deficiency Letter (2020) (deficiency letter issued on Dec. 22, 2020 regarding an Oct. 30, 2020 filing submitted pursuant to section 205 of the FPA noting that, pending receipt of the information requested to be provided 30 days from the date of the letter, a filing date will be assigned to the filing).

²⁹ *Allegheny*, 964 F.3d 1, 9 (D.C. Cir. 2020) (en banc).

³⁰ *Id.* at 10 (citing *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 (2019) (*Spire*) (Glick, Comm'r, dissenting at PP 29-30)); see also *Spire*, 169 FERC ¶ 61,134 (Glick, Comm'r, dissenting at P 33) (criticizing "fundamental[] unfair[ness]," recognizing "good government is about more than meeting the absolute minimum of constitutional due process," noting that a "regulatory construct . . . [that] ensures that irreparable harm will occur before any party has access to judicial relief . . . ought to keep every member of [the] Commission up at night," and criticizing "bureaucratic indifference that I find hard to stomach."); *id.* (Glick, Comm'r, dissenting at P 34) ("Alternatively, the Commission could have taken 'the easiest path of all' by simply . . . not issuing its standard tolling

B. FPA Section 205(g) Notice

12. And now, the latest procedural maneuver: the October 13, 2021 Secretary's Notice. This notice, issued again by staff under the Chairman's supervision, implies that, following Commission inaction by the statutory deadline of October 11, 2021, only eight of the twelve related dockets had been accepted by operation of law. The notice simply fails to mention four additional dockets, each of which relate to the tariff changes necessary for the individual utilities to implement the accepted Southeast EEM proposal and provide NFEETs.

13. Because the Commission *did not issue an order* accepting or denying the Southeast EEM proposal, under FPA section 205(g)(1)(A), such inaction is "considered to be an order issued by the Commission accepting the change for purposes of section 825/(a)." ³¹ The notice is not an order, and has no legal effect on whether a filing has been accepted by operation of law. Individual Commissioner's statements are no more than opinions and do not have the force of law. Statements are not institutional decisions and do not reflect a majority vote. The Commission only speaks through its orders. ³² Because the entire filing constitutes an integrated package, all twelve dockets went into effect by operation of law. The Commission's notice is deficient, unlawful, and of no effect because it is the Commission's inaction that triggers parties' rights under the FPA, not the notice. Since the entire set of twelve dockets has now gone into effect, the filing parties are free to immediately begin implementation of the Southeast EEM proposal.

14. Chairman Glick acknowledges that "[s]tatutory filings are filings made pursuant to section 205 of the FPA." ³³ Chairman Glick claims that these rate proposals should not be treated like a normal FPA section 205 rate change ³⁴ because the filing parties used an

order.") (citation omitted).

³¹ 16 U.S.C. § 824d(g)(1)(A).

³² See, e.g., *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d at 776; see also *Pub. Citizen, Inc. v. FERC*, 839 F.3d at 1169.

³³ Glick Statement at P 17 n.20 ("Statutory filings are filings made pursuant to section 205 of the FPA, section 4 of the Natural Gas Act, and section 6 of the Interstate Commerce Act.").

³⁴ Glick Statement at P 18 ("Here, four of the relevant 12 filings incorporated open-ended proposed effective dates. As a result, these four filings did not become effective on October 12, 2021, when the Commission failed to act within 61 days of the filing date.").

effective date of 12/31/9998³⁵ and thus are excluded from the FPA 60-day clock. The effect of this exclusion, if it were lawful, would be to block the tariff revisions required to effectuate the Southeast EEM proposal and thus to prevent the now-accepted proposal from going into effect.

15. The argument goes as follows: the four dockets at issue, all of which update individual utilities' tariffs in order to establish provisions effectuating the Southeast EEM proposal, were not, in fact, FPA section 205 filings because a Commission staff Implementation Guide required them to use the 12/31/9998 effective date. The staff Implementation Guide provides that “[i]f 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.*”³⁶ Therefore, the filing parties do not enjoy the benefit of the 60-day time limit for Commission action. This, despite the fact that the filing parties have repeatedly stated that every one of the unconsolidated dockets are part of a single, unified filing and despite the fact that, upon inspection, it is evident that the tariff revisions contemplated in the four excluded dockets are necessary for the Southeast EEM proposal to function. The reason? Because the filing parties entered an effective date of 12/31/9998 on eTariff and despite the fact that this is the *exact entry* that the Commission staff Implementation Guide required them to use.³⁷

³⁵ Cf. Glick Statement at P 18 (“[F]our of the relevant 12 filings incorporated open-ended proposed effective dates.”); Glick Statement at P 18 n.22 (“[T]he open-ended proposed effective date for their OATT filings [was] chosen by the filing parties at their discretion”); *id.* (“The applicants therefore followed the Commission’s eTariff rules exactly as expected, given their own request that the OATT revisions take effect at an unknown point after, not coincident with, the Southeast EEM Agreement.”). While it is correct to say the filing parties asked for a future effective date for the OATT filings, their transmittal letters clearly evidenced a requested acceptance date of their filings within the statutory 60-day period in both deficiency letter responses.

³⁶ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 12 n.36 (quoting *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* at 10 (last updated on Nov. 14, 2016) (emphasis added)).

³⁷ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 12 n.36 (“*See Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* at p. 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.*’)”) (emphasis added).

16. This cannot be correct. No precedent is, or to my knowledge can be, cited in support of this theory and that which³⁸ is cited is inapposite.³⁹ Regardless, the FPA governs, not a staff Implementation Guide. The FPA requires the Commission to act

³⁸ “In order for the Commission and the public to obtain a complete picture of a company’s tariff, these various provisions need to be integrated into a single system that will provide information as to the status of tariff provisions, permit the assembly of a complete tariff, and permit tariff related research. Indeed, for tariffs filed on paper, the Commission has managed these tariffs as a database by keeping tariff books The standards we are adopting in this Final Rule merely replace this paper system with a very similar electronic database that will similarly track the tariff submissions and tariff history, but in a form that will make tariff information more widely available over the Internet.” *Electronic Tariff Filings*, Order No. 714, 124 FERC ¶ 61,270, at P 10 (2008), *clarified*, Order No. 714-A, 147 FERC ¶ 61,115 (2014).

Step-by-step instructions explain how one must download and populate the .xml file with the tariff record and use the eTariff Filing Codes for inclusion of metadata. Then one must zip the .xml file but not the documents. One submits the .xml file to the FERC Sandbox Electronic Test Site in order to correct any errors received before resubmitting it to the sandbox and “[c]ontinue correcting any errors and resubmitting until no errors are reported.” Fed. Energy Regul. Comm’n, *Electric and MBR Step-by-Step Filing*, <https://www.ferc.gov/industries-data/electric/overview/electric-market-based-rates/initial-applications/step-step-guide-filing-your-application-etariff-system> (last updated Nov. 19, 2020). Then, one logs into FERC Online to submit the eFiling including the zip file that contains the .xml file. Two emails are sent by FERC verifying receipt of the filing. If errors are identified then one must amend the .xml file and resubmit it. If one receives warnings, this signals the filing was received but one must double-check that the correct information was submitted as warnings may indicate that what was submitted is different than what FERC normally receives. *See id.*

³⁹ Glick Statement at P 17 & nn.18-19. The cited regulations, 18 C.F.R. §§ 35.7(d) and 385.205(b), and cited orders, *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096, at 31,504 (2000) (cross-referenced at 90 FERC ¶ 61,352); *Electronic Tariff Filings*, Order No. 714, 124 FERC ¶ 61,270 (2008), *clarified*, Order No. 714-A, 147 FERC ¶ 61,115, at P 4 (2014); and, *Pioneer Transmission, LLC*, 169 FERC ¶ 61,265, at P 20 (2019). Neither the eTariff program nor a staff Implementation Guide can trump the FPA; to do so is unlawful. The cited case *Ala. Power Co. v. FERC*, 22 F.3d 270, 272-73 (11th Cir. 1994) is inapposite as the sole issue on appeal was whether the FERC may properly decide that when several utilities jointly file their respective rates in a single contract, the 60-day review period begins only when the filing is complete for every utility. Here, the filings were individually submitted and complete within the last 60-day statutory period.

within 60 days. We did not, for reasons I have already highlighted. The staff Implementation Guide, on the other hand, is nothing more than staff's ministerial effort to provide "guidance" (that is why it is called a "Guide") when rate proponents have an unknown future effective date. The 12/31/9998 date imposed (but really "guided") by the Commission via a staff Implementation Guide in such cases obviously is a placeholder date and does not reflect the parties' actual intended effective date. A good faith reading of neither the Implementation Guide nor the FPA would seriously contemplate empowering the Commission to provide itself up to 7,977 years to act on such a filing.⁴⁰ And such a reading of the FPA lacks majority support in any event.

17. Apart from having no basis in law, this approach gives no effect to filing parties' repeatedly expressed, unambiguous intent for Commission acceptance within the statutory period.⁴¹ And to the extent to which any proposed solution relies upon a further submission and yet another 60 days to elapse before those filings must be accepted, that would deny the filing parties the very regulatory certainty they require to begin implementation. Refiling is unnecessary under the FPA, and—given the history of delay

⁴⁰ Under Chairman Glick's logic, the only way the rate proposal at issue in these four dockets could go into effect by operation of law today would be if the Filing Parties' Neolithic ancestors had filed it circa 6,000 B.C.

⁴¹ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3-4, 12-13, 42, 44; *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 2 & n.6, 6-7, 8; *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 2 & n.6; 6-7, 8; *KU*, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 2 & n.6, 6-7; *DEC*, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 2 & n.6, 6-7,8; *DEP*, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 2 & n.6, 6-7, 8; *Ga. Power*, Docket No. ER21-1119-000, February 12, 2021 Transmittal at 3; *Miss. Power*, Docket No. ER21-1121-000, February 12, 2021 Transmittal at 3.

"The Southeast EEM filings are a package." *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 3; *see also Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 3 (same); *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 3 (same); *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 3 (same). *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2 n.5, 3, 12, 14; *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 2-3, 12, 14; *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 2-3, 2 n.7, 13, 15; *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 2-3, 2 n.5, 13, 15.

in this proceeding—would be difficult to view as anything but a further cynical attempt to stall the establishment of the Southeast EEM.

18. All of which is to say, the entire filing package, including every associated docket, has been accepted. And, since the original version of the proposal that was filed with the Commission has not been superseded, the *Mobile-Sierra* public interest standard of review applies to the *entire* agreement, as requested in the initial submission.⁴² Due to the Commission’s failure to issue an order, no compliance filing is triggered as a result of the October 13, 2021 Notice. Rehearing rights as to the original filing are now perfected, paving the way for judicial review under FPA section 205(g).

III. Substantive Matters

19. As to the merits of the case, I would have voted to approve the Southeast EEM proposal in full.

20. We must first understand what the Southeast EEM proposal is and what it is not. The filing parties clearly state that, “the Southeast EEM is not—and was never intended to be—a top-to-bottom reimagining of the Southeast energy market; rather, it reflects incremental improvement to the existing bilateral market.”⁴³ This market does not offer joint dispatch, joint operation, or joint planning. And it is not an energy imbalance market.

21. While some may have preferred that the utilities in the Southeast create a regional independent system operator (ISO) or regional transmission organization (RTO), that is not the filing the parties submitted. My colleagues detail a litany of objections⁴⁴ to the

⁴² Second Deficiency Response at 9 (“If the Commission finds these proposed changes acceptable and otherwise accepts the Southeast EEM Proposal as submitted, the Southeast EEM Members commit to subsequently submit a compliance filing to effectuate the proposed revisions within 30 days of acceptance.”).

⁴³ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 9.

⁴⁴ Examples of these include: membership (Clements Statement at PP 3, 8 & n.8, Section III); governance (Clements Statement at PP 3, 7, 33-41); oversight and preference for independent market monitor to address market power and manipulation (Clements Statement at PP 3, 8 & n.8, 33, 42-51; Glick Statement at PP 3, 13, 14); “black box” algorithm” (Clements Statement at P 5); participation and access requirements (Clements Statement at PP 5, 8 & n.8, 9, 11-12, 16, 17, 19, 21, 40, 48); transparency (Clements Statement at PP 8, 9, 21, 33, 50); undue discrimination (Clements Statement at P 7). *Cf.* Glick Statement at P 3 (“I believe that the Commission’s monitoring capabilities, enforcement authority, and ability to institute an FPA section 206 action provide adequate protections should any Southeast EEM members or participants engage in any

Southeast EEM proposal that, I presume, stem from just such a preference⁴⁵ since the establishment of an ISO or RTO would bring with it open access throughout the

conduct that may transgress the FPA or Commission regulations.”).

⁴⁵ Glick Statement at P 1 (“I believe . . . [RTOs and ISOs] are, by far, the best way to achieve these benefits [i.e., save customers money, enhance reliability, and integrate intermittent resources most efficiently.]. That is also true for the Southeastern United States. 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. But that is not the proposal presented to us in this docket.”); *id.* (“in my opinion there clearly is” a “better option for the region”); *id.* at P 8 (“A centralized and competitive wholesale market in the Southeast, or at least something closer to that model, is a step in the right direction.”); *id.* at P 12 (“the best available option . . . in my view is to establish an RTO”); Clements Statement at P 2 (the proposal “fails to abide by the bedrock principles of open access and non-discrimination that were crystallized in the Commission’s landmark Order No. 888”); Clements Statement, Section II, at PP 15-25 (“Access to the Southeast EEM is not open, violating Order No. 888”); Clements Statement, Section III.A, at PP 28-32 (“The proposal’s membership restrictions violate Order No. 888”); Clements Statement, Section III.B, at PP 33-41 (the membership provisions unduly discriminate by creating two unequal classes of market participants (Members and Non-Members) that create an impermissible barrier to transmission access and violate ‘the legal and policy cornerstone’ of Order No. 888).

Southeast in accordance with Order Nos. 888,⁴⁶ 719⁴⁷ or 2000.⁴⁸ But that decision is not ours to make.⁴⁹ That choice is reserved wholly to the States and their utilities.⁵⁰

22. All we need decide here is whether the proposal meets the requirements of FPA section 205. Whether there might be a better arrangement that could have been requested, is absolutely irrelevant to our analysis.⁵¹ Arguments that the proposal

⁴⁶ *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 31,738 (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 Pol'y Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁴⁷ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

⁴⁸ *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-referenced at 90 FERC ¶ 61,201), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)).

⁴⁹ *N.C. Waste Awareness & Reduction Network, Inc. v. Duke Energy Carolinas, LLC*, 151 FERC ¶ 61,079, at P 64 (2015) (noting that “[t]he Commission’s longstanding policy is that RTO participation is voluntary”) (citations omitted)).

⁵⁰ *See* Order No. 2000, FERC Stats. & Regs. at 31,213 (“[M]ost states must approve a utility joining an RTO, and several states have required their utilities to turn over their transmission facilities to an independent transmission operator. Also, states must approve the siting of transmission facilities that are called for in an RTO expansion plan.”).

⁵¹ *Neb. Pub. Power Dist. v. FERC*, 957 F.3d 932, 943 (8th Cir. 2020) (recognizing that the Commission “restricts itself to evaluating the confined proposal” and therefore “need only find the *proposed* rates to be just and reasonable.” (citations omitted) (emphasis in original)); *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (stating “[w]hen acting on a public utility’s rate filing under section 205, the Commission undertakes ‘an essentially passive and reactive role’ and restricts itself to

establishes a multilateral construct in violation of the principles of Order No. 888 fail to persuade—this proposal, by its own terms, purports to be no more than an enhancement to an existing bilateral regime which is obviously permissible under the FPA.⁵² While recognizing that market-based rate authorities and safeguards are already in place for the existing bilateral market,⁵³ my colleague argues that these are insufficient given the new market structure and footprint and argues a need for “quantitative analysis” about the ability “to exercise market power or manipulate the market” and for “safeguards to protect against these abuses.”⁵⁴ I disagree. The filing parties have amply demonstrated how existing and new, additional mechanisms will guard against such concerns, including the establishment of an Administrator and Auditor.

23. While occupied with cataloguing deficiencies, real or perceived, in the Southeast EEM proposal, we should not lose sight of the fact that Non-Firm Energy Exchange Transmission Service is available *only if* the existing transmission system is not fully employed. Entities may continue to use the existing transmission system in accordance with the Commission-approved OATTs in place today and may continue to engage in bilateral transactions under Commission-approved market-based tariffs that already

evaluating the confined proposal.” (quoting *City of Winnfield v. FERC*, 774 F.2d 871, 875-76 (D.C. Cir. 1984)); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (finding that the Commission did not adopt an incorrect legal standard when it did not determine “whether [one] method is more appropriate than a [another] method, but rather whether the [proposed] method is reasonable and adequate.”).

⁵² The Commission has described the electric power market in the Southeast as follows: “The Southeast electricity market is a bilateral market . . . and virtually all the physical sales in the Southeast are done bilaterally.” Fed. Energy Regul. Comm’n, *Electric Power Markets*, <https://www.ferc.gov/electric-power-markets> (last updated July 20, 2021); *see also* Fed. Energy. Regul. Comm’n, Staff Report, Energy Primer: A Handbook of Energy Market Basics 61 (April 2020), <https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020.pdf> (explaining that in traditional wholesale electricity markets, which “exist primarily in the Southeast[,] . . . [u]tilities . . . are frequently vertically integrated . . . [and] [w]holesale physical power trading typically occurs through bilateral transactions.”). Bilateral market wholesale sales of electric energy in interstate commerce and the transmission of electric energy in interstate commerce are subject to the Commission’s FPA section 205 authority. 16 U.S.C. §§ 824(a), 824d; *Ala. Power Co.* Docket No. ER17-514-001 (May 17, 2017) (delegated letter order) (accepting Southern Companies’ revised market-based rate tariff).

⁵³ Clements Statement at P 6.

⁵⁴ *See, e.g., id.*

impose market power mitigation restrictions. These same OATTs, as revised to provide the Non-Firm Energy Exchange Transmission Service, and the utilities' market-based rate tariffs, will effectuate the Non-Firm Energy Exchange Transmission Service transactions *only* when there is unused transmission capacity.

24. While some of the opposition may stem from the preference to see RTOs and open access established as widely as possible, one of my colleagues voted against the proposal because he disagrees with the application of the *Mobile-Sierra* standard to protect the Southeast EEM agreements. That is an insufficient basis upon which to cast a vote to reject. The Commission's recent precedent restricting *Mobile-Sierra* protections to only those contracts that bear particular hallmarks is in error. It violates the principles animating the *Mobile-Sierra* doctrine and deviates from the plain terms of the judicial precedent establishing and reinforcing it.

25. While recognizing that "much of the Southeast EEM proposal arguably satisfies the Section 205 standard"⁵⁵ Chairman Glick stated that he "voted no in large part because the filing parties' proposal to apply the *Mobile-Sierra* public interest presumption to the Southeast EEM Agreement violates well-established Commission precedent."⁵⁶ In fact, Chairman Glick objects not only to the application of the presumption to the entire agreement, which was what the originally-filed proposal called for, but he objects even to the presumption's application to the smaller subset of enumerated provisions to which the filing parties conditionally agreed in their response to the First Deficiency Letter.⁵⁷ In addition to stating that application of the *Mobile-Sierra* presumption would cause

⁵⁵ Glick Statement at P 2.

⁵⁶ *Id.*

⁵⁷ First Deficiency Response at 43. Chairman Glick's claim that the filing parties conceded that certain provisions of their agreement did not qualify for the *Mobile-Sierra* presumption is inaccurate. Glick Statement at 10. The parties did not concede that they could not have *Mobile-Sierra* protection for the entire agreement. They agreed under the duress attendant to the delay caused by the first deficiency letter to reduce the scope of the *Mobile-Sierra* protection *if* the Commission were to accept the rest of the proposal in full. They agreed to do so *after* the Commission accepted the proposal. Because the Commission has discretion to apply *Mobile-Sierra* protection, the filing parties could not have conceded the entire agreement was ineligible for *Mobile-Sierra* protection in any event. See *New Eng. Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364, 370-71 (D.C. Cir. 2013) (holding Commission has considerable discretion to apply *Mobile-Sierra* to non-contract rates).

“considerable risk to the public,”⁵⁸ he states that “the *Mobile-Sierra* presumption applies to a contract ‘only if the contract has certain characteristics that justify the presumption.’”⁵⁹ He explains that it does not apply to generally applicable contractual provisions that bind any potential future signatories and no extraordinary or compelling circumstances apply that warrant application of *Mobile-Sierra* as a matter of agency discretion.⁶⁰ I freely acknowledge that Chairman Glick has the weight of Commission precedent on his side. But the Commission’s excursion outside the bounds of *Mobile-Sierra* has yet to be addressed squarely by the courts and is based upon an incorrect reading of the case law.

26. The Commission has repeatedly held that the presumption of *Mobile-Sierra* protection applies only to those contracts that have certain characteristics. The Commission’s belief flows from the Supreme Court’s statement in *Morgan Stanley*,⁶¹ and quoted in *NRG*,⁶² that “[u]nder the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out *in a freely negotiated wholesale-energy contract* meets the ‘just and reasonable’ requirement imposed by law.”⁶³ The Court further held that “[t]he presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.”⁶⁴

⁵⁸ Glick Statement at 11; *see also* Clements Statement at P 7.

⁵⁹ Glick Statement at P 9 & n.4 (citing *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 182 (2013)).

⁶⁰ Glick Statement at PP 10-11.

⁶¹ *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008) (*Morgan Stanley*).

⁶² *NRG Power Mktg., LLC v. Me. Pub. Util. Comm’n*, 558 U.S. 165, 167 (2010) (*NRG*).

⁶³ *Morgan Stanley*, 554 U.S. at 530 (emphasis added); *accord NRG*, 558 U.S. at 167 (quoting, in part, *Morgan Stanley*, 554 U.S. at 530) (emphasis added).

⁶⁴ *Morgan Stanley*, 554 U.S. at 530. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214; *cf. N.Y. Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,038 (2021) (granting petition for declaratory order that New York Transmission Owners have a federal right of first refusal under New York Independent System Operator, Inc.’s foundational agreements and OATT).

27. I cannot accept the Commission's apparent reliance on the "freely negotiated" language in *Morgan Stanley* and *NRG*⁶⁵ to hold that the presumption applies only to contracts with individualized rates, terms, or conditions, and not to contracts with standard rates, terms, or conditions entered into by multiple counterparties.⁶⁶ The Commission has placed more weight on this one statement in *Morgan Stanley* than it can reasonably bear and, in inventing this requirement out of whole cloth, it has abandoned its obligations under the *Mobile-Sierra* doctrine.⁶⁷

⁶⁵ Glick Statement at P 2 & n.1 (citing *NRG*, 558 U.S. at 174 (quoting *Morgan Stanley*, 554 U.S. at 530)).

⁶⁶ In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm's length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm's-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption. See *ISO New Eng. Inc.*, 150 FERC ¶ 61,209, at P 183 (2015) (declining to apply the *Mobile-Sierra* presumption but recognizing that the D.C. Circuit "has determined that the Commission is legally authorized to impose a more rigorous application of the statutory 'just and reasonable' standard of review on future changes to agreements that do not present contract rates."); *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048, at P 94 (2014) (same); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 185 (permitting the Consolidated Transmission Owner Agreement to be subject to differing standards of review because it could not "be classified in its entirety as containing contract rates or tariff rates" and noting that the differing standards would "recognize the distinctions among its provisions."); cf. *N.Y. Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,107, at PP 143-145 (2018) (approving public interest standard provisions in Non-Incumbent Transmission Owner Agreement in NYISO tariff to conform to NYISO-Transmission Owner Agreement); *ISO New Eng. Inc. v. New Eng. Power Pool*, 106 FERC ¶ 61,280, at PP 126-131, *reh'g granted in part, denied in part*, 109 FERC ¶ 61,147, at P 84 (2004) ("We agree that the issues addressed by [section 9.01 (indemnification requirements) and section 9.06 (assumption of liability)] affect primarily the rights and interests of the Filing Parties alone. Accordingly, we will accept the Filing Parties' proposed *Mobile-Sierra* provision as it relates to these provisions.").

⁶⁷ The D.C. Circuit described the Commission's approach in *Okla. Gas & Elec. Co. v. FERC*, 827 F.3d 75, 78-80 (D.C. Cir. 2016). However, although the court went on to uphold the Commission's determination that the *Mobile-Sierra* presumption does not apply to the right of first refusal provision in the Southwest Power Pool Membership Agreement, the court did not rule on the Commission's approach. Instead, the court's

28. It is worth taking a moment to explain why the case law does not reasonably allow the liberties the Commission has taken. In *Morgan Stanley*, the Court reversed the Ninth Circuit’s holding that the *Mobile-Sierra* presumption does not apply to market-based rate contracts not initially approved by the Commission. In so doing, the Court explained the important public policy benefits of this doctrine:

The Ninth Circuit’s standard would give short shrift to the important role of contracts in the FPA, as reflected in our decision in *Sierra*, and *would threaten to inject more volatility into the electricity market by undermining a key source of stability*. The FPA recognizes that contract stability ultimately benefits consumers, even if short-term rates for a subset of the public might be high by historical standards—which is why it permits rates to be set by contract and not just by tariff. As the Commission has recently put it, its “first and foremost duty is to protect consumers from unjust and unreasonable rates; however, . . . *uncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller’s willingness to enter into long-term contracts and this, in turn, can harm customers in the long run.*”⁶⁸

Similarly, in *NRG*, the Court referenced “*the essential role of contracts as a key factor fostering stability in the electricity market, to the long-run benefit of consumers.*”⁶⁹

29. These benefits are conferred by *all* contracts, and I see no justification for depriving the parties of *Mobile-Sierra* here. In addition, fixation upon the phrase “freely negotiated” is unwarranted. Every contract entered into freely is, to one degree or another, negotiated. This is true even if the negotiation amounts to no more than an offer and a rejection, implicit or explicit. This Commission-created doctrine simply has no support in the case law. We cannot subject the Southeast EEM Agreement to scrutiny on matters not contemplated by the holdings that established the Supreme Court’s *Mobile-Sierra* doctrine, and thereby defeat the very purpose of the doctrine: to ensure that—

ruling was based on its conclusion that “FERC did not err in determining that the doctrine does not extend to anti-competitive measures that were not arrived at through arms-length bargaining.” *Id.* at 79.

⁶⁸ *Morgan Stanley*, 554 U.S. at 551 (quoting *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, 119 FERC ¶ 61,295, at P 6 (2007)) (emphasis added).

⁶⁹ *NRG*, 558 U.S. at 174 (citing *Morgan Stanley*, 554 U.S. at 547-48, 551) (emphasis added).

absent extraordinary circumstances that would justify a public interest finding—contracts can be relied upon.

30. My colleague asserts that to support *Mobile-Sierra* would be to “undermine our ability to protect consumers under the Southeast EEM.”⁷⁰ As I see it, denial of the Southeast EEM proposal would be to allow unused transmission capacity go unused, thereby denying consumers the “meaningful” benefits of the filing parties’ projection of “over \$100 million per year in market-wide savings by 2037, assuming higher renewable and energy storage penetration, or \$40 million per year compared to the current bilateral market under a more conservative estimate.”⁷¹ And to deny the filing parties the protection of the *Mobile-Sierra* presumption would be to make every aspect of this market construct more expensive and less certain. Neither of these results can be said to be in the public interest.

31. My colleagues’ objections are not properly within the narrow scope of our analysis under FPA section 205.⁷² There is only one question before us: whether the proposed tariff amendments are just and reasonable and not unduly discriminatory or preferential.⁷³ In reviewing a section 205 filing, the Commission makes a limited determination

⁷⁰ Glick Statement at P 20.

⁷¹ *Id.* at P 12.

⁷² In addition, Commissioner Clements contends that “In past similar circumstances, the Commission has taken the approach of rejecting initial proposals for new market constructs that fail to meet the requirements of section 205, and later approving revised proposals when those shortcomings were later addressed.” Clements Statement at P 3 n.5 (citing *Pub. Serv. Co. of Colo.*, 151 FERC ¶ 61,248 (2015) (*PSCo*); *Sw. Power Pool, Inc.*, 172 FERC ¶ 61,115 (2020) (*SPP*)). In *PSCo*, the filing entity did not have and was not seeking market-based rate authority, unlike the circumstances here; additionally, the Commission noted that it had accepted other joint dispatch agreements with varying payment structures, including those that split the savings equally among participants, which is the structure presented in the Southeast EEM filing. *PSCo*, 151 FERC ¶ 61,248 at P 99. Unlike in *PSCo*, access to non-public information will be restricted. *Id.* at P 100. *PSCo* is inapposite. With respect to *SPP*, the Commission determined the filing was not clear regarding the “use of transmission and the role of the reliability coordinator” and provided guidance on “supply adequacy, marginal losses, and market power.” *SPP*, 172 FERC ¶ 61,115 at P 19. Here, it is clear that the purpose of the filing is to enhance the existing bilateral mechanism to use *unused* transmission, and existing approvals and safeguards, with enhancements thereto, will apply.

⁷³ 16 U.S.C. § 824d.

“whether the rates proposed by a utility are reasonable—and [the analysis does not] extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.”⁷⁴ The Commission has authority to accept, reject, or make only “minor deviations” from the filed provisions with the filer’s consent.⁷⁵ The Commission is prohibited from requiring an “entirely different rate design” than the one submitted, and it cannot accept “only half of a proposed rate.”⁷⁶ According to Chairman Glick, acceptance of only certain of the filings is not a prohibited modification under *NRG*, and he maintains that by expressly requesting that the Commission not consolidate their dockets they “foreclose[ed] the possibility that these filings are part of a single rate for purposes of *NRG*.”⁷⁷ I disagree.

32. Chairman Glick’s reading of the Southeast EEM filings ignores other statements in the filings that the Southeast EEM proposal was a package and that regulatory certainty was required to proceed,⁷⁸ the explanation of the filing parties that mandatory

⁷⁴ *Cities of Bethany*, 727 F.2d at 1136 (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”).

⁷⁵ See *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993) (*W. Res.*); *City of Winnfield v. FERC*, 744 F.2d. 871, 876.

⁷⁶ *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017) (quoting *W. Res.*, 9 F.3d at 1578-79).

⁷⁷ Glick Statement at P 16 & n.16.

⁷⁸ See, e.g., “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.” *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 3; *Dominion Energy SC*, ER21-1128-000, February 12, 2021 Transmittal at 3; *Duke*, ER21-1115-000, February 12, 2021 Transmittal at 3; *LG&E*, ER21-1118-000, February 12, 2021 Transmittal at 3. These are the four OATT dockets. See, e.g., *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2 n.5 (“In addition to Southern Companies, Dominion Energy South Carolina, DEC, and LG&E are each filing amendments to their transmission tariffs, some of which are joint OATTs, to add Non-Firm Energy Exchange Transmission Service (‘Tariff Filings,’ together with the Agreement Filing and the Concurrence Filings, the ‘Southeast EEM Filings’).”); see also, e.g., *Ala. Power*, Docket No., ER21-1111-000, February 12, 2021 Transmittal at 3 (defining the Tariff Filings, Concurrence Filings, and

eTariff procedures required each of the filings to have its own docket but “the issues in the dockets are related . . . [and] use of a single pleading across all dockets will allow all concerned to focus on substance,”⁷⁹ and it ignores the Commission’s own designation of the dockets as having been filed under FPA section 205(d).⁸⁰ It also cannot be squared with *NRG*.

33. This submission is just and reasonable. The Southeast EEM would enhance the existing bilateral market by creating an automated, region-wide platform that facilitates sub-hourly bilateral transactions using otherwise unused transmission capacity to achieve cost savings throughout the region. It facilitates trades and more efficiently uses the transmission system in the existing market. It does so in reliance upon Commission approvals already granted to the filing parties and is designed in accordance with existing precedent. The provision that prices Non-Firm Energy Exchange Transmission Service at \$0/MWh is just and reasonable because the Southeast EEM would make unused transmission capacity available only after all other transmission customers make their transmission reservations.⁸¹ This represents transmission capacity that would otherwise be left fallow. As such, there are no opportunity costs associated with Non-Firm Energy Exchange Transmission Service.⁸² In the face of all of the potential benefits that could be

the Agreement Filings as the Southeast EEM Filings); *id.* at 4 (“the requested effective date, and the requested date for Commission action . . . will still provide the Commission 60 days to act upon the Southeast EEM Filings”).

⁷⁹ *See, e.g., Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3.

⁸⁰ *See, e.g., 86 Fed. Reg.* 10,264, 10,264-10,265 (Feb. 19, 2021); 86 Fed. Reg. 31,492, 31,493 (June 14, 2021); 86 Fed. Reg. 45,980, 45,980-45,981 (Aug. 17, 2021). *Pioneer*, 169 FERC ¶ 61,265 at P 24 (“Pioneer also had notice that its filing was not a statutory filing made pursuant to section 205(d), as the Commission’s Notice of Filing did not indicate that Pioneer made its filing pursuant to section 205(d) or that it had a proposed effective date.”); *see also id.* P 24 n.45 (“Compare Pioneer’s Notice of Filing, at 3 with Pacific Gas and Electric Company’s Notice of Filing, at 3 in Combined Notice of Filings #1, Docket No. ER18-2119-000, (August 1, 2018), (Pacific Gas and Electric Company’s Notice states that it is a § 205(d) Rate Filing with a proposed effective date while Pioneer’s does not). *The Commission adds the § 205(d) Rate Filing and the proposed effective date to those filings with statutory action dates that are properly made through eTariff.*” (emphasis added)).

⁸¹ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 24-25.

⁸² *See Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107, at P 84 (2016) (finding that the

realized by the creation of the Southeast EEM, and the fact that there is virtually no downside to its implementation, there is simply no lawful basis upon which to reject this submission.

34. While protestors raise concerns with various aspects of the Southeast EEM proposal, we should have found that the filing parties have satisfied their burden under FPA section 205, and we should have ruled on the proposal before us and not upon protestors' alternatives.⁸³

IV. Conclusion

35. I voted to accept the Southeast EEM proposal and would have done so on August 6, 2021, as just and reasonable.

36. The Commission will get a second chance to issue a merits order in response to requests for rehearing. I sincerely hope that wisdom prevails, and that the Southeast EEM proposal is ultimately accepted.

37. However, should this matter eventually come to the court under FPA section 205(g), the court should remand it back to FERC for an order in the first instance. Failing that, if the court chooses to issue a decision on the merits, it should deny the petitions for review and remand with instructions that every aspect of the filers' submission—in all related dockets—be accepted.

James P. Danly
Commissioner

zero-rate transmission service at issue would otherwise be unused and, therefore, there would be no associated opportunity costs).

⁸³ See, e.g., *Cities of Bethany*, 727 F.2d at 1136 (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”).

ATTACHMENT A

I. Second Deficiency Response⁸⁴

1. “Given the limited nature of the second Deficiency Letter and response, the Southeast EEM Members request a shortened comment period of 10 days, or August 23, 2021, and action within 30 days, or September 10. Additionally, the Members request an effective date (as to the Southeast EEM Agreement and concurrence filings) of October 12, 2021, sixty days from the filing of this Response.”⁸⁵
2. “The Southeast EEM Members also respectfully request expedited Commission action on or before September 10, 2021—30 days after the filing date.”⁸⁶
3. “The Southeast EEM Members respectfully request that the Commission accept the Southeast EEM Agreement, and the related filings in these unconsolidated dockets, subject to the modifications proposed by the Members in previous filings, to become effective on October 12, 2021. If the Commission finds these proposed changes acceptable and otherwise accepts the Southeast EEM Proposal as submitted, the Southeast EEM Members commit to subsequently submit a compliance filing to effectuate the proposed revisions within 30 days of acceptance.”⁸⁷

II. First Deficiency Response⁸⁸

4. “Because the evidence demonstrates that the Southeast EEM, as proposed to be modified here, will benefit customers, the Southeast EEM Members request that the Commission approve the Southeast EEM as soon as reasonably possible, but no later than August 6, 2021.”⁸⁹
5. “The Southeast EEM Members respectfully request that the Commission accept the Southeast EEM Agreement, and the related filings in these unconsolidated dockets,

⁸⁴ *Ala. Power*, Docket Nos. ER21-1111-002, et al., Second Deficiency Response (Aug. 11, 2021).

⁸⁵ Second Deficiency Response at 2

⁸⁶ Second Deficiency Response at 8.

⁸⁷ Second Deficiency Response at 9.

⁸⁸ *Ala. Power*, Docket Nos. ER21-1111-001, et al., First Deficiency Response (June 6, 2021).

⁸⁹ First Deficiency Response at 7.

subject to the modifications proposed herein, to become effective on August 6, 2021. If the Commission finds these proposed changes acceptable and otherwise accepts the Southeast EEM Proposal as submitted, the Southeast EEM Members commit to subsequently submit a compliance filing to effectuate the proposed revisions within 30 days of acceptance.”⁹⁰

III. Initial Filings

A. *Ala. Power, Docket No. ER21-1111-000, February 12, 2021 Transmittal*

6. “Concurrently with this filing, each of the other Commission-jurisdictional Members (together with Southern Companies, the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with an open access transmission tariff (‘transmission tariff’ or OATT) on file with the Commission, including Southern Companies, is filing amendments to its transmission tariff to offer zero-charge transmission service for Southeast Energy Exchange transactions (known as ‘Non-Firm Energy Exchange Transmission Service’ or ‘NFEETS’) (collectively, the ‘Tariff Filings,’ together with the Concurrence Filings and this filing, the ‘Southeast EEM Filings’).”⁹¹

7. “[T]he requested effective date, and the requested date for Commission action . . . will still provide the Commission 60 days to act upon the Southeast EEM Filings”⁹²

8. “The Southeast EEM Members respectfully request that the Commission accept the Southeast EEM Agreement to become effective May 13, 2021, 90 days after this filing.”⁹³

9. “In order to provide ample time to potential commenters who may wish to provide comments, we respectfully request that the Commission establish a comment period of thirty days, rather than the usual twenty-one, such that the comment date would be March 15, 2021. As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still provide the

⁹⁰ First Deficiency Response at 43.

⁹¹ *Ala. Power, Docket No. ER21-1111-000, February 12, 2021 Transmittal* at 3.

⁹² *Ala. Power, Docket No. ER21-1111-000, February 12, 2021 Transmittal* at 4.

⁹³ *Ala. Power, Docket No. ER21-1111-000, February 12, 2021 Transmittal* at 3.

Commission 60 days to act upon the Southeast EEM Filings after comments are received.”⁹⁴

10. “If the Commission accepts the Southeast EEM Filings without material modification or condition within the requested 90 days, the Members anticipate the following schedule to implement the Southeast EEM: May 13, 2021: Proposed effective date of the Southeast EEM Agreement.”⁹⁵

11. “Southern Company and the other Southeast EEM Members respectfully request that the Southeast EEM Agreement become effective on May 13, 2021, 90 days after filing. This requested effective date is consistent with 18 C.F.R. §§ 35.2(f) and 35.3(a)(1).”⁹⁶

12. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”⁹⁷

13. “Southern Company and the Southeast EEM Members respectfully request that the Commission accept the Southeast EEM Agreement, without modification, to become effective on May 13, 2021.”⁹⁸

⁹⁴ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 3-4.

⁹⁵ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 12-13.

⁹⁶ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 42.

⁹⁷ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 42.

⁹⁸ *Ala. Power*, Docket No. ER21-1111-000, February 12, 2021 Transmittal at 44.

B. Dominion Energy SC, Docket No. ER21-1112-000, February 12, 2021 Transmittal

14. “[Dominion Energy SC] respectfully requests an effective date of May 13, 2021 for its concurrence, the same effective date proposed by Southern Company in the related filing of the Southeast EEM Agreement, and 90 days after the date of this filing.”⁹⁹

15. “Each of the other Commission-jurisdictional Members (together with [Dominion Energy SC], the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with a transmission tariff on file with the Commission, is filing amendments to its transmission tariff to offer zero-cost transmission service for Southeast Energy Exchange transactions (collectively, the ‘Tariff Filings’). Each Southeast EEM Filing Filings (collectively, the ‘Southeast EEM Filings’) will have its own docket. There are a total of twelve Southeast EEM Filings.”¹⁰⁰

16. “In addition, consistent with the request made regarding the Southeast EEM Agreement filing, [Dominion Energy SC] requests a 30-day comment period for this filing, such that comments would be due on March 15, 2021.”¹⁰¹

17. “[Dominion Energy SC] respectfully requests that this Concurrence become effective on May 13, 2021, 90 days after filing and the same effective date requested in the Southeast EEM Agreement Filing.”¹⁰²

18. “Granting an effective date of May 13, 2021 for this Concurrence Filing will allow it to synchronize with the effective date requested in the Southeast EEM Agreement Filing for a seamless implementation of the Southeast EEM.”¹⁰³

⁹⁹ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 2

¹⁰⁰ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 2 n.6.

¹⁰¹ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 2.

¹⁰² *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 6.

¹⁰³ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021

19. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”¹⁰⁴

20. “[Dominion Energy SC] respectfully requests that the Commission establish a 30-day comment period for this filing and accept its concurrence to the Southeast EEM Agreement, without modification, to become effective on May 13, 2021.”¹⁰⁵

C. LG&E, Docket No. ER21-1114-000, February 12, 2021 Transmittal

21. “LG&E respectfully requests an effective date of May 13, 2021 for its concurrence, the same effective date proposed by Southern Companies in the related filing of the Southeast EEM Agreement, and 90 days after the date of this filing.”¹⁰⁶

22. Each of the other Commission-jurisdictional Members (together with LG&E, the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with a transmission tariff on file with the Commission, is filing amendments to its transmission tariff to offer zero-cost transmission service for Southeast Energy Exchange transactions (collectively, the ‘Tariff Filings’). Each Southeast EEM Filing Filings (collectively, the ‘Southeast EEM Filings’) will have its own docket. There are a total of twelve Southeast EEM Filings.”¹⁰⁷

23. “In order to provide ample time to potential commenters who may wish to provide comments, LG&E respectfully requests that the Commission establish a comment period of thirty days, rather than the usual twenty-one, such that the comment date would be March 15, 2021. As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still

Transmittal at 6.

¹⁰⁴ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 7.

¹⁰⁵ *Dominion Energy SC*, Docket No. ER21-1112-000, February 12, 2021 Transmittal at 8.

¹⁰⁶ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 2.

¹⁰⁷ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 2 n.6.

provide the Commission 60 days to act upon the Southeast EEM Filings after comments are received.”¹⁰⁸

24. “LG&E respectfully requests that this Concurrence become effective on May 13, 2021, 90 days after filing and the same effective date requested in the Southeast EEM Agreement Filing.”¹⁰⁹

25. “Granting an effective date of May 13, 2021 for this Concurrence Filing will allow it to synchronize with the effective date requested in the Southeast EEM Agreement Filing for a seamless implementation of the Southeast EEM.”¹¹⁰

26. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”¹¹¹

27. “LG&E respectfully requests that the Commission accept its concurrence to the Southeast EEM Agreement, without modification, to become effective on May 13, 2021.”¹¹²

D. DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal

28. “DEC respectfully requests an effective date of May 13, 2021 for its concurrence, the same effective date proposed by Alabama Power Company in the related filing of the Southeast EEM Agreement, and 90 days after the date of this filing.”¹¹³

29. “Each of the other Commission-jurisdictional Members (together with DEC, the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with a transmission tariff on file with the Commission, is filing amendments to

¹⁰⁸ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 2.

¹⁰⁹ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 6.

¹¹⁰ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 7.

¹¹¹ *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 7.

¹¹² *LG&E*, Docket No. ER21-1114-000, February 12, 2021 Transmittal at 8.

¹¹³ *DEC*, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 2.

its transmission tariff to offer zero-cost transmission service for Southeast Energy Exchange transactions (collectively, the ‘Tariff Filings’). Each Southeast EEM Filing Filings (collectively, the ‘Southeast EEM Filings’) will have its own docket. There are a total of twelve Southeast EEM Filings.”¹¹⁴

30. “In order to provide ample time to potential commenters who may wish to provide comments, DEC respectfully requests that the Commission establish a comment period of thirty days, rather than the usual twenty-one, such that the comment date would be March 15, 2021. As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still provide the Commission 60 days to act upon the Southeast EEM Filings after comments are received.”¹¹⁵

31. “DEC respectfully requests that this Concurrence become effective on May 13, 2021, 90 days after filing and the same effective date requested in the Southeast EEM Agreement Filing.”¹¹⁶

32. “Granting an effective date of May 13, 2021 for this Concurrence Filing will allow it to synchronize with the effective date requested in the Southeast EEM Agreement Filing for a seamless implementation of the Southeast EEM.”¹¹⁷

33. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”¹¹⁸

34. “DEC respectfully request[s] that the Commission accept its concurrence to the Southeast EEM Agreement, without modification, to become effective on May 13, 2021.”¹¹⁹

¹¹⁴ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 2 n.6.

¹¹⁵ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 2.

¹¹⁶ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 6.

¹¹⁷ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 7.

¹¹⁸ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 7.

¹¹⁹ DEC, Docket No. ER21-1116-000, February 12, 2021 Transmittal at 8.

E. DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal

35. “DEP respectfully requests an effective date of May 13, 2021 for its concurrence, the same effective date proposed by Alabama Power Company in the related filing of the Southeast EEM Agreement, and 90 days after the date of this filing.”¹²⁰

36. “Each of the other Commission-jurisdictional Members (together with DEP, the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with a transmission tariff on file with the Commission, is filing amendments to its transmission tariff to offer zero-cost transmission service for Southeast Energy Exchange transactions (collectively, the ‘Tariff Filings’). Each Southeast EEM Filing Filings (collectively, the ‘Southeast EEM Filings’) will have its own docket. There are a total of twelve Southeast EEM Filings.”¹²¹

37. “In order to provide ample time to potential commenters who may wish to provide comments, DEP respectfully requests that the Commission establish a comment period of thirty days, rather than the usual twenty-one, such that the comment date would be March 15, 2021. As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still provide the Commission 60 days to act upon the Southeast EEM Filings after comments are received.”¹²²

38. “DEP respectfully requests that this Concurrence become effective on May 13, 2021, 90 days after filing and the same effective date requested in the Southeast EEM Agreement Filing.”¹²³

39. “Granting an effective date of May 13, 2021 for this Concurrence Filing will allow it to synchronize with the effective date requested in the Southeast EEM Agreement Filing for a seamless implementation of the Southeast EEM.”¹²⁴

¹²⁰ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 2.

¹²¹ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 2 n.6.

¹²² DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 2.

¹²³ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 6.

¹²⁴ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 6-7.

40. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”¹²⁵

41. “DEP respectfully request[s] that the Commission accept its concurrence to the Southeast EEM Agreement, without modification, to become effective on May 13, 2021.”¹²⁶

F. Ga. Power, Docket No. ER21-1119-000 February 12, 2021 Transmittal

42. “SCS respectfully requests the Commission make the attached tariff record effective as of May 13, 2021, consistent with the effective date requested in Alabama Power’s filing of the Southeast EEM Agreement.”¹²⁷

G. KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal

43. “KU respectfully requests an effective date of May 13, 2021 for its concurrence, the same effective date proposed by Southern Companies in the related filing of the Southeast EEM Agreement, and 90 days after the date of this filing.”¹²⁸

44. “Each of the other Commission-jurisdictional Members (together with KU, the ‘FERC Jurisdictional Members’), is filing a Certificate of Concurrence (together, the ‘Concurrence Filings’). Additionally, each Member that is a transmission service provider with a transmission tariff on file with the Commission, is filing amendments to its transmission tariff to offer zero-cost transmission service for Southeast Energy Exchange transactions (collectively, the ‘Tariff Filings’). Each Southeast EEM Filing Filings (collectively, the ‘Southeast EEM Filings’) will have its own docket. There are a total of twelve Southeast EEM Filings.”¹²⁹

¹²⁵ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 7.

¹²⁶ DEP, Docket No. ER21-1117-000, February 12, 2021 Transmittal at 8.

¹²⁷ Ga. Power, Docket No. ER21-1119-000, February 12, 2021 Transmittal at 2.

¹²⁸ KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 2.

¹²⁹ KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 2 n.6.

45. “In order to provide ample time to potential commenters who may wish to provide comments, KU respectfully requests that the Commission establish a comment period of thirty days, rather than the usual twenty-one, such that the comment date would be March 15, 2021. As noted, the requested effective date, and the requested date for Commission action, is in 90 days. Accordingly, a 30-day period for comments will still provide the Commission 60 days to act upon the Southeast EEM Filings after comments are received.”¹³⁰

46. “KU respectfully requests that this Concurrence become effective on May 13, 2021, 90 days after filing and the same effective date requested in the Southeast EEM Agreement Filing.”¹³¹

47. “Granting an effective date of May 13, 2021 for this Concurrence Filing will allow it to synchronize with the effective date requested in the Southeast EEM Agreement Filing for a seamless implementation of the Southeast EEM.”¹³²

48. “However, to the extent a waiver is needed, good cause exists to grant it, because acceptance of the filing effective May 13, 2021 will permit customers in the Southeast to begin enjoying the benefits of the Southeast EEM at the earliest possible date.”¹³³

H. Miss. Power, Docket No. ER21-1121-000 February 12, 2021 Transmittal

49. “SCS respectfully requests the Commission make the attached tariff record effective as of May 13, 2021, consistent with the effective date requested in Alabama Power’s filing of the Southeast EEM Agreement.”¹³⁴

¹³⁰ KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 2.

¹³¹ KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 6.

¹³² KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 7.

¹³³ KU, Docket No. ER21-1120-000, February 12, 2021 Transmittal at 7.

¹³⁴ Miss. Power, Docket No. ER21-1121-000, February 12, 2021 Transmittal at 2.

I. Ala. Power, Docket No. ER21-1125-000, February 12, 2021 Transmittal

50. “eTariff requirements mandate that each of the Southeast EEM Filings have its own docket . . . the issues in the dockets are related”¹³⁵

51. “In addition to Southern Companies, Dominion Energy South Carolina, DEC, and LG&E are each filing amendments to their transmission tariffs, some of which are joint OATTs, to add NFEETS (‘Tariff Filings,’ together with the Agreement Filing and the Concurrence Filings, the ‘Southeast EEM Filings’).”¹³⁶

52. “Southern Companies request that the Commission issue an order within 90 days, by May 13, 2021, accepting the proposed OATT changes included in this filing, effective as of the dates requested herein. The requested date for Commission action is the same date requested in the Agreement Filing. Also consistent with that filing, Southern Companies request that the Commission establish a comment period of 30 days in this docket, or March 15, 2021. The Southeast EEM filings are a package.”¹³⁷

53. “Accordingly, Southern Companies are using an open-ended effective date (12/31/9998), consistent with Commission guidelines.”¹³⁸

54. “Although Southern Companies are requesting a 12/31/9998 effective date, to be updated once the Southeast EEM Commencement Date is known, Southern Companies respectfully request that the Commission act on this filing within 90 days of filing, i.e., no later than May 13, 2021, the same day as the proposed effective date of the Southeast EEM Agreement. As explained in the Agreement Filing, the Members desire regulatory certainty as to Commission acceptance of the package of filings that include this filing and the Agreement Filing before making significant additional investment in the Southeast EEM.”¹³⁹

¹³⁵ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2-3.

¹³⁶ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 2 n.5

¹³⁷ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 3.

¹³⁸ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 12.

¹³⁹ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 12.

55. “Southern Companies ask the Commission to issue an order not later than May 13, 2021 that accepts for filing the proposed OATT revisions included herewith with an effective date as discussed in Section III above.”¹⁴⁰

J. Dominion Energy SC, Docket No. ER21-1128-000, February 12, 2021 Transmittal

56. “eTariff requirements mandate that each of the twelve Southeast EEM Filings have its own docket the issues in the dockets are related”¹⁴¹

57. “The Company requests that the Commission issue an order within 90 days, by May 13, 2021, accepting the proposed OATT changes included in this filing, effective as of the dates requested herein. The requested date for Commission action is the same date requested in the Southeast EEM Agreement Filing. Also consistent with that filing, the Company requests that the Commission establish a comment period of 30 days in this docket, or March 15, 2021. The Southeast EEM filings are a package.”¹⁴²

58. “Accordingly, the Company is using an open-ended effective date (12/31/9998), consistent with Commission guidelines.”¹⁴³

59. “Although the Company is requesting a 12/31/9998 effective date, the Company respectfully requests that the Commission act on this filing within 90 days of filing, i.e., no later than May 13, 2021, the same day as the proposed effective date of the Southeast EEM Agreement. As explained in the Southeast EEM Agreement Filing, the Members desire regulatory certainty as to Commission acceptance of the package of filings that include this filing and the Southeast EEM Agreement Filing before making additional investment in the Southeast EEM.”¹⁴⁴

¹⁴⁰ *Ala. Power*, Docket No. ER21-1125-000, February 12, 2021 Transmittal at 14.

¹⁴¹ *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 2.

¹⁴² *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 3.

¹⁴³ *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 11.

¹⁴⁴ *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 12.

60. “[T]he Company asks the Commission to issue an order not later than May 13, 2021 that accepts for filing the proposed OATT revisions included herewith with an effective date as discussed in Section IV above.”¹⁴⁵

K. Duke, Docket No. ER21-1115-000, February 12, 2021 Transmittal

61. “eTariff requirements mandate that each of the twelve Southeast EEM Filings have its own docket . . . the issues in the dockets are related”¹⁴⁶

62. “Those twelve filings are Southern Companies’ filing of the Southeast EEM Agreement, the seven Concurrence Filings, and the four OATT filings to implement NFEETS, including this one (‘Tariff Filings,’ together with the Agreement Filing and the Concurrence Filing, the ‘Southeast EEM Filings’).”¹⁴⁷

63. “The Filing Parties request that the Commission issue an order within 90 days of this filing, i.e., by May 13, 2021, accepting the proposed OATT changes included in this filing, effective as of the dates requested herein. The requested date for Commission action is the same date requested in the Agreement Filing. Also consistent with that filing, the Filing Parties request that the Commission establish a comment period of 30 days in this docket, i.e., March 15, 2021. The Southeast EEM filings are a package.”¹⁴⁸

64. “Accordingly, the Filing Parties are using an open-ended effective date (12/31/9998), consistent with Commission guidelines.”¹⁴⁹

65. “Although the Filing Parties are requesting a 12/31/9998 effective date, to be updated once the Southeast EEM Commencement Date is known, the Filing Parties respectfully request that the Commission act on this filing within 90 days of filing, i.e., no later than May 13, 2021, the same day as the proposed effective date of the Southeast EEM Agreement. As explained in the Southeast EEM Agreement Filing, the Members desire regulatory certainty as to Commission acceptance of the package of filings that

¹⁴⁵ *Dominion Energy SC*, Docket No. ER21-1128-000, February 12, 2021 Transmittal at 14.

¹⁴⁶ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 2-3.

¹⁴⁷ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 2 n.7.

¹⁴⁸ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 3.

¹⁴⁹ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 12.

include this filing and the Southeast EEM Agreement Filing before making significant additional investment in the Southeast EEM.”¹⁵⁰

66. “[T]he Filing Parties ask the Commission to issue an order not later than May 13, 2021 that accepts for filing the proposed OATT revisions included herewith with an effective date as discussed in Section IV above.”¹⁵¹

L. LG&E, Docket No. ER21-1118-000, February 12, 2021 Transmittal

67. “eTariff requirements mandate that each of the twelve Southeast EEM Filings have its own docket . . . the issues in the dockets are related.”¹⁵²

68. “In addition to LG&E/KU, Southern Companies, Dominion Energy South Carolina, DEC are each filing amendments to their transmission tariffs, some of which are joint OATTs to add NFEETS (‘Tariff Filings,’ together with the Agreement Filing and the Concurrence Filings, the ‘Southeast EEM Filings’).”¹⁵³

69. “LG&E/KU request that the Commission issue an order within 90 days, by May 13, 2021, accepting the proposed OATT changes included in this filing, effective as of the dates requested herein. The requested date for Commission action is the same date requested in the Southeast EEM Agreement Filing. Also consistent with that filing, LG&E/KU request that the Commission establish a comment period of 30 days in this docket, or March 15, 2021. The Southeast EEM filings are a package.”¹⁵⁴

70. “Accordingly, the LG&E/KU are using an open-ended effective date (12/31/9998), consistent with Commission guidelines.”¹⁵⁵

71. “Although the LG&E/KU are requesting a 12/31/9998 effective date, to be updated once the Southeast EEM Commencement Date is known, the LG&E/KU respectfully request that the Commission act on this filing within 90 days of filing, i.e., no later than May 13, 2021, the same day as the proposed effective date of the Southeast

¹⁵⁰ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 13.

¹⁵¹ *Duke*, Docket No. ER21-1115-000, February 12, 2021 Transmittal at 15.

¹⁵² *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 2-3.

¹⁵³ *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 2 n.5.

¹⁵⁴ *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 3.

¹⁵⁵ *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 12.

EEM Agreement. As explained in the Southeast EEM Agreement Filing, the Members desire regulatory certainty as to Commission acceptance of the package of filings that include this filing and the Southeast EEM Agreement Filing before making significant additional investment in the Southeast EEM.”¹⁵⁶

72. “LG&E/KU ask the Commission to issue an order not later than May 13, 2021 that accepts for filing the proposed OATT revisions included herewith with an effective date as discussed in Section IV above.”¹⁵⁷

¹⁵⁶ *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 13.

¹⁵⁷ *LG&E*, Docket No. ER21-1118-000, February 12, 2021 Transmittal at 15.

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