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 Carolinas, LLC	ER21-1116-002
Duke Energy Progress, LLC	ER21-1117-002
Georgia Power Company	ER21-1119-002
Kentucky Utilities Company	ER21-1120-002
Mississippi Power Company	ER21-1121-002

STATEMENT OF COMMISSIONER CLEMENTS

(Issued October 20, 2021)

1. The proposed Southeast Energy Exchange Market (Southeast EEM) Agreement, filed in this proceeding pursuant to section 205 of the Federal Power Act (FPA),[1] by Southern Company Services, Inc. as agent for Alabama Power Company, and on behalf of itself and the other prospective Members, went into effect by operation of law because the Commissioners are divided two against two as to the lawfulness of the market. That means that the Commission did not determine whether the proposed market is just and reasonable and not unduly discriminatory or preferential. When this happens, section 205(g) of the FPA[2] requires each Commissioner to issue a "written statement explaining the views of the Commissioner with respect to the change[s]."[3]

2. While I am an ardent supporter of market formation across the electricity sector as a means of harnessing competition to ensure better outcomes for customers, market formation cannot be blessed at the expense of compromising the Commission's bedrock principles of ensuring open access to non-discriminatory rates and service, and applying adequate protections to markets to ensure just and reasonable rates. The cost and reliability benefits that all sorts of organized market structures have provided to customers, utilities, and regions—whether from tight power pools, RTOs, the more recent Western imbalance markets, or other constructs—are clear and compelling. While I appreciate the efforts of the Filing Parties in this proceeding toward increasing the

[1] 16 U.S.C. § 824(d).

[2] *Id.* § 824d(g).

[3] *Id.*

efficiency of the existing Southeastern bilateral markets, I would have voted against the Southeast EEM as proposed by the Filing Parties. I believe the Southeast EEM, as proposed by the Filing Parties, fails to abide by the bedrock principles of open access and non-discrimination that were crystallized in the Commission's landmark Order No. 888, and fails to ensure just and reasonable rates.

3. To be very clear, my lack of support for the instant proposal is not because I would prefer a different market structure or that I fail to appreciate the parameters of the legal inquiry that Section 205 prescribes. I am cognizant of Section 205's requirements that we not let perfect be the enemy of the good and that we can only review the proposal in front of us.[4] But legal insufficiency must foreclose Commission approval. In my view, the Southeast EEM, as proposed, contains infirmities that compel the Commission to find that the Filing Parties have not satisfied their legal burden. That is not to say that the Southeast EEM, or a similar market structure, has no path to legal sufficiency. Rather, as I discuss below, my concerns with this market could be addressed with some discrete changes to the membership and governance provisions, as well as a superior approach to market power and manipulation concerns.[5]

4. The Filing Parties' proposal rests on two legally and factually flawed contentions: first, that the Southeast EEM is nothing more than an enhancement to the existing bilateral markets that currently exist in the Southeastern United States; and second, that no new evidence, analysis, or safeguards are required to reach the conclusion that there exists no opportunity for market power or manipulation across the proposal's exchange platform.

5. As I describe in more detail below, the proposed Southeast EEM is far from the existing bilateral market regime. The Southeast EEM is a multilateral market, with a unique (and large) footprint, designed to allocate limited rights to a new, desirable

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[4] *See, e.g.*, *PJM Interconnection, L.L.C.*, Docket No. ER21-2582-000, Statement of Chairman Glick and Comm'r Clements, Oct. 19, 2021, at P 32 ("Under section 205, a utility does not need to show that the existing tariff is unjust and unreasonable, nor must it demonstrate that its proposal is the best option. Rather it must show only that its proposed tariff is just and reasonable [and not unduly discriminatory].") (citing *Emera Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017); *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,243, at P 57 (2020); *City of Winfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984)).

[5] 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. *See, e.g.*, *Pub. Serv. Co. of Colorado*, 151 FERC ¶ 61,248 (2015); *Sw. Power Pool, Inc.*, 172 FERC ¶ 61,115 (2020).

transmission product and match electric power supply and demand offers across a suite of potential exchange matches using a complex "black box" algorithm.[6] The transmission product and matching service are accessible only to Southeast EEM market Participants that sign and obtain countersigned participation agreements and acquiesce to the platform's governing rules, which are controlled by a coterie of preferred Members. None of these characteristics are features of a bilateral market.

6. I am concerned that the Southeast EEM may expose Participants to unjust and unreasonable rates. The Filing Parties proposed the Southeast EEM with neither any quantitative analysis demonstrating an inability by Participants to exercise market power or manipulate the market, nor adequate safeguards to protect against these abuses on a going-forward basis. It is insufficient to rely on Participants' existing market-based rate authorities given the new market structure and new market footprint of the Southeast EEM. Yet the Filing Parties suggest that despite these clear differences, the Commission should rely on analysis conducted for the existing bilateral market, and safeguards put in place for a bilateral, not multi-lateral market structure.

7. I also agree with Chairman Glick's conclusion that applying the *Mobile-Sierra* standard to the generally applicable Southeast EEM Agreement provisions, even the "enumerated provisions" identified in the response to the First Deficiency Letter, would violate Commission precedent. As he ably explains, the Southeast EEM provisions are tariff rates for which *Mobile-Sierra* protection does not lie.[7] Applying the *Mobile-Sierra* standard would therefore inappropriately make any future challenge to the justness and reasonableness of the Southeast EEM Agreement more difficult. This is particularly problematic here given the concerns with undue discrimination, governance, market power, and manipulation that the proposal presents.

8. While Filing Parties made some relevant additional commitments to provide data in response to the Commission's May 4, 2021 deficiency letter,[8] they still wave off most

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[6] The Territory will span 10 states, feature 160,000 MW of generating capacity, and serve about 640 TWh of load. Transmittal Letter at 4.

[7] Chairman Glick Statement at PP 9-10.

[8] Among other things, the Filing Parties committed to: provide Order No. 760-style data to the Commission; require the Administrator, Auditor, and Participants to respond to inquiries from the Commission and other regulators; post reports, analysis, and Participant complaints on the Southeast EEM website; post the network map and information on binding transmission paths and the marginal value of transmission constraints; and make transparency improvements (*e.g.* making Membership Board meeting minutes public and allowing non-Members to observe Membership Board meetings). While this would have provided more transparency than the tariff provisions that have gone into effect by operation of law, these concessions do not eliminate the

of protestors' concerns about the Southeast EEM's barriers to participation, restrictions on membership, preferential structure for load-serving entity Members, lack of transparency or oversight, and potential for the exercises of market power and manipulation. These concerns, however, constitute legal grounds on which the Commission should have rejected the current proposal. To be clear, there is no insurmountable barrier to the formation of a market like the Southeast EEM. In fact, straightforward revisions to the platform's participation and membership rules, and common approaches to protection against the exercise of market power and manipulation would cure most, if not all, of the statutory violations that impair the current proposal.

9. By failing to reject the Southeast EEM as proposed, despite its demonstrable flaws, the Commission compromises its fundamental principles of transparency, oversight and fair and open market access. Failing to apply these principles to this market is dangerous not only because of the discriminatory and unjust rate impacts it may impart in the region, but because it may inhibit the Commission's ability to ensure that other organized markets, existing or forthcoming, are just and reasonable and not unduly discriminatory. Failing to reject the instant proposal is likely to invite future attacks on the Commission's fundamental market design safeguards in existing and future markets across the country.

I. The Southeast EEM is a multi-lateral market construct

10. First, it is necessary to understand what the Southeast EEM is and is not. The Filing Parties take the position that the Southeast EEM is merely an enhancement of the bilateral markets that currently exist in the Southeastern United States. They argue that the introduction of the Southeast EEM algorithm, which will automatically match buyers and sellers for Energy Exchanges, and NFEETS, a zero-cost transmission product, are merely improvements on the existing bilateral structure.[9] This position requires an insurmountable strain on logic that lacks any compelling rationale.

11. Bilateral electric power supply transactions involve two known parties engaging in a negotiated exchange of electricity and related services. They involve the parties participating in a back-and-forth regarding terms of the sale including the price, quantity, transmission path, tenor, performance expectations, and other terms and conditions. While market data may influence agreed-upon prices or other terms, any given bilateral transaction is defined by the four corners of the deal struck by the engaging parties.

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impermissible barriers to access, cure the unduly discriminatory membership and participation structure, or remedy the failure to carry out market power analysis or provide for an independent market monitor whose institutional role is to independently protect the Southeast EEM from manipulation or the exercise of market power.

[9] Transmittal Letter at 9-11.

Bilateral transaction prices are not influenced in real-time by various other bid and buy offer levels, nor are they optimized across a set of various buyer and seller matches. Bilateral electric power supply transactions are not automatically combined with transmission service and do not require access to a participant-only transmission product. Bilateral transactions do not involve a members committee, an administrator, an auditor, or satisfaction of a set of participation requirements as a condition to execution.

12. While the Southeast EEM relies on bilaterally arranged enabling agreements, the structure hinges upon a complex multi-lateral optimization engine that replaces the bilateral negotiation of key terms, including price and quantity. This engine, operated by the Southeast EEM Administrator, is responsible for (1) selecting which transactions should be consummated from among many potential buy and sell offers from many participants in order to optimize dispatch over the Southeast EEM footprint, and (2) allocating the NFEETS, which is an exclusive transmission service reserved for participants in the Southeast EEM, in order to consummate those transactions.[10] The multi-lateral engine is so complex that the Filing Parties assert that simply providing a "mathematical statement of the optimization problem solved by the Algorithm (*i.e.*, the software platform implementing the Southeast EEM)" would be a "significant undertaking and possibly an additional material Southeast EEM Member expense in addition to the planned cost of hiring a software vendor."[11] Necessarily, the Southeast EEM also has its own set of rules, a governance structure, and participation requirements, each of which further distinguish it from traditional bilateral markets.

13. My colleagues disagree with this assessment, but offer no rationale whatsoever regarding how these plainly multi-lateral market features represent a mere immaterial "enhancement" to the bilateral market and do not transform it into a multi-lateral construct. Rather than engage with these arguments on the merits, their positions amount to credulously accepting the Filing Parties' assertions that the market will be bilateral in nature without examining the ample evidence to the contrary.[12]

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[10] The existence of NFEETS is in itself an important distinction between the Southeast EEM and traditional bilateral markets. In true bilateral transactions arranging and paying for transmission is a part of effectuating any trade. NFEETS, which is only obtainable by joining the Southeast EEM, is factored into the market's optimization.

[11] Response to First Deficiency Letter at 38.

[12] *See* Comm'r Danly Statement at P 20 ("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.'") (quoting Transmittal Letter at 9); Comm'r Christie Statement at PP 6, 8 (stating in conclusory fashion that the proposal enhances rather than modifies the existing bilateral market). While Commissioner Danly observes that "[t]his market does

14. But closing our eyes, clicking our heels three times, and wishing "the Southeast will remain a purely bilateral market" will not make that so. Given its features, the Southeast EEM is clearly more than an enhancement of the status quo. It is an entirely new market construct, with its own set of rules and a unique footprint. As such, it is the Commission's obligation to go beyond taking the Filing Parties' word for it and to review the Southeast EEM proposal to ensure that it meets basic principles of non-discrimination and protects against the exercise of market power and manipulation.

II. Access to the Southeast EEM is not open, violating Order No. 888

15. Order No. 888 compels open "access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce,"[13] and requires public utilities to "remove preferential transmission access and pricing provisions from agreements governing their transactions."[14] The Southeast EEM contravenes these bedrock requirements by restricting access to NFEETS.

16. In order to join and obtain the ability to access NFEETS, a prospective Participant is required: (1) to obtain the countersignature of the Southeast EEM Agent at the direction of the Operating Committee, a body controlled entirely by Members,[15] and (2) to execute Enabling Agreements with at least three other Participants. These provisions give Southeast EEM Members and existing Participants leverage they may use to block market access to transmission service.[16] In addition, to participate, an entity must be registered as a Source or Sink within the Southeast EEM footprint.

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not offer joint dispatch, joint operation, or joint planning," these are arguments that the Southeast EEM is an RTO, not a rebuttal to any of the logic I have set forth regarding why the Southeast EEM platform is multi-lateral, not bilateral. Comm'r Danly Statement at P 20.

[13] Order No. 888, 61 Fed. Reg. 21,540, 21,541 (1996).

[14] *Id.*

[15] *See* Southeast EEM Agreement § 5.1 (describing Operating Committee membership).

[16] Southeast EEM Market Rules § III.B.3. A prospective Participant must also (3) own or otherwise control a Source within the Territory and/or be contractually obligated to serve a Sink; and (4) arrange to take NFEETS from each Participating Transmission Provider, either through execution of a service agreement under the Participating Transmission Provider's tariff or by otherwise making arrangements for such service.

17. While the Filing Parties argue that Members and Participants have economic incentives to execute participation and enabling agreements, they neglect that Members and Participants also have economic incentives to block access, and the reality is that the proposal erects substantial barriers to participation. Although the Filing Parties observe that "enabling agreements are used today in the Southeast bilateral market "to facilitate regular bilateral energy transactions"[17] this fact is beside the point. While transmission service is not governed by enabling agreements in the existing bilateral market, the question the Commission must ask here is whether these requirements serve as an unduly discriminatory barrier to entry to Southeast EEM and the NFEETS *transmission service* it provides. Order No. 888 establishes a firm requirement of open access, not a demonstration that economic incentives *might* create conditions where utilities choose of their own accord to permit open competition.[18]

18. As protestors persuasively argue, the Three Counterparty Rule and Participant Agreement requirements may prevent a prospective Participant from accessing the market because current Participants may "collude to exclude prospective Participants by refusing to enter into Enabling Agreements," or the Operating Committee could direct the Agent to block access by declining to sign the Participant Agreement with a given counterparty.[19] The Filing Parties contend that the Commission need not worry about such abuse of the Three Counterparty Rule and Participant Agreement because the benefits of the Southeast EEM "will be at their greatest with eligible counterparties maximized," arguing that if they had incentive to block market access for any individual prospective participant they would not have proposed the Southeast EEM at all.[20] To accept this simplistic logic is naïve.

19. While it is true that retail customer benefits would be maximized if Participants entered into as many matches as possible, incentives for load serving entity shareholder

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[17] Response to First Deficiency Letter at 19-20.

[18] *See* Order No. 888, 61 Fed. Reg. at 21,541 ("The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce."). Order No. 888 targets denials of open access "whether they are blatant or subtle," and also targets "the *potential* for future denials of access." *Id.* at 21,550 (emphasis added).

[19] The proposal appears not to contain any provision requiring the Agent to not unreasonably withhold its signature, in contrast to other market arrangements. *See, e.g.*, Public Service Company of Colorado, Transmission and Service Agreements Tariff, Joint Dispatch Trans Svc, Section 43.

[20] Filing Parties March 30 Answer at 37.

profits do not neatly align with retail customer benefits in the Southeast EEM as proposed. Indeed, while some Members may indirectly have an incentive to lower costs, many of the Filing Parties earn more return on equity by spending more capital. Shareholder profits for Southeast EEM Members may go up if they retain a larger market share by blocking access for competitors and thereby increase the megawatt-hours served by generation owned by Members.[21]

20. Even if it does not choose to block access outright, the Southeast EEM Operating Committee could seek to use Participant Agreements as an opportunity to exercise leverage over prospective Participants.[22] The Commission's regulations require that a market-based rate seller demonstrate that "the seller cannot erect any barriers to entry against potential competitors."[23] It is hard to imagine a more direct and problematic barrier than granting a subset of market participants veto power over whether others may access transmission service, as the Participant Agreement requirement does.[24] While it is common for organized markets to require some sort of participation agreement, such

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[21] Monopoly regulation of vertically integrated, investor-owned utilities exists because of the structural misalignment of economic incentives that fail to ensure the maximization of consumer benefits. Here, protections are necessary not as a speculative assumption of bad faith on the part of Filing Parties, but as part of the Commission's statutory obligation. In no situation can one simply assume that monopoly entities will work to adequately protect customers without regulation to require it.

[22] Contrary to the Filing Parties' response, such abuse is perfectly consistent with a broader desire by the Filing Parties to utilize the Southeast EEM construct. While seeking to deliver consumer savings facilitated by the Southeast EEM, the Filing Parties may nevertheless seek to administer the platform in a manner that locks out certain competitors who they determine might pose a threat to their market positions, or who they can secure concessions from in other market contexts by exerting leverage in agreeing to permit access to SEEM. *See* March 30 Answer at 36 ("If utilities in the Southeast were driven, when it came to consideration of the Southeast EEM, by the idea that 'competition and the availability of lower cost suppliers erodes the potential profits that come from a monopoly's main source of revenue: building additional generation,' . . . there would be no Southeast EEM proposal.").

[23] *Public Citizen v. FERC*, No. 20-1156, 2021 WL 3438374, at *3 (D.C. Cir. Aug. 6, 2021) (citing 18 C.F.R. § 35.37 (2020)).

[24] *See* PIOs March 24 Protest at 13 ("[B]y exercising unmitigated authority over who is permitted to execute Enabling Agreements and become a SEEM Participant, the Applicants cement their control over the transmission system and all but guarantee that competitors will be provided inferior transmission service.").

agreements should have clear application procedures and must not allow for other participants to reject the agreement without cause.[25]

21. Further, by failing to act, the Commission approves a market construct by which prospective Participants do not have adequate means of detecting or seeking redress regarding abuse in restricting market access. Prospective Participants appear not to have a right to bring complaints to the Auditor (with such complaints limited to Participants).[26] And while prospective Participants could in theory bring a complaint directly to the Commission, the absence of market transparency provides them with scant ability to gather the evidence that would be necessary to support such a complaint. Further, several Southeast EEM Members are unregulated transmitting utilities, over whom the Commission likely would not have jurisdiction for such a complaint. The upshot is that to the extent that abuse occurs, the Commission may never find out. Something as fundamental as open access to transmission services must not rely on speculation. Rather, a basic tenet of Order No. 888 is that transmission providers must file tariff terms that provide open access without giving themselves an opportunity to exercise discretion to block access.[27]

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[25] Such barriers to transmission access were the express focus of Order 888. Order No. 888, 61 Fed. Reg. at 21,541-42. *See, e.g.*, Public Service Company of Colorado, Transmission and Service Agreements Tariff, Joint Dispatch Trans Svc, Section 43 (an example of an agreement with clearer application features that do not permit unjustified rejection).

[26] Transmittal Letter at 31 ("The Auditor may also receive complaints from Participants, which it will refer to the Membership Board and investigate at the Membership Board's discretion."). Further, even if prospective Participants did have a right to bring complaints to the Auditor, complaints to the Auditor about undue discrimination via the Enabling Agreements are submitted to the Membership Board, which can choose not to act and to not submit such complaints to the Commission.

[27] Order No. 888, 61 Fed. Reg. at 21, 552 ("We conclude that functional unbundling of wholesale services is necessary to implement non-discriminatory open access transmission and that corporate unbundling should not now be required. As we explained in the NOPR, functional unbundling means three things: (1) a public utility must take transmission services (including ancillary services) for all of its new wholesale sales and purchases of energy under the same tariff of general applicability as do others; (2) a public utility must state separate rates for wholesale generation, transmission, and ancillary services; (3) a public utility must rely on the same electronic information network that its transmission customers rely on to obtain information about its transmission system when buying or selling power.").

22. The proposal further restricts participation by requiring Participants to own or otherwise control a Source within the Territory and/or be contractually obligated to serve a Sink within the Territory.[28] Public Interest Organizations (PIOs) assert that this restriction will exclude "an estimated 65 trading partners that border the SEEM territory . . . because they do not have resources located in the territory."[29] Excluding these trading partners from the Southeast EEM closes their access to a valuable transmission service offered by each Transmission Owner, and is demonstrably more restrictive than the required Open Access Transmission Tariffs (OATTs) of the participating jurisdictional Transmission Owners. As PIOs explain, the Commission's "open access rules require that transmission service is offered under each public utility's OATT to all transmission customers in a comparable, non-discriminatory manner, including existing trading partners."[30]

23. The Filing Parties rationalize the proposed geographic restriction as permissible because it "is not currently technically feasible to allow entities outside the Territory to participate in the Southeast SEEM because 'transactions involving the use of transmission outside of the Territory . . . would require the coordination of e-Tags with non-NFEETS providers in the less-than-20 minute timeframe required, which is not possible at this time.'"[31]

24. This reasoning is circular: open access is not technically feasible because the Filing Parties have not designed the market in a manner that facilitates a workable solution, and have not invested in the software or other analytical capabilities necessary to facilitate access under their chosen design. Permitting transmission providers to evade open access requirements via their own market design choices and investment decisions would fundamentally undermine open access. Filing Parties have done nothing to demonstrate why, in the abstract, e-Tags for external resources could not be coordinated on the timeframe necessary, or why another solution, such as requiring external resources to secure firm service to the border of the Southeast EEM Territory, is not feasible. Rather, they have designed the market and chosen a scope of work for the relevant vendors that accomplishes coordination for their own purposes without facilitating access for competitors outside the Territory. Such undue exclusion is not permitted by Order No. 888.[32]

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[28] Transmittal Letter at 16.

[29] PIOs July 29 Answer at 10-11.

[30] *Id.* at 11.

[31] Filing Parties March 30 Answer at 44.

[32] Order No. 888, 61 Fed. Reg. at 21,594 ("[M]embership provision[s] must allow

25. The basic unavoidable fact is that NFEETS is transmission service, and thus must be provided by each of the Southeast EEM Members on an open and non-discriminatory basis. That NFEETS is last priority service does not change this analysis,[33] nor does it make a whit of difference that NFEETS will technically be accessed via the relevant Southeast EEM Member's OATT. While the service will technically be administered via the OATT, it can only be accessed by Southeast EEM participants, pursuant to the discriminatory terms set forth in the Southeast EEM Agreement and other relevant documents. None of my colleagues reckons with how the proposal's blatant barriers to open access—manifested by the participation agreement provisions, Three Counterparty Rule, and source/sink requirements—pass muster under Order No. 888.[34]

III. Southeast EEM's membership structure, market rules and governance are unduly discriminatory

26. Beyond violating Order No. 888 by providing for unlawful barriers to accessing NFEETS, the Southeast EEM proposal also unlawfully limits access to transmission service via its restrictive membership provisions, and by forcing prospective non-Member Participants into a choice between either (i) agreeing to a set of discriminatory rules that may only be amended or otherwise influenced by a small cohort of Members in

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any bulk power market participant to join, regardless of the type of entity, affiliation, or geographic location.").

[33] Were it material that "NFEETS service is available *only if* the existing transmission system is not fully employed," as Commissioner Danly suggests, then non-firm service could likewise skirt the basic requirements of Order No. 888. Comm'r Danly Statement at P 23 (emphasis in original). Nothing in that order suggests or has been understood to apply only to firm service.

[34] For example, Commissioner Christie asserts that the Three Counterparty Rule and source/sink requirements are "necessary to ensure technical feasibility," and repeats his conclusion that "this proposal represents an enhancement to a bilateral system in which enabling agreements are not unusual," but does not address the obvious distinction that, unlike in this existing bilateral market, such requirements *in this context* inhibit open access to transmission service. Comm'r Christie Statement at P 13. The Filing Parties suggest that open membership requirements do not apply because the Southeast EEM will not establish a loose power pool. *See* Filing Parties March 30 Answer at 9. While I disagree with this conclusion, it is irrelevant with regard to the barriers to *participation* imposed by the participation agreement provisions, Three Counterparty Rule, and source/sink requirements. Such barriers implicate Order No. 888's requirement that transmission providers provide open access to transmission service; requirements for loose power pools are layered on top of this floor set for all jurisdictional transmission providers.

order to access NFEETS and the Southeast EEM's matching service, or (ii) forgoing service altogether.

27. A key defect of the Southeast EEM is that, except for one narrow exception, an entity must be an LSE in the Southeast EEM footprint to be a Member.[35] This restrictive provision, standing alone, violates the express terms of Order No. 888. But even if such Membership restrictions were permissible, as discussed below, they constitute an impermissible barrier to transmission service when considered together with the combination of features in the proposal that discriminate in favor of Members.

A. The proposal's membership restrictions violate Order No. 888

28. The proposed restrictions on membership for the Southeast EEM violate Order No. 888, which requires open, non-discriminatory membership for "'loose' power pools" or "other coordination arrangements."[36] Contrary to the conclusion of my colleagues, the proposed arrangement constitutes a loose power pool, for which Order No. 888 requires "open, non-discriminatory membership provisions" and mandates modification of "any provisions that are unduly discriminatory or preferential."[37] Order No. 888 specifically requires open membership for loose power pools to extend beyond transmission owning utilities: "membership provision[s] must allow any bulk power market participant to join, regardless of the type of entity, affiliation, or geographic location."[38]

29. The Southeast EEM fits comfortably within Order No. 888-A's definition for loose power pools, which is "(1) any multi-lateral arrangement, other than a tight power pool or a holding company arrangement, that (2) explicitly or implicitly contains discounted and/or special transmission arrangements, that is, rates, terms, or conditions."[39] NFEETS is a "discounted and/or special transmission arrangement" because it provides a service not otherwise available under relevant Participants' OATTs: $0/MWh transmission service with no associated Schedule 1 or Schedule 2 ancillary service charges, and financial losses only. While Filing Parties contend that NFEETS is

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[35] A Member must either be "(1) an LSE located in the Territory; (2) an association, Cooperative, or Governmental Entity that is an LSE located in the Territory; or (3) an association, Cooperative, or Governmental Utility created for the purpose of providing Energy to a Cooperative or Governmental LSEs." Transmittal Letter at 13.

[36] Order No. 888, 61 Fed. Reg. at 21, 593.

[37] *Id.* at 21,594.

[38] *Id.*

[39] Order No. 888-A, 62 Fed. Reg. 12,274, 12,313 (1997).

not a discounted service because it relies on otherwise unused capacity, providing service at zero cost is not something typically done by the relevant transmission providers, who generally charge for non-firm service.[40]

30. The Commission's recent decision in *PSCo* fails to support a finding that the Southeast EEM will not establish a loose power pool. *PSCO* merely stated in conclusory fashion that the arrangement at issue was not a loose power pool, without justifying that conclusion.[41] Further, *PSCo*'s conclusion ran counter to Order No. 888's express terms, despite the fact that *PSCo* was an order on a proceeding contested by a single party, not a rulemaking that would be required to reverse Order No. 888. In addition, *PSCo* addressed circumstances that entailed a far simpler arrangement across only a single balancing authority, and was inconsistent with the Commission's prior conclusion in *Wolverine Power Supply*, where the Commission explained that Order No. 888, "in seeking to eliminate undue discrimination in pooling arrangements, . . . defined pooling arrangements in the broadest terms possible."[42]

31. While NFEETS schedules transmission on infrastructure that would otherwise go unused, *PSCo* fails to address the fact that the service is discounted insofar as NFEETS does not include any ancillary service charges and does not entail any charges for operating the platform to arrange service. Moreover, *PSCo* never considered whether such service was "special."[43] Here, in addition to the special terms described above, the elimination of rate pancaking across the broad Southeastern EEM service territory is a demonstrably special service delivered by NFEETS, sparing Participants from the multiplicity of charges that could otherwise be incurred in the existing bilateral markets. Further, in a significant distinction from *PSCo*, this case entails a complex multi-lateral optimization engine that *coordinates* the apportionment of the zero-cost transmission service among a wide array of participating entities across at least several balancing authority areas.

32. Even if the Southeast EEM were not classified as a loose power pool, the same need for non-discriminatory membership provisions applies in order to avoid triggering

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[40] *See* PIOs April 12 Answer at 3-5 (citing Filing Parties March 30 Answer at 8-9).

[41] *PSCo*, 154 FERC ¶ 61,107, at P 85 (2016) ("PSCo is not proposing the establishment of a loose power pool and as such the requirements cited to are not required of the arrangement proposed by PSCo.").

[42] *Wolverine Power Supply*, 85 FERC ¶ 61,099, 61,355 (1998).

[43] *PSCo*, 154 FERC ¶ 61,107, at P 84 (2016) ("Therefore, Joint Dispatch Transmission Service does not represent a discount of non-firm transmission service, and does not serve as a substitute for that service.").

the FPA's bar on undue discrimination. Indeed, in speaking more broadly about "power pools *or other coordination arrangements*," or "certain bilateral arrangements that allow preferential transmission pricing or access," Order No. 888 states that "[t]he filing of open access tariffs by the public utility members . . . is not enough to cure undue discrimination in transmission if those public utilities can continue to trade with a selective group within a power pool that discriminatorily excludes others from becoming a member and that provides preferential intra-pool transmission rights and rates."[44] The Filing Parties' proposal violates this requirement because it establishes a select group of Members with exclusive transmission-related rights: namely, the ability to participate in controlling and overseeing the platform for administering service across a footprint comprised of many different transmission owners.[45] The heart of the proposal's deficiency in this regard stems from the Southeast EEM's exclusion of non-LSEs from the opportunity to fund the platform in exchange for Membership rights.

B. Further, the proposal's membership restrictions act in conjunction with its asymmetric market and governance structure to provide discriminatory access to transmission service

33. Beyond directly violating Order No. 888's requirements for loose power pools or other coordination arrangements, the Southeast EEM's restrictive membership provisions act in concert with other aspects of the Southeast EEM proposal to violate the FPA's prohibition on undue discrimination by creating two unequal classes of market participants. The proposal gives preferential treatment to the small coterie of Members, granting them operational control of the complex and important market platform that allocates transmission service, as well as unique auditing and oversight abilities not shared with other Participants, and exclusive control over all meaningful governance decisions.[46] Non-Member Participants, on the other hand, face a Hobson's choice: agree to participate in a market that is controlled in all substantive respects by preferred Members and risk exposure to market flaws, potential exercises of market power, or other abuses that may not be detected due to skewed and inadequate oversight, transparency and fair governance; or forgo access to a valuable transmission service altogether. Taken, together, these provisions amount to an impermissible barrier to transmission access and thereby violate "the legal and policy cornerstone" of Order No. 888.[47]

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[44] Order No. 888, 61 Fed. Reg. at 21,594 (emphasis added).

[45] These preferential rights include Members' ability to effectively control the Southeast EEM Agent, Administrator, and Auditor, and to dictate the Southeast EEM's governance.

[46] Transmittal Letter at 21-23.

[47] Order No. 888, 61 Fed. Reg. at 21,541.

Prospective Participants confirm that these discriminatory features may cause them to choose not to participate in the Southeast EEM.[48]

34. Member control over operations is provided via their exclusive ability to participate in both the Southeast EEM Membership Board and Operating Committee, which are vested with near total control over the structure and operation of the market. The Membership Board will have sole responsibility and input into the operation and oversight of the Southeast EEM platform, including the hiring and firing of the Administrator, who operates the platform.[49] The Membership Board also chooses the Auditor, who oversees the platform, and determines how often, if ever, the Auditor performs its function.[50] Together, the Auditor and Administrator are responsible for ensuring that the Southeast EEM's multi-lateral optimization platform functions as intended.

35. Allowing operational control and oversight to be conducted by a small sub-class of Participants is particularly troubling in the context of the Southeast EEM proposal because of the extreme complexity of the optimization platform. Given the platform's complexity, it is unsurprising that Members provided a mechanism for themselves to ensure that it functions as intended. The Auditor is to "monitor the functionality of the Southeast EEM System to ensure that it is operating correctly and in accordance with the Market Rules outlined in the Southeast EEM Agreement."[51] But in providing the

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[48] *See* Clean Energy Coalition March 15 Comments at 22 ("Without more transparency that offers some assurance of fairness and proper market function, independent sellers and buyers of power may severely limit their participation in SEEM."). While Order No. 888's open access requirement does not speak directly to terms and conditions by which transmission service is accessed, it stands to reason that conditioning access on acceding to undesirable terms and conditions must at some point constitute an impermissible bar to access. A large monetary fee imposed only on non-Members, for example, would clearly constitute undue discrimination. Here, as confirmed by the Clean Energy Coalition's declaration that its members are hesitant to participate in the Southeast EEM, the discriminatory administration, oversight, and governance provisions acting in concert rise to the level of a clear barrier to participation that can reasonably be expected to inhibit non-Members' access to transmission services.

[49] The Administrator will oversee and operating the Southeast EEM System and submit e-Tags to reserve and schedule NFEETS. Transmittal Letter at 17.

[50] Transmittal Letter at 17; Operations Affidavit at P 52.

[51] Transmittal Letter at 17.

Members alone with control over the Auditor's actions, the proposal gives non-Member Participants no such assurance.

36. The proposal also vests Members alone with power to meaningfully weigh in on any potential changes to the Market Rules, providing no meaningful opportunity for non-Members, including other Southeast EEM market participants, states, or customers, to have a voice. While the Filing Parties propose to provide limited opportunities for non-Member engagement, such as an "Annual Meeting of Participants and Stakeholders,"[52] these opportunities equate to no more than a chance to provide a perspective. The proposal does not include any requirements for or process by which these perspectives will be incorporated or acted upon. These opportunities fail to provide non-Member Participants with any real ability or leverage to shape decisions, or to participate in market administration and oversight.

37. The Filing Parties rationalize this blatantly preferential treatment with a theory that superior rights for Members are appropriate because the Members financed the Southeast EEM platform.[53] This argument neglects the fact that non-LSE Participants are not offered the opportunity to become Members or otherwise participate in the funding of the platform. The exclusive opportunity to fund a market platform that organizes market activity and allocates transmission service across several utilities' footprints, and enjoy special rights granted in exchange for that funding, is unduly discriminatory because no reason has been given why LSEs alone should enjoy this right in exchange for preferential terms and conditions. Although the Filing Parties reference the recently accepted governance structure of SPP WEIS' market as support,[54] such reliance is inappropriate for three reasons: (1) although representation on WEIS' WMEC is similarly exclusive to WEIS Participants, there are no restrictions on who can become a WEIS Participant; (2) there are meaningful avenues for non-WEIS Participants to provide input on WEIS decisions (*i.e.*, through the WEIS Revision Request Process); and (3) the WMEC is overseen by the independent SPP Board of Directors, with any decisions by WMEC appealable up to the SPP Board of Directors.

38. The Commission has on prior occasions disapproved of transmission service arrangements that give preference to a certain class of Members, even where that preference is less marked than the combination of factors present here. For example, in evaluating the "governance rules for the Management Committee and the Regional Reliability Committee" of the Mid-Continent Area Power Pool, the Commission determined that the rules "do not satisfy Order No. 888" because they provided for

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[52] Southeast EEM Agreement § 4.4.

[53] Filing Parties March 30 Answer at 37.

[54] *Id*.

"voting on the basis of Electric Revenues, which . . . gives too much influence to the vertically integrated utility members that own the transmission system."[55] Similarly, the D.C. Circuit upheld a Commission order rejecting the membership criteria of a loose power pooling arrangement that provided for two classes of Participants, with one class enjoying substantially better rights to govern the pool's market rules and control operation of the pool.[56] In that case, the relevant filing parties had proposed an arrangement that included "Participants," who enjoyed full membership rights, and "Associate Participants," who were entitled only to "representation on certain pool committees and participation in pool planning functions."[57] The Commission found this distinction "discriminatory on its face under sections 205 and 206 of [the Federal Power Act]", and its determination was specifically approved by the D.C. Circuit.[58] While the names of the two classes diverge, the difference between Participants and Associate Participants in many respects mirrors the Southeast EEM proposal's distinction of rights between Member Participants and non-Member Participants.

39. Commissioners Danly and Christie dismiss these discriminatory features of the Southeast EEM, suggesting that they would only be problematic if the Southeast EEM were an RTO. In doing so, they ignore the fact that, together, the preference for Members built into the Southeast EEM agreement, these features are a clear barrier to access for prospective non-Member Participants. My colleagues fail to set forth any theory for why forcing potential Participants to choose between accepting these discriminatory market rules or forgoing access to this valuable transmission service is not a violation of Order No. 888 and the underlying requirement of the FPA that service not be unduly discriminatory.

40. Allowing the Southeast EEM to go into effect with the existing governance structure and market participation requirements may have a significant effect on the Southeast energy market. For one, it will decrease volume and liquidity of non-firm point-to-point service within or across the Southeast EEM territory,[59] making it more difficult and expensive for anyone who continues to engage bilaterally in the Southeast

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[55] *Mid-Continent Area Power Pool*, 87 FERC ¶ 61,075 at 61,317 (1999), *petitions for review denied*, *Alliant Energy Corp. v. FERC*, 253 F.3d 748 (D.C. Cir. 2001).

[56] *See Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156, 1170 (D.C. Cir. 1979).

[57] *Id.*

[58] *Id.* at 1170, 1171.

[59] Filing Parties predict this effect, citing it in their benefits analysis. *See* Transmittal Letter at 36-37 (citing Benefits Analysis at 8, 19).

EEM footprint. The Filing Parties acknowledge this potential cost impact on non-Participants.[60] The FPA does not permit requiring non-Participants to subsidize benefits for Participants, especially for Participants with valid concerns that joining the Southeast EEM may subject them to discriminatory treatment.

41. There are clear and straightforward solutions here, which would not derail the Filing Parties goal of an efficient Southeast EEM platform. For example, the Filing Parties could remedy these infirmities by: (1) creating the option for non-LSE Participants to become Members if they make the necessary financial commitment, like in the WEIS; and (2) creating a process for non-Member Participants, states and other stakeholders, such as consumer groups, to provide complaints and concerns on Southeast EEM proposals, also like in the WEIS.

IV. Southeast EEM's lack of adequate market protections may result in unjust and unreasonable rates

42. I am also concerned that the Southeast EEM, as proposed, could result in unjust and unreasonable rates. The Filing Parties failed to provide sufficient analysis demonstrating a lack of potential by Southeast EEM Participants for the exercise of market power or manipulation of the market, or adequate safeguards to protect against these potential abuses on a going forward basis.

43. The Filing Parties dismiss market power concerns raised by protestors and argue that no market power analysis or other market power protection is needed for the Southeast EEM because the core functioning of the Southeast bilateral market is not being changed by the Southeast EEM and the market presents no new opportunities for the exercise of market power.[61] In other words, the Filing Parties propose to rely on the jurisdictional Southeast EEM Participants' existing market-based rate authorities as proof that Participants in the Southeast EEM will not be able to exercise market power. This reliance depends on the false premise that the Southeast EEM is nothing more than an enhancement on the existing bilateral markets in the Southeast.[62] Such cursory analysis

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[60] See Pope Aff. ¶ 67. The Filing Parties justify the potential increase in transmission service costs to native load customers as permissible because native load customers may receive greater benefits via the relevant utilities' participation in the Southeast EEM. *Id*. But this argument neglects that *non*-native load customers can likewise expect increased transmission service costs and will receive *no* corresponding benefits where they are not Participants in the Southeast EEM.

[61] *See* Filing Parties March 30 Answer at 29; Response to First Deficiency Letter at 2.

[62] *See supra* at PP 10-12.

violates the Commission's duty to ensure that participants in the Southeast EEM "either lack, or have adequately mitigated, any horizontal or vertical market power."[63]

44. First, as discussed above, the Southeast EEM is a new market footprint. To the extent that the Commission has granted jurisdictional Southeast EEM Participants the authority to transact in the Southeast, it has done so based on the results of market power analyses of each Participant's ability to exercise market power in the balancing authority areas in which they own generation and transmission assets. Those analyses assume that each balancing authority is essentially its own unique market, and require a number of inputs that are specific to the market being studied.[64] Given its expanded footprint, voluntary nature, and introduction of NFEETS, all of these inputs would necessarily be different for the Southeast EEM.

45. Furthermore, traditional market power analyses assume that all uncommitted capacity located within the market footprint is available to compete. However, given the participation requirements, and the voluntary nature of the market, it is unclear who will participate in the market and how many resources they will make available. The Filing Parties admit that they do not know the level of participation in the Southeast EEM.[65] If participation levels are lower than the Filing Parties anticipate, it is very possible that Participants the Commission found to not have market power as studied in individual balancing authority areas could have the ability to exercise market power in the Southeast EEM.

46. The failure to provide market-specific market power analyses contradicts the Commission's decisions in the Western EIM. In *PacifiCorp*, the Commission found that the EIM will be a new relevant geographic market for market power purposes, and required PacifiCorp (and all subsequent market members) to study the EIM when joining, as well as study it as part of their triennial market power updates.[66] This helped ensure

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[63] *Public Citizen v. FERC*, No. 20-1156, 2021 WL 3438374, at *3.

[64] For example, the amount of generation located in the balancing authority area, the average amount of load, the number of potential competitors, and the amount of potential competing transfers that can be imported from neighboring balancing authority areas.

[65] In the first Deficiency Letter, Commission staff inquired about the number of companies that are expected to participate in the Southeast EEM, as well as their expected supply and demand offers. The Filing Parties declined to offer any specifics, instead arguing that "forward looking estimates . . . are difficult to make with any precision or certainty" and they expect "that the market will attract robust participation." *See* Response to First Deficiency Letter at 13-14.

[66] *PacifiCorp*, 147 FERC ¶ 61,227, at P 206 (2014) ("[B]ecause the EIM will be a

that PacifiCorp, which had market-based rate authority in all balancing areas that comprised the EIM at the time it joined the market, would not be able to exercise market power.

47. Without a market power analysis that looks specifically at the Southeast EEM, the Commission is flying blind. The risk of market power abuse created by the Southeast EEM going into effect without adequate market power analysis is exacerbated by the fact that the market has no independent market monitor. Other organized market proposals recently approved by the Commission, like the WEIS and EIM, include independent market monitors that work to prevent the exercise of market power, by constantly analyzing the market and enforcing market power mitigation measures when they detect that conditions are such that a market participant will be able to exercise market power – even when those participants have received authorization to transact at market-based rates. The Commission relied on the presence of the market monitors in approving the design of the Western EIM and SPP's WEIS.[67] While the Commission is equipped to

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new relevant geographic market for market power purposes, PacifiCorp is required to make a market-based rate change of status filing within nine months of the launch of the EIM market so that the Commission can assess whether PacifiCorp has market power in the EIM.").

[67] *See e.g.*, *Cal. Indep. Sys. Operator Corp.*, 147 FERC ¶ 61,231, at P 226 (2014) ("With regard to Neighboring Systems' request that market power analyses be performed on an ongoing basis and that the Department of Market Monitoring publish quarterly reports on the performance of the EIM, we note that CAISO has proposed that the Department of Market Monitoring will monitor markets administered by CAISO, which include the EIM. In addition, CAISO's tariff requires the Department of Market Monitoring to report on wholesale market trends on a quarterly basis."); *Sw. Power Pool, Inc.,* 173 FERC ¶ 61,267, at P 81 (2020) ("Instead, SPP and the SPP MMU will evaluate the mitigation thresholds over time, and SPP will file with the Commission to implement changes as needed. We find that this approach is just and reasonable and addresses the Commission's concern in the July Order regarding automatic increases of mitigation thresholds."); *id*. at P 83 ("Furthermore, the SPP MMU is obligated to recommend frequently constrained areas prior to the start of the WEIS Market"); *id.* at P 99 ("In addition, to the extent that market participants are consistently short due to physical withholding, they face potential referral to the Commission's Office of Enforcement if the SPP MMU suspects physical withholding behavior based on credible evidence."). SPP's market monitor also completed a Market Power Study several months prior to Commission approval of the proposed WEIS market, found that a single supplier could possess structural market power at the system level, and recommended that the SPP develop a system-wide market power mitigation measure. *Id.* at P 69.

provide some *ex post* monitoring of the Southeast EEM, that is not a replacement for active monitoring that will prevent the exercise of market power.

48. I am also concerned that the Southeast EEM's design will create avenues for manipulation. The Southeast EEM permits Participants to "select Counterparty Specific Constraints for any reason."[68] Given this lack of any need for justification,[69] as well as the absence of market monitoring, such "toggling" presents a risk of abuse. The Filing Parties argue that such toggling "is just a manifestation of a decision that any market participant can make today."[70] This argument neglects the fact that that the risk is materially different in the Southeast EEM context. Under the proposal, actions by one participant not only impact that participant and its counterparties, but also automatically flow through the multi-lateral algorithm, impacting other potential buyers and sellers at the same time. Prices of various transactions that emerge from the algorithm depend upon the multi-lateral landscape of bids, not just on that party's own conduct. Further, the Filing Parties glaze over the fact that the Southeast EEM is a mechanism to allocate finite transmission rights. The ability to toggle off competitors, or entire balancing authority areas, creates the opportunity for participating Southeast EEM Members to secure NFEETS transmission rights for themselves while denying their competitors access.[71] The bilateral market, by contrast, subjects all bilateral transactions to equal transmission opportunities.

49. Using the Three Eligible Counterparty Rule[72] as a safeguard against collusive schemes is a recognition that such schemes may occur. There has been no demonstration

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[68] Transmittal Letter at 25.

[69] While Filing Parties explain that Counterparty Specific Constraints can be used to allow Participants to comply with limits on their market-based rate authority ("toggling off" in regions where they are not permitted to market-based sales), nothing obligates them to use Counterparty Specific Constraints only for this purpose, and they need not give any justification for imposing constraints. *Id.*

[70] Filing Parties March 30 Answer at 33.

[71] The Filing Parties list 180 counterparties to existing enabling agreements as evidence that they are widely used in the Southeast. However, these agreements have never been used as a gating mechanism for participation in a multilateral market construct. Prospective Southeast EEM Participants must enter into enabling agreements with existing Southeast EEM Participants to gain entry into the market.

[72] The Three Eligible Counterparty Rule is "the requirement that all Participants have 'toggled on' at least three unaffiliated potential counterparties each time they bid or offer." Transmittal Letter at 40.

that this requirement will act as an effective safeguard to prevent such schemes. The Filing Parties state that the number of required counterparties renders it difficult for Participants to engage in anticompetitive conduct,[73] but do not provide any analysis, evidence, or rationale why three is the right number to protect the integrity of the market. This amounts to acknowledgment that anticompetitive conduct is a valid concern, without any demonstration that such concern has been properly mitigated.

50. The Southeast EEM algorithm's complexity and lack of transparency expose the market to manipulation, particularly in the absence of a market monitor to observe its operation and investigate anomalies. The Commission's enforcement docket is full of examples of market participants using superior knowledge of, and experience with, vulnerabilities in optimization algorithms or other features of complex markets to manipulate prices or collect unjustified payments.[74] That the algorithm is too complex for Filing Parties even to describe in a mathematical formula evinces a high risk of design flaws for manipulators to exploit.

51. The lack of analysis specific to Southeast EEM's unique characteristics, demonstrating that Participants will not be able to exercise market power, as well as the unchecked potential avenues for manipulation, means that Filing Parties have failed to demonstrate that rates in the Southeast EEM will be just and reasonable. Like earlier concerns about undue discrimination, these issues are not insurmountable. The Filing Parties could easily address these deficiencies by submitting a Southeast EEM-specific market power analysis and by closing some of these potential avenues for manipulation (e.g. instituting protections to avoid toggling off abuse). Of course, adding an independent market monitor would also go a long way to address both the market power and market manipulation concerns. These are legitimate issues with straightforward solutions that the Commission could have provided as guidance to Filing Parties in a rejection order.

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[73] Transmittal Letter at 41.

[74] *See, e.g., Vitol Inc. and Federico Corteggiano*, 169 FERC ¶ 61,0170 (2019) (order assessing penalties for market manipulation where knowledgeable market participants used feature of CAISO's marginal cost of congestion formula to manipulate physical energy prices for benefit of participants' related financial positions); *Coaltrain Energy, L.P.,* 155 FERC ¶ 61,204 (2016) (market participants manipulate market by placing economically meaningless 'Up to Congestion' bids at nodes with small or no price spreads for sole purpose of collecting unjustified marginal loss surplus allocation credits, rather than for legitimate arbitrage purposes); *City Power Marketing, LLC,* 152 FERC ¶ 61,012 (2015) (manipulative 'Up to Congestion' bids); *Houlian Chen,* 151 FERC ¶ 61,179 (2015) (manipulative 'Up to Congestion' bids).

V. Conclusion: Creation of this market puts non-Members at a permanent disadvantage in the Southeast

52. The Commission's responsibility under section 205 of the FPA is to evaluate proposals to determine whether they will result in just and reasonable rates that are not unduly discriminatory or preferential. As my colleagues have emphasized, the Filing Parties have not put forth an RTO proposal, so in the context of this proceeding it is not the Commission's role to evaluate whether an RTO would deliver greater benefits than the proposal before us. By the same token, we cannot dismiss a failure of this proposal to abide by the Commission's bedrock principles necessary to guarantee just and reasonable and non-discriminatory rates simply because opponents of the proposal may prefer an RTO. We have an obligation under the Administrative Procedure Act to articulate a "rational connection between the facts found and the choice made."[75] (Here, the choice being to allow the tariff to go into effect by operation of law via split vote.) My colleagues' failure to explain why they would have rejected protestors' detailed arguments that the proposal imposes unduly discriminatory barriers to transmission access and fails to safeguard the market against just and reasonable rates violates this obligation.[76]

53. Engaging on the merits of the actual filing under consideration, it is clear that the Southeast EEM proposal, whether accepted by operation of law or with the commitments offered in the response to the first deficiency letter, fails to meet the standard set forth in section 205. I therefore cannot support the market platform as proposed.

54. A well-designed Southeast EEM has the potential to provide valuable benefits to the Southeast energy markets. An order rejecting the proposal could easily have set the stage for a future proposal complying with the FPA's requirements, thereby providing a pathway for the promise of benefits to bear fruit. It is disappointing that, perhaps in search of near-term incremental cost savings, the Commission has compromised its fundamental responsibilities to guarantee non-discriminatory service and safeguard the market from abuse. Allowing this tariff to go into effect by operation of law puts at risk the Commission's long-running and largely unified commitment to steadily expanding

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[75] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962)).

[76] *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) ("It is well established that the Commission must 'respond meaningfully to the arguments raised before it.'") (quoting *Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005)).

non-discriminatory open access, a legal tradition exemplified by one of the Commission's proudest actions, Order No. 888.

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Allison Clements
Commissioner

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