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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

| | Docket Nos. | |
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| Alabama Power Company | | 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 CHAIRMAN GLICK

(Issued October 20, 2021)

1. Expanding regional electricity markets is one of the single most important steps that the Commission can take to save customers money, enhance reliability, and integrate intermittent resources most efficiently. I believe regional transmission organizations (RTOs) and independent system operators (ISOs) are, by far, the best way to achieve these benefits. 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. Instead, the parties submitted a filing pursuant to section 205 of the Federal Power Act (FPA) proposing to establish the Southeast Energy Exchange Market (Southeast EEM) to facilitate bilateral trading in the Southeast. And we were called upon to determine whether this proposal is just and reasonable and not unduly discriminatory or preferential, not whether there is a better option for the region—in my opinion, there clearly is.

2. I believe that much of the Southeast EEM proposal arguably satisfies the Section 205 standard. However, I 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. When *Mobile-Sierra* applies, the

Commission must presume that the relevant agreement meets the statutory just-and-reasonable standard, so the agreement can only be changed if it seriously harms the "public interest," a significantly higher evidentiary hurdle.[1]

3. That is important here because I share some of Commissioner Clements's concerns over transparency and the potential for the exercise of market power and manipulation in the Southeast EEM. But 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 conduct that may transgress the FPA or Commission regulations.

4. That is true, however, only if the Commission's section 206 authority is not hamstrung, for instance, by the improper application of the *Mobile-Sierra* presumption. And because the Southeast EEM proposal would apply *Mobile-Sierra* in a manner inconsistent with our precedent—I voted no. In the balance of this statement, I lay out my "views . . . with respect to the change" submitted by the Southeast EEM parties in the above-captioned dockets, as section 205(g) of the FPA requires when a filing goes into effect by operation of law after a 2-2 vote of the Commission.[2]

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5. Currently, the Southeast region operates as a traditional wholesale electricity market. Trading occurs bilaterally under wholesale power sales contracts. Trades generally occur on an hourly basis as the shortest increment, and usually only amongst entities in the same or directly interconnected balancing authority areas. Parties must use phone or electronic communication tools to negotiate terms of sale, arrange for transmission service, and schedule delivery.

6. The Southeast EEM represents a step toward modernizing this antiquated approach. The proposal will establish a new automated electronic trading platform designed to facilitate bilateral trading in the Southeast region. The platform will use an algorithm to match willing buyers and sellers for 15-minute transactions, facilitated by a

[1] *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010) ("In unmistakably plain language, *Morgan Stanley* restated *Mobile–Sierra*'s instruction to the Commission: FERC 'must presume that the rate set out in a freely negotiated wholesale-energy contract meets the 'just and reasonable' requirement imposed by law. The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.'") (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 530 (2008)).

[2] 16 U.S.C. § 824d(g); Alabama Power Co., *et al.*, Notice, Docket Nos. ER21-1111, *et al.* (issued Oct. 13, 2021) (taking effect by operation of law).

zero-charge transmission service (Non-Firm Energy Exchange Transmission Service or NFEETS) offered by participating transmission providers. Under the Agreement, NFEETS will be available to all participants on the same terms. The Agreement covers a substantial geographic footprint spanning ten states. The founding entities of the Southeast EEM collectively own 160,000 MW of generating capacity and serve approximately 640 TWh of load across ten balancing authority areas and two time zones.[3] According to the filing parties, their proposal will produce approximately $40 million in market-wide savings each year relative to the existing bilateral market; and, assuming increased penetration of renewable resources, those savings are projected at $100 million per year.

7. To buy or sell energy through the Southeast EEM, an entity must join as a participant. To become a participant, an entity must execute a participant agreement, arrange to take NFEETS from each participating transmission provider, and enter into "Enabling Agreements" with at least three other participants. The 14 entities that executed the Southeast EEM Agreement are designated as members. To become a member, an entity must be a load serving entity located in the Southeast EEM territory or an association or governmental utility created for the purpose of providing energy to a cooperative or governmental load serving entity in the territory. Under the Agreement, members share the costs of developing and operating the Southeast EEM system. Each member will have a seat on the membership board, responsible for all significant decisions, while a revolving group of members will sit on the operating committee, responsible for day-to-day operations.

8. Considering the history of entrenched resistance to organized markets in the Southeast, the Southeast EEM represents at least a positive step forward. Currently, several large incumbent utilities serve most of the consumers in the Southeast as bundled retail customers. Delivering power across multiple balancing authority areas in the region requires multiple transmission reservations and payment of pancaked transmission rates. A centralized and competitive wholesale market in the Southeast, or at least something closer to that model, is a step in the right direction.

9. But finding a proposal just and reasonable and not unduly discriminatory or preferential under Section 205 of the FPA requires that it be more than just a step in the right direction. The filing parties initially proposed to apply *Mobile-Sierra* to the entire Southeast EEM Agreement and later narrowed that to a smaller subset of "enumerated provisions." I cannot support this part of the proposal because I believe that application of the *Mobile-Sierra* presumption here violates Commission precedent. Under that well-

[3] Alabama Power Company, Tariff Filing, Docket No. ER21-1111-000, at 4 (filed Feb. 12, 2021) (Southeast EEM Transmittal).

settled precedent, the *Mobile-Sierra* presumption applies to a contract "only if the contract has certain characteristics that justify the presumption."[4]

10. The Southeast EEM Agreement fails this test. We have consistently held that *Mobile-Sierra* does not apply to "generally applicable" contractual provisions, including those that bind not just the parties to the contract but also would apply to any potential future signatories with limited, if any, room for negotiation.[5] The filing parties have already conceded that the *Mobile-Sierra* presumption should not apply to the entire Agreement: when they narrowed their proposal to apply *Mobile-Sierra* to just the enumerated provisions, they acknowledged that "certain portions of the Southeast EEM Agreement . . . may be perceived as being generally applicable in nature."[6] Our prior holdings require that we reject the imposition of *Mobile-Sierra* on even the enumerated provisions of the Southeast EEM Agreement. Entities that may later seek to join the Southeast EEM would need to accept the enumerated provisions "as is," with limited room for negotiation. New signatories thus would be placed in a position "that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption."[7] And the Southeast EEM filing parties have not shown "extraordinary" or "compelling" circumstances that, under Commission precedent, would merit application of *Mobile-Sierra* here as a matter of agency discretion.[8] For these reasons, applying the

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[4] *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 182 (2013).

[5] *See, e.g.*, *Arizona Pub. Serv. Co.*, 148 FERC ¶ 61,012, at P 4 (2014) (contrasting settlement rates that apply only to parties to the settlement with another settlement involving generally applicable rate schedules that apply to any entity for open access service); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at P 187 (2013) (stating that the Commission's conclusion that right of first refusal provisions at issue created generally applicable requirements was "bolstered by the fact that any new PJM Transmission Owner would have to accept these provisions as-is, with limited room for negotiation"); *ISO New England Inc.*, 150 FERC ¶ 61,209, at P 185 (2015); *Sw. Power Pool, Inc.*, 145 FERC ¶ 61,137, at P 9 (2013). Commissioner Danly concedes that my position "has the weight of Commission precedent" on my side. Comm'r Danly Statement at P 25. And while he cites broad statements in Supreme Court cases on *Mobile-Sierra* extolling the public policy benefits of contractual stability *as a general matter*, he offers no case—indeed, there is none—that contradicts either my position against applying *Mobile-Sierra* under the circumstances of this proceeding or the extensive Commission precedent on which I rely.

[6] *See* June 7 Deficiency Response at 40.

[7] *ISO New England Inc.*, 150 FERC ¶ 61,209, at P 185.

[8] *See*, *e.g.*, *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at PP 23-25

*Mobile-Sierra* public interest presumption to at least the enumerated provisions of the Southeast EEM Agreement departs from our precedent without justification.[9] I am disappointed that a majority of the Commission did not reach this conclusion.

11. We must always tread cautiously when determining whether a *presumption* that an agreement satisfies the statutory "just and reasonable" standard is applicable. Had the Commission been able to reach agreement on the *Mobile-Sierra* issue discussed above, I believe that our existing statutory protections against undue discrimination would have been sufficient to address protestors' concerns about the Southeast EEM and to protect consumers and market participants in the region. Applying the *Mobile-Sierra* presumption in these circumstances will make it more difficult for third parties or even the Commission to mount legitimate challenges in the future to the justness and reasonableness of the Southeast EEM. Put simply, there is no need (and no basis) to apply the *Mobile-Sierra* presumption here—and there is considerable risk to the public in doing so.

12. Aside from my disagreement on the *Mobile-Sierra* issue, I was willing to support the Southeast EEM proposal—as modified by the filing parties' June 7 and August 11 responses[10] to Commission deficiency letters—because I believe the modified proposal otherwise meets the "just and reasonable" standard of section 205 of the Federal Power Act. Our role here is to decide only whether the proposal before us meets that standard—not whether the filing parties have chosen the best available option, which in my view is to establish an RTO.[11] The Southeast EEM filing parties have proposed essentially a

(2011); *Devon Power,* 137 FERC ¶ 61,073, at P 37 (2011).

[9] The *Mobile-Sierra* question is not "weeds of legal minutiae." Comm'r Christie Statement at P 20. The doctrine, which has been repeatedly addressed by the U.S. Supreme Court, establishes the standard for Commission modifications to the agreements at issue here, implicating both our statutory authority and our duty to protect consumers. *See NRG Power Mktg.*, 558 U.S. at 172 (noting origins of the doctrine in Supreme Court decisions from 1956).

[10] *See, e.g.*, June 7 Deficiency Response at 17-18 (committing to providing additional transaction data in response to concerns about opportunities for market manipulation under the Southeast EEM Agreement); August 11 Deficiency Response at 3-4 (committing to additional restrictions on sharing of non-public market information received through the Southeast EEM).

[11] *See, e.g.*, *PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,243, at P 57 (2020) (citing *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984); *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,282, at P 31 (2009)).

matching platform for bilateral transactions. The intent of this platform, as these parties have stated, is to augment the existing bilateral nature of energy transactions in the region. And the stated benefits of this platform, though unverified, appear to be meaningful: The filing parties project over $100 million per year in market-wide savings by 2037 assuming higher renewable and energy storage penetration across the region, or $40 million per year relative to the current bilateral market under a more conservative estimate.

13. For customers to realize such benefits, however, market outcomes must be the product of genuine competition, not market manipulation. For this reason, I share the concern of many that the Southeast EEM Agreement may present opportunities for the participants to engage in manipulation.[12] The Southeast EEM parties made commitments, in their responses to deficiency letters, to provide additional transparency safeguards.[13] While the original filings, not those subsequent responses, go into effect by operation of law, I urge the parties to stand by their additional commitments on transparency.

14. Indeed, without those commitments embodied in the filing parties' responses to the deficiency letters, the Southeast EEM may be unjust and unreasonable under section 206 of the Federal Power Act. These added safeguards are necessary to protect consumers and market participants from anticompetitive conduct. For example, the filing parties' commitment to providing extensive transaction data on a weekly basis will enable the Commission to be aware of any abusive conduct. The filing parties also offered critical transparency measures to protect market participants and consumers: by publicly posting, with appropriate confidentiality limitations, any information requests from regulators and the Southeast EEM Auditor's responses to such requests. Beyond what the parties have offered, the Commission has the tools—and stands ready—to investigate any potential fraudulent or manipulative conduct and take any corrective action as needed, including imposing civil penalties. As I have often stated, guarding against market manipulation remains one of the core obligations vested in this agency by Congress. I intend for the Commission to continue to remain vigilant on this front.

15. I believe the parties' Southeast EEM proposal, while admittedly not perfect, is a positive first step on the road to regionalization. The better outcome here, in my view, is for markets like the Southeast to move toward organized wholesale electricity markets. RTOs and ISOs have led to significant benefits for consumers across the country, including more efficient coordination and dispatch of generation, enhanced reliability,

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[12] *See, e.g.*, Comments of Advanced Energy Economy, *et al.*, at 23-24 (Mar. 15, 2021); Protest of Public Interest Organizations, at 24-26 (Mar. 15, 2021).

[13] June 7 Deficiency Response at 17-19; Filing Parties July 14 Answer at 8-15.

and more effective integration of renewable resources.[14] As the generation mix transforms rapidly before our eyes,[15] the benefits of organized wholesale markets will continue to accrue in the future—particularly when it comes to both meeting our nation's critical need to rapidly integrate massive amounts of new renewable resources at relatively low costs and minimizing disruptions to energy markets from extreme weather events.

16. Finally, both Commissioners Danly and Christie raise objections to the omission of the parties' open access transmission tariff filings from the Secretary's October 13, 2021 notice of the filings that went into effect by operation of law effective October 12, 2021. In their view, all twelve dockets related to the Southeast EEM proposal should have gone into effect by operation of law, rather than only the eight that were included in the notice. Their preferred result would unsettle established Commission precedent and introduce significant uncertainty into Commission proceedings.[16]

17. In enacting the FPA, "Congress did not set forth any filing procedures. Rather, it expressly authorized the FERC to prescribe rules and regulations pertaining to rate filings and to designate the form of such filings."[17] Under that authority, the Commission has

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[14] *See, e.g.*, *Pac. Gas & Elec. Co*., 168 FERC ¶ 61,038 (2019) (Glick, Comm'r, concurring at P 4); *Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285, 1999 WL 33505505, at *37-38 (2000).

[15] *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024 (2021) (Glick, Chairman, and Clements, Comm'r, concurring at P 4).

[16] Separately, Commissioner Danly calls for a remand based on his suggestion that the Commission has "accept[ed]" only "half of a proposed rate" in violation of the D.C. Circuit's *NRG Power Marketing* decision. Comm'r Danly Statement at P 31 & n.76. But *NRG* is inapt. *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 115 (D.C. Cir. 2017). There, the court held that the Commission could not "suggest *modifications* that result in an 'entirely different rate design' than the utility's original proposal or the utility's prior rate scheme." *Id*. (emphasis added). Here, the Commission, as a result of a 2-2 split, has merely let filings go into effect on their proposed effective date, as required by section 205 of the FPA. It has not "modified" a rate in any respect. Moreover, Commissioner Danly's theory is undercut by the filing parties themselves, who expressly asked the Commission not to consolidate their filings, foreclosing the possibility that these filings are part of a single rate for the purposes of *NRG*. Southeast EEM Members, Answer, Docket Nos. ER21-1111, at 54 (filed Mar. 30, 2021) ("Notwithstanding the common nexus of facts, the filings are by different entities who retain their individual Section 205 rights.").

[17] *Ala. Power Co. v. FERC*, 22 F.3d 270, 272-73 (11th Cir. 1994) (citing 16 U.S.C.

adopted regulations, by notice-and-comment rulemaking, regarding the electronic filing of tariffs, including the rules governing the use of proposed effective dates. Pursuant to these regulations, only filings with statutory action dates become effective in the absence of Commission action.[18] And it is longstanding Commission practice even before the emergence of electronic tariff filing—again, codified through notice-and-comment rulemaking—to determine the effective dates of section 205 filings based on the effective dates proposed by the filing parties in their tariff sheets.[19] Since the advent of the Commission's eTariff filing system in 2010, parties have relied on those rules when filing nearly 1,200 statutory filings with open-ended effective dates.[20]

18. Here, four of the relevant 12 filings incorporated open-ended proposed effective dates.[21] As a result, these four filings did not become effective on October 12, 2021,

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§ 824d(c)).

[18] 18 C.F.R. § 35.7(d) ("Only filings filed and designated as filings with statutory action dates in accordance with these electronic filing requirements and formats will be considered to have statutory action dates."); *see also* 18 C.F.R. § 385.205(b) (filings without statutory action dates "will not become effective should the Commission not act by the requested action date"); Electronic Tariff Filings, Order No. 714-A, 147 FERC ¶ 61,115, at P 4 (2014) ("The regulations now will provide explicitly that only tariff filings properly filed as and designated as statutory filings according to the Commission's eTariff requirements will be considered to have statutory action dates, and that tariff filings not properly filed and designated as statutory filings will not become effective in the absence of Commission action."); *Pioneer Transmission, LLC*, 169 FERC ¶ 61,265, at P 20 (2019) ("Any filer who desires to have its section 205 filing subject to the statutory clock must follow the prescribed eTariff filing format.").

[19] *See Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs. ¶ 31,096, at 31,504 (2000) ("It is thus incumbent upon utilities to unambiguously identify their proposed changes in a manner conforming to the Commission's regulations including properly formatting and designating their proposed tariff sheets. . . . It is not the function of this Commission to speculate on the nature of an applicant's filing (for example, what a utility intends as the effective date) nor is it our function to, on our own, perfect a utility's application.").

[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.

[21] *See* Alabama Power Co., Transmittal, Docket No. ER21-1125, at 12 & n.36 (filed Feb. 12, 2021) ("While the Southeast EEM Commencement Date is anticipated to occur sometime in the first quarter of 2022, *the exact date is unknown at this time*. The Southeast EEM Commencement Date will be determined by the Members in accordance with the provisions of Section 4.1.9(a)(v) of the Southeast EEM Agreement.

when the Commission failed to act within 61 days of the filing date. Despite Commissioner Christie's statements to the contrary, the record shows that the applicants understood these rules,[22] expressly sought an open-ended effective date,[23] and opposed consolidation.[24] As the filing parties also recognized, their use of an open-ended effective date requires action by the Commission in the form of a waiver of agency regulations.[25] The Secretary's October 13 notice fully complies with the statute as well as with the Commission's regulations and precedent, and is consistent with the filing

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*Accordingly, Southern Companies are using an open-ended effective date (12/31/9998), consistent with Commission guidelines*.") (emphases added).

[22] Commissioner Christie implies that the applicants might have been confused by the Commission's eTariff rules, but he also concedes that the applicants intended that "the transmission revisions should only go into effect *at a later date* when the service was established under the market structure approved by the Commission," and he cites applicants' own statement that they used a 12/31/9998 effective date for that reason. Comm'r Christie Statement at P 24 (emphasis added). 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. Commissioner Christie's criticism of Commission staff for not raising such eTariff issues in the deficiency letters is unfounded. Those letters sought additional information in light of deficiencies in the filings—but the open-ended proposed effective date for their OATT filings, chosen by the filing parties at their discretion, was not a deficiency.

[23] Alabama Power Co., Transmittal, Docket No. ER21-1125, at 12 (filed Feb. 12, 2021) ("An effective date prior to the Southeast EEM Commencement Date would be inconsistent with current non-Southeast EEM operations and illogical because NFEETS can be taken only in conjunction with Energy Exchanges. . . . Southern Companies respectfully *request* that the Commission act on this filing within 90 days of filing.") (emphasis added); Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Transmittal, Docket No. ER21-1115, at 12-13 (filed Feb. 12, 2021) (same); Dominion Energy South Carolina, Inc., Transmittal, Docket No. ER21-1128, at 11-12 (filed Feb. 12, 2021) (same); Louisville Gas & Elec. Co., Transmittal Letter, Docket No. ER21-1118, at 12-13 (filed Feb. 12, 2021) (same).

[24] Southeast EEM Members, Answer, Docket Nos. ER21-1111, at 54 (filed Mar. 30, 2021).

[25] *See, e.g.,* Alabama Power Co., Transmittal, Docket No. ER21-1125, at 12 (filed Feb. 12, 2021) ("In addition, because the requested effective date may be more than 120 days after the date these OATT revisions are filed with the Commission, Southern Companies seek waiver of Section 35.3(a)(1) of the Commission's regulations.").

parties' discretionary choice to include effective dates on some—but not all—of their submissions.

19. Still, there remains an easy solution for the filing parties: In the event that the Commission has not acted on their filings, when they know the implementation date for the Southeast EEM, they can establish an effective date by submitting an amended filing with the proposed date on which their OATTs will become effective; in the absence of Commission action, this filing will go into effect on the later of their proposed effective date or 61 days from the date of filing.[26]

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20. Under FPA section 205, our role is to evaluate whether the proposal before us is just and reasonable and not unduly discriminatory or preferential. As described above, while on balance I believe the proposal comes close to meeting that standard, I cannot support application of the *Mobile-Sierra* presumption in these circumstances. To do so would run contrary to Commission precedent and undermine our ability to protect consumers under the Southeast EEM.

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Richard Glick
Chairman

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[26] *Notice of Procedures for Making Statutory Filings when Authorization for New or Revised Tariff Provisions is Not Required*, Docket No. RM01-5, at 5 (June 3, 2020) (the effective date on which a public utility filing goes into effect in the absence of Commission action is "the later of either the 61st day after the date of filing or the earliest of the proposed tariff record effective dates that is after the 61st day").

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