UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Power Company	)	ER21-1111-000
Dominion Energy South Carolina, Inc.	)	ER21-1112-000
Louisville Gas and Electric Company	)	ER21-1114-000
Duke Energy Progress, LLC Duke Energy Carolinas, LLC	)	ER21-1115-000
Duke Energy Carolinas, LLC	)	ER21-1116-000
Duke Energy Progress, LLC	)	ER21-1117-000
Louisville Gas and Electric Company	)	ER21-1118-000
Georgia Power Company	)	ER21-1119-000
Kentucky Utilities Company	)	ER21-1120-000
Mississippi Power Company	)	ER21-1121-000
Alabama Power Company	)	ER21-1125-000
Dominion Energy South Carolina, Inc.	)	ER21-1128-000 (not consolidated)

MOTION TO RESPOND AND RESPONSE OF PUBLIC INTEREST ORGANIZATIONS

I. INTRODUCTION

Energy Alabama, Sierra Club, South Carolina Coastal Conservation League, GASP, Southern Alliance for Clean Energy, Southface Energy Institute, Inc., Vote Solar, Georgia Interfaith Power and Light, Georgia Conservation Voters, Partnership for Southern Equity, North Carolina Sustainable Energy Association, Sustainable FERC Project, and Natural Resources Defense Council ("Public Interest Organizations" or "PIOs"), pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[1] move for leave to respond and respond to the Answer of the Southeast EEM Members ("SEEM Members" or "Applicants") on July 14, 2021 ("SEEM Answer").[2] Although the Commission's procedural rules generally do not allow for answers to answers,[3] the Commission has accepted answers that facilitate the decisional process or aid in the explication of issues, and has explained that it will accept answers that "assist[] in our decision-making process."[4] PIOs request that the Commission accept this answer to clarify the record and address issues raised by the SEEM Answer.

President Biden's Executive Order on Promoting Competition in the American Economy urges agencies—including FERC—to use their various authorities "to address overconcentration, monopolization, and unfair competition in the American economy."[5] The Executive Order

[1] 18 C.F.R. §§ 385.212 (1984), 385.213 (2012).
[2] Mot. for Leave to Answer and Answer of the SEEM Members, at 4–5 (July 14, 2021) ("SEEM Answer"), Accession No. 20210714-5072.
[3] 18 C.F.R. §§ 385.213(a)(2), 385.213(d)(1).
[4] *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied sub nom Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015); *see also Algonquin Gas Transmission Co.,* 83 FERC ¶ 61,200, at 61,893 n.2 (1998) (accepting an answer in order to ensure "a complete and accurate record"), *order amending certificate*, 94 FERC ¶ 61,183 (2001); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211, at 61,672 n.5 (1990) (citing *Buckeye Pipe Line Co.*, 45 FERC ¶ 61,046 (1988)) (accepting answer "where consideration of matters sought [will be] addressed in the answer will facilitate the decisional process or aid in the explication of issues.").
[5] Exec. Order No. 14,036, 3 C.F.R. 36987 (2021) §§ 2(g), 5(a), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

affirms that it is the cornerstone of the American economy and policy of the Biden Administration to "combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly" and establishes an inter-agency White House Competition Council to coordinate and advance federal efforts in this regard.[6] Against this backdrop, the Applicants, many of whom are franchise monopoly utilities, seek approval to create a new wholesale energy market in the Southeast that is rife with opportunities for market power abuse and discrimination. If approved, SEEM would allow monopoly utilities to exclude their competition—independent power producers—from accessing zero-cost transmission service[7] and participating in beneficial energy exchanges,[8] thereby conferring upon themselves a significant advantage. SEEM would also allow three monopoly utilities with market power in their respective service territories—Southern Company, Duke Energy, and Tennessee Valley Authority—to dominate the market's governance.[9] To top it off, SEEM does not have an independent Market Monitor to deter and investigate market abuses. Instead, the proposal includes a "Market Auditor" who reports directly to the Membership Board and according to the Applicants "will not monitor Participant behavior."[10] The SEEM proposal is the antithesis of the "fair, open, and competitive marketplace [that] has long been a cornerstone of the American economy,"[11] and must be rejected.

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[6] *Id.* §§ 1, 4.
[7] Protest of Public Interest Organizations at 12–13 (Mar. 24, 2021), Accession No. 20210324-5235 ("PIO March Protest"); Motion for Leave to Respond and Response of Public Interest Organizations, at 10–11 (Apr. 12, 2021), Accession No. 20210412-5876 ("PIO Response"); Protest of Public Interest Organizations, at 6–10 (June 28, 2021), Accession No. 20210628-5162 ("PIO June Protest").
[8] PIO June Protest, at Attach. A, ¶¶ 16, 26–38 ("Suppl. Sotkiewicz Aff.").
[9] *See* PIO March Protest at 28–30.
[10] PIO June Protest at 18 n.70; Southeast Energy Exchange Market Agreement, at 17 (Feb. 12, 2021) Accession No. 20210212-5033 ("SEEM Proposal").
[11] Exec. Order No. 14,036, 3 C.F.R. 36987 (2021) § 1, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

II. The SEEM Proposal is Unjust, Unreasonable, and Unduly Discriminatory

In determining whether Section 205's just and reasonable standard has been met with regard to organized markets like SEEM, the Commission has long relied on several fundamental principles,[12] which include:

1. Mitigation of market power and opportunities for abuse.[13]
2. Governance structured in a fair and non-discriminatory manner where rules "prevent control, and appearance of control, of decision-making by any class of participants."[14]
3. Open access to transmission "pursuant to a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner."[15]
4. Independence from any market participant: the operators of the market "should have no financial interest in the economic performance of any power market participant."[16]
5. Management and administration of the market "should be carried out in an efficient manner . . . [and] [all] procedures and protocols should be publicly available."[17]
6. Transmission system information should be made "publicly available on a timely basis via an electronic information network . . . at a minimum, information on

[12] *See* PIO March Protest at 16–19.
[13] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540, 21,552 (May 10, 1996) ("Order 888").
[14] *Id.* at 21,596.
[15] *Id.*
[16] *Id.*
[17] *Id.*

> system operation, conditions, available capacity and constraints, and all contracts or other service arrangements . . . should be made publicly available."[18]

PIOs have consistently pointed out specific ways in which the SEEM proposal fails to meet these requirements and Applicants have been provided multiple opportunities to revise the SEEM proposal accordingly—including in response to the Commission's recent deficiency letter.[19] Even with the minor modifications proposed in the Deficiency Response and their Answer, the SEEM proposal still fails to meet Section 205's just and reasonable standard and is not consistent with or superior to the *pro forma* Open Access Transmission Tariff ("OATT") and must therefore be rejected.[20]

A. Applicants' Rejection of Market Power Concerns Doth Protest Too Much

Applicants have refused to acknowledge the substantive market power concerns raised by PIOs and others[21] and instead attempt to paint the PIOs' concerns about market power as "outlandish" and "extreme."[22] This characterization is false. In fact, the D.C. Circuit warned against exactly the kind of monopolistic behaviors that Dr. Sotkiewicz and the PIOs have raised:

> Entry into the transmission market is difficult and restricted, so those utilities that already own transmission facilities enjoy a natural monopoly over that field. The transmission-owning utilities can use their position to favor their own generated electricity and to exclude competitors from the market, whether by denying transmission access outright, or by providing transmission services to competitors

[18] *Id.*
[19] *See generally* PIO March Protest; PIO Response; Deficiency Letter (May 4, 2021), Accession No. 20210504-3015 ("Deficiency Letter"); PIO June Protest.
[20] *See Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282 at P 3 (Mar. 17, 2006) (explaining the legal standard applied—that a change to an OATT must be "consistent with or superior to" the *pro forma* OATT—when LG&E modified its OATT to exit from Midwest Independent System Operator). The Applicants imply that the PIOs are presenting a moving target, but the PIOs have raised these same concerns in every filing they have made. *See generally* PIO March Protest, PIO Response, and PIO June Protest.
[21] *See, e.g.*, PIO March Protest at 19–26, 34–37; PIO Response at 16–18; PIO June Protest at 14–20; Comments of Advanced Energy Econ. et al., at 21–27 (Mar. 15, 2021), Accession No. 20210315-5301; Mot. for Leave to Answer, And Answer, of Advanced Energy Econ. et al., at 7–11 (Apr. 12, 2021), Accession No. 20210414-5208; Joint Resp. of the Clean Energy Coalition to the Suppl. Submission by the SEEM Members, at 5–10 (June 28, 2021), Accession No. 20210628-5175.
[22] SEEM Answer at 4–5.

> only at comparatively unfavorable rates, terms, and conditions. Utilities that own or control transmission facilities naturally wish to maximize profit. The transmission-owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.[23]

Hence, it is well-established that transmission-owning utilities have an incentive to maintain their monopoly power at the expense of their customers. Applicants' blustery denials have done little to dispel the applicability of this fundamental principle of economics. In fact, some applicants have used their considerable power to undermine efforts to introduce meaningful competition to the Southeast energy markets in ways that do little to allay PIO concerns regarding the potential for market power abuse in the proposed SEEM structure.[24]

[23] *Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 683–684 (D.C. Cir. 2000).

[24] Of recent note are the considerable efforts and questionable tactics used by Duke Energy to oppose legislation in North Carolina that would examine the economic benefits of expanded competition. *See* John Downey, *Duke Energy opposes—and may block—an NC study on regulatory market reforms*, Charlotte Bus. J. (May 21, 2021), https://www.bizjournals.com/charlotte/news/2021/05/21/duke-energy-opposes-nc-study-on-rtos.html (updated May 22, 2021). Recently proposed and sweeping energy legislation backed by Duke Energy ultimately omitted an earlier provision to study market reforms that would explore forming or joining a Regional Transmission Organization ("RTO"), instead directing additional investment in potentially stranded gas assets, allowing the implementation of multi-year rate plans that would charge customers for future projected costs, allowing Duke Energy to keep profits above its allowed profit range, and setting preferential treatment for Duke Energy compared to independent power producers in building renewable energy. Daniel Tait, *North Carolina HB 951 could mean windfall for Duke, large rate increases for customers*, Energy and Pol'y Inst. (June 17, 2021), https://www.energyandpolicy.org/duke-energy-windfall-hb-951/. Just last week, media outlets obtained public records indicating that a North Carolina Utilities Commission's Public Staff analysis regarding ratepayer impacts of Duke Energy-backed state energy legislation—which the utility had touted as an independent seal of approval from the consumer advocate—was in fact based on a model created and run by Duke Energy. Daniel Tait, *Duke Energy given preferential treatment to shape study of HB 951 by North Carolina Utilities Commission Public Staff*, Energy and Pol'y Inst. (July 14, 2021), https://www.energyandpolicy.org/records-reveal-duke-energys-preferential-treatment-during-hb-951-analysis-by-the-north-carolina-utilities-commission-public-staff/. Unsurprisingly, the model created by Duke Energy predicted that impacts to customer rates from the energy legislation were much smaller than other analyses. John Downey, *NC customer advocate denies charge it gave Duke Energy special treatment on reform bill*, Charlotte Bus. J. (July 15, 2021), https://www.bizjournals.com/charlotte/news/2021/07/15/public-staff-denies-advocacy-groups-charge.html.

B. A Hybrid Standard of Review Is Inappropriate

Contrary to the Applicants' assertions,[25] the PIOs do not seek to substitute the proposal at hand for an RTO or energy imbalance market. PIOs have only ever requested that the SEEM proposal be evaluated, as is required, under Section 205's just and reasonable standard.[26] The Applicants conceded in their initial transmittal letter that Section 205's just and reasonable standard applied to this proposal[27]—indeed, they filed the SEEM proposal with the Commission for acceptance under Section 205.[28] However, Section 16.9 of the SEEM Agreement itself sought to apply the *Mobile-Sierra* standard of review to any changes to the SEEM Agreement.[29] Following the Commission's deficiency letter requesting that Applicants explain the justification for seeking application of the *Mobile-Sierra* doctrine, Applicants now propose that SEEM be evaluated under a hybrid approach that entitles most terms of the SEEM proposal to a presumption of reasonableness.[30] Applicants claim that this is appropriate because they "determined it was not appropriately classified, in its entirety, as either an agreement containing only 'contract rates' or only 'tariff rates,' but instead contained (practically speaking) a mixture of both."[31] Applicants base their proposed hybrid approach on a division between provisions of the SEEM Agreement Applicants believe:

> …to be more akin to 'contract rates' (i.e., those *terms* that reflected terms that . . . affect only the Southeast EEM Members) versus the other provisions that are

[25] SEEM Answer at 18. PIOs are not seeking "business models and market designs that may be more advantageous to their members" and are not "only arguing for market rules and structures that they can manipulate for the financial benefit of their shareholders" because unlike the Applicants—who assert that their "overriding duty [is] to their shareholders"—the PIOs are all non-profit public interest organizations. *Id.*
[26] PIO March Protest at 13–15; PIO Response at 19; PIO June Protest at 11, 24–28.
[27] SEEM Proposal at 5.
[28] *Id.* at 1.
[29] *See id.*, Attach. A, SEEM Agreement at Art. 16.9 (citing *United Gas Pipe Line Co. v. Mobile Sierra Gas Ser. Corp.*, 350 U.S. 332 (1956) and *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)).
[30] Resp. to Deficiency Letter, at 4, 40–42 (June 7, 2021), Accession No. 20210607-5164 ("Deficiency Response"); Deficiency Response, Attach. A, Proposed Revisions to Southeast EEM Agreement ("Revised SEEM Agreement") at Art. 16.9.
[31] SEEM Answer at 19.

> more akin to a 'tariff rate' (i.e., those that will be generally applicable to all Participants…).[32]

Once again, Applicants demonstrate a fundamental confusion between contract *rates* and contract *terms*. Applicants insist that SEEM "cannot be classified as either a contract rate or a tariff rate in its entirety"[33] and point to contract *terms* that they assert were the product of careful negotiations between Applicants, but never once identify or explain what they believe to be a contract *rate*—i.e., the pricing mechanism—as opposed to a tariff *rate* in the SEEM Agreement. This is because SEEM is an agreement setting up a marketplace to sell 15-minute blocks of non-firm energy according to the rate generated by the SEEM algorithm that is generally applicable to all participants—i.e., a *tariff rate*. That the tariff agreement has contract terms that govern participation between the members, entry and exit into SEEM, how disputes will be handled, or any number of logistical requirements for implementing a tariff agreement does not convert the agreement itself into a *contract rate*. Consistent mischaracterization of the SEEM proposal as a bilateral agreement notwithstanding, it is not the parties to the agreement who ultimately make the final choice of what energy to supply to exactly which party at what price—control over and performance of those functions rests with the SEEM algorithm, and by its very terms future members and participants of SEEM will not be able to negotiate these rates or rules for themselves. These elements of general applicability make SEEM a tariff agreement that must meet FERC's just and reasonable standard of review and *not* a bilateral contract subject to the *Mobile-Sierra* doctrine.[34]

[32] *Id.* (emphasis added).
[33] *Id.* at 22.
[34] *Automated Power Exch., Inc.*, 84 FERC ¶ 61,020, 61,085–86 (1998), *aff'd by Automated Power Exch. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000).

As authority for their hybrid approach, Applicants curiously rely on cases involving failed and overturned efforts by transmission owners to seek *Mobile-Sierra* application to certain provisions of the highly complex transmission operating agreements that, in addition to rate-setting mechanisms applicable to all suppliers and purchasers, also set forth the contractual agreement under which the relevant transmission owners voluntarily turned over operations to New England Independent System Operator and PJM Interconnection, LLC.[35] As PIOs pointed out in their June Protest, Applicants have failed to establish that they are similarly situated or to meet the step-by-step criteria used by the Commission in these and other cases to evaluate the appropriateness of applying the *Mobile-Sierra* doctrine, a flaw Applicants fail to acknowledge or remedy with their Answer.[36]

Applicants' proposed insertion of a blanket "public interest standard of review" to rates, terms, and conditions of a tariff rate is a strategy attempted and rejected by the Commission before. When applicant Duke Energy attempted to do the same thing in its proposed OATT revisions in 2011,[37] the Commission made clear that while it had discretion to apply the public interest standard in non-contract rates "if considerations relevant to what is 'just and reasonable' make that approach appropriate," it would not do so "absent compelling circumstances, such as we found to exist in *Devon Power…*"[38] As in *High Island Offshore*, the Commission rejected

[35] SEEM Answer at 19–20 (citing *ISO New England Inc*., 143 FERC ¶ 61,150 (2013), *order on reh'g and compliance,* 150 FERC 61,209 (2015), *review denied, Emera Maine v. FERC*, 854, F.3d 662 (D.C. Cir. 2017); *PJM Interconnection, L.L.C.,* 142 FERC ¶ 61,214, at P 185 (2013), *reh'g granted in part, denied in part* 147 FERC ¶ 61,128 (2014); *ISO New England Inc. v. New England Power Pool*, 106 FERC ¶ 61,280 (2004), *reh'g granted in part, denied in part*, 109 FERC ¶ 61,147 (2004)). These cases also undermine Applicants' objection to the relevance of any legal authority related to matters not in an identical procedural posture. *Id.* at 21.
[36] PIO June Protest at 24–28.
[37] *See Duke Energy Carolinas, LLC*, 137 FERC ¶ 61,058 (2011).
[38] *Id.* at PP 28–29 (citing *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105 at P 25 (2011)). In *Devon Power, LLC*, the Commission narrowly applied the public interest standard to two provisions of a multi-year, complex, and contested settlement agreement establishing the forward capacity market in New England, which the Commission determined was a necessary solution "to serious deficiencies in the New England market that were impairing critical infrastructure development and threatening reliability." 134 FERC ¶ 61,208 at P 4 (2011). The Commission

Duke Energy's proposed application of the *Mobile-Sierra* doctrine where the rate at issue was not a contract rate, but an ordinary tariff rate that was not intended to correct serious deficiencies in the market.[39] Applicants have failed to demonstrate any compelling need for SEEM. In fact, Applicants take great pains to liken SEEM more to the existing voluntary bilateral market, acknowledges that it provides a product that is currently rarely in demand, and insists that it is unable to perform the services of an energy imbalance market.[40]

C. The SEEM Proposal Is Inconsistent with the OATT and Presents Structural Opportunities for Undue Discrimination

The lack of a standardized Enabling Agreement as part of the SEEM rules creates serious concerns regarding opportunities for undue discrimination. Applicants point to the list of 181 existing Enabling Agreements as evidence that there is a robust, diverse network of trading partners for SEEM.[41] But this list simply shows that there is some existing bilateral trading between the members of SEEM that could increase with free transmission service and facilitation of access to SEEM Members' systems.[42] It does not establish that the Members have need for or will use the type of product being offered by SEEM or guarantee that any party wishing to participate will have rights to an Enabling Agreement or one on the same terms. It also shows that an estimated 65 trading partners that border the SEEM territory would be excluded from that

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allowed a stricter standard of review *after* 45 days post-auction where the auction had itself been determined to meet the just and reasonable standard and where such application would promote rate stability in a market that had been determined to be particularly unstable. *Id.* at PP 19–20. FERC was very clear in its majority and concurring opinion that discretionary application of the public interest standard to tariff rates would be very fact-specific and might be "intolerable in the context of other circumstances." *Id.* at P 24; *Id.* (LaFleur, Comm'r, concurring).

[39] *Duke Energy Carolinas, LLC*, 137 FERC ¶ 61,058 at PP 29–30; *High Island Offshore Sys., LLC*, 135 FERC ¶ 61,105, at P 23.

[40] Deficiency Response at 6,10–13; *Id.*, Attach. D, Supp. Aff. of Susan L. Pope on Behalf of SEEM Members, Sec. IV.

[41] Deficiency Response at 20; *Id.*, Attach. C.

[42] Deficiency Response, Attach. C. The list also shows inflation of the overall numbers given the 35 or more duplicates in the list, including, for example, "Southern Company Services, Inc.," "Southern Power," and "Southern Power Company," all as stand-ins for Southern Company.

free transmission service and not able to participate like SEEM Members because they do not have resources located in the territory.[43]

Applicants have not explained why it is consistent with or superior to the *pro forma* OATT to exclude at least 65 existing bilateral trading partners from access to the new free point-to-point service offered through the SEEM. Nor can they, as FERC'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.[44] Under other market structures and joint dispatch agreements, the Commission has allowed some limitations on access to free transmission service to those with resources and/or loads located on the utilities' systems.[45] However, at a minimum, those market structures provide imbalance service—that is, balancing loads and resources to meet needs reliably in real time. As Applicants are fond of repeating, SEEM is not an energy imbalance market and has no imbalance or reliability requirements.[46] Thus, Applicants cannot reasonably exclude any transmission customers from the Non-Firm Energy Exchange Transmission Service ("NFEETS"), including those outside the SEEM Territory, due to reliability concerns or claims that they are not similarly situated. As proposed, the OATTs of SEEM Members are unduly discriminatory because they

[43] In the PIOs' conservative analysis of the list of existing agreements, we first removed 36 duplicates, many of which represent companies located outside of the SEEM Territory. We then identified those entities such as Western Systems Power Pool, municipal systems in Central Florida and Arkansas, and utilities in the upper Midwest that clearly do not have resources located in the Territory to identify at least 66 entities that cannot transact in SEEM under the proposed rules. If there was any question as to whether the entity might have a resource in the SEEM territory, our analysis included that entity as a possible participant in SEEM. For this reason, many power marketing entities are included even though pure play power marketers only market resources owned by others.

[44] Order 888 at 21,596 (Final Rule requires that transmission is offered "pursuant to a single, unbundled, grid-wide tariff that applies to all eligible users in a non-discriminatory manner.").

[45] *See Pub. Serv. Co. of Colorado*, 154 FERC ¶ 61,107 at P 85 (2016) ("to the extent any resource only needs the transmission resources of Parties to join the Joint Dispatch Agreement, it only needs to sign the Joint Dispatch Agreement to receive Joint Dispatch Transmission Service").].

[46] *See* e.g., Deficiency Response at 6 ("Southeast EEM is not transforming the existing bilateral market into a new market. It will not function as an imbalance market – balancing services will continue to be provided by the relevant balancing authorities."), Attach. D, Sec. IV; SEEM Answer at 2–3.

preclude transmission customers that are existing bilateral trading partners from access to the enhanced bilateral market provided by SEEM. To meet the requirements of Order No. 888, Applicants have an obligation to offer NFEETS to all transmission customers on the same terms, including the 65 or more existing trading partners with resources located outside of the SEEM Territory.[47]

In addition to ensuring that all transmission services are available on a comparable, non-discriminatory basis, the Commission has an obligation to ensure that all transmission rates are just and reasonable, an obligation that it reiterated recently.[48] The Commission specifically asked Applicants to explain how the availability of NFEETS will impact existing firm point-to-point customers' transmission charges.[49] As PIOs' Protest explained, Applicants offered a non-sequitur in their Answer when they focused on net benefits of loads in the SEEM territory instead of the effects on point-to-point transmission customer charges.[50] It is telling that Applicants' July 14 Answer is also devoid of any response to PIOs' arguments concerning the increase in costs for firm point-to-point customers from the proposed discounting of NFEETS.[51] Applicants' attempt to avoid the question should focus the Commission on the fact that rates for firm point-to-point customers will increase due to the zero rate NFEETS. There will be no off-setting savings for customers that use the firm point-to-point service to wheel across the Territory to reach their consumers or that sell into the more transparent and liquid RTO markets

[47] Even if the scheduling rules in neighboring RTOs *may* prevent participation in SEEM by resources located in those RTOs, there are resources on the border of the SEEM Territory outside of RTOs that should qualify to participate in SEEM.
[48] *See*, *e.g.*, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 176 FERC ¶ 61,024 at P 1 (2021) (seeking input on how to enhance the Commission's oversight to control transmission costs).
[49] Deficiency Letter at Q 9.b.
[50] PIO June Protest at 23–24 (quoting Deficiency Response at 37 and explaining that benefits to load do not convey to point-to-point transmission customers in all, or even many, circumstances).
[51] *See id.*

that border the SEEM Territory.[52] For these reasons, the SEEM proposal does not adequately protect consumers, shifts costs to independent power producers, and does not yield just and reasonable rates. The Commission must apply "rigorous scrutiny of the rates charged for transmission service"—including the zero rate NFEETS—because it will raise firm transmission rates relied on by competitors of SEEM Members without any offsetting benefit for their ultimate end-use consumers.[53]

D. PIOs' Earlier Concerns Remain Unaddressed

The SEEM proposal violates the Commission's fundamental wholesale market principles in several additional ways that the PIOs have discussed in previous filings and Applicants have continuously failed to remedy. For example:

- The governance structure explicitly preferences transmission-owning Members over Participants.[54]
- SEEM Members may selectively enter into Enabling Agreements or negotiate terms and conditions of each agreement in an unduly discriminatory manner.[55]
- Even if independent power producers are able to obtain an Enabling Agreement with a significant number of trading partners so as to be qualified to make some exchanges, the SEEM algorithm allows Members and Participants to "toggle off"

[52] Nor will there be off-setting saving for transmission customers, e.g., independent power producers, that sell at all-in, fixed rates to loads in SEEM. It is undisputed that they will see increased costs for transmission services and only the SEEM load, not its service provider, has the potential to see decreased costs for energy exchanges from SEEM.
[53] *Entergy Arkansas, Inc.*, 175 FERC ¶ 61,136 (2021) (Clements, Comm'r, dissenting at P 8); *see also Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) ("FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the *costs sought to be shifted to its members*." (emphasis added)); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992) ("all approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them.").
[54] *See, e.g.*, PIO June Protest at 28–29 (SEEM's proposed governance structure concentrates voting power with three entities: Southern Company, Duke, and the Tennessee Valley Authority), 30 (SEEM proposal lacks any governance roles for non-Members and prohibits independent power producers from becoming Members).
[55] *See* PIO March Protest at 10–13; PIO June Protest at 6–10; 16 U.S.C. § 824d(b).

potential counter-parties, limiting beneficial trades and creating opportunities to exercise market power and manipulation.[56]

- The lack of an independent market monitor means that not only will the SEEM Members operating the market have a financial interest in the economic performance of power market participants, but there will be no full-time, independent oversight to limit potential market abuse.[57]

Neither the Applicants' Deficiency Response nor their Answer rectify any of these problems.

Any one of these flaws shows that the SEEM proposal is unjust, unreasonable, and unduly discriminatory. Applicants refuse to modify the proposal in ways necessary to prevent increased opportunities for market manipulation, discrimination, and cost shifts. Applicants' tweaks around the edges have not saved their unjust, unreasonable, and unduly discriminatory filing and the Commission must reject the SEEM proposal as failing to comply with Section 205's requirements.

If the Commission is not inclined to reject the proposal on this basis it should direct Commission Staff to issue a deficiency letter on the issues raised in PIOs' protest and this answer or hold a technical conference to gather the information necessary to clarify these issues. Such a deficiency letter or technical conference should also include questions about how SEEM's internal complaint mechanism will function in a non-discriminatory manner,[58] and how the NFEETS' impact on point-to-point revenues would impact independent power producers who

[56] PIO June Protest at 12–13; Suppl. Sotkiewicz Aff. at ¶ 38.
[57] The Applicants expect the Commission and state regulators to take on this monumental task in addition to all of their existing responsibilities.
[58] *See* PIO June Protest at 21.

sell energy into neighboring wholesale markets and how this impact is consistent with cost-causation principles.[59]

Finally, the concessions made by the Applicants regarding public access to market data[60] and SEEM's internal complaint procedure[61] make some modest improvements to the proposal. However, Applicants are still unwilling to provide the algorithm that will be used to set the tariff rates. If the Commission approves the SEEM proposal (which it should not), it should require the Applicants to make compliance filings that: (1) provide all of the data set forth in Applicants' chart;[62] (2) provide the mathematical formulation of the algorithm; (3) publicly share all market data with the public (appropriately masked and with a time-lag as necessary) and (4) require the SEEM Board to decide whether to investigate a complaint within 60 days and communicate that decision to the public.

III. Request for Technical Conference on Southeast Energy Market Reform

President Biden's Executive Order lends further support to the request made by PIOs and numerous other Protestors and Commenters for a technical conference on energy market reform in the Southeast. Residential customers in the Southeast pay some of the highest electricity bills and experience the highest energy burden—the portion of household income spent on home energy costs—in the nation.[63] Contrary to the Applicants' self-congratulatory claims,[64] the existing bilateral energy market dominated by monopoly utilities is not working for families in the Southeast.[65] And as explained in the PIO's previous filings SEEM will not help and may

[59] *Id.* at 23–24.
[60] SEEM Answer at 8–14.
[61] *See* Deficiency Response at 24, n. 52.
[62] SEEM Answer at 11–14.
[63] PIO March Protest at 45–47.
[64] SEEM Answer at 17–18.
[65] *See* PIO March Protest at 44–51.

hurt.[66] A technical conference or joint regional meeting is a critical step towards a real solution that increases competition and lowers customer bills throughout the Southeast.

An opportunity for meaningful stakeholder involvement is especially important since the Applicants failed to engage any public stakeholders before finalizing the SEEM design.[67] Adding insult to injury, the Applicants are publicly claiming that "SEEM members and participants have engaged in comprehensive and extensive outreach to other stakeholders including regulatory staff, trade groups, customers of all classification and size, as well as other stakeholders."[68] Multiple PIOs have been identified on the SEEM website as stakeholders despite never having been given an opportunity to engage in discussions regarding the development of the SEEM proposal. A technical conference would ensure that a diverse array of stakeholders is actually given an opportunity to participate in the development of a fair, open, and competitive energy market in the Southeast. Given the opportunities at stake, the Commission should make this a priority.

Respectfully submitted,

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[66] PIO March Protest at 49–51.
[67] *Id.* at 61. Two of the Applicants—Southern Company and Duke—provided after-the-fact informational briefings to a handful of organizations on an invite-only basis. *Id.*
[68] Applicants SEEM website included claims to this effect, a PDF copy of which is attached at Exhibit A.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each party designated on the official service lists in the proceedings listed above, by email.

Dated at Washington, D.C. this 29th day of July, 2021.

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EXHIBIT A

SEEM Website – List of Parties

SEEM

An Integrated, Automated Intra-Hour Energy Exchange

Stakeholder Engagement

SEEM members and participants have engaged in comprehensive and extensive outreach to other stakeholders including regulatory staff, trade groups, customers of all classification and size, as well as other stakeholders. The following is a list of stakeholders provided briefings, many of whom received multiple briefings.

Entities Involved In Stakeholder Outreach

Associations:

- AWEA – American Wind Energy Association
- SEIA – Solar Energy Industries Association

- SEIA – Solar Energy Industries Association
- ECRC- Electricity Consumers Resource Council
- EPSA – Electric Power Supply Association
- IECA – Industrial Energy Consumers of America
- Georgia Manufacturing
- AARP (South Carolina Outreach)
- Southeastern Wind Coalition
- CIGFUR – Carolina Industrial Group for Fair Utility Rates
- CUCA – Carolina Utility Customer Association
- NCCEBA – North Carolina Clean Energy Business Alliance

NGOs:

- SELC – Southern Environmental Law Center
- NRDC
- ACORE – American Council on Renewable Energy
- ICCR – Interfaith Council on Corporate Responsivity
- SACE – Southern Alliance for Clean Energy
- RFF – Resources for the Future
- NC Justice Center
- Appalachian Voices
- Coastal Conservation League

Government:

- State Commissioners – MS, AL, GA, NC, KY
- South Carolina Governor's Office
- South Carolina Senate Leadership and Staff
- South Carolina House Leadership and Staff
- South Carolina Office of Regulatory Staff
- North Carolina Utility Commission Public Staff
- North Carolina Governor's Office

- North Carolina Governor's Office
- North Carolina Attorney General's Office
- North Carolina DEQ – Department of Environmental Quality
- North Carolina Office of Regulatory Staff
- FERC Commissioners
- FERC Staff

Companies:

- Kimberly Clark
- Evergreen Packaging
- Olin
- Shell
- Nucor
- Carolinas Solar Industry Members including: Cypress Creek, Southern Current, Ecoplexus, and Birdseye
- Apex Clean Energy
- Georgia-Pacific

The SEEM members want to thank all of the parties that have shared their thoughts on SEEM. We welcome the ongoing dialogue and want to hear from interested parties at any time.

Contact

Privacy