BEFORE THE

ALABAMA PUBLIC SERVICE COMMISSION

PETITION OF ALABAMA POWER COMPANY FOR APPROVAL OF THE SEVENTH REVISION OF RATE CPE (CONTRACT FOR PURCHASED ENERGY) BASED ON UPDATED AVOIDED COST DATA, FILED ON FEBRUARY 15, 2024	**)**	**DOCKET NO. U-5213**

SOUTHERN RENEWABLE ENERGY ASSOCIATION'S
APPLICATION FOR RECONSIDERATION AND MODIFICATION OF ORDER

COMES NOW, the Southern Renewable Energy Association ("SREA"), and hereby files this *Application for Reconsideration and Modification of Order* ("Application") in the above-referenced docket pursuant to Rule 21 of the Alabama Public Service Commission ("Commission") Rules of Practice.[1] In support hereof, SREA respectfully states as follows:

INTRODUCTION AND BACKGROUND

On February 15, 2024, Alabama Power Company ("Alabama Power" or "the Company") made a filing proposing revisions to its Rate CPE (Contract for Purchased Energy), which provides terms and rates for the sale of alternate electrical energy from certain Qualifying Facilities ("QFs") to Alabama Power pursuant to the Public Utility Regulatory Policies Act of 1978 ("PURPA").[2] Alabama Power proposed revisions included changes to the purchase rates, changes to the seasonal time periods, and changes to the standard contract which applies to any QF that wishes to sell its total output to the Company pursuant to Rate CPE.[3] The revisions include new retroactivity

[1] Rules of Practice of the Alabama Commission, available at https://psc.alabama.gov/wp-content/uploads/2021/12/RevRulesofPractice.pdf. *See also* Alabama Administrative Code Chapter 770-X-X-4 – Rules of Practice, available at https://admincode.legislature.state.al.us/administrative-code/770-X-4.
[2] Docket No. U-5213, Alabama Power Request for Approval of Proposed Revisions to Rate CPE, February 15, 2024.
[3] *Id.*

language in the Rate CPE form power purchase agreement ("PPA") and the imposition of an "Integration Cost" of $0.00193 per kWh of Delivered Energy, which Alabama Power alleges "relates to the increasing levels of penetration of variable resources on the Southern Company system and the corresponding cost incurred to mitigate a reduction in reliability."[4] Alabama Power proposes to substantially decrease the rate for purchase of energy from QFs by approximately 40-50% beginning on April 1st, 2024.[5]

On March 5, the Commission held a Monthly Commission Meeting and issued an order approving Alabama Power's proposed revisions to Rate CPE, finding that the revisions approved shall be effective beginning April 1, 2024. However, the Commission has not held any hearing regarding Alabama Power's seventh revision of Rate CPE. The Commission's Rules of Practice distinguish between "Hearings" and "Monthly Commission Meetings", providing separate rules for each.[6] The Commission's Rule 26 regarding Monthly Commission Meetings expressly prohibits a party or the public from presenting arguments or evidence.[7]

SUMMARY OF APPLICATION

Pursuant to Rule 21 of the Commission's Rules of Practice, SREA requests reconsideration and modification of the Commission's March 5th Order approving Alabama Power's seventh revision of Rate CPE in APSC Docket No. U-5213. SREA seeks reconsideration and modification of the Commission's order on the grounds that the Commission did not provide due process, including notice and a hearing. Additionally, on the substance, Alabama Power failed to demonstrate that the proposed changes to Rate CPE discussed herein are just and reasonable under

[4] *Id.* at 1.
[5] *Id*. at 8 (e.g., proposing to decrease Transmission Voltage rates for purchase of energy from QFs from 7.327 to 3.653 ¢/kWh during the period of 12pm to 5pm, and from 4.990 to 2.984 ¢/kWh during all other hours.
[6] Hearings are governed by Rule 15. Monthly Commission Meetings are governed by Rule 26.
[7] Rule 26, Monthly Commission Meetings ("Arguments or evidence will not be received from a party or the public at this time.")

applicable law, including PURPA. For these reasons, SREA requests that the Commission modify the March 5th order to remove the proposed disputed rate provisions identified herein until a hearing has been held regarding their merits and that the Commission clarify the procedures for subsequent annual revisions to Alabama Power's Rate CPE to include adequate notice and due process, including a hearing.

LEGAL STANDARD

SREA's Application is timely pursuant to Rule 21 of the Commission's Rules of Practice because it was filed within thirty (30) days from March 5, 2024 (i.e., the final action on the matter for which reconsideration is sought).[8] Under Rule 21 of the Commission's Rules of Practice, "(1) Applications for rehearing or reconsideration must be made by petition, stating specifically the grounds relied upon, filed with the Commission and served upon all parties or their attorneys of record who appeared at the hearing, or oral argument if had, or on brief." Rule 21 provides that "[i]f any such application is based upon matters of law, the Applicant must state fully the legal propositions involved and cite the authorities therefore." Additionally, the Alabama Code provides that "[a]t any time after an order has been made by the Commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the Commission *shall* grant and hold such rehearing within 60 days after the application has been filed."[9]

[8] Rule 21, Applications For Reconsideration, Rehearing Or Modification Of Order, (3) ("All applications for rehearing or reconsideration must be filed with the Commission within thirty (30) days from the date of the final action on the matter for which rehearing or reconsideration is sought, unless an extension is granted by the Commission.")
[9] Ala. Code § 37-1-105.

GROUNDS FOR RECONSIDERATION AND MODIFICATION

A. The Commission's Monthly Meeting did not provide due process, including a hearing.

The right to a hearing is an "inexorable safeguard" that is "assured to every litigant by the Fourteenth Amendment as a minimal requirement."[10] As the Supreme Court of the United States has stated, the due process clause "require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."[11] The basic elements of a full and complete hearing — which the U.S. Supreme Court has described as a "fundamental requirement of due process in matters of public utility regulation"[12]— is that all whose rights are involved have the opportunity to be heard, to submit evidence and testimony, to examine witnesses and present evidence or testimony in rebuttal to adverse positions.[13]

As discussed in SREA's Petition to Intervene filed contemporaneously herewith, the Commission has not held any hearing regarding Alabama Power's seventh revision of Rate CPE. No witnesses were sworn or cross examined. SREA was not allowed any opportunity to present rebuttal evidence or arguments (nor was any member of the public that may wish to intervene). The Commission's Rule 26 regarding Monthly Commission Meetings expressly prohibits a party or the public from presenting arguments or evidence,[14] and thus did not provide due process to SREA and its members. Because these basic elements were not afforded to SREA by the Commission prior to the issuance of Order No. 5, SREA was denied procedural due process. As

[10] *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 305 (1937).
[11] *Mullane v. Central Hanover Bank & Tr. Co*, 339 U.S. 306, 313 (1950).
[12] *See Shields v. Utah Idaho Central Railroad Co.*, 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938).
[13] *See Fed. Trade Comm'n v. Nat'l Lead Co.,* 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957).
[14] Rule 26, Monthly Commission Meetings ("Arguments or evidence will not be received from a party or the public at this time.")

such, the 14th Amendment of the U.S. Constitution, which controls all Commission action, demands that the Commission reconsider Order No. 5.

B. The revisions to Alabama Power's Rate CPE are not consistent with applicable law.

Pursuant to PURPA Section 210(b), QF rates must be "just and reasonable" and "shall not discriminate against qualifying cogenerators or qualifying small power producers."[15] Likewise, Section 37-1-80 of the Alabama Code states the following: "(a) The rates and charges for the services rendered and required shall be reasonable and just to both the utility and the public. Pursuant to Rule 21 of the Commission's Rules of Practice, the **"**Applicant in a Commission proceeding must "establish the facts alleged by him as the basis for the relief sought." Thus, as the Applicant in this proceeding, Alabama Power bears the burden of proof to demonstrate that its proposed changes are just and reasonable and non-discriminatory as required by PURPA and state law.

i. Alabama Power's standard contract revisions are impermissible.

Alabama Power proposes the following language to the Standard Contract in its CPE rate revision:

> Following the Effective Date, if prior to the commencement of a Term, a new version of the Standard Contract (Attachment A) is filed with and approved by the APSC, the terms and conditions of that version of the Standard Contract (Attachment A), shall be incorporated by reference, and in the event of a conflict with the Agreement, control the rights and obligations of the Parties subject to the right of QF to any pricing for capacity established pursuant to a legally enforceable obligation consistent with 18 C.F.R. § 292.304(d).[16]

While this language is somewhat unclear, SREA is concerned that it could be read to require that members execute PPAs and make investments in QFs without knowing whether significant

[15] 16 U.S.C. 824a-3(b), available at https://www.govinfo.gov/content/pkg/USCODE-2022-title16/pdf/USCODE-2022-title16-chap12-subchapII-sec824a-3.pdf.

[16] Alabama Power February 15, 2024 Rate CPE 2024 proposed updates at 66-67, Article 3, Paragraph 3.4, Adherence to Rate CPE.

contract terms may subsequently altered in material and deleterious ways. For example, SREA is concerned that because Rate CPE contracts renew annually, this language could potentially be read to contemplate changes to fundamental contract terms and conditions years after the initial contract period commences. If that is the intent, it would mean that a party signing a Rate CPE PPA would be signing an agreement that is subject to unspecified, unlimited modification in the future.

A bedrock principle of contract law that the parties must share a mutual understanding of their agreement and responsibilities at the time of contract execution. "It is fundamental that courts will not enforce a contract which is vague, indefinite, or uncertain." *Muscle Shoals Aviation, Inc. v. Muscle Shoals Airport Auth.*, 508 So. 2d 225, 228 (Ala. 1987). Where a contract contains a provision saying that any and all its terms are subject to change at an unknown future date, it may not constitute a contract at all. Such uncertainty would deter SREA members from making investments in QFs and discourage competition, contrary to the goals and requirements of PURPA. The Commission should either rescind its approval of this change or issue limiting guidance to ensure that parties executing Rate CPE contracts do not face unlimited risk of future contract modification.

ii. Alabama Power has not demonstrated that proposed "Integration Cost" is just and reasonable.

In order to demonstrate that Integration Cost is just and reasonable, Alabama Power must provide evidence proving that the penetration of variable resources in Alabama is in fact substantial, is in fact causing a reduction in reliability, and that the proposed integration cost recovery component, which will materially reduce rates paid to QFs, is a just and reasonable remedy to mitigate the alleged "reduction in reliability." In a mere cover letter addressed to Commission Secretary Walter L. Thomas, Jr., Alabama Power alleges that its proposal "to

incorporate a new variable integration cost recover component…relates to increasing levels of penetration of variable resources on the Southern Company system and the corresponding cost incurred to mitigate a reduction in reliability."[17] However, Alabama Power provided no evidence in the record (e.g., testimony, engineering studies, or other empirical data) to support its claims and meet its burden of proof.

a. Alabama Power has not demonstrated that the penetration of variable resources in Alabama is causing a reduction in reliability.

Alabama Power provides no evidence to prove that the penetration of variable resources in Alabama is substantial, is in fact causing a reduction in reliability, or that the proposed integration cost recovery component, which will materially reduce rates paid to QFs, is a just and reasonable remedy to mitigate the alleged "reduction in reliability." To substantiate the claim that the penetration of "variable resources" is causing a reduction in reliability, the Company must provide a factual basis (e.g., engineering study or expert testimony) to support this claim. Instead, the claim regarding "variable resources" is made in a mere cover letter and signed without even indicating the qualifications of the signor or his/her expertise with regard to electrical engineering. Moreover, Alabama Power's cover letter references "increasing levels of penetration of variable resources on *the Southern Company system,*" but does not reference penetration levels or impacts in the Alabama Power service territory. The Commission does not have jurisdiction to regulate the Southern Company system broadly, but only the Southern Company System *in Alabama* (i.e., Alabama Power's system). Thus, Alabama Power must prove both that (1) the applicable penetration of variable resources it seeks to address is in fact in its service territory, (2) that the penetration of variable resources is in fact causing a reduction in reliability, and (3) that the

[17] Docket No. U-5213, Alabama Power Request for Approval of Proposed Revisions to Rate CPE, February 15, 2024 at 1.

proposed integration charge accurately offsets reasonable and necessary increased costs to maintain reliability at required levels. Alabama Power has failed on all accounts, and not provided substantial evidence to meet its burden of proof as the applicant in this proceeding.

b. Alabama Power has not demonstrated that its "Integration Cost" is non-discriminatory.

PURPA requires electric utilities to purchase available electric energy from QFs at rates that do not discriminate against QFs.[18] Further, unlike provisions of the Federal Power Act, PURPA prohibits any discrimination against QFs, not just undue discrimination.[19] SREA is concerned that PURPA's prohibition against discrimination also means that if Alabama Power is imposing an Integration Cost of $0.00193 per kWh of Delivered Energy on QFs, it must also impose the same Integration Cost when entering Power Purchase Agreements with a similarly situated non-QF, including SREA's members who seek to execute PPAs with Alabama Power for facilities with generating capacities exceeding 80 MW.[20] Put another way, if Alabama Power does not avoid $0.00193 per kWh of Delivered Energy when purchasing power from similarly situated independent power facilities, this cannot legally be part of the avoided cost calculation under PURPA. However, Alabama Power has provided no evidence that it avoids $0.00193 per kWh of Delivered Energy when purchasing power from similarly situated independent power facilities, or that it is applying the Integration Cost equally to similarly situated variable resources (*i.e.*, independent power producers) on a non-discriminatory basis. Therefore, Alabama Power has not

[18] 16 U.S. Code 824a–3(b)(2). *See* FERC Order No. 872, 172 FERC ¶ 61,041 at P 82.
[19] *Id.*
[20] *See, e.g., Entergy Servs. Inc. Gen. Coal. v. Entergy Servs., Inc.,* 103 FERC ¶ 61,125, at PP 27–29 (2003) *(*finding that the utility discriminated against QFs compared to other independent generators when it imposed certain fees on QFs but not on other generators*).*

demonstrated that its proposed CPE Rate revisions are non-discriminatory and comply with PURPA.

C. Request for Modification of March 5th Order and Hearing.

SREA requests that the Commission modify the March 5th order to remove the proposed Integration Cost and specified changes to the standard contract form, pending a hearing on these issues. As demonstrated in this filing, because the Integration Cost is not supported by substantial evidence, it is not just and reasonable, appears unjustly discriminatory, was adopted without adequately due process, and is beyond the scope of the Commission's jurisdiction to the extent that relates to penetration of variable resources on the Southern Company System outside of Alabama. Likewise, the proposed changes to the standard contract form discussed herein are unfairly discriminatory to QFs and will inhibit contract formation for future for SREA's members, and should be set aside or clarified to avoid those results.

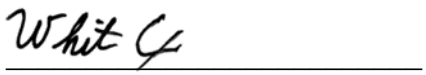
D. Request for adequate notice and due process in future rate proceedings.

SREA requests that the Commission clarify the procedures for subsequent annual revisions to Alabama Power's Rate CPE. A 50% reduction in the applicable purchase rates with less than thirty (30) days' notice and no opportunity for interested parties to participate in the Commission's Monthly Meetings does not comply with basic standards of due process. SREA requests that the Commission require Alabama Power to present evidence in support of its proposed rate changes, allow interested parties sufficient notice (i.e., at least thirty days) and the opportunity to intervene and file comments, and hold a hearing pursuant to Rule 21 of the Commission's Rules of Practice in cases where the proposed rate changes are contested.

REQUEST FOR RELIEF

WHEREFORE, SREA respectfully requests that the Commission reconsider its order regarding Alabama Power's Rate CPE that was issued on March 5th, 2024; modify its order as requested herein; provide adequate notice and a hearing prior to approving subsequent revisions to Alabama's Rate CPE; and grant all other relief that is just and reasonable.

Respectfully submitted this 4th day of April, 2024.



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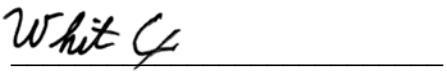
CERTIFICATE OF SERVICE

I hereby certify that I have served all parties with the foregoing document by electronic mail on this 4th day of April, 2024.



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