Southern Renewable Energy Association
11610 Pleasant Ridge Rd., Suite 103 #176, Little Rock, AR 72

April 19, 2024

Walter L. Thomas, Jr.
Secretary of the Commission
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Room 950
Montgomery, Alabama, 36104

Re: **APSC Docket No. U-5213,** Alabama Power Company's Request for Approval of the Seventh Revision of Rate CPE (Contract for Purchased Energy)

Dear Mr. Thomas:

Please find enclosed the Southern Renewable Energy Association's ("SREA") *Response to Alabama Power Company's Motion to Dismiss* that was filed electronically in the above referenced docket. Please contact me if you have any questions. Thank you for your assistance with this matter.

Respectfully submitted,

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Enclosures

cc: All parties of record in this docket (*via e-mail*)

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
RESPONSE TO ALABAMA POWER COMPANY'S MOTION TO DISMISS

COMES NOW, the Southern Renewable Energy Association ("SREA"), and hereby files this *Response to Alabama Power Company's Motion to Dismiss* ("Response") in the above-referenced docket pursuant to Rule 11 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] 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. On April 4, 2024, SREA filed a *Petition to Intervene* ("Petition") and *Application for Reconsideration and Modification of Order* ("Application"),

[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.

pursuant to Rules 8 and 21 of the Commission's Rules of Practice. On April 15, Alabama Power filed a *Motion to Dismiss* ("Motion"), asserting that SREA's Petition was untimely, SREA lacks standing to intervene, and SREA's Application does not warrant further action by the Commission.

LEGAL ARGUMENT

I. SREA'S PETITION WAS TIMELY

Alabama Power incorrectly argues that SREA must have filed its Petition before the conclusion of the Commission's Monthly Meeting held on March 5, 2024, in order for the Petition to be timely. As explained below, SREA's Petition was timely filed under both Alabama statutes and Commission Rules. Moreover, the case cited by Alabama Power does not constitute valid legal precedent.

a. SREA's Petition was timely under Alabama Statutes

SREA's Petition was timely under the Alabama Code, which provides the following:

> At 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."[3]

If Alabama Power's position was correct, the statute would have to say "any party…may apply for a rehearing" rather than "any person…may apply for a rehearing" However, since the Alabama statute expressly allows "any person interested" to seek rehearing of a Commission order "[a]t any time after an order has been made by the Commission", this clearly indicates that a non-party may seek rehearing of a Commission order, and thus the deadline to seek intervention cannot be before the applicable order was issued. Because the Commission's jurisdiction is statutory, the Commission has no authority to make rules or issues that are contrary to the statute.

[3] Ala. Code § 37-1-105 (emphasis added).

b. SREA's Petition was timely under the Commission's Rules of Practice

SREA's Petition was timely under the Commission's Rules of Practice. As discussed in SREA's Petition and Application, this proceeding has not yet been called for hearing, and thus SREA's Petition was timely filed under Rule 8 of the Commission's Rules of Practice, which provides the following:

> Petitioners permitted to intervene, as hereinafter provided, are styled intervenors. Anyone entitled under the law to complain to the Commission may petition for leave to intervene in any pending proceeding prior to or at the time it is called for hearing, but not after, except for good cause shown.

The Commission has not held any hearing regarding Alabama Power's seventh revision of Rate CPE. Rule 15 of the Commission's Rules of Practice regarding Hearings provides that "Witnesses shall be sworn and examined orally before the Commission or presiding Commissioner or Administrative Law Judge." As noted in SREA's Petition and Application, no witnesses were sworn and examined at the Commission's March 5th Monthly Meeting. Therefore, the March 5th, Monthly Meeting did not meet the requirements of a Hearing under the Commission's Rules, and thus SREA's Petition was timely filed.

c. The rate proceeding cited by Alabama Power does not constitute legal precedent.

SREA disputes that the 2003 rate case cited by Alabama Power constitutes valid legal precedent.[4] As explained by the Alabama Supreme Court, "orders not authorized by law are unenforceable."[5] Alabama Code § 41-22-20 states the following:

> The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

[4] *See* Motion at 6 (*citing In re Alabama Power Co. (Rate Rider RE)*, Docket No. U-4485, 2003 WL 22508442 (Sept. 22, 2003).).
[5] *Alabama Public Service Commission v. Western Union Telegraph Co*., 208 Ala. 243, 94 So. 472 (1922).

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) In violation of any pertinent agency rule;
(4) Made upon unlawful procedure;
(5) Affected by other error of law;
(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

As demonstrated herein, an order from the Commission finding that SREA's Petition is untimely would be in violation of statutory provisions, in violation of any pertinent agency rule, and made upon unlawful procedure, and thus reversible under Alabama Code § 41-22-20. The fact that the Commission may have issued an order denying intervention to another entity more than twenty years ago does not provide the Commission with legal authority to violate SREA's statutory rights today. Simply put, two wrongs don't make a right. Statutes trump Commission orders, and thus a prior Commission order cannot constitute valid legal precedent to justify violating SREA's statutory right to seek rehearing of the Commission's order.

d. Alabama Power's requested relief is excessive.

Alabama Power asserts that SREA's Petition is "due to be denied" because it was not filed until after the conclusion of the March 5, 2024, meeting of the Commission wherein Alabama Power's update to Rate CPE was formally approved.[6] However, as noted by Alabama Power in its Motion, the Commission has "directed the Company to make annual updates to the avoided energy pricing."[7] Even if the Commission finds Alabama Power's arguments regarding the timeliness of SREA's Petition to be persuasive with regard to its seventh revision to Rate CPE, Alabama Power has provided no reason why SREA's Petition is not timely with regard to

[6] Motion at 7.
[7] *Id.* at 4.

subsequent annual updates, to be filed not later than February 15th of each year. Therefore, Alabama Power's request for SREA's Petition to be dismissed and denied is excessive.

II. SREA'S PETITION ESTABLISHED STANDING

SREA has demonstrated that it is affected by this proceeding and that its members have a direct, personal interest in the proceeding.[8] As outlined in the Petition, SREA's members develop and deploy QFs to generate renewable energy pursuant to PURPA, and Alabama Power's Rate CPE provides terms and rates for QFs. SREA members have already made significant financial investments in the development of ongoing projects in Alabama, including through generator interconnection customer processes and securing land leases to site projects in Alabama Power's service territory. Decreasing the purchase rates paid for energy through lower avoided cost rates and integration charge negatively impacts SREA's member companies by reducing the amounts paid for their product. Therefore, SREA's interests are directly affected by this proceeding.

Alabama Supreme Court precedent does not support Alabama Power's request to deny SREA's intervention. In support of its position, Alabama Power cites to *M. W. Smith Lumber Co. v. APSC*, 24 So. 2d 409, 41 l (Ala. 1946). The *M. W. Smith* case involved a proceeding before the Commission wherein the Commission determined that a commercial customer of Alabama Power (M. W. Smith Lumber Company) lacked standing to intervene in a rate proceeding involving residential customers. More specifically, the Commission concluded that said commercial customer failed to demonstrate a direct interest in the proceeding in question sufficient to justify intervention. On appeal, the Alabama Supreme Court noted that the words "affected thereby" in *Alabama Code* §65, Title 48 (1940) were reflective of the general rule requiring one who seeks to invoke the jurisdiction of an appellate court to review the actions of a subordinate court or body,

[8] *See* Petition at 3-5 (discussing SREA's specific interests in Rate CPE).

to "show that he is a party to the proceeding or 'that he has a personal interest in the subject-matter, and not a mere public interest, in common with the general public."

This proceeding is distinct from the rate proceeding at issue in *M.W. Smith* because SREA is not seeking to intervene in a rate proceeding involving residential customers. This proceeding is also distinct from Docket No. 39253 because SREA is not seeking to intervene in a proceeding involving a Petition for a Certificate of Convenience and Necessity for a natural gas-fired facility. Instead, SREA is seeking to intervene in a rate proceeding involving the very facilities that many of its members develop: QFs under PURPA. Thus, Alabama Power's assertion that "SREA's interests are no different today than they were in 2019" is inaccurate.[9] SREA's interests are in fact different today because this proceeding directly affects the compensation paid to QFs, whereas Docket No. 39253 did not directly affect QFs. Therefore, the fact that the Commission previously denied SREA's intervention in a gas CCN docket does not provide justification for denying SREA's intervention in a docket where's SREA's interests are more directly affected and distinct from the interests of the general public. Additionally, SREA has identified members of its association in this proceeding, which may be viewed on its website.[10]

Furthermore, the Commission's prior orders do not support Alabama Power's objections to SREA's intervention. Alabama Power's primary objection to SREA's standing to intervene in this proceeding appears to be that "the Petition does not identify any SREA member that is a current customer of Alabama Power."[11] Alabama Power likewise argues that SREA must claim interests that are different from "any outside developer or industry that might be interested in building, operating, or living in Alabama Power's service territory."[12] However, these objections

[9] Motion at 10.
[10] https://www.southernrenewable.org/our-members.html.
[11] Petition at 6.
[12] Petition at 8.

are not consistent with the Commission's 2004 declaratory order regarding intervention in Commission proceedings, which stated the following:

> In light of the foregoing, we reaffirm our longstanding policy of requiring individuals or entities who seek to intervene in proceedings before the Commission to affirmatively demonstrate that they are affected by those proceedings. Consistent with the Supreme Court's holding in the *M. W. Smith* case, we continue to find it appropriate to require parties seeking to intervene in matters before the Commission to demonstrate that they have a ***direct, personal interest in the proceedings*** under consideration and ***not merely issues in common with the general public.*** That is not to say, however, that an intervenor must always demonstrate that it is a "customer" of the utility involved in the proceeding in question. ***We recognize that individuals or entities can be "affected" for reasons unrelated to their customer status.***[13]

Pursuant to the Commission's 2004 declaratory order, SREA does not have to claim customer status or demonstrate interests that are distinct from other hypothetical developers that have not sought to intervene in this proceeding. Instead, the applicable standard is whether SREA's members have affected interests that are not held by the "general public." The general public does not develop power facilities in Alabama Power's service territory and there is no other association of solar and wind developers that is currently a party in this proceeding. Therefore, SREA has demonstrated interests that are not held by the general public and it cannot be said that any other party in the proceeding adequately represents the interests of SREA's members. As such, it is in the public interest to grant SREA's intervention in this proceeding.

Additionally, Alabama Power's Motion bolsters SREA's case for standing by indicating that it will apply the objectionable variable integration cost not only to QFs under Rate CPE, but also "in connection with incremental variable sources with which it executes power purchase agreements pursuant to the renewable generation certificate."[14] Alabama Power also notes that it "will take this approach with any variable resources, be it an independent producer not eligible for

[13] Declaratory Proceeding, Docket No. 28941, 2004 WL 417279 (Jan. 9, 2004) (emphasis added).
[14] Motion at 12.

QF status or a QF that sought to enter into a negotiated PPA (as opposed to pursuing an Attachment A standard contract under Rate CPE)."[15] In other words, Alabama Power has indicated that the variable integration cost will directly affect the interests of more of SREA's members and their projects because it will apply not only to QFs, but also to similarly situated non-QF facilities, including facilities with generating capacities that exceed 80 MW. Since SREA's members include independent producers not eligible for QF status, SREA should also have standing to intervene based on the assertions made in Alabama Power's Motion.

III. SREA'S APPLICATION RAISES LEGITIMATE CONCERNS WARRANTING FURTHER ACTION BY THE COMMISSION

First, SREA's due process arguments have merit. As outlined in SREA's Application, the Commission should not have approved Alabama Power's non-routine rate revisions, including its proposed integration cost fee and standard contract form changes, without first holding a hearing. The fact that "the public has been on notice since 2017…that Alabama Power would be making annual updates to the avoided energy rates in Rate CPE"[16] does not mean that Alabama Power should be granted *carte blanche* to make any updates it wants without thorough review and investigation by the Commission and affected entities such as SREA. The issue here is not the lack of notice, but the lack of a hearing regarding non-routine rate revisions.[17]

Second, the Commission should address the substantive concerns raised in SREA's application. It is notable that Alabama Power makes no attempt to deny or otherwise dispute SREA's concerns regarding the new retroactive language in the Rate CPE form power purchase

[15] *Id.*
[16] Motion at 10.
[17] In *South Cent. Bell Tel. v. APSC*, 425 So. 2d 1093 (Ala. 1983), the Alabama Supreme Court held that "the order of the APSC was invalid" because the Commission failed to hold a hearing on the contested issue before issuing its order.

agreement ("PPA"), which SREA maintains is unenforceable under Alabama contract law.[18] Instead, Alabama Power proposes the following:

> If and when a SREA member enters into an Attachment A standard contract, it would presumably have standing to intervene in a Rate CPE update. And if, in the future, Alabama Power proposes a revision to Attachment A that the member finds "material and deleterious", it can protest the filing in accordance with Alabama law and the rules of the Commission.[19]

Ripeness is a question concerning judicial review.[20] The Commission is an agency not a court, and thus the Commission is not limited by questions of ripeness. It is unreasonable to ask SREA's members to make a business decision to invest millions of dollars developing a power facility so that they can enter a contract and then protest the contract. Moreover, it is in the interest of administrative efficiency for the Commission to address issues when they are raised, without requiring subsequent protest filings after SREA members have executed the Attachment A standard contract.

Additionally, Alabama Power's Motion still fails to provide a valid basis for the variable integration charge that it seeks to impose on QFs and other variable resources with which it executes power purchase agreements.[21] Although Alabama Power indicates that it is applying the integration cost in a non-discriminatory manner (i.e., to both QFs and similarly situated non-QFs), Alabama Power does not provide evidence that there is a substantial penetration of variable resources in its service territory to justify the proposed charge, or that the calculation of the charge itself is appropriately quantified. Further, even if considering the entire Southern Company system pursuant to Alabama Power's explanation regarding the Southern Company System Intercompany

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[18] *See* Application at 6 (citing *Muscle Shoals Aviation, Inc. v. Muscle Shoals Airport Auth*., 508 So. 2d 225, 228 (Ala. 1987)).
[19] Motion at 11.
[20] *See* https://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/ripeness-of-question-for-judicial-review/.
[21] *See* Motion at 11-12.

Interchange Contract,[22] Alabama Power has still not demonstrated that the variable integration cost is just and reasonable.

WHEREFORE, SREA respectfully requests that the Commission deny Alabama Power's *Motion to Dismiss*, grant SREA's *Petition to Intervene*, grant SREA's *Application for Reconsideration and Modification of Order*, and grant all other relief that is just and reasonable.

Respectfully submitted this 19th day of April, 2024.

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[22] SREA notes that Alabama Power has not filed the Southern Company System Intercompany Interchange Contract in this docket for its review.

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties with the foregoing document by electronic mail on this 19th day of April, 2024.

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