

**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	)	ER21-1115-000
Duke Energy Carolinas, LLC	)	
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
	)	ER21-1128-000
Dominion Energy South Carolina, Inc.	)	(not consolidated)

**MOTION FOR LEAVE TO RESPOND AND RESPONSE OF PUBLIC INTEREST**

**ORGANIZATIONS**

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,<sup>1</sup> move for leave to respond and respond to the Answer of the Southeast EEM Members (“SEEM Members” or “Applicants”) on March 30, 2021.<sup>2</sup> Although the Commission’s procedural rules generally do not allow for answers to answers,<sup>3</sup> 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.”<sup>4</sup> PIOs requests that the Commission accept this answer to clarify the record and address issues raised by the SEEM Answer.

## RESPONSE OF PUBLIC INTEREST ORGANIZATIONS

### I. INTRODUCTION

Across the proposed SEEM footprint nearly five million households face a high or severe energy burden by the only measure that matters to them—the bills they receive every month.<sup>5</sup> This problem is why the legal deficiencies of the Southeast Energy Exchange Market Agreement, Docket Nos. ER21-1111 et al. (Feb. 12, 2021), Accession No. 20210212-5033 (“SEEM Proposal”), laid out in the Protest of Public Interest Organizations, Docket Nos. ER21-

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<sup>1</sup> 18 C.F.R. §§ 385.212, 385.213.

<sup>2</sup> Motion for Leave to Answer and Answer of the Southeast EEM Members, Docket Nos. ER21-1111 et al. (Mar. 30, 2021), Accession No. 20210330-5322 (“SEEM Answer”).

<sup>3</sup> 18 C.F.R. §§ 385.213(a)(2), 385.213(d)(1).

<sup>4</sup> *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied*; *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.”).

<sup>5</sup> U.S. Dep’t of Energy, *Low-Income Energy Affordability Data (LEAD) Tool*, <https://www.energy.gov/eere/slsc/low-income-energy-affordability-data-lead-tool> (last visited Apr. 12, 2021); U.S. Census Bureau, *American Community Survey – 5-Year Estimates Data Profiles (2015–2019)*, <https://data.census.gov/cedsci/table?d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2019.DP03>. Based on this data, approximately 4,959,009 households are facing high or severe energy burden in the states in the SEEM footprint. A high energy burden is defined as paying more than 6% of income on energy bills and a severe energy burden is defined as paying more than 10% of income on energy. Ariel Dreihobl. et al, *How High are Household Energy Burdens? An Assessment of National and Metropolitan Energy Burden across the United States*, American Council for an Energy-Efficient Economy (Sept. 2020), <https://www.aceee.org/sites/default/files/pdfs/u2006.pdf>; *see* PIOs’ Protest at 45–47.

1111 et al. (Mar. 24, 2021) Accession No. 20210324-5139 (“PIOs’ Protest”), matter to far too many Southerners: the Applicants have put forth a proposal that not only fails to address the financial burden their customers are already carrying, but could make the situation worse. If the Commission rejects the SEEM Proposal and issues guidance based on the legal flaws discussed in the PIOs’ Protest and below, Applicants would have an opportunity to submit a revised proposal that complies with federal law and promotes an equitable, non-discriminatory, and truly competitive wholesale market structure that will lower consumer costs for people in the Southeast. Unfortunately, as filed, the SEEM Proposal does neither.

## **II. SEEM IS A POWER POOL AND THE COMMISSION’S RULES REQUIRE APPLICANTS TO FILE A JOINT POOL-WIDE OPEN ACCESS TRANSMISSION TARIFF**

In an attempt to evade the Commission’s power pool regulations, Applicants proffer several arguments, none of which have merit. They contend that SEEM is not a power pool because the Non-Firm Energy Exchange Transmission Service (“NFEETS”) is not a discounted service. Applicants further assert that even if SEEM is a power pool, its structure prevents undue discrimination and a joint pool-wide Open Access Transmission Tariff (“OATT”) is not required.<sup>6</sup> These claims are wrong: SEEM is a loose power pool and the filings should be rejected because they fail to comply with the Commission’s regulations for power pools.

### **A. SEEM is a power pool**

The Applicants admit that a multilateral arrangement such as SEEM that includes “discounted and/or special arrangements transmission service” is a power pool.<sup>7</sup> Nevertheless,

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<sup>6</sup> SEEM Answer at 8–14.

<sup>7</sup> *Id.* at 9. Applicants also reference a Notice of Inquiry predating Order No. 888 as evidence that SEEM does not match the “common understanding” of a power pool. *Id.* at 11, n. 25. The description of a power pool included in that document was never adopted by the Commission and any attempt to substitute it for the definition used in Commission

they proceed to ignore half of the Commission’s definition, claiming that “central to the question of whether Order No. 888 and 888-A principles apply to an arrangement is whether the arrangement contains a discounted transmission rate.”<sup>8</sup> The Applicants fail to acknowledge that even if NFEETS were not discounted—and in fact it is—the special terms and conditions that apply to transmission that is pooled from the ten Balancing Authority Areas, in and of themselves, make SEEM a power pool.<sup>9</sup> The SEEM Filing clearly enumerates each of these special arrangements including that: (1) the only qualified use of NFEETS is for 15-minute Energy Exchanges; (2) NFEETS has “the lowest curtailment priority” of any transmission service; (3) NFEETS “is available on an as-available basis (i.e., it is only available after all other uses have been taken into account);” and, (4) “[l]osses will be ‘financial’ in that they will be supplied by the applicable Participating Transmission Provider and paid for by the matched bidder and offeror in each Energy Exchange.”<sup>10</sup> One of the most important special conditions on NFEETS is that it can be used only by resources in the Territory to serve load in the Territory. It cannot be used like other transmission services, for example, to wheel power out of a Transmission Provider’s footprint into neighboring systems that are not part of SEEM. These special arrangements are not part of the *pro forma* OATT. Any one of these special arrangements alone would qualify the multilateral SEEM Agreement and its dependence on pooled facilities of the ten balancing authorities as a loose power pool.

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regulations must be rejected. *Id.* at 9. See *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996); *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997).

<sup>8</sup> *Id.*

<sup>9</sup> See PIOs’ Protest at 10 (explaining that NFEETS is discounted and subject to special terms and conditions); SEEM Answer at 9 (“NFEETS is not discounted transmission, so the Southeast EEM is not a loose power pool”)

<sup>10</sup> SEEM Proposal at 24; see also SEEM Proposal, Attach. A (“SEEM Agreement”) at App. B. (“SEEM Market Rules”) § II (NFEETS definition at (i) and (ii)).

Moreover, SEEM with its NFEETS is expected to provide service at a discounted rate across facilities that are pooled for Energy Exchanges primarily by providing a zero price for NFEETS but also by waiving Schedule 1 and Schedule 2 ancillary service charges.<sup>11</sup> According to the Guidehouse/CRA Benefits Analysis commissioned by the Applicants, NFEETS is likely to “cannibalize some hourly trading yielding a reduction in non-firm transmission revenues.”<sup>12</sup> In other words, Participants, including SEEM Members, who are currently paying for hourly firm and non-firm transmission will shift some of that service to zero dollar NFEETS, making NFEETS a discounted substitute for that service.<sup>13</sup> The Applicants ignore this conclusion from their own report, instead attempting to rely on *PSC Colorado*, a Commission order regarding a Joint Dispatch Agreement (“JDA”) where—unlike here—there was no evidence showing that parties were likely to use the proposed zero dollar transmission service as a discounted substitute for existing hourly firm and non-firm service.<sup>14</sup> Moreover, the zero rate in the JDA applies within a single balancing area whereas the zero rate here not only provides a discount in each balancing area of SEEM but also provides another discount in the form of elimination of rate pancakes between the balancing areas. In *PSC Colorado*, the Commission found that introduction of the new Joint Dispatch Transmission service “will not deprive customers of non-firm revenue credits”,<sup>15</sup> but both Applicants’ own economist and Dr. Sotkiewicz’s affidavit

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<sup>11</sup> SEEM Proposal at 24.

<sup>12</sup> SEEM Proposal, Attach. E-1: Benefits Analysis by Guidehouse Inc. and CRA International at viii, 11 (“Guidehouse/CRA Benefits Analysis” or “Benefits Analysis”).

<sup>13</sup> See PIOs’ Protest, Exh. A, Affidavit of Paul M. Sotkiewicz, at ¶ 60 (“Signaling that there is sufficient NFEETS available through SEEM could signal to those parties currently paying for Firm PtP and Non-firm PtP, and in some cases, paying pancaked transmission rates, to not renew Firm PtP and Non-firm PtP service since they can satisfy their needs through SEEM.”) (“Sotkiewicz Aff.”)

<sup>14</sup> SEEM Answer at 9; See *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at PP 84–85 (2016).

<sup>15</sup> *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at P 84.

indicate that the opposite is true here.<sup>16</sup> Indeed, Applicants fail to grapple with arguments showing that this expected reduction in non-firm revenue credits will increase the costs of Point-to-Point Service for suppliers selling out of the Territory.<sup>17</sup> In sum, *PSC Colorado*, is distinguishable, NFEETS is a discounted substitute for existing transmission service, and SEEM is therefore a loose power pool.

Applicants' comparison to the JDA in *PSC Colorado* is inapt for additional reasons. There, the Commission found that membership requirements for a loose power pool did not apply because the "Joint Dispatch Agreement pool"<sup>18</sup> allowed for any resource that signed the JDA to join and participate as long as the resource only needed the transmission facilities of the applicants or made arrangements with its transmission provider to have access to unused Available Transmission Capacity at a zero dollar rate.<sup>19</sup> Based on this, the Commission dismissed the power pooling argument, finding that the applicants were "not attempting to restrict access to their own transmission resources[.]"<sup>20</sup> Finally, FERC affirmed that "[s]ervice under the Joint Dispatch Agreement will involve the moment to moment dispatch of *all* resources on a least-cost basis using unused transmission capacity."<sup>21</sup>

The SEEM filing does not have any of these qualities that would excuse it from the membership and the joint OATT requirements of the Commission's regulations. First,

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<sup>16</sup> Guidehouse/CRA Benefits Analysis at viii, 11; Sotkiewicz Aff. at ¶ 60; *See generally* Request to Answer and Answer of Entergy Services, LLC, Docket No. ER21-1111. (Apr. 8, 2021) Accession No. 20210408-5296 (explaining that the SEEM Proposal lacks comparability).

<sup>17</sup> Applicants attempt to obscure the argument of protestors by focusing solely on load as bearing these higher costs and ignore that suppliers located in the Territory sell outside the territory using Point-to-Point Service. See SEEM Answer at 46 ("any rational load, whether served by Network Service or Point-to-Point Service, will view its transmission costs as sunk, and still make Energy Exchange transactions where such transactions reduce the delivered cost of power.").

<sup>18</sup> *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at P 22.

<sup>19</sup> *Id.* at P 85 ("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").

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at P 87 (emphasis added).

Participant status does not convey membership status as it did in *PSC Colorado*.<sup>22</sup> Second, SEEM does not allow for “one-stop shopping” like the JDA.<sup>23</sup> Instead of executing one JDA to participate in the pool of dispatched resources, resources located in the Territory and seeking to participate in SEEM must sign the Participant Agreement, execute agreements for NFEETS or equivalent service with at least 10 transmission providers, and execute at least three as-yet unrevealed enabling agreements but probably many more.<sup>24</sup> That is at least 13, and potentially in the realm of 20, agreements that must be negotiated prior to a resource having a chance—but no assurance—that it will be able to sell some power in SEEM. Finally, while the SEEM members propose to pool transmission for pool-wide use and operate the SEEM algorithm to reserve, schedule, and tag each transaction, SEEM does not purport to provide least cost dispatch of *all* resources in the Territory as in the *PSC Colorado* case.<sup>25</sup> The *PSC Colorado* JDA functioned more like an organized imbalance market in a single balancing authority (with special Commission-approved mitigation); whereas, SEEM has all the qualities and characteristics of a traditional loose power pool.<sup>26</sup>

**B. A pool-wide OATT is necessary to meet FERC regulations, for compliance with comparability, and to avoid undue discrimination**

The Applicants claim that even if SEEM is a loose power pool, it is structured in a manner that prevents undue discrimination, and therefore the filing of a joint OATT is unnecessary.<sup>27</sup> Applicants ignore the regulations that require a joint pool-wide OATT and offer

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<sup>22</sup> *Id.* at P 85.

<sup>23</sup> *Id.* (resource “only needs to sign the Joint Dispatch Agreement to receive Joint Dispatch Transmission Service”).

<sup>24</sup> SEEM Answer at 41–42.

<sup>25</sup> *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at PP 84, 87.

<sup>26</sup> SEEM Members incorrectly conflate Regional Transmission Organizations (“RTOs”) and other organized markets with power pools. See SEEM Answer at 8 (some protests request “formation of an RTO, a power pool, or some other form of organized market”). Loose power pools are not organized markets and are not required to meet Order No. 2000 requirements for RTOs or Order No. 888 requirements for Independent System Operators.

<sup>27</sup> SEEM Answer at 11.

no alternative means of compliance that meets these requirements. Further, contrary to Applicants' assertions, the proposed OATT revisions in combination with the SEEM Agreement do not provide comparability or address opportunities for undue discrimination.

FERC requires that every public utility member of a loose power pool, such as the SEEM, file a joint pool-wide OATT.<sup>28</sup> FERC's regulations provide that the joint pool-wide or system-wide OATT may vary from the *pro forma* OATT as long as it is consistent with Order No. 888 principles.<sup>29</sup> While Order No. 888-A clarified that in addition to services through a pool-wide OATT, pool transmission services are allowed to be sold under public utilities' individual OATTs, those individual OATTs must make the service available to any customer on a non-discriminatory basis.<sup>30</sup> To comply with this non-discriminatory requirement, Applicants must make the NFEETS in each individual OATT available to any qualified transmission customer without the special arrangement that it must be reserved and scheduled through SEEM only for Energy Exchanges and only for load and resources located in the Territory.<sup>31</sup> It is these special arrangements to use the NFEETS, as well as the discount rate, that converts the service into a power pool service.<sup>32</sup> Applicants have not proposed non-discriminatory access to the

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<sup>28</sup> 18 C.F.R. § 35.28(c)(3); *see also MidContinent Area Power Pool*, 78 FERC ¶ 61,203, 61,881 (1997) (describing the requirements of Order Nos. 888 and 888-A: "The public utility members must take transmission service under the joint compliance tariff to accommodate wholesale trade among pool members. This obligation to file and take service under joint pool-wide tariffs also extends to "loose" pools."). 18 C.F.R. § 35.28(c)(3) also requires that public utilities that are part of a "multi-lateral trading . . . agreement that contains transmission rates, terms or conditions, must have on file a joint pool-wide or system-wide [OATT]." Assuming *arguendo* that the Commission finds that SEEM is not a loose power pool, it should find that it meets the criteria for the joint pool-wide OATT requirement as a multi-lateral trading agreement that contains transmission rates. *See* SEEM Agreement at App. B, Section II (NFEETS definition).

<sup>29</sup> 18 C.F.R. § 35.28(c)(3).

<sup>30</sup> Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 62 Fed. Reg. 12,274-01, 12,277-12,278 (Mar. 14, 1997).

<sup>31</sup> For example, if NFEETS were available on a non-discriminatory basis, a resource located in the Territory should be able to arrange to use the zero-price transmission on a first-come first-serve basis to export power out of the Territory.

<sup>32</sup> *W. Sys. Power Pool*, 83 FERC ¶ 61,099, 61,478 (1998).

NFEETS and offer no interpretation of the Commission’s power pool regulation that would allow them to avoid filing joint pool-wide OATT for the SEEM.

Nor do Applicants rely on precedent that allows for a different interpretation. In *Western Systems Power Pool*, the Commission approved a joint pool-wide OATT for use by members and non-members even though the pool agreement, unlike the SEEM Agreement here, “[did] not require any member to provide . . . transmission services to other members.”<sup>33</sup> Contrary to Applicants’ assertions,<sup>34</sup> the Commission directed in Order No. 888 that Western Systems Power Pool (“WSPP”) and all other public utilities with existing multi-lateral agreements with special transmission terms and conditions or discounted transmission rates to file a joint pool-wide OATT.<sup>35</sup> Indeed, the Commission held in *Western Systems Power Pool* that power pools’ joint pool-wide tariff must provide services to members and nonmembers alike to cure undue discrimination concerns,<sup>36</sup> even though it allowed transmission service to be taken under individual transmission provider OATTs. It is the Commission’s regulations—not intervenors in this proceeding as Applicants argue<sup>37</sup>—that call for there to be two tariffs (one for SEEM transactions and one for individual OATTs for other longer-term transmission services) to address undue discrimination concerns raised by the SEEM power pool. Applicants are incorrect in asserting that this would require another operator of transmission or add administrative and

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<sup>33</sup> 83 FERC ¶ 61,099, at 61,478.

<sup>34</sup> SEEM Answer at 11–12 (arguing that in only one case did FERC order creation of a joint OATT for a multi-lateral trading agreement).

<sup>35</sup> 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. 21,540-01, 21,693 (May 10, 1996); *see also W. Sys. Power Pool*, 83 FERC ¶ 61,099, 61,476 (describing WSPP compliance filing).

<sup>36</sup> *W. Sys. Power Pool*, 83 FERC ¶ 61,099, 61,479 (directing “WSPP to revise the WSPP Agreement to provide that services offered under the WSPP Default Tariff must be provided to members and nonmembers alike on a non-discriminatory basis”); *see id.* at 61,478 (“WSPP proposes to add a pool-wide open access tariff to the WSPP Agreement . . . to serve as the open access tariff of any member that does not already have an Individual Open Access Tariff on file (e.g., municipals).”).

<sup>37</sup> *See* SEEM Answer at 13.

operation complications;<sup>38</sup> SEEM could function as proposed under the pool-wide tariff to allocate, schedule, and tag transmission for Energy Exchanges.

It appears that the real motivation behind Applicants' desire not to file a pool-wide tariff is that doing so would require Applicants to allow for open membership and related governance changes to the SEEM Agreement.<sup>39</sup> This, in turn, would allow for broader input into any changes to market operations—something that is not addressed through review and comment of SEEM Section 205 filings.<sup>40</sup> Applicants are unwilling to share examples of how the SEEM algorithm would work in practice arguing that these implementation details are not required in a Section 205 proceeding.<sup>41</sup> As such, it is clear that Applicants plan to incorporate important implementation details in their business practice manuals for which there is no notice, no opportunity through Commission processes to counter discriminatory implementation measures, and no opportunity to challenge any violations of those business practice manuals on complaint to the Commission. The Commission must reject the filing and provide guidance that for SEEM to go forward as proposed, a joint pool-wide OATT must be filed “to establish open, nondiscriminatory membership provisions which allow any bulk power market participant to join, regardless of the type of entity, affiliation or geographic location.”<sup>42</sup> Anything less is not consistent with the Commission's regulations.

Finally, a pool-wide OATT is needed to address undue discrimination concerns. While it is correct that today load-serving entities, i.e., SEEM Members, can design their transactions to

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<sup>38</sup> *Id.* at 13 n.31.

<sup>39</sup> *See* PIO Protest at 10–11; *see also* SEEM Answer at 39 (arguing that intervenors did not explain why the market additions warrant changes to membership and governance).

<sup>40</sup> *See* SEEM Answer at 40 (arguing that market power and market manipulation cannot take root through rule changes).

<sup>41</sup> *Id.* at 49.

<sup>42</sup> *MidContinent Area Power Pool*, 78 FERC ¶ 61,203, 61,881.

meet their goals, including who to transact with, and under what circumstances,<sup>43</sup> SEEM would allow them to exclude others from access to free transmission and therefore access to the market and neighboring markets. Because only those participants matched through the SEEM algorithm can access the free transmission across the entire Territory, load-serving entities can, by their selections of counterparties, use free transmission on a basis that is not comparable with others' access to the free transmission. Indeed, Applicants offer an example that is telling of their ability to use SEEM and their transmission systems on a basis that is not comparable with others' use of SEEM and the system. They describe a situation in which a SEEM Member (all of which are load-serving entities) can import generation from a neighboring region on an hourly or longer basis and sell in-region output through the SEEM.<sup>44</sup> Because resources outside of SEEM cannot use the transmission in that same way to access the market, the use of the transmission systems is not provided on a non-discriminatory basis. Broadening SEEM membership would go far to address this concern by allowing those entities that are not load-serving entities to participate in governance and address such non-comparable uses of the transmission system.

### **III. APPLICANTS HAVE NOT PROVIDED SUBSTANTIAL EVIDENCE THAT SEEM WILL PRODUCE NET BENEFITS**

In the SEEM Proposal, Applicants rely heavily on the Guidehouse/CRA Benefits Analysis<sup>45</sup> to establish that its proposed bilateral “market enhancement” will result “in material customer benefits.”<sup>46</sup> However, when faced with significant concerns by PIOs and a number of other parties with the methodology of the Benefits Analysis (and by extension the validity of its

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<sup>43</sup> See SEEM Answer at 40.

<sup>44</sup> *Id.* at 44.

<sup>45</sup> SEEM Proposal, Attach. E-1, *Southeast EEM Benefits and Non-Centralized Costs*, Guidehouse Inc. and CRA International (Nov. 18, 2020).

<sup>46</sup> SEEM Proposal at 4. Applicants refer to the Benefits Analysis estimates as justification for SEEM's approval eight times throughout its cover letter.

results), Applicants suddenly argue that “no quantified cost-benefit analysis is required” for SEEM.<sup>47</sup>

Applicants cite as support for their about-face three FERC proceedings that have been taken out of their original contexts and assembled to suggest that cost-benefit analyses are unnecessary for new market proposals.<sup>48</sup> As a preliminary matter, it is critical to note that all of the cases to which Applicants cite actually *did* have some quantitative estimates as part of the record and the question before the Commission was how that information should inform the ultimate determination of whether a proposed market rule change would lead to just and reasonable rates.<sup>49</sup> The common thread of the holdings is that while estimates need not be perfectly exact, determination of a just and reasonable rate requires the Commission to consider the costs and benefits of a given proposal.

For example, Applicants’ excerpt regarding the 2012 FERC order omits that FERC was evaluating the proposal by Southwest Power Pool, Inc. (“SPP”) to create a new energy market which had been studied for several years and the basis of which was largely guided by a multi-year Cost Benefit Task Force study of four potential market design options, which resulted in pursuit of the option that would result in estimated annual benefits of \$100 million.<sup>50</sup> In the

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<sup>47</sup> SEEM Answer at 24. Applicants also argue that there is no need for a quantification of benefits because the Commission has found their existing market structure is just and reasonable and SEEM is simply a small modification to that structure. *See id.* Applicants go so far as to argue that protestors are making collateral attacks on this Commission finding. *See id.* at 19. But Applicants fail to cite a single Commission order in which the Commission has explicitly found SEEM Members’ market structures to be just and reasonable. Indeed, the SEEM Proposal cited to many orders in which the Commission found that SEEM Members have the ability to exercise market power in their markets, SEEM Proposal at 39–40, leading to the conclusion that the existing markets are not structurally competitive. Given this conclusion, the Commission should closely evaluate the unreliable benefits analysis to determine if SEEM will bring benefits greater than costs. SEEM Answer at 24.

<sup>48</sup> SEEM Answer at 24 n.70.

<sup>49</sup> The two Southwest Power Pool proceedings cited by applicants also involve the creation of new markets, but the PJM case involved changes to the existing market designed to address reliability concerns, and so is not particularly relevant. It is noteworthy however that even there, FERC and the D.C. Circuit both relied in part upon a quantitative analysis of cost savings in the billions of dollars. *PJM Interconnection L.L.C.*, 155 FERC ¶ 61,157 at P 34; *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017).

<sup>50</sup> *Southwest Power Pool, Inc.*, 141 FERC ¶ 61,048 at PP 1–7 (2012).

paragraph cited by Applicants, FERC was responding to claims that one proposed element of the design might substantially reduce the estimated benefits. FERC found that the estimated benefits were unlikely to be substantially impacted but also recognized that “proposals filed with the Commission will deviate, to some extent, from assumptions used in a cost-benefit analysis issued before a proposal is finalized, and these deviations do not render the study useless.”<sup>51</sup> The Commission’s analysis clearly relied in part on the quantitative economic benefits of the proposal, even though it did not rely on an exact estimate.<sup>52</sup>

Further, all of the cases cited by Applicants as instances where the Commission upheld a proposal based in part on a qualitative analysis of benefits were those implementing RTO market design principles Applicants argue vehemently should not be applied to SEEM. Applicants cite to the Commission’s recent affirmation of SPP’s Western Energy Imbalance Service (“WEIS”) proposal that did not include a quantified cost-benefit analysis as grounds for not requiring one for SEEM.<sup>53</sup> To the extent that Applicants would suggest that they, too, have provided similar qualitative evidence of benefits to consumers, that comparison is inapposite. Unlike SEEM, the WEIS proposal was a multi-year market development effort, and SPP drew upon seven years of running an earlier version of its Energy Imbalance Market (“EIM”) and specifically relied upon Commission staff and SPP Market Monitoring Unit reports and recommendations when designing an EIM designed to comply with FERC rules pertaining to organized markets.<sup>54</sup> SPP pointed to the Commission’s extensive experience with and historical recognition of “the broad benefits that energy imbalance markets bring to the bulk electric system” and based on its

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<sup>51</sup> *Id.* at P 57.

<sup>52</sup> *Id.*.

<sup>53</sup> SEEM Answer at 24 n.70.

<sup>54</sup> *Southwest Power Pool, Inc.*, 173 FERC ¶ 61,267 at PP 20–23 (2020).

historical recognition of the benefits of other EIMs, expected WEIS to “bring similar benefits.”<sup>55</sup> Also unlike the SEEM Proposal, both SPP market design proposals cited by Applicants involved real-time markets that employ nodal location marginal pricing with marginal losses and marginal cost of congestion to ensure least cost dispatch, and include provisions for an independent Market Monitor and stringent market power mitigation requirements - all elements that have been shown to ensure competition and significantly benefit consumers,<sup>56</sup> but none of which are present in the SEEM proposal.

Ultimately, as proponents of SEEM, Applicants bear the burden of providing substantial evidence that its proposal will result in just and reasonable rates and “must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision.”<sup>57</sup> As PIOs (and others) have established at length and will not repeat here, even taking a holistic look at the quantitative and qualitative elements of the SEEM proposal, it fails to meet this requirement.

Despite arguing that it need not supply a quantitative cost-benefit analysis, Applicants continue to argue that the Guidehouse/CRA Benefits Analysis “is a reasonable and conservative estimation of the Southeast EEM’s potential benefits.”<sup>58</sup> Applicants therefore bear the burden of demonstrating that the estimate is reliable and of probative value.<sup>59</sup> This they have still failed to do. As an initial matter, PIOs and their expert raised six categories of major concerns regarding the Benefits Analysis.<sup>60</sup> Applicants respond to only three of them, and even then, their responses are partial and often fail to address – or end up confirming – the identified problem. For example, with regard to the issue of whether and how the Benefits Analysis accounted for

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<sup>55</sup> *Id.* at PP 20–22.

<sup>56</sup> *Id.* at P 80.

<sup>57</sup> *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,019 at P 14 (2019).

<sup>58</sup> SEEM Answer at 24.

<sup>59</sup> *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,019 at P 14.

<sup>60</sup> Sotkiewicz Aff. at ¶¶ 93–112.

transmission constraints, Applicants do clarify the conflicting information in Table 3, confirming that some transmission restriction (Available Transmission Capability) was considered, but also admitting that the modeling failed to consider potential curtailments due to Transmission Loading Relief (“TLR”) or some of the mixed integer calculations that are part of the actual market design.<sup>61</sup> While Applicants’ Answer asserts that NFEETS is “unlikely” to have a TLR,<sup>62</sup> elsewhere the SEEM Proposal stresses this as a distinct possibility.<sup>63</sup> And although Applicants assert that they have considered “known geographical and counterparty restrictions for which the toggle would be used,” the toggle function allows for additional restrictions, such as creditworthiness, which have not been considered.<sup>64</sup> As Dr. Sotkiewicz points out, ultimately the Benefits Analysis is not modeling for the actual variables of the SEEM market design or actual power flows likely to occur across the different Balancing Authority areas, and is therefore fundamentally flawed.<sup>65</sup>

Applicants also admit that Guidehouse/CRA did not include “proprietary details” about the sub-hourly modeling tool they built in lieu of using a standard software capable of analyzing sub-hourly trades, which Applicants argue is “neither surprising nor a basis to conclude that the Benefits Analysis is flawed.”<sup>66</sup> To the contrary, transparency around modeling is standard practice as it is critical to being able to evaluate the strength and validity of the model’s

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<sup>61</sup> SEEM Answer at 25–26; *compare* Sotkiewicz Aff. at ¶ 102–105.

<sup>62</sup> SEEM Answer at 26.

<sup>63</sup> SEEM Proposal at 37–38. Other intervenors have also raised concerns about the potential for constraints based on actual power flows. *See, e.g.*, Motion to Intervene and Comments of the Midcontinent Independent Transmission System Operator Inc., Docket No. ER21-1111 et al. (Mar. 15, 2021), Accession No. 20210315-5347; Protest of Entergy Services, LLC, Docket No. ER21-1111 et al. (Mar. 15, 2021), Accession No. 20210315-5325.

<sup>64</sup> SEEM Answer at 27.

<sup>65</sup> Sotkiewicz Aff. at ¶¶ 104–105.

<sup>66</sup> SEEM Answer at 28.

purported results.<sup>67</sup> The failure to provide the fundamental assumptions upon which a model is based as well as a reasonable amount of detail on what the inputs are and what kinds of outputs they generate renders the proposed Benefits Analysis completely unverifiable.<sup>68</sup> Applicants' position that the Commission should rely on non-replicable results from an unverifiable model amounts to saying "Just Trust Us" – which has never been found to constitute substantial evidence.

#### **IV. AS SHOWN IN THE PIO'S PROTEST, APPLICANTS HAVE INCENTIVES AND OPPORTUNITIES TO EXERCISE MARKET POWER IN THE SEEM**

The Applicants attempt to diminish and dismiss the legitimate market power concerns raised in the PIO's Protest and the attached Sotkiewicz Affidavit by claiming that they do not have an incentive to exercise market power.<sup>69</sup> This argument ignores a fundamental tenet of energy market regulation: monopolists have an incentive to behave in a discriminatory manner.<sup>70</sup>

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<sup>67</sup> See, e.g., Fed. Judicial Center, *Reference Manual on Scientific Evidence*, 937–38 (3<sup>rd</sup> Ed. 2011), <https://www.fjc.gov/sites/default/files/2015/SciMan3D01.pdf> ("There is an old adage in the modeling world, called 'garbage in–garbage out,' or GIGO, that gets to the heart of the issue... The proper way to evaluate the efficacy of the model or simulation is to validate it, and this is usually done by processing known scenarios or input conditions, and making certain the results are representative of the known output within the validated range... [I]f any mathematical model has not been validated within the boundaries at issue, its use . . . should be carefully considered. . . [E]ngineers should be prepared to provide a fully executable copy of the model if requested during discovery."); see also *Puget Sound Energy Inc.*, 153 FERC ¶ 61,386 at PP 105–106 (2015) (rejecting analyses that were not shown to represent "valid and unbiased comparisons that account for all relevant factors."); *Transcontinental Gas Pipe Line Corp.*, 15 FERC ¶ 63,005, 65,024-025 (discussing the requirement to provide source data and to explain techniques and methodologies used to derive estimates, noting that "the quality of the ultimate result is likely to depend on the quality of the material supplied" and referencing the GIGO principle).

<sup>68</sup> It is unusual, if not unique that, Applicants instituting a new market mechanism that is unlike any that the Commission has approved before, outright refuse to provide any examples of how the market will solve given different scenarios of inputs, counterparty constraints, and transmission limitations. See SEEM Answer at 49.

<sup>69</sup> SEEM Answer at 35–37. "The PIOs also rather confusingly argue that the Southeast EEM Members will want to undermine the functioning of the Southeast EEM because it is contrary to certain incentives that the PIOs assign to such Members. Most of these incentives also suppose a willingness to create a market with the intention of subverting it by taking on substantial risk to collude with other Members for rather speculative gains."

<sup>70</sup> See *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 687 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002) ("To support [Order No. 888], the Commission relied upon unsubstantiated allegations of discriminatory conduct in public comments, its own experience in reviewing applications and complaints, and *its own understanding of the incentives for monopolists to behave discriminatorily.*") (emphasis added).

The Commission has historically incorporated this fact into its policy-making and practice.<sup>71</sup>

The question before the Commission is not whether PIOs have demonstrated that the Applicants have an incentive to manipulate the market, but whether the SEEM Proposal creates opportunities for market manipulation. As discussed at length in the PIO's Protest, it does.

The SEEM Proposal creates additional opportunities for market manipulation beyond those present in the existing market. As noted in the PIOs' Protest, the SEEM design creates a mechanism for larger actors to push out merchant generation and renewable development by abusing the unfettered ability to toggle off certain counterparties that are price-competitive.<sup>72</sup> In their response the Applicants explain why the toggling feature is a core part of the SEEM Proposal and attempt to convince the Commission that they would not abuse that feature; the Applicants minimize rather than actually address the existence of the opportunity for abuse.<sup>73</sup> Additionally, the SEEM governance structure creates opportunities for control by large actors through the voting structure and exclusive membership requirements.<sup>74</sup> The Applicants responded by attempting to justify the governance structure without responding to the market power issues inherent in that structure.<sup>75</sup>

The Applicants have incentives to create and use this market power to maintain control over a changing market. As noted in the PIOs' Protest, the SEEM Proposal “undermines its ability to meaningfully expand the potential to tap into cost-effective renewable generation” and instead “has the potential to protect uneconomic, unsustainable generation technologies such as

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<sup>71</sup> See, e.g., *Wholesale Competition in Regions with Organized Markets*, 125 FERC ¶ 61,071 at P 1 (2008) (noting that the Commission, “balances the mix of regulation and competition based on changing circumstances, taking into account such factors as the *opportunities for competition to control market power*, advances in technology, changes in economies of scale, and new state and federal laws that affect the energy industry”) (emphasis added).

<sup>72</sup> PIO Protest at 23–26.

<sup>73</sup> See SEEM Answer at 32–37.

<sup>74</sup> PIO Protest at 28–32.

<sup>75</sup> See SEEM Answer at 37–40.

coal at the cost of clean generation such as solar.”<sup>76</sup> Additionally, the SEEM Proposal benefits the Applicants by being a tool that could relieve the building pressure in the Southeast pushing for more significant reform,<sup>77</sup> and could allow the Applicants to stay ahead of and in control of the first stages of reform. The Applicants have every incentive to protect their existing control and ability to support uneconomic resources in designing and implementing the SEEM Proposal. Applicants broadly characterize any incentives for market manipulation as illogical and question why they would ever choose to undercut competitive outcomes – questions the PIOs have answered and Applicants ignore.<sup>78</sup> In the end, the question of why matters less than the fact that they can. SEEM provides Applicants with structural opportunities for market power abuse and no meaningful monitoring or mitigation guardrails to prevent it and as such, should be rejected.

**V. A TECHNICAL CONFERENCE AND DEFICIENCY LETTER ARE NEEDED TO ADDRESS DEFICIENCIES IN THE APPLICANT’S FILING**

Many of the deficiencies in the SEEM filing raised by the PIOs and other intervenors persist. Neither the Applicants’ initial filing nor their answer address:

- How SEEM will ensure available contract path transmission across multiple balancing authorities;<sup>79</sup>
- Concrete examples of how the SEEM algorithm uses various inputs to produce matches;<sup>80</sup>
- What the true costs and benefits of the SEEM Proposal are, given the flaws in the Guidehouse/CRA Benefits Analysis raised in the Sotkiewicz Affidavit;<sup>81</sup>

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<sup>76</sup> PIO Protest at 49–51.

<sup>77</sup> *See id.* at 51–56.

<sup>78</sup> *Compare* PIO’s Protest at 23–26, Sotkiewicz Aff. At PP 54–79 *with* SEEM Answer at 35–37.

<sup>79</sup> PIO Protest at 57.

<sup>80</sup> *Id.* at 57.

<sup>81</sup> *Id.* at 57–58; Sotkiewicz Aff. ¶¶ 113–115.

- What, if any, analysis Applicants did to identify and consider potential market power issues created by SEEM before concluding that there were none;<sup>82</sup>
- Whether the terms of the Enabling Agreements through which SEEM transactions will limit the ability of some entities to become Participants;<sup>83</sup>
- How, if at all, the SEEM Proposal ensures that SEEM Members and Participants do not selectively enter into Enabling Agreements in a discriminatory manner;<sup>84</sup> and
- How SEEM would impact renewable energy adoption in the Southeast.<sup>85</sup>

Without this, the Commission lacks sufficient information to substantively review the proposal under the Federal Power Act Section 205. Therefore, if it does not reject the filing, the Commission should convene a technical conference or direct the applicants to provide additional information through a deficiency letter pursuant to 18 C.F.R. § 375.307(a)(1)(v).

Moreover, there is a consensus on the need for a technical conference or joint regional meeting regarding competitive market reform in the Southeast.<sup>86</sup> Nineteen intervenors requested a technical conference or joint regional meeting, an unsurprising number given the ongoing

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<sup>82</sup> *Id.* at 58.

<sup>83</sup> *Id.* at 58

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 59

<sup>86</sup> In contrast, there is no consensus on the SEEM proposal being “well-received.” *See, e.g.*, SEEM Answer at 5, 58. Twenty-five intervenors opposed or sought major modifications to the SEEM Proposal (Public Citizen, Southern Renewable Energy Association, Environmental Defense Fund, Advanced Energy Economy, Advanced Energy Buyers Group, Renewable Energy Buyers Alliance, Solar Energy Industry Association, Entergy Services, LLC, Carolinas Clean Energy Business Association, American Forest & Paper Association (expressing general support but asking the Commission to condition approval on the submittal of a more complete cost/benefit analysis and additional measure to protect against market manipulation by the SEEM Members), Voltus, Inc., Energy Alabama, Sierra Club, South Carolina Coastal Conservation League, GASP, Southern Alliance for Clean Energy, Southface Energy Institute, Inc., Vote Solar, Georgia Interfaith Power & Light, Georgia Conservation Voters, Partnership for Southern Equity, North Carolina Sustainable Energy Association, Sustainable FERC Project, Natural Resources Defense Council, and R Street Institute). Only five intervenors (including two SEEM Members) submitted comments in support of the SEEM Proposal (Georgia Association of Manufacturers, Associated Electric Cooperative, Tennessee Valley Authority, Midcontinent Independent System Operator, and PJM).

interest and discussions regarding market reform in the Southeast.<sup>87</sup> Several state actors, including legislators<sup>88</sup> and public service commissioners,<sup>89</sup> have echoed this request, explaining that SEEM should be the beginning not the end of the Commission’s engagement on wholesale market issues in the region. Even the Applicants do not oppose the concept of a technical conference on market reform in the Southeast.<sup>90</sup> Regardless of its decision on the SEEM Proposal, the Public Interest Organizations urge the Commission to convene a broad technical conference to address the issue of market reform in the Southeast.

## **VI. CONCLUSION**

The SEEM Proposal has serious legal deficiencies that the Applicants’ Answer fails to address. SEEM is a loose power pool that grants zero-cost transmission service with special conditions without complying with the Commission’s requirement for a pool-wide tariff with broad membership and without addressing opportunities for undue discrimination in the proposed modifications to the SEEM Members’ OATTs. This creates barriers to entry that will likely prevent independent power producers from accessing these benefits, in violation of the Commission’s policies to promote open access and non-discriminatory competitive markets. The Applicants’ cost-benefit analysis is defective and cannot be relied upon to determine that SEEM’s benefits would outweigh its costs. The Applicants’ Answer fails to address legitimate

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<sup>87</sup> See Comments of Carolinas Clean Energy Business Ass’n, FERC Docket No. ER21-1111 (Mar. 15, 2021), Accession No. 20210315-5326; Comments of Advanced Energy Economy et al., FERC Docket No. ER21-1111 (Mar. 15, 2021), Accession No. 20210315-5301; Mot. to Intervene and Limited Protest and Comment of PIOs, FERC Docket No. ER21-1111 (Mar. 15, 2021), Accession No. 20210315-5405; Mot. to Intervene and Comments of R Street Institute, FERC Docket No. ER21-1111 (Mar. 15, 2021), Accession No. 20210315-5303.

<sup>88</sup> Letter from North Carolina Legislators, Invitation to Joint Technical Conference (Mar. 15, 2021); Letter from South Carolina Senator Tom Davis, Invitation to Joint Technical Conference, FERC Docket No. ER21-1111 (Mar. 4, 2021), Accession No. 20210315-4001; Letter from South Carolina Representative Nathan Ballentine, Invitation for Fed/State Technical Conference, FERC Docket No. ER21-1111 (Mar. 9, 2021), Accession No. 20210318-4000.

<sup>89</sup> Tim Echols, Letter from Commissioner Echols Re: Southeast Market Reform Technical Conference in re: Docket No. ER21-1111 (Mar. 11, 2021).

<sup>90</sup> SEEM Answer at 6 (“As to the arguments for a technical conference to explore policy issues related to the general restructuring of the Southeast markets, the Southeast EEM Members take no position in the current case. . .”).

concerns about the exercise of market power or provide critical information about how SEEM would operate and whether it would cause undue discrimination. For all these reasons, the Commission should reject the SEEM Proposal. If the Commission does not reject the proposal, it should convene a technical conference or direct SEEM Members to provide information to update their deficient filing as necessary to reach a decision in these proceedings.

Dated: April 12, 2021.

Respectfully submitted,

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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 these proceedings listed above, by email.

Dated: April 12, 2021.

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