



## AlaFile E-Notice

03-CV-2021-900028.00

Judge: GREG GRIFFIN

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ENERGY ALABAMA ET AL V. ALABAMA PUBLIC SERVICE COMMISSION  
03-CV-2021-900028.00

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**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

ENERGY ALABAMA,	)	
GASP,	)	
Plaintiffs,	)	
	)	
V.	)	Case No.: CV-2021-900028.00
	)	
ALABAMA PUBLIC SERVICE	)	
COMMISSION,	)	
Defendant.	)	

**Proposed Order**

This matter concerns an appeal of orders by the Alabama Public Service Commission (“Commission”) pursuant to § 37-1-120, *et seq.*, of the Alabama Code. Appellants Energy Alabama and GASP appeal the Commission’s decision partially approving a petition by Appellee-Intervenor Alabama Power Company (“Alabama Power” or “Company”) for a certificate of convenience and necessity to add 2,400 megawatts (MW) of new generation resources (“Certificate Order”). Appellants also appeal the Commission’s refusal to rehear or reconsider its decision in light of the global COVID-19 pandemic, which struck Alabama just as the certificate proceeding concluded (“Reconsideration Order”).

The Court has considered briefing by the parties on the relevant issues. In addition, a hearing was held on August 3, 2021 during which the Court received and considered oral arguments of the parties.

After careful consideration of all written and oral arguments, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this case is reversed and remanded to the Commission for further proceedings consistent with this Order.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On September 6, 2019, pursuant to Alabama Code § 37-4-28, Alabama Power filed a Petition for a Certificate of Convenience and Necessity (the “Petition”) with the Commission. C. 1–342 (public version), 4001–6036 (confidential version). In its Petition, Alabama Power requested that the Commission grant the Petition and authorize Alabama Power to:

(1) construct and install a natural gas combined cycle generating facility at the site of Alabama Power’s Barry Steam Plant (“Barry Unit 8”) located in Mobile County with an ultimate winter capacity rating of 743 MW;

(2) acquire the Central Alabama Generating Station, a natural gas combined cycle generating facility located in Autauga County with a winter capacity rating of 915 MW;

(3) acquire rights and assume payment obligations under a power purchase agreement (PPA) pertaining to the Hog Bayou Energy Center, a natural gas combined cycle generating facility located in Mobile County with a winter capacity rating of 238 MW;

(4) acquire rights and assume payment obligations under five PPAs pertaining to solar photovoltaic facilities paired with battery energy storage systems (“solar/storage projects”), located in Calhoun, Chambers, Dallas, Houston and Talladega Counties, with nameplate capacity of 400 MW and a cumulative winter capacity equivalence of 340 MW (68 MW each); and

(5) pursue 200 MW of yet to be determined demand-side management and distributed energy resource programs.

Collectively, these resources totaled over 2,400 MW of additional capacity, or approximately 19% of the Company’s current generation capacity, making this the largest single generation capacity increase Alabama Power has ever proposed for approval by the Commission.

**A. Alabama Power's Basis For The Petition**

Alabama Power's claimed capacity need arose from its integrated resource planning (IRP) process. The IRP process is the analytical tool used by Alabama Power to identify the timing, amount, and type of resources necessary to serve long-term expected energy and demand requirements of customers. C. 2657. Alabama Power engages in integrated resource planning on an annual basis, and each time, considers a 20-year load forecast. R. 164:11-16. However, Alabama Power presents its IRP results to the public only once every three years in the form of a summary document. R. 459:6-10.

Alabama Power's 2019 IRP was the basis for the capacity need asserted by Alabama Power in its Petition. R. 458:22–459:2. Alabama Power's prior public IRP, from 2016, forecasted no need for additional capacity until 2035. C. 7152. However, just three years later, Alabama Power projected an immediate winter capacity need and stated that its needs would continue to grow until the 2023/2024 winter season. R. 440:2-12.

The drastic shift in Alabama Power's claimed capacity need had two alleged principal causes: (1) an updated load forecast and (2) emerging winter reliability concerns. C. 2657:18–2666:23. First, a load forecast is a forecast of customers' electric needs—both the amount of energy they are projected to consume and the amount of generation capacity needed to supply it. *See* C. 2698. According to the 2019 IRP, the load forecast is “heavily dependent on the level of expected economic activity and continued employment growth in the State of Alabama.” C. 2703. Alabama Power's updated load forecast was developed in August 2018 using forecasts from May 2018 and then presented in the 2019 IRP. R. 285:3-6, 290:21-23; C. 7815.

Second, Alabama Power's emerging winter reliability concerns were the subject of its Reserve Margin Study. C. 2659:10–2660:17. A reserve margin is a measure of excess capacity

(i.e., capacity in excess of peak customer demand) deemed necessary to safeguard against the loss of electric service during extreme events. *See* C. 2659:18-22. In its 2016 IRP, Alabama Power cited a need to increase its long-term target planning reserve margin from 15% to 16.25% for reasons that included “the predicted effects of extreme cold weather events.” C. 7151. Just three years later, in its 2019 IRP, Alabama Power cited the need for a separate, Southern Company-wide winter target reserve margin of 26%, which results in a 25.25% long-term diversified winter target reserve margin for Alabama Power. C. 2683–84.

Alabama Power’s claimed capacity need ultimately resulted from a combination of its updated load forecast and the new target winter reserve margin. R. 60:6-9. Taking the two together, the 2019 IRP revealed a projected resource deficit for the 2020 winter of 1,650 MW, which would grow to over 2,400 MW by 2024 before dropping back to only 1,652 MW in 2026. C. 2708. The 2,400 MW of resources contained in the Petition were the type and amount that Alabama Power determined were needed to meet its future capacity needs. C. 2666:15-23.

### **B. Costs Of The Proposed Portfolio**

Alabama Power’s proposal will be costly for its customers. The proposal’s projected capital cost is \$1.1 billion, a figure that does not include multi-decadal operation and maintenance costs that Alabama Power will incur. R. 382:21-22, 383:3-8.

The costs of the proposal will be recovered through customer rates. R. 855:12-15. In 2024, the proposal will cost residential customers approximately \$95 million, with the average residential customer (with usage around 1,200 kilowatt-hours per month) paying more than \$50 extra per year. R. 880:9-10, 852:3-8, 867:16-17, 869:7-11. For other retail customers, Alabama Power estimates a rate increase of 2%. R. 871:9-10. Alabama Power did not look beyond 2024 for its bill impacts calculations. R. 879:1-2.

### **C. Proceedings Below**

In support of its Petition, Alabama Power submitted pre-filed direct testimony of five witnesses. C. 1–342 (public version), 4001–6036 (confidential version). Following the Petition’s filing, multiple parties intervened in the Commission docket, including Appellants and the Alabama Attorney General. C. 346–49, 383–90. Several intervening parties submitted pre-filed direct testimony in response to Alabama Power’s Petition, including Appellants, who submitted direct testimony of three witnesses. C. 834–949, 1809–2018 (public version), 6956–8143 (confidential version). Alabama Power then filed rebuttal testimony of the five witnesses who submitted initial testimony, as well as two new rebuttal witnesses. C. 2091–2489 (public version), 8239–8642 (confidential version).

Between October 2019 and February 2020, the parties conducted written discovery and noticed and took the depositions of several witnesses, including witnesses who submitted pre-filed testimony on behalf of Alabama Power.

On March 6, 2020, the administrative law judge issued a procedural ruling to clarify certain hearing procedures. C. 2959. Paragraph 5 of the ruling directed the parties to “file deposition designations that the parties expect the Commission to consider” and further stated that “[d]esignations must be by page and line numbers . . . .” C. 2960. Both Appellants and Alabama Power filed deposition designations by page and line number, as directed by the Commission. C. 2975-93, 3001-06, 3019. Neither Appellants nor Alabama Power introduced any depositions or deposition excerpts as exhibits to be included in the record.

From March 9, 2020 to March 11, 2020, the Commission held an evidentiary hearing on the Petition. At the hearing’s conclusion, the Commission directed the parties to submit post-hearing briefs in the form of proposed orders. Appellants and Alabama Power timely filed

proposed orders on May 1, 2020. C. 3031–90. Concurrently, Appellants filed a motion for supplemental briefing to allow the parties to brief the impact of the COVID-19 pandemic on the need and timing of Alabama Power’s Petition. C. 3115–42. Alabama’s first coronavirus case was confirmed on March 13, 2020, two days after the certificate hearing concluded, and on April 3, 2020, Governor Ivey issued a stay-at-home order. C. 3507. The Commission subsequently issued a procedural ruling giving intervening parties one week to supplement their post-hearing briefs with no more than five pages of discussion regarding the potential impacts of the pandemic on Alabama Power’s \$1.1 billion Petition. C. 3316–17. Appellants filed their supplemental brief addressing the impacts of the pandemic on June 4, 2020. C. 3318–26.

The very next day, June 5, the Commission’s Legal Division and Electricity Policy Division jointly recommended that the Commission issue the Certificate of Convenience and Necessity for the proposed natural gas plants and for the authority to pursue up to 200 MW of undetermined demand-side management and distributed energy resource programs, but that the 400 MW of solar/storage projects be denied and evaluated in a different, already existing docket.<sup>[1]</sup>

The Commission Staff presented its recommendation to the Commission at its June 9, 2020 meeting, and by unanimous vote, the Commissioners accepted the Staff’s recommendation that same day. C. 3348–53. On August 14, 2020, the Commission issued its Certificate Order adopting the Staff’s recommendation. C. 3409–74.

On September 11, 2020, Appellants filed a Petition for Reconsideration and Rehearing. C. 3505–31. Energy Alabama and GASP urged the Commission to reconsider its need determination and grant a rehearing for the purpose of taking further testimony on Alabama Power’s claimed capacity need given the substantially altered economic outlook as a result of the

global pandemic. C. 3510–15. Appellants submitted the declaration of their expert economist, Mr. James Wilson, discussing the pandemic’s economic implications and consequent need to reevaluate the Alabama Power’s claimed capacity need. C. 3522–31. Appellants also sought reconsideration of the Commission’s refusal to require Alabama Power shareholders to bear any stranded costs associated with its proposals as well as the Commission’s denial of the solar/storage projects, C. 3515–18. On December 10, 2020, the Commission issued the Reconsideration Order denying Appellants’ request. C. 3772–83. This appeal followed.

## II. STATUTORY BACKGROUND

The Commission has jurisdiction over retail public utilities, such as Alabama Power, pursuant to the regulatory framework set out in Title 37 of the Code of Alabama. This framework gives the Commission general supervisory authority over utilities subject to Title 37 (Ala. Code § 37-1-32) and requires it to balance the interests of public ratepayers with those of investor-owned utilities. *See* Ala. Code § 37-1-80 (utility rates “shall be reasonable and just to both the utility and the public”). This statutory framework also requires the balancing of interests by the Commission when a public utility seeks to construct or acquire a plant for production of electricity. On the one hand, the Commission must allow the utility to meet its duty to provide adequate service, which includes making “such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under a duty to serve.” Ala. Code § 37-1-49. On the other hand, as the Commission acknowledges in its brief, “it must not permit the unnecessary construction or acquisition of electric generation which will be paid for by ratepayers.” Ala. Pub. Serv. Comm’n Brief at 10 (Doc. 130) [hereinafter “PSC Br.”].

The regulatory mechanism by which the Commission ensures that only needed facilities are constructed or acquired is the statutory requirement for a certificate of convenience and necessity. Pursuant to Alabama Code § 37-4-28, a public utility like Alabama Power shall not construct or acquire electric generating facilities without approval from the Commission in the form of a certificate of convenience and necessity. The Commission is authorized to grant or deny a petition for certificate of convenience and necessity, in whole or in part, and to prescribe any conditions on its approval as it deems advisable. *Id.* When exercising that authority, however, the Commission must not “interfere with the proper operation of the utility as a business by usurping managerial prerogatives.” C. 3417 (citing *Ala. Power Co. v. Ala. Pub. Serv. Comm’n*, 359 So. 2d 776, 780 (Ala. 1978)). Nor is the Commission “empowered to substitute its judgment for that of the owners [of the utility], who are responsible for the rendition of service, unless the owners have abused their discretion.” *Id.* at n.12 (quoting *S. Cent. Bell Tel. Co. v. Ala. Pub. Serv. Comm’n*, 425 So. 2d 1093, 1096 (Ala. 1983)).

In a certificate proceeding, the Commission makes two fundamental determinations, with the petitioning utility—here, Alabama Power—bearing the burden of proof. First, it must determine whether Alabama Power has shown a need for additional capacity (the need question). C. 3418. Second, if the evidence supports this showing of need, the Commission must determine whether the proposed facilities are a reasonable means of satisfying that need (the resource question). *Id.* The Commission has consistently interpreted the latter element as requiring the most cost-effective solution to Alabama Power’s capacity need. *See, e.g.,* Order at 2, *Ala. Power Co. Petition to Amend an Existing Certificate of Convenience & Necessity*, Docket 27785 (Ala. P.S.C. Apr. 22, 2009). Ultimately, the Commission must determine, under the totality of the circumstances before it, whether granting the certificate is just and reasonable and in the public

interest. Order at 11, *Ala. Power Co. Petition for a Certificate of Convenience & Necessity*, Docket No. 32382 (Ala. P.S.C. Sept. 16, 2015).

As for petitions for reconsideration and rehearing, under Rule 21 of the Commission's Rules of Practice, a party may make an application for rehearing or reconsideration within 30 days from the final order. For applications based on new evidence to be offered on a rehearing, "the nature and purpose of the evidence must be briefly stated, and it must not appear to be merely cumulative." PSC Rules of Practice 21(A). If the Commission finds that a hearing for additional testimony is justified, it will set a hearing date and "give consideration to the record in the light of such additional testimony and render its decision and order thereon." *Id.* 21(B). The Alabama Code also allows interested persons to apply for rehearing on any matter. Ala. Code § 37-1-105.

### III. STANDARD OF REVIEW

Appeals of Commission orders are governed by Alabama Code § 37-1-124. The Court must hear the case upon the certified record and "[n]o new or additional evidence may be introduced in the circuit court," except as needed to prove fraud or misconduct. *Id.* While Commission orders are taken as "prima facie just and reasonable," they may be set aside if: "(1) The commission erred to the prejudice of appellant's substantial rights in its application of the law; or (2) The order, decision or award was procured by fraud or was based upon a finding of facts contrary to the substantial weight of the evidence." *Id.* Alternatively, the Court may "remand the case to the commission for further proceedings in conformity with the direction of the court." *Id.* The Court may also remand the case prior to judgment "for the purpose of taking additional testimony or other proceedings." *Id.*

The Court's scope of review is limited and its "inquiry ordinarily goes no further than to ascertain whether there is evidence to support the Commission's findings." *Ala. Power Co. v. Ala. Pub. Serv. Comm'n*, 390 So. 2d 1017, 1025 (Ala. 1980) (citing *Gen. Tel. Co. of the Se. v. Ala. Pub. Serv. Comm'n*, 335 So. 2d 151 (Ala. 1976)). Substantial evidence means legal evidence of substantial weight and probative force. *See Eagle Motor Lines, Inc. v. Ala. Pub. Serv. Comm'n*, 343 So. 2d 767, 772–73 (Ala. 1977) (citing *N. Ala. Motor Express v. Rookis*, 12 So. 2d 183 (Ala. 1943)). "If the Commission's finding is based solely on hearsay or other improper evidence the Commission's decision will not be upheld for there must be some evidence presented to the Commission which is competent and legal under general rules of evidence." *Id.* The burden is on the party challenging the Commission order "to establish that the evidence does not sustain the conclusion reached by the Commission." *Ala. Gas Corp. v. Wallace*, 308 So. 2d 674, 678 (Ala. 1975) (citing *Ill. Central R. Co. v. Thomas Ala. Kaolin Co.*, 153 So. 2d 794 (Ala. 1963)).

#### IV. ANALYSIS

Appellants assert four grounds for their appeal. First, Appellants contend that the Commission unlawfully and arbitrarily refused to grant a rehearing to consider whether the global coronavirus pandemic may have changed the amount and/or timing of Alabama Power's claimed capacity need. Second, Appellants assert that the Commission erred by denying approval of the five solar/storage projects, which they contend amounted to the Commission improperly substituting its judgment for that of Alabama Power and was contrary to the substantial weight of the evidence. Third, Appellants claim that the Commission improperly and erroneously refused to condition its approval with the requirement that Alabama Power shareholders bear the risk that its chosen natural gas assets may become stranded during their

useful lives, as the Alabama Attorney General recommended, instead of ratepayers shouldering that risk. Finally, Appellants fault the Commission for stating repeatedly in its Certificate Order that it based its ruling, in part, on evidentiary materials that the Commission did not in fact have in its possession—specifically, excerpts of depositions designated by the parties. The Court examines these grounds in turn.

**A. The Global Pandemic’s Effects On Alabama Power’s Claimed Capacity Need**

Appellants argue that the COVID-19 pandemic has likely altered Alabama Power’s need projections, requiring a refreshed assessment of need. They assert that the Commission erred by denying their Petition for Reconsideration and Rehearing, which they suggest was contrary to the substantial weight of the evidence. Energy Ala. & GASP Brief 14 (Doc. 125) [hereinafter “EA/GASP Br.”]. The Court agrees that the Commission erred by denying Appellants’ Petition for Reconsideration and Rehearing and finds that the case should be remanded so that the Commission may consider Alabama Power’s updated load forecasts and determine whether the global pandemic has altered the amount and/or timing of its claimed need.

The Court bases its ruling on the following undisputed facts from the record below: First, both the Commission (in its Certificate Order) and Alabama Power (in its proposed order below) acknowledged the need to consider “the potential for *prolonged* economic effects flowing from the pandemic, and specifically, whether potential impacts to the state, national and global economies are likely to cause a material change in the amount of capacity needed by Alabama Power.” C. 3432 (Commission Order) (emphasis added); *see* C. 3190 (Company’s Proposed Order). Nevertheless, the Commission allowed only limited supplemental briefing on the topic (five pages) over an extremely short timespan (one week). The Commission’s Staff made its recommendation to approve the majority of Alabama Power’s Petition just one day later, and the

Commission adopted Staff's recommendation just four days later. Hence, despite acknowledging the potential for the pandemic to materially alter the need question, the Commission gave surprisingly short shrift to the subject before proceeding as though it was not a factor.

Second, none of the evidentiary record compiled at the hearing concerned the global pandemic and its impacts, for the simple reason that COVID-19 did not strike Alabama and the rest of country in earnest until after the evidentiary proceedings concluded. Appellants were the **only** parties to submit evidence on this question, in the form of the declaration of their expert economist, which they attached as an exhibit to their Petition for Reconsideration and Rehearing. C. 5322–31. The Commission and Alabama Power argue that Appellants' expert declaration supported the denial of reconsideration and rehearing, but the evidence is contrary to their claim. PSC Br. 33; Ala. Power Co. Brief 17 (Doc. 132) [hereinafter "APC Br."]. Appellants' expert concluded that if Alabama Power were to update its 2019 load forecast, "the economic downturn would substantially affect the forecasts in all sectors." C. 3529 ¶ 14. He opined that the industrial sales and peak load forecasts would be substantially lower. *Id.* ¶ 15. Ultimately, Appellants' expert concluded that updated forecasts would result in delayed capacity needs:

[I]f Alabama Power were to update its forecasts of loads and capacity needs, they would be substantially lower for the 2020 to 2023 period than projected by the B2019 Load Forecast; and if [the Company] were to update its resource development plans based on the delayed future capacity needs, the revised plans would increase the benefits to customers.

C. 3530:18-22.

As the only evidence on the topic, Appellants' expert declaration underscored the importance of reexamining Alabama Power's need projections, which were based on 2018 data. R. 285:3-6, 290:21-23; C. 7815. Further, the burden to establish need in the proceeding below was Alabama Power's, not Appellants'. Appellants' burden under Commission Rule 21 was

simply to present new evidence showing that reconsideration and rehearing were warranted.<sup>[2]</sup> Appellants met that burden. In contrast, Alabama Power presented no evidence establishing that the size and timing of its needs remained unaltered despite the global pandemic and its far-reaching economic impacts.

Third, the record shows that Alabama Power's load forecasts are highly dependent upon economic conditions. As Alabama Power stated in its 2019 IRP, its load forecast was "heavily dependent on the level of expected economic activity and continued employment growth in the State of Alabama." C. 2703. Past economic declines, such as the Great Recession, have significantly impacted the Alabama Power's claimed capacity needs. In its 2010 IRP, Alabama Power forecasted a need for peaking resources in 2022 and intermediate resources in 2025. C. 3135. In the 2013 IRP, however, Alabama Power delayed its next resource addition by eight years, until 2030, in part because the recession's economic effects resulted in lower forecasted load. *Id.*

Fourth, the record shows that the load forecast underpinning Alabama Power's assertion of need was based on analyses which are now stale because they were conducted in 2018 and 2019. R. 285:3-6, 290:21-23; C. 7815. The record reflects that Alabama Power has an entire Forecasting and Resource Planning group, which includes a Forecasting Manager who "ha[s] direct responsibility for the development of Alabama Power's demand, energy, customer and revenue forecasts." C. 2365:5-7. To account for changing conditions, Alabama Power regularly assesses its future capacity requirements and updates its forecasts. C. 3464; APC Br. 13 n.28. Alabama Power conducts integrated resource planning (the "IRP" process) on an annual basis, of which "[t]he load forecast is a critical component." R. 164:11-13; C. 2365:19-20. With each annual IRP, Alabama Power "considers a twenty-year forecast of customer load." R. 164:15-16.

Thus, Alabama Power could have updated its load projections prior to the Commission's Orders, and can certainly do so now in a manner that accounts for the pandemic's near and long-term effects. The Court agrees the ratepaying public deserves to know what those revised projections hold before being asked to fund a resource expansion that will cost them more than \$1.1 Billion.

The Court is not persuaded by the Commission's stated reasons for refusing reconsideration and rehearing. The Commission simply adopted verbatim, from Alabama Power's proposed order, the conclusion that "the long-term impacts of the pandemic are not knowable with any reasonable degree of certainty." C. 3433. But that was not the question. The question was whether Alabama Power's immediate and longer-term capacity needs, which were based on assumptions long pre-dating the pandemic, remained reliable or should be reevaluated using updated projections. Projections about the future will always involve the inherently unknowable; the Commission's responsibility is to insist upon the most accurate projections so that ratepayers are not burdened with the costs of excess capacity, especially in light of wholly unforeseen circumstances like the global pandemic.

In the Court's view, there is no question that the pandemic was an unforeseen event of such significance as to require a demonstration by Alabama Power, based on the latest and best information available, that the timing and size of its claimed needs remain unchanged. The Commission's mere assumption that Alabama Power's needs have not changed, without any evidentiary showing to that effect, was error.

Nor is the Court persuaded by suggestions that reversal and remand for the purpose of reevaluating the need question will compromise electric reliability or result in the loss of cost-competitive options. As Alabama Power admits, its needs assessment showed that "no additional resources were needed to maintain summer reliability." APC Br. 10. The proposed resources

were needed to maintain *winter* reliability—i.e., “the ability of the electric system to handle sharp increases in customer electric usage . . . in response to very cold conditions, and at a time when not all electric generation resource options may be available due to freezing conditions, dark skies, a lack of fuel or other reasons.” *Id.* at 3. When those rare winter events occur, Alabama Power does not operate in a vacuum; it participates in a contract between the other Southern Company operating companies, called the Intercompany Interchange Contract (IIC), which allows the companies to pool resources and dispatch as one system. R. 53:15-22. Alabama Power acknowledged below that it can rely on surplus capacity made available through the pool. R. 371:23–372:3. Southern Company’s operating companies can and do help cover capacity needs, especially in the short-term, including contingencies prompted by extreme winter weather. Further, because the majority of Alabama Power’s claimed needs do not arise until 2024 and after, there is time to reassess Alabama Power’s need determination. A modest delay is warranted to protect ratepayers from paying for potentially unnecessary investments, which the Commission admits is its core responsibility when evaluating a petition of this kind.<sup>[3]</sup>

As for concerns that delay will cause Alabama Power to lose cost-competitive resource options or result in resources less beneficial to customers, *see* PSC Br. 31; APC Br. 18, Appellants’ expert refuted those concerns as “contrary to the trends in the energy industry over many years now, with costs of technologies and fuels continuing to decline due to innovation, competition, and increasing efficiency in production.” C. 3530 ¶ 16. Further, there is no evidence that the approved resources are threatened by remand. The Court is simply ordering that the need question be reevaluated on remand using the most updated load forecasts. If ultimately some of those resource options are not pursued because Alabama Power’s needs have in fact changed,

then the governing framework will have done its job of shielding ratepayers from costly, unnecessary investments.

The Commission recognizes that administrative agencies have been required to reopen the record in light of “extraordinary circumstances.” PSC Br. 31 (citing *S. Co. Servs. Inc.*, 43 FERC ¶ 61,003, 61,024 (1988)). Circumstances are extraordinary “where there has been a change in circumstances, subsequent to administrative decision and prior to court decision, that is not merely ‘material’ but rises to the level of a change in ‘core’ circumstances, the kind of change that goes to the very heart of the case.” *Am. Optometric Ass’n v. F.T.C.*, 626 F.2d 896, 907 (D.C. Cir. 1980) (internal citations omitted). The global pandemic, which is still raging in Alabama and with cases on the rise due to the Delta variant, easily satisfies that metric.<sup>[4]</sup> As such, its unforeseen occurrence outweighs any immediate need for “finality” of the Commission’s Orders.

For all the foregoing reasons, the Court reverses the Commission’s denial of Appellants’ Petition for Reconsideration and Rehearing, and remands so that the Commission may appropriately analyze the pandemic’s impacts on Alabama Power’s projected capacity needs. The Court directs the Commission to take additional evidence and testimony from the parties on the need question, including updated load forecasts and related testimony from Alabama Power.

#### **B. The Solar/Storage Projects**

Appellants next argue that the Commission erred by denying the five solar/storage projects put forward by Alabama Power. In doing so, Appellants assert that the Commission acted directly contrary to the substantial weight of the evidence while also misapplying the law by substituting its judgment for that of Alabama Power. Appellants are correct on both counts.

1. Substantial record evidence supported approving the five solar/storage projects.

The record is replete with evidence of the solar/storage projects' reliability benefits and their ability to help with the Alabama Power's winter reliability needs, the very basis for the petition. Most of this evidence came from Alabama Power itself, as would be expected given that it proposed the projects and sought their approval. As Alabama Power witness Brandon Looney testified, "[the battery storage] can have a very high benefit to reliability, because we're going to withhold [energy from the batteries] until that moment when they're needed most," including during "emergency situations." R. 800:17-23. Mr. Looney added that "the battery capacity allows us to increase flexibility in our system." R. 801:7-10. Battery storage was chosen because it "will serve a specific reliability function in the Company's generating fleet" and "can provide a very high capacity equivalence." C. 2462:3-7. Mr. Looney further testified that the batteries would help Alabama Power during peak periods and would be as effective as other projects in extreme weather events. R. 801:9-16, 832:16-32, 833:1-2.

The record also contained substantial evidence of the solar/storage projects' cost-effectiveness. According to Alabama Power, the solar/storage projects "proved to be economically attractive when modeled along with existing system resources." C. 28:5-7. Not only were they "economically attractive" compared to the other existing resources, they were "the **most** cost-effective options in [the Company's] evaluation" and would "provide excellent value for customers." C. 2459:3-5, 2462:3-4 (emphasis added); *see also* R. 503:12-504:23. It was undisputed below that the proposals would lessen the economic burden of the overall proposal on ratepayers by exerting downward pressure on rates. R. 766:14-21.

The Commission's vote to deny the five projects went against this clear weight of evidence. The Commission's Certificate Order cited no record evidence supporting its stated concern about the reliability of such projects. *See* C. 3462-64. Neither does its briefing in this

appeal. PSC Br. 35. Curiously, despite seeking the projects' approval below, Alabama Power now attempts to supply record cites supposedly justifying the Commission's concerns. APC Br. 24–25. But those meager citations are insufficient to overcome the substantial record evidence put forward by *Alabama Power* supporting the projects' approval.<sup>[5]</sup> The evidence was not only substantial but specific as to Alabama Power's reasons for selecting those resources, including their reliability during system emergencies and their favorability from a cost perspective.

2. The Commission misapplied the law by substituting its judgment for that of Alabama Power.

By denying the solar/storage projects against the clear weight of the evidence, the Commission misapplied the applicable law. As the Commission concedes in its brief, it may not “substitute its judgment for that of the owners, who are responsible for the rendition of service, unless the owners have abused their discretion.” *S. Cent. Bell Tel. Co.*, 425 So. 2d at 1096. The Commission does not argue that Alabama Power abused its discretion in proposing and seeking approval of the five projects, nor does it cite any evidence to that effect. The result is that, despite agreeing with Alabama Power that it had demonstrated a winter-based reliability need totaling 2,400 MW, the Commission has left Alabama Power 400 MW short of its target. Under Alabama law, this was an impermissible instance of the Commission substituting its judgment for that of utility management as to the amount and type of resources needed to maintain reliability during extreme winter events.

3. This issue is not moot.

The Court must now address the assertion by the Commission and Alabama Power that the issue surrounding the Commission's denial of the five solar/storage projects is moot. The record shows that the five solar/storage agreements automatically expired as a result of the Commission's failure to approve them by July 31, 2020. C. 3683; *see, e.g.*, C. 4173-74. The

Commission voted to deny the five projects on June 9, 2020, and that decision was later incorporated into the Commission's August 14, 2020 Certificate Order. Because the contracts have nominally expired, the Commission and Alabama Power argue that the issue of whether the Commission was right to deny their approval is moot. They assert that neither this Court nor the Commission have the authority to revive expired contracts. PSC Br. 34; APC Br. 22.

The issue is not moot, however, for the reasons stated in the Commission's and Alabama Power's briefs: the five projects may still be considered going forward.<sup>[6]</sup> Indeed, in its Certificate Order, the Commission recommended that the projects be considered in another docket, despite knowing or having reason to know that the underlying agreements would automatically expire as a result of the Commission's failure to approve them by July 31, 2020. C. 3411, 3462. In doing so, the Commission appears to have recognized that the projects could still receive future consideration, perhaps under revised terms even more favorable to ratepayers. For the Commission now to argue that, if directed to reconsider these projects following their expiration, "it would have no authority to act in any manner," PSC Br. 34, is directly at odds with its recommendation in the Certificate Order. The Commission was right the first time: the "solar/battery projects can be considered . . . as indicated in the Certificate Order." *Id.* For that reason, the issue is not moot.

Furthermore, even if the issue is technically moot, this case falls within Alabama's public interest exception to the mootness doctrine. *Slawson v. Ala. Forestry Comm'n*, 631 So. 2d 953 (Ala. 1994). The three elements needed to invoke this exception are met here. First, there is no question that a significant public interest is at stake in the form of reliable electric service for 1.45 million Alabamians and the overall cost of the proposal, which will be recovered through rates. Second, there is a clear need for corrective guidance from this Court. Like the Forestry

Commission in *Slawson*, the Commission here continues to dispute the reliability and diversity values of the solar/storage projects, against the clear weight of the evidence. The Commission's position remains not just that the issue is moot (because the contracts nominally expired), but that the projects "did not meet the need," PSC Br. 34, identified by Alabama Power despite its witnesses' consistent and persuasive testimony that they did. The reliability benefits of the projects, and their suitability for evaluation in a reliability-based need docket,<sup>[7]</sup> remain controverted by the Commission, just like the notice issue in *Slawson*. See *Underwood*, 39 So. 2d at 131 (distinguishing *Slawson* on the basis that a dispositive issue remained controverted).

Finally, there is no doubt that instances like this will recur, given the Commission's ongoing regulatory authority over Alabama Power, and the latter's need to receive Commission approval for resource proposals (including power purchase agreements). The Court agrees that corrective guidance is necessary to ensure that the Commission does not, in this or future instances, act contrary to the substantial weight of the evidence and substitute its judgment for the Company on a matter as important as electric service reliability.

In its brief, the Commission offers no persuasive reason why reevaluation of the solar/storage projects cannot take place on remand of this case, rather than in the other docket. Appellants in turn explain why evaluation in the other docket, which is not focused on reliability, is not appropriate.<sup>[8]</sup> For the evaluation to occur there, instead of on remand in this proceeding, is to accept the Commission's judgment that the solar/storage projects are not reliability resources. Because that determination was against the substantial weight of the evidence and involved overruling Alabama Power's judgment, it must be reversed.

For all the foregoing reasons, the Commission's denial of the five solar/storage projects is reversed. On remand, as part of its reconsideration of the need question, the Commission should reevaluate these or similar proposals if there is still a demonstrated capacity need.

**C. Stranded Asset Risk**

Appellants next argue that the Commission erred by failing to include a condition imposing stranded asset risk on Alabama Power's shareholders, instead of its customers. The Alabama Attorney General, the office charged with representing ratepayers, expressly sought such a condition and gave compelling reasons for why one was warranted:

In an era of little to no demand growth, when the Company is already removing plants from service before their planned retirement dates, the Company is now asking to add thousands of megawatts of new capacity. As a regulated monopoly, the Company will continue to pass the costs of shuttered plants as well as these proposed additions along to its customers. If the Company has over-forecasted future electricity demand, Alabama ratepayers will be left to foot the bill. Presently, ratepayers will be required to pay the Company for the costs incurred plus a profit, regardless of how much these units run and whether they do so profitably. The Commission must use its expertise to ensure that all proposed costs to be incurred and profits to be acquired by the Company are convenient and necessary.

C. 3109. As a result, consistent with its statutory duty of representing the public and the public interest, the Attorney General recommended that “[a]ny costs incurred by the Company due to any addition in the Petition becoming a stranded asset shall be borne by the Company's shareholders rather than the ratepayers.” C. 3111.

The Commission is empowered by statute to “prescribe such conditions upon the issuance [of a certificate of convenience and necessity] as it may deem advisable.” Ala. Code § 37-4-28. The Commission has previously exercised that authority to impose stranded asset protection for Alabama Power's customers. Order at 11, *Ala. Power Co. Petition for a Certificate of Pub. Convenience & Necessity*, Docket No. 26115 (Ala. P.S.C. Dec. 31, 1997)

[hereinafter “1997 Order”]. As it happens, the 1997 Order pertained to a certificate proceeding wherein Alabama Power sought approval to build new gas generation at its Barry Steam Plant, the exact location where it seeks to build another gas plant now. Appellants argue that the Commission’s failure to include such a condition in this similar instance was inconsistent with past decisions and therefore arbitrary and capricious. EA/GASP Br. 26; EA/GASP Reply Br. 18 (Doc. 136).

The Commission and Alabama Power seek to distinguish that prior instance on two grounds: first, that the facts and circumstances were then wholly different (specifically, the threat of utility deregulation in Alabama); and second, that the Commission cannot condition approval on some future event that is “unknown and unknowable.” PSC Br. 26–27; APC Br. 28–29. The Court finds neither argument persuasive.

The first argument rests on the erroneous notion that stranded asset risk must be “near-term” in order for stranded asset protection to be appropriate. Stranded asset risk is not simply a near-term risk; it is the risk that these investments may prove useless to customers *at any point* before the end of their expected useful lives, and before fully paid for, leaving customers on the hook for imprudent investments. The natural gas plants in question are intended to serve Alabama Power customers for decades.

As for the assertion that the future events creating stranded asset risk must be “known and knowable” to be protected against, the Commission made no such insistence in the prior certificate proceeding involving Barry Units 6 and 7. There, the Commission approved stranded asset protection despite finding that “no one can say with any degree of certainty whether retail competition will, in fact, come to Alabama and, if it comes, what form it will take.” *See* 1997 Order at 5. In fact, utility deregulation never happened. Moreover, the record below identified

multiple known risks including carbon regulation risk, declining costs of alternative, fuel-free generation technologies, and natural gas price volatility. C. 905:13; R. 779:20–780:3. Prudent utilities recognize the significant threat of carbon regulation by considering varying potential levels of carbon price risk, as indeed Alabama Power did here in evaluating its chosen proposals. R. 760:23–761:4. The Commission’s suggestion that such risks were not known or knowable is therefore contrary to the substantial record evidence.

Here, the record shows that the Commission and Alabama Power did not view stranded asset risk as “unknown and unknowable” so much as “unlikely.”<sup>[9]</sup> All the more reason, then, for the Commission to include a stranded asset condition for ratepayers’ protection. Indeed, as the Alabama Attorney General stated in its post-hearing brief, Alabama Power’s faith in its proposal and professed certainty that stranded asset risk was minimal, “should make the addition of this requirement immaterial.” See C. 3109–10. Without such a requirement, the Commission has failed its responsibility to balance ratepayers and utility shareholder interests. As it stands, utility shareholders enjoy considerable upside (the ability to profit from more than \$1 billion in new resource investments), with no downside. If the new resources prove useless to customers over the next forty or more years, Alabama Power’s customers will remain obligated to pay for them.

For these reasons, the Commission erred by not adopting the Attorney General’s recommendation. While the Commission was not bound, in the *res judicata* sense, to follow the same approach used when approving Barry Units 6 and 7, Alabama law is clear that for agency decisions, “consistency is essential if arbitrariness is to be avoided.” *Ala. Power Co.*, 390 So. 2d at 1026. And in its Certificate Order the Commission stressed the importance of its precedent from prior certificate proceedings. C. 3417 n.11. Here, the Commission’s stated reasons for

refusing stranded asset protection simply do not square with its own precedent. Accordingly, reversal on this ground is likewise appropriate. On remand, the Commission is directed to include stranded asset protection in accordance with the Alabama Attorney General's recommendation.

**D. The Commission's Stated Reliance On Evidence It Did Not Have**

Appellants' final enumeration of error concerns the Commission's stated reliance on evidence—in the form of designated deposition excerpts—which the Commission did not in fact have in its possession. As directed by a Commission procedural ruling, Appellants and Alabama Power each filed designations, by line and page number, indicating which portions of deposition transcripts they wished to have the Commission consider as part of the evidentiary record. C. 2975–93, 3001–06, 3019. Having duly filed the designations, neither Appellants nor Alabama Power subsequently filed the actual deposition excerpts. Nevertheless, in multiple places in its Certificate Order, the Commission purported to base its decision on a record that included “properly designated deposition transcript excerpts.” See C. 3410, 3419, 3461 n.195, 3472. It was with reference to *that* record that the Commission observed, “[b]y any objective measure, the record before us is fully developed and has certainly afforded us a more than adequate basis for a reasoned decision.” C. 3461 n.195. The Commission not only professed to have considered all of the excerpts, but put them on equal footing with other record materials.

However, as Appellants discovered when the Commission certified the record on appeal, the Commission did not in fact have access to the deposition transcript excerpts. The Commission concedes that it “mistakenly” referenced the excerpts, but disagrees that its mistake constitutes reversible error. PSC Br. 38–41. The Commission also asserts (as does Alabama Power) that Appellants cannot benefit from an error to which they contributed (by failing to

confirm that the Commission had possession of the materials) and should have raised the issue below. *Id.* at 43–44; APC Br. 31 n.87. Appellants respond that they complied with the Commission’s procedural ruling and that they had a good faith basis to believe that the Commission already had access to the materials, as indeed the Certificate Order in multiple places suggested. Appellants state they cannot have waived a ground for appeal that they had no reason to know was even an issue below. EA/GASP Reply Br. 25–26.

The Commission and Alabama Power also argue that the error was harmless because, even without the designated excerpts, the Commission’s decision rests on a substantial evidentiary footing. PSC Br. 40; APC Br. 33. Alabama Power furnishes an appendix showing record evidence which it contends is equivalent in substance to the deposition excerpts cited by the parties. APC Br. at App. A. Alabama Power states that the issue for the Court is not whether the Commission might have reached a different result had it in fact reviewed the designated materials, but whether there is substantial evidence to support the result it did reach. *Id.* at 33.

The Court does not agree the error was harmless. The Court agrees with Appellants that Alabama ratepayers have a right to expect that when their state regulator says it reviewed something, it actually did so. That expectation has added force in a proceeding such as this one, where ratepayers are expected to pay for an extremely costly resource expansion. Accordingly, the Court reverses on this basis as well. On remand, the parties are directed to file the designated excerpts, and the Commission is directed to consider them prior to issuing final order on remand.

## V. CONCLUSION AND ORDER

In light of the foregoing analysis, the Commission’s Certificate Order and Reconsideration Order are hereby **REVERSED** and **REMANDED** for the following reasons:

1. The Commission's denial of Appellants' Petition for Reconsideration and Rehearing with respect to the Alabama Power's capacity needs in light of the COVID-19 pandemic was contrary to the substantial weight of the evidence. Ala. Code § 37-1-124(2). On remand, the Court directs the Commission to take additional evidence and testimony from the parties on the need question including updated load forecasts and related testimony from Alabama Power.

2. The Commission's denial of Alabama Power's five solar/storage projects was contrary to the substantial weight of the evidence and error to the prejudice of Appellants' substantial rights in its application of the law. Ala. Code § 37-1-124(1)–(2). On remand, as part of its reconsideration of the need question, the Commission should reevaluate these or similar proposals if there is still a demonstrated capacity need.

3. The Commission's refusal to protect Alabama Power customers from the risk of stranded assets through the imposition of a condition on the Certificate was inconsistent with prior decisions and against the substantial weight of the evidence. Ala. Code § 37-1-124(2). On remand, the Commission is directed to include stranded asset protection in accordance with the Alabama Attorney General's recommendation. Ala. Code § 37-4-28.

4. The Commission erred by stating that it relied on evidence that it did not in fact have in its possession when it made its decision. On remand, the Commission is directed to consider the designated deposition excerpts prior to issuing a final order on remand.

[1] Memorandum from Legal Division, Ala. Pub. Serv. Comm'n, to Comm'n President Twinkle Address Cavanaugh, Comm'r Jeremy H. Oden and Comm'r Chris "Chip" Beeker, Jr. (June 5, 2020). The memorandum begins on PDF page 17 of the agenda and can be downloaded at: <https://www.pscpublicaccess.alabama.gov/pscpublicaccess/PSC/CommissionMeetingDetailsPage.aspx?meetingId=71d1ddca-9afa-4913-a194-d14f5ec06d04>.

[2] The Commission asserts that petitions for rehearing and reconsideration are treated in the same manner as motions for new trial in circuit court. C. 3774–75; PSC Br. 29. Even assuming that is the case, Appellants' evidence

satisfied the relevant criteria. Among the criteria for granting a new trial are whether the evidence has been discovered since the trial and whether the evidence is material. C. 3775.

[3] Moreover, the Commission’s stated reliability concerns are at odds with its ruling denying the five solar/storage proposals. That decision leaves Alabama Power 400 MW short of its demonstrated capacity need and results in overwhelming reliance on a single resource—natural gas—that can have its own reliability challenges in extreme weather.

[4] The Court takes judicial notice of the current status of the pandemic and the significant increase of cases due to the Delta variant. Ala. R. Evid. 201(b); *see Independent Life Ins. Co. v. Carroll*, 130 So. 402, 405 (Ala. 1930) (“[C]ourts may properly take notice of facts that may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence.”).

[5] For example, Alabama Power cites evidence that two-hour batteries are incapable of discharging throughout a peak lasting more than two hours. But Alabama Power knew of this fact when it selected batteries of that duration to be paired with solar for part of its proposal. The two-hour duration was appropriate considering testimony from Alabama Power that its winter peak typically occurs over a two-hour period, between 6 a.m. and 8 a.m. R. 112:2-5. The Court is not persuaded by Alabama Power’s attempt to downplay its own overwhelming evidence favoring the proposals.

[6] *See* PSC Br. 4 (“proposals of this kind may be presented and evaluated in the future”), 34 (the “solar/battery projects *can be considered* under another Commission docket, as indicated in the Certificate Order.”) (emphasis added); APC Br. 21–22 (the counterparties are “free to resubmit under the original terms or to submit under revised terms”; “the Commission’s decision to refer the projects for evaluation in another docket, should one or more of the agreement counter-parties so desire, *continues unaffected*.”) (emphasis added).

[7] The Commission’s position likewise remains that “the five solar/battery projects were better suited for consideration under the RGC, Docket No. 32382,” PSC Br. 35, which Appellants assert is incorrect. *See* n.8 *infra*.

[8] Appellants note that projects put forward in Docket No. 32382 must satisfy specific economic criteria that are not required for reliability resources. Order at 5–6, 10, *Ala. Power Co. Petition for a Certificate of Convenience & Necessity*, Docket No. 32382 (Ala. P.S.C. Sept. 16, 2015). Appellants also note that the RGC docket exists only for *generating* resources. *See id.* at 4–5 (authorizing renewable energy resources identified in Ala. Code § 40-18-1(30) and “environmentally specialized generating resources” to be certificated under the docket). As Alabama Power witnesses testified, storage is not a generation resource. R. 800:2-4 (“[A] battery doesn’t generate electricity. It stores it.”).

[9] Alabama Power witnesses stated numerous times throughout the proceedings that they find the stranded asset risk of the proposal to be minimal or non-existent. C. 2434:19–2435:2; R. 431:1-23, 432:1-5, 487:11-14, 616:2-20 (“I don’t see any risk for Barry 8 on the stranded asset perspective.”).

**DONE this[To be filled by the Judge].**

**/s/[To be filled by the Judge]**  
**CIRCUIT JUDGE**