UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Alabama Power Company	)	ER21-1111-002
Dominion Energy South Carolina, Inc.	)	ER21-1112-002
Louisville Gas and Electric Company	)	ER21-1114-002
Duke Energy Carolinas, LLC	)	ER21-1116-002
Duke Energy Progress, LLC	)	ER21-1117-002
Georgia Power Company	)	ER21-1119-002
Kentucky Utilities Company	)	ER21-1120-002
Mississippi Power Company	)	ER21-1121-002
	)	(not consolidated)

REQUEST FOR REHEARING OF PUBLIC INTEREST ORGANIZATIONS

Pursuant to Sections 215 and 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure[2] of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 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") hereby respectfully submit this Request for Rehearing of the Commission's failure to act on the SEEM filing within the period

[1] 16 U.S.C. §§ 824d, 825l.
[2] 18 C.F.R. § 385.713 (2006).

established.[3] Under FPA Section 205(g)(1)(A), 16 U.S.C. § 824d, "the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change" for purposes of rehearing and appeal.

I. INTRODUCTION

This proceeding involves a request by several utilities in the Southeast ("the Utilities")[4] for approval to create a multi-lateral trading and transmission pooling agreement, the Southeast Energy Exchange Market ("SEEM"). The Utilities filed their revised tariffs and the SEEM Market Agreement and Market Rules on February 12, 2021.[5] The Public Interest Organizations filed a Motion to Intervene and Protest on March 15, 2021,[6] and a Motion for Leave to Respond and Response on April 12, 2021.[7] The Commission issued deficiency letters on May 3, 2021[8] and August 6, 2021,[9] and the Utilities responded to the deficiency letters on June 7, 2021[10] and August 11, 2021.[11] The Public Interest Organizations filed additional Protests and Responses on

[3] Notice of Filing Taking Effect by Operation Law (Oct. 13, 2021) ("Notice of Filing Taking Effect by Operation of Law" or "the Order"), Accession No. 20211013-3010.
[4] The SEEM Member utilities included in the filing are: Ala. Power Co., Ga. Power Co., and Miss. Power Co.; Associated Elec. Coop., Inc.; Dalton Utilities; Dominion Energy S.C., Inc.; Duke Energy Carolinas, LLC and Duke Energy Progress, LLC; Louisville Gas & Elec. Co. and Ky. Utilities Co.; N.C. Mun. Power Agency Number 1; PowerSouth Energy Coop.; N.C. Elec. Membership Corp.; and Tennessee Valley Authority (collectively, "SEEM Members").
[5] Transmittal Letter (Feb. 12, 2021) ("SEEM Proposal" or "Proposal"), Accession No. 20210212-5033.
[6] Mot. to Intervene and Limited Protest and Comment of PIOs (Mar. 15, 2021), Accession No. 20210315-5405.
[7] Mot. for Leave to Respond and Resp. of PIOs (Apr. 12, 2021), Accession No. 20210412-5876.
[8] Letter Informing Ala. Power Co. et al. that the 02/12/2021 Filing is Deficient and Requesting Additional Information Within 45 days Under ER21-1118 et al. (May 4, 2021) ("First Deficiency Letter"), Accession No. 20210504-3015.
[9] Letter Informing Ala. Power Co. that the 06/07/2021 Filing is Deficient and Requesting Additional Information Within 10 days Under ER21-1111 et al. (Aug. 6, 2021) ("Second Deficiency Letter"), Accession No. 20210806-3000.
[10] Resp. to Deficiency Letter Regarding SEEM Agreement to be Effective 8/6/2021 under ER21-1111 Filing (June 7, 2021) ("Resp. to First Deficiency Letter"), Accession No. 20210607-5164.
[11] Resp. to Second Deficiency Letter Regarding SEEM Agreement to be effective 10/12/2021 under ER21-1111 (Aug. 11, 2021) (requesting a shortened and expedited comment period) ("Resp. to Second Deficiency Letter"), Accession No. 20210811-5101.

July 29, 2021[12] and August 16, 2021.[13] On October 13, 2021, the Commission failed to act within the 60-day period set by Section 205 of the FPA and the SEEM Proposal went into effect by operation of law.[14] On November 8, 2021, the Commission issued an order accepting the revisions to investor-owned utilities' Open Access Tariffs.[15]

As discussed herein, the Public Interest Organizations seek rehearing on the Commission's failure to act on the Order. The Utilities' SEEM Proposal creates a multi-lateral trading and transmission pooling agreement that unduly discriminates against merchant generators and renewable energy developers (together, "independent power producers") by preventing them from accessing zero-cost transmission service on equal footing as the Utilities in violation of the Commission's open access rules and past precedent. The Commission should grant rehearing because the Order allows the Utilities to (1) assign the generally-applicable terms of the SEEM Agreement[16] *Mobile-Sierra* protection; and (2) creates new opportunities for the Utilities to exercise market power in an environment that lacks the necessary transparency and oversight to prevent and detect potential abuses. For these reasons, the SEEM Proposal is unjust, unreasonable, and unduly discriminatory and the Commission should grant rehearing and reject the SEEM Agreement.

The PIOs intend to timely request rehearing on the Order Accepting OATT Revisions and will address, at that time, that order's failure to ensure open access to transmission service and just, reasonable, and non-discriminatory rates.

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[12] Mot. For Leave to Respond and Resp. of PIOs (July 29, 2021), Accession No. 20210729-5190.
[13] Protest of PIOs (Aug. 16, 2021), Accession No. 20210816-5211.
[14] Notice of Filing Taking Effect by Operation of Law.
[15] Order Accepting Tariff Revisions, Docket Nos. ER21-1115, et al. (Nov. 8, 2021) ("Order Accepting OATT Revisions"), Accession No. 20211108-3065.
[16] SEEM Proposal, Attach A. ("SEEM Agreement").

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERROR

In accordance with Rule 713(c),[17] Public Interest Organizations provide the following specifications of error and statement of issues, including citations to representative Commission and court precedent.

1. The Commission's Order allows the filing parties to apply the *Mobile-Sierra* public interest presumption to generally applicable rates, terms, or conditions of the SEEM Agreement in violation of Commission policy and precedent.[18]
2. The Commission's failure to require a market power analysis of the new SEEM footprint or require an independent market monitor may lead to unjust and unreasonable rates. Similarly, the Order fails to require an independent market monitor and does not mandate sufficient transparency to allow the Commission to effectively monitor the market. Both these shortcomings violate Commission precedent.[19]
3. The Commission acted arbitrarily and capriciously by failing to address the above arguments raised in PIO's protests and answers and failing to provide sufficient justification or explanation for its decision.[20]

III. REQUESTS FOR REHEARING

A. The Commission failed to apply its *Mobile-Sierra* precedent to the generally applicable rates, terms, and conditions of the SEEM Agreement.

The Commission's decision to allow *Mobile-Sierra* protection for the entirety of the SEEM Agreement violates well-established Commission and federal court precedent. Even a more limited application of the *Mobile-Sierra* protection to the subset of enumerated provisions, as proposed by the Utilities in their deficiency response, would have been unlawful because

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[17] 18 C.F.R. §§ 385.713(c)(1), (2); *see* 16 U.S.C. § 824d(g).
[18] *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214, at PP 182–87 (2013); *NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 174 (2010); *Ariz. Pub. Serv. Co.*, 148 FERC ¶ 61,012, at P 4 (2014); *ISO New England Inc.*, 150 FERC ¶ 61,209, at P 185 (2015); *Sw. Power Pool, Inc.*, 145 FERC ¶ 61,137, at P 9 (2013).
[19] *Pub. Citizen v. FERC*, 7 F.4th 1177, *3 (D.C. Cir. 2021); 18 C.F.R. § 35.37 (2020).
[20] *Del. Div. of Pub. Advoc. v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021) (Commission acts arbitrarily if it "fail[s] to consider an important aspect of the problem…"); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992). ([I]t remains the duty of the courts "to ensure that an agency engage the arguments raised before it—that it conduct a process of reasoned decisionmaking.").

these provisions would bind potential signatories—the Utilities' competitors in the market—who would not have the opportunity to "freely negotiate."[21]

The *Mobile-Sierra* doctrine provides that the rates set in a "freely negotiated" wholesale energy contract meet the "just and reasonable" requirement of the FPA—a presumption that may be overcome only if FERC concludes that the contract seriously harms the public interest.[22] *Mobile-Sierra* only applies to a contract if it "has certain characteristics that justify the presumption."[23] More specifically, the Commission has consistently held that *Mobile-Sierra* does not apply to "generally applicable" contractual provisions—those that bind current parties to the contract but would also apply to future signatories who have limited, if any, room for negotiation.[24]

Section 16.9 of the SEEM Agreement approved by the Order applies the *Mobile-Sierra* standard of review to any future changes to the SEEM Agreement.[25] Following the Commission's May 4, 2021 Deficiency Letter requesting that the Utilities justify the application of the *Mobile-Sierra* standard, the Utilities, in their June 7, 2021 response, proposed to modify their proposal so that the just and reasonable standard would be the default and the *Mobile-Sierra* public interest standard would apply only to a set of enumerated provisions.[26]

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[21] *See Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 530, 128 S.Ct. 2733, 2737 (2008); *NRG Power Marketing, LLC v. Maine Public Utilities Comm'n*, 558 U.S. 165, 167, 130 S.Ct. 693, 696 (2010).
[22] *Morgan Stanley*, 554 U.S. at 530, 128 S.Ct. at 2737; *NRG*, 558 U.S. at 167, 130 S.Ct. at 696.
[23] *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 182 (2013).
[24] *See* Statement of Chairman Glick, Accession No. 20211020-4002 at P 10 (Oct. 20, 2021) (citing *Arizona Pub. Serv. Co.*, 148 FERC ¶ 61,012 at P 4 (2014); *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at P 187 (2013); *ISO New England Inc.*, 150 FERC ¶ 61,209 at P 185 (2015); *SW. Power Pool, Inc.*, 145 FERC ¶ 61,137 at P 9 (2013)).
[25] SEEM Agreement at 35, Art. 16.9 (citing *United Gas Pipe Line Co. v. Mobile Sierra Gas Ser. Corp.*, 350 U.S. 332 (1956) and *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956)).
[26] Resp. to First Deficiency Letter at 3–4; Resp. to First Deficiency Letter, Attach. A, Proposed Revisions to SEEM Agreement, at 35–36 ("Proposed Revisions to SEEM Agreement").

The SEEM Agreement's provisions, which were negotiated and drafted exclusively by transmission-owning Members, apply to any prospective Participant. Participants would have to accept these conditions as-is, with limited—if any—room for negotiation. In *ISO New England*, the Commission concluded that this kind of arrangement placed future signatories "in a position that differs fundamentally from that of parties who are able to negotiate freely like buyers and sellers entering into a typical power sales contract that would be entitled to a *Mobile-Sierra* presumption."[27] The *Mobile-Sierra* doctrine is framed to protect third-party interests.[28] Yet the Utilities' proposed application of the doctrine would fail to protect these interests by undermining the ability of future Participants to seek just and reasonable rates.

Moreover, *Mobile-Sierra* protection is not appropriate where, as here, the negotiating parties have "[s]ignificant commonality of interests" that "serves to undermine . . . assurance of justness and reasonableness."[29] The Utilities are the region's largest transmission-owning utilities who all share an interest in limiting competition from independent power producers in order to maximize their own energy sales.[30] It is Commission policy that *Mobile-Sierra* does not

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[27] *ISO New England Inc.*, 150 FERC ¶ 61,209 at P 185 (2015).

[28] *NRG*, 558 U.S. at 175, 130 S.Ct at 700 ("the *Mobile-Sierra* doctrine does not overlook third-party interest; it is framed with a view to their protection"); *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 961 (1st Cir. 1993) (Stating that the case for application of the *Mobile-Sierra* doctrine is strongest "where the protection is intended to safeguard the interests of third parties.").

[29] *ISO New England Inc.*, 150 FERC ¶ 61,209 at P 186 (2015) ("[T]he *Mobile-Sierra* presumption does require that the contract provisions arise in circumstances that provide the assurance of justness and reasonableness. Significant commonality of interests serves to undermine such assurance of justness and reasonableness") (internal citations omitted).

[30] As explained by the United States Court of Appeals for the District of Columbia:

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

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

apply to "terms arrived at by horizontal competitors with a common interest to exclude any future competition."[31]

Following the Commission's May 4, 2021 Deficiency Letter requesting that the Utilities justify the application of the *Mobile-Sierra* standard, the Utilities, in their June 7, 2021 response, proposed to modify their Proposal so that the just and reasonable standard would be the default and the *Mobile-Sierra* public interest standard would apply only to a set of enumerated provisions.[32] The Utilities proposed to make these modifications in subsequent compliance filing, if directed to do so by the Commission.[33] Thus, the refiled SEEM Agreement did not contain the narrowing language and instead applied the *Mobile-Sierra* standard to all of the SEEM Agreement's terms.[34] Though the Utilities appear to have abandoned their proposed hybrid approach to application of *Mobile-Sierra* protection, even that proposed modification of the SEEM Agreement would have been deficient as it failed to safeguard the interests of prospective future Participants.

The Utilities based their hybrid approach on a distinction between "contract rates (i.e., those terms that. . . affect only the Southeast EEM Members)" and "tariff rate[s] (i.e., those that will be generally applicable to all Participants)."[35] This approach is illogical. For example,

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[31] *Oklahoma Gas and Electric Co. v. FERC*, 827 F.3d 75, 79–80, 423 U.S. App. DC 433, 437–38 (D.C. Cir. 2016); *see also ISO New England Inc.*, 150 FERC ¶ 61,209 at P 186 (2015) ("[T]he *Mobile-Sierra* presumption does require that the contract provisions arise in circumstances that provide the assurance of justness and reasonableness. Significant commonality of interests serves to undermine such assurance of justness and reasonableness") (internal citations omitted).

[32] Resp. to First Deficiency Letter at 3–4; Proposed Revisions to SEEM Agreement 35–36 (June 7, 2021).

[33] Resp. to First Deficiency Letter at 7 ("If the Commission finds these proposed changes acceptable and otherwise accepts the Southeast EEM Proposal as submitted, the Southeast EEM Members commit to subsequently submit a compliance filing to effectuate the proposed revisions to the Southeast EEM Agreement within 30 days of acceptance.")

[34] Resp. to Second Deficiency Letter, Clean Tariff at Art. 16.9 (Aug. 11, 2021).

[35] Mot. for Leave to Answer and Answer of the SEEM Members, at 19 (July 14, 2021), Accession No. 20210714-5072.

Section 3.2 "Member Criteria" and Article 4 "Governance" which the Utilities characterize as warranting *Mobile-Sierra* protection, certainly effect Participants because the restrictive "Membership Criteria" and "Membership Board" created by Article 4, prevent Participants from having any say in the SEEM's governance structure.[36] Applying the *Mobile-Sierra* presumption to these two provisions all but guarantees that future Participants—who had no role in the initial negotiations—are forever locked out of SEEM's governance structure. This is exactly why the Commission disfavors application of the *Mobile-Sierra* presumption to even isolated provisions of membership agreements: "as a form contract, [a] membership agreement must be viewed in its entirety as containing rates, terms, or condition that are generally applicable to all entities seeking [] membership[.]"[37] Moreover, even if a hybrid approach were appropriate in this context, the Utilities did not even attempt to justify the application of *Mobile-Sierra* to each specific enumerated provision, which means they failed to "carr[y] their burden in showing that their proposal . . . strikes the necessary balance of interests."[38]

In spite of this well-established precedent, Commissioners Christie and Danly summarily dismissed Protestors' concerns regarding the application of *Mobile-Sierra* protection to the terms of the SEEM Agreement. Commissioner Christie stated, that the *Mobile-Sierra* "issue provides no basis to vote against the Southeast EEM;"[39] however, effectively sidestepping Protestors' contentions, Commissioner Christie merely laments that existing precedent is "muddled at best,"

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[36] Resp. to First Deficiency Letter at 40.
[37] *Am. Wind Energy Ass'n v. Sw. Power Pool, Inc*. 167 FERC ¶ 61,033 at P 72 (2019); *see also PJM*, 142 FERC ¶ 61,214 at P 184 ("[W]here the terms of an agreement would, if approved, be incorporated into the service agreements of all present and future customers, those terms are properly classified as tariff rates and the *Mobile-Sierra* presumption would not apply.").
[38] *ISO New England*, 106 FERC ¶ 61,280 at P 131 (2004) ("Finally, we find that the Filing Parties have not justified, to date, the remainder of their proposed *Mobile-Sierra* requests. In fact, the Filing Parties did not even attempt to do so, other than to provide a broad overview supporting these requests.").
[39] Statement of Commissioner Christie, Accession No. 20211020-4004 at P 20 (Oct. 20, 2021).

and provides no further substantive response.[40] Commissioner Danly rightly recognizes that a cavalcade of existing Commission precedent supports Protestors' position. Specifically, Commissioner Danly concedes that "[t]he Commission's recent precedent restrict[s] *Mobile-Sierra* protections to only those contracts that bear particular hallmarks . . ." and that he "freely acknowledge[s] that Chairman Glick has the weight of Commission precedent on his side."[41] Nevertheless, Commissioner Danly then argues that both Commission and judicial precedent are "in error."[42]

Commissioner Danly's objection is predicated upon a fundamental misapprehension of the *Sierra-Mobile* doctrine. Commissioner Danly asserts that the "very purpose of the doctrine" is "to ensure that—absent extraordinary circumstances that would justify a public interest finding—contracts can be relied upon."[43] That simply is not, and has never been, the purpose of the *Mobile-Sierra* doctrine. The Supreme Court, and numerous others, have explained that the justification for applying the heightened public interest standard is premised on the fact that the contract was negotiated at arm's length between "sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them.'"[44] Those circumstances are why a contract with these exact characteristics—and only these exact characteristics—can be uniquely relied upon. Ironically, upending years of Commission and judicial precedence, as Commissioner Danly

[40] *Id*.
[41] Statement of Commissioner Danly at P 24 (Oct. 20, 2021).
[42] *Id*.
[43] *Id*.
[44] *Morgan Stanley*, 554 U.S. at 545 (quoting *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 479, 122 S. Ct. 1646, 1656 (2002)); *see also Devon Power*, 134 FERC ¶ 61,208 at P 11 (discussing *Mobile-Sierra* presumption's underlying premise).

seeks, involving the application of the *Mobile-Sierra* doctrine introduces the very element that Commissioner Danly seeks to eliminate, contractual uncertainty.

Commissioner Danly further contends that "[e]very contract entered into freely is, to one degree or another, negotiated. This is true even if the negotiation amounts to no more than an offer and a rejection, implicit or explicit."[45] However, the case law is clear that what the Applicants have provided here merely reflects a strict binary, take-it-or-leave-it choice, with no room for arm's-length negotiation.[46]

Moreover, while Commissioner Danly attempts to cabin the D.C. Circuit's decision in *Okla. Gas & Elec. Co. v. FERC* that endorsed FERC's position,[47] Commissioner Danly does not—and cannot—rebut the fundamental principle animating that decision, that, "[j]ust as unfair dealing, fraud, or duress will remove a provision from the ambit of Mobile–Sierra, *so also will terms arrived at by horizontal competitors with a common interest to exclude any future competition*."[48] Not only has the D.C. Circuit agreed with FERC's interpretation on this issue, the 7th Circuit in *MISO Transmission Owners v. FERC*, similarly held that "because the parties to the agreement were 'seeking to protect themselves from competition from third parties,' the Mobile-Sierra presumption does not apply."[49] FERC's application of *Mobile-Sierra* is ultimately rooted in an "assumption that contract negotiations are between adversarial parties pursuing

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[45] Statement of Commissioner Danly at P 29.
[46] *See Metro E. Ctr. for Conditioning and Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 926 (7th Cir. 2002) (explaining that a "tariff is a take-it-or-leave-it proposition"); *see also Sw. Power Pool*, 144 FERC ¶ 61,059 at PP 127, 129–31, 135, *on reh'g*, 149 FERC ¶ 61,048 at PP 94, 98, 101, 104–06; *Midwest Indep. Sys. Operator*, 142 FERC ¶ 61,215 at PP 177, 175, 180–81, 185, *on reh'g*, 147 FERC ¶ 61,127 at PP 108, 111, 113, 118.
[47] *Id*. at fn. 67.
[48] *Oklahoma Gas & Elec. Co.*, 827 F.3d at 80 (emphasis added); *see also Am. Transmission Sys. Inc., v. FERC*, 2016 WL 3615443 (D.C. Cir. 2016, unpublished) (dismissed for lack of jurisdiction); *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017).
[49] *MISO Transmission Owners, et al. v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016).

independent interests."[50] Here, the record shows that (1) the Utilities collectively share an interest in limiting competition from independent power producers as some of the region's largest transmission-owning investor-owned utilities, and (2) the parties that join SEEM in the future will not have the same negotiating opportunities as the Utilities.

For the reasons described above, the Commission's application of the *Mobile-Sierra* doctrine to the entire SEEM Agreement was unjust and unreasonable and inconsistent with past precedent.

B. The Commission erred in allowing the SEEM Proposal to become effective without a market-specific market power analysis or independent market monitor.

The Commission erred in allowing the SEEM Proposal to go into effect given the Utilities' failure to prove that SEEM would not allow for the exercise of market power or manipulation of the market. Moreover, the Commission disregarded evidence from Intervenors, including PIOs, that the structure of the SEEM Proposal makes the exercise of market power both likely and difficult to detect. The Commission's failure to require a market power analysis and independent market monitor violates its duty to ensure that participants in SEEM "either lack, or have adequately mitigated, any horizontal or vertical market power."[51] This lack of meaningful oversight may result in the exercise of market power, which in turn will create unjust and unreasonable rates. On rehearing the Commission should reject the proposal.

1. Because the Utilities did not conduct a market power analysis the SEEM Proposal may result in unjust and unreasonable rates.

The Commission unreasonably relied on jurisdictional SEEM Members' existing market-based rate authorities despite evidence that SEEM provides the Utilities the incentive and

[50] Ari Peskoe, *Is the Utility Transmission Syndicate Forever?*, 42 Energy L.J. 1, 49 (2021), https://www.eba-net.org/assets/1/6/5_-_%5bPeskoe%5d%5b1-66%5d.pdf.
[51] *Public Citizen*, No. 20-1156, 2021 WL 3438374, at *3 (D.C. Cir. Aug. 6, 2021) (citing 18 C.F.R. § 35.37 (2020)).

opportunity to exercise market power. The Utilities did not include a market power study or market mitigating procedures or measures in the SEEM Proposal. Instead the Utilities assumed "[p]articipation in the Southeast EEM will not alter the applicability of each entity's MBR authority requirements."[52] Commissioner Christie agreed with the Utilities that because there is "no new product introduced," that no such study is required.[53] But this position is not consistent with Commission precedent regarding its requirements for market power analysis.

Market-based rate sellers are required to report changes in status to the Commission that "would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority."[54] Participation in a "new relevant geographic market" triggers this requirement and necessitates a new market power analysis.[55]

As Commissioner Clements explained,

> To the extent that the Commission has granted jurisdictional Southeast EEM Participants the authority to transact in the Southeast, it has done so based on the results of market power analyses of each Participant's ability to exercise market power in the balancing authority areas in which they own generation and transmission assets. Those analyses assume that each balancing authority is essentially its own unique market, and require a number of inputs that are specific to the market being studied. Given its expanded footprint, voluntary nature, and introduction of NFEETS, all of these inputs would necessarily be different for the Southeast EEM.[56]

The Utilities' failure to provide, and Commission's failure to require, a market-specific market power analysis makes it impossible to reasonably conclude that SEEM Members and future Participants would not be able to exercise market power. Without this guarantee, SEEM cannot be determined to produce just and reasonable rates and should have been rejected.

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[52] SEEM Proposal at 7.
[53] Statement of Commissioner Christie at P 14.
[54] *Pacificorp*, 147 FERC P 61,227, 62,338–39 (2014).
[55] *Id.*
[56] Statement of Commissioner Clements, Accession No. 20211020-4003 at P 44 (Oct. 20, 2021).

2. The SEEM Proposal lacks transparency and fails to include an independent market monitor, and therefore may result in unjust and unreasonable rates.

To make matters worse, SEEM's lack of transparency and absence of an independent market monitor means that market power abuse could take place and the Commission would never know. Instead of an independent market monitor, the SEEM Proposal assigns a Market Auditor to review the market's operation.[57] However, the Market Auditor does not fulfill the critical oversight functions associated with an independent market monitor such as watching for market abuse and design flaws and reporting any such problems to the Commission.[58] The Market Auditor does not monitor Participant behavior.[59] Moreover, the Market Auditor is not in any way independent—it reports to the Membership Board and no one else.[60]

In response to the Commission's deficiency letters the Utilities made commitments to provide additional transparency, but those commitments were not part of the SEEM Agreement that went into effect by operation of law.[61] As things stand, the Utilities are not required, and have not proposed any modification to their tariffs that would provide the Commission or the public with weekly market data. And even if the Utilities provided the Commission with market data, it would be insufficient to allow the Commission to meaningfully monitor the market for market power abuse. As the Commission has previously explained, "transaction-specific data is the 'minimum needed for market monitoring purposes.'"[62] Without an independent market monitor or enough transparency to empower the Commission to monitor for market power abuse,

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[57] SEEM Proposal at 17.
[58] *See, e.g.*, *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810, 904 (2000) (describing the requirements of a monitoring plan).
[59] SEEM Proposal at 17.
[60] SEEM Agreement at App. B., Section VI.D.
[61] Statement of Chairman Glick at P 13.
[62] *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1014 (9th Cir. 2004) (quoting *Revised Public Utility Filing Requirements*, 99 FERC P 61,107 (2002)).

SEEM may be unjust and unreasonable.[63] The Commission should correct these errors by rejecting the proposal on rehearing.

C. The Commission should grant rehearing because it failed to adequately explain its conclusion that the SEEM Proposal is just and reasonable.

The Commission's Order is arbitrary and capricious because it fails to address the PIOs' and other Intervenors' protests and does not include any explanation of its conclusion.[64]

In the past, courts have found that a "deadlocked vote is unreviewable."[65] But in 2018, Congress revised Section 824d of the Federal Power Act to provide that if the Commission allows the 60-day period to expire without issuing an order, "the failure to issue an order . . . shall be considered to be an order issued by the Commission accepting the change[.]"[66] Congress specified that such an order could be subject to a rehearing request and was appealable to the United States Court of Appeals for the District of Columbia.[67]

A Commission order containing no explanation cannot be just and reasonable.[68] While the Commissioner's Fair Rates Act Statements may in theory be entitled to deference,[69] the statements collectively "lack reasoned explanation" as noted above regarding numerous issued

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[63] *See* Statement of Chairman Glick at PP 13–14 (explaining that without increased transparency promised in the Utilities' response to deficiency letters SEEM may be unjust and unreasonable.).
[64] *See Delaware Div. of Pub. Advocate*, 3 F.4th at 465("The Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record . . . [and] must articulate a satisfactory explanation for its action[.]") (internal citations and quotations omitted).
[65] *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (quoting *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007)).
[66] 16 U.S.C. § 824d(g)(1)(A).
[67] 16 U.S.C. §§ 824d(g)(2), 825I(b).
[68] *See Public Citizen, Inc. v. FERC*, 7 F.4th 1177, 1196 (D.C. Cir. 2021) ("[T]he Commission fell far short of the type of reasoned explanation that the law requires."); *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1518, (D.C. Cir. 1984) (FERC must "articulate a satisfactory explanation for its action.").
[69] *See FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (holding that a joint statement from three out of six FEC Commissioners dismissing a complaint was entitled to deference); *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 875 (D.C. Cir. 1999) (holding that a joint statement from two out of four deadlocked FCC Commissioners declining to adopt a rule was entitled to deference).

raised by PIOs. As explained above, the Commissioners who would have voted to approve the SEEM Proposal have put forward positions that conflict with Commission and court precedent, or are otherwise nonresponsive to PIOs comments.[70]

Thus, the Commission's Order, which fails to respond to the aforementioned concerns, cannot be just and reasonable.[71] Moreover, lacking sufficient explanation or application of agency expertise, the Order would not be entitled to deference upon review.[72]

IV. RELIEF REQUESTED

For the aforementioned reasons, the PIOs respectfully request that the Commission grant this request for rehearing and reject the SEEM Proposal for failing to meet Section 205 of the Federal Power Act's requirement that all rates be just and reasonable.[73] In the alternative, the PIOs request that the Commission set the issues raised here and those to be raised in subsequent requests for rehearing on the Order Accepting OATT Revisions for a paper hearing with a technical conference before briefing. The PIOs also reiterate their request for a broader technical conference on wholesale market development in the Southeast.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Public Interest Organizations respectfully request that the Commission grant rehearing of its Order and reject the SEEM Proposal.

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[70] *See supra* at pp. 9-11, 12; *see also* Statement of Commissioner Clements at P 13 (noting that with regard to a number of arguments raised in this docket, that the other Commissioners who would have voted for the proposal did not "engage with these arguments on the merits")

[71] *Emera Maine v. FERC*, 854 F.3d 9, 23 (D.C. Cir. 2017) ("[I]n all cases, the Commission must explain its reasoning when it purports to approve rates as just and reasonable.") (quoting *TransCanada Power Mktg. Ltd. v. FERC*, 811 F,3d 1, 12 (D.C. Cir. 2015)).

[72] *See Delaware Div. of Pub. Advocate*, 3 F.4th at 465.

[73] 16 U.S.C. § 824d(a).

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 the proceedings listed above, by email.

Dated at Chapel Hill, N.C. this 12th day of November, 2021.

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