

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

**REQUEST FOR REHEARING BY THE REHEARING PARTIES**

Pursuant to Sections 205 and 313 of the Federal Power Act (“FPA”)<sup>1</sup> and Rule 713 of the Rules of Practice and Procedure<sup>2</sup> 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

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<sup>1</sup> 16 U.S.C. §§ 824d, 825l.

<sup>2</sup> 18 C.F.R. § 385.713 (2006).

Carolina Sustainable Energy Association, Sustainable FERC Project, and Natural Resources Defense Council (“Public Interest Organizations” or “PIOs”), together with Advanced Energy Economy (“AEE”), the Advanced Energy Buyers Group (“AEBG”), Clean Energy Buyers Association (“CEBA”), and Solar Energy Industries Association (“SEIA”) (SEIA together with CEBA, AEBG and AEE, the “Clean Energy Coalition” and the Clean Energy Coalition together with the Public Interest Organizations, the “Rehearing Parties”) hereby respectfully submit this Request for Rehearing of the Commission’s December 10, 2021 Order Rejecting Rehearing Requests as Untimely (“the December 10th Order” or “the Order”).<sup>3</sup>

## I. INTRODUCTION

This proceeding involves a request by several utilities in the Southeast (“the Utilities”)<sup>4</sup> 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 SEEM Market Agreement and Market Rules (“SEEM Agreement”) on February 12, 2021, as amended on June 7, 2021, and August 11, 2021.<sup>5</sup> The Public Interest Organizations filed a Motion to Intervene and Protest on March 15, 2021,<sup>6</sup> and a Motion for Leave to Respond and Response on April 12, 2021.<sup>7</sup> The Clean Energy Coalition filed comment on March 15, 2021<sup>8</sup> and a Motion for Leave

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<sup>3</sup> Order Rejecting Rehearing Requests as Untimely, 177 FERC ¶ 61,178 (Dec. 10, 2021) (“December 10th Order”).

<sup>4</sup> The SEEM Member utilities included in the filing are Alabama Power Co., Georgia Power Co., and Mississippi Power Co.; Associated Electric Coop., Inc.; Dalton Utilities; Dominion Energy South Carolina, Inc.; Duke Energy Carolinas, LLC and Duke Energy Progress, LLC; Louisville Gas & Electric Co. and Kentucky Utilities Co.; North Carolina Municipal Power Agency Number 1; PowerSouth Energy Coop.; North Carolina Electric Membership Corp.; and Tennessee Valley Authority (collectively, “SEEM Members”).

<sup>5</sup> Transmittal Letter (Feb. 12, 2021) (“SEEM Proposal” or “Proposal”), Accession No. 20210212-5033.

<sup>6</sup> Mot. to Intervene and Limited Protest and Comment of PIOs (Mar. 15, 2021), Accession No. 20210315-5405. An errata was filed on March 24, 2021. Errata to Mot. to Intervene and Limited Protest and Comment of PIOs (Mar. 24, 2021) (“PIOs March 2021 Protest”), Accession No. 20210324-5235.

<sup>7</sup> Mot. for Leave to Respond and Resp. of PIOs (Apr. 12, 2021) (“April PIOs Response”), Accession No. 20210412-5876.

<sup>8</sup> Comments of Advanced Energy Economy, Advanced Energy Buyers Group, Renewable Energy Buyers Alliance, and the Solar Energy Industry Association, ER21-1111 et al., (Mar. 15, 2021), Accession No. 20210315-5301.

to Answer and Answer on April 14, 2021.<sup>9</sup> The Commission issued deficiency letters on May 4, 2021<sup>10</sup> and August 6, 2021,<sup>11</sup> and the Utilities responded to the deficiency letters on June 7, 2021<sup>12</sup> and August 11, 2021.<sup>13</sup> The Public Interest Organizations filed additional Responses and Protests on July 29, 2021<sup>14</sup> and August 16, 2021.<sup>15</sup> The Clean Energy Coalition filed a Response to the SEEM Member's Supplemental Submission on June 28, 2021.<sup>16</sup> PIOs filed a Protest on August 16, 2021.<sup>17</sup> AEE, AEBG and SEIA filed an additional Response on June 28, 2021.<sup>18</sup> On August 23, 2021, AEE, AEBG and REBA filed additional Comments<sup>19</sup> and SEIA filed an additional Protest.<sup>20</sup> On October 13, 2021, the Commission issued a Notice stating that it had failed to act within the 60-day period set by Section 205 of the FPA due to a 2-2 split on the lawfulness of the change and that the SEEM Proposal had gone into effect by operation of law.<sup>21</sup> As required by FPA Section 205(g)(1)(B), on October 20, 2021, the Commissioners issued statements explaining the rationale behind their initial positions.<sup>22</sup> On November 12, 2021, both

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<sup>9</sup> Mot. for Leave to Answer, and Answer, of Advanced Energy Economy, Advanced Energy Buyers Group, Renewable Energy Buyers Alliance, and the Solar Energy Industry Association, ER21-1111 et al., (Apr. 14, 2021), Accession No. 20210414-5208.

<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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.

<sup>13</sup> Resp. to Second Deficiency Letter Regarding SEEM Agreement to be effective 10/12/2021 under ER21-1111 (Aug. 11, 2021) ("Resp. to Second Deficiency Letter"), Accession No. 20210811-5101.

<sup>14</sup> Mot. to Respond and Resp. of PIOs (July 29, 2021) ("PIOs July 2021 Response"), Accession No. 20210729-5190.

<sup>15</sup> Protest of PIOs (Aug. 16, 2021) ("PIOs August 2021 Protest"), Accession No. 20210816-5211.

<sup>16</sup> Joint Resp. of the Clean Energy Coalition to the Supplemental Submission by the SEEM Members (June 28, 2021), Accession No. 20210628-5175.

<sup>17</sup> Protest of Public Interest Organizations (Aug. 16, 2021), Accession No. 20210816-5211.

<sup>18</sup> Joint Resp. of the Clean Energy Coalition to the Supplemental Submission by the SEEM Members (June 28, 2021), Accession No. 20210628-5175.

<sup>19</sup> Joint Comments AEE, AEBG and REBA (Aug. 23, 2021), Accession No. 20210823-5198.

<sup>20</sup> Protest by the Solar Energy Industries Association (Aug. 23, 2021), Accession No. 20210823-5203.

<sup>21</sup> Notice of Filing Taking Effect by Operation of Law (Oct. 13, 2021), Accession No. 20211013-3010.

<sup>22</sup> See Statement of Chairman Glick re Alabama Power Company, et al., under ER21-1111-002, et al. (Oct. 20, 2021), Accession No. 20211020-4002; Statement of Commissioner Clements re Alabama Power Company, et al.,

the Public Interest Organizations<sup>23</sup> and Clean Energy Coalition<sup>24</sup> filed requests for rehearing on the Commission's failure to act on the SEEM Proposal (the "Requests for Rehearing"). On December 8, 2021, PIOs filed a Request for Rehearing on the Commission's Order Accepting Tariff Revisions. On December 10, 2021, the Commission issued an Order Rejecting Rehearing Requests as Untimely, improperly rejecting both Requests for Rehearing.

As discussed herein, the Rehearing Parties seek rehearing on the December 10th Order. The December 10th Order violated 18 C.F.R. § 385.2007(a)(2) ("Rule 2007") when it determined that the statutory period for Commission action on the SEEM Agreement expired on October 11, 2021, a legal public holiday, and that Rehearing Parties' Requests for Rehearing, filed on November 12, 2021, were untimely. This determination is contrary to the plain language of Rule 2007 and Commission and court precedent. Under Rule 2007, the statutory period set by FPA Section 205(d), codified at 16 U.S.C. § 824d, cannot expire on a legal public holiday, and therefore ended on October 12, 2021. The 30th day after October 12, 2021 was November 11, 2021, another legal public holiday. Therefore, the Requests for Rehearing, filed on November 12, 2021, were timely. Nevertheless, the December 10th Order invents and retroactively applies a brand-new approach to time computation, which directly conflicts with the Commission's consistent, longstanding practice of tabulating deadlines for statutory periods set by FPA Section 205(d) using Rule 2007, in an attempt to deprive Rehearing Parties of an opportunity to seek rehearing and, potentially, judicial review. The December 10th Order is contrary to an unambiguous Commission regulation, frustrates the Rehearing Parties' reasonable reliance on

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under ER21-1111-002, et al. (Oct. 20, 2021), Accession No. 20211020-4003; Statement of Commissioner Christie re Alabama Power Company, et al., under ER21-1111-002, et al. (Oct. 20, 2021), Accession No. 20211020-4004; Statement of Commissioner Danly re Alabama Power Company, et al., under ER21-1111-002, et al. (Oct. 20, 2021), Accession No. 20211020-4005.

<sup>23</sup> Req. for Rehearing of Public Interest Organizations (Nov. 12, 2021), Accession No. 20211112-5224.

<sup>24</sup> Req. for Rehearing of Clean Energy Coalition for October 13, 2021 Deadlock Notice (Nov. 12, 2021), Accession No. 20211112-5317.

the Commission's past precedent, and improperly divests the Rehearing Parties of their procedural rights under the APA and FPA.

## II. STATEMENT OF ISSUES AND SPECIFICATION OF ERROR

In accordance with Rule 713(c), the Rehearing Parties provide the following specifications of error and statement of issues, including citations to representative and court precedent.

1. The December 10th Order did not comply with Rule 2007's governing procedures for time computation, which prohibit the expiration of a statutory time period on Saturday, Sunday, or legal public holidays.<sup>25</sup> The Order's determination that the 60-day time period established by 16 U.S.C. § 824d(g)(1) expired on October 11, 2021, a legal public holiday, directly contradicts the unambiguous terms of Rule 2007. The Commission's unexplained departure from its own longstanding regulations and precedent is arbitrary, capricious, and contrary to law.<sup>26</sup> Moreover, the Commission could not rescind or revise Rule 2007 without going through notice-and-comment rulemaking.<sup>27</sup>
2. The December 10th Order retroactively applies its new interpretation of FPA Section 205(d) in an attempt to deprive the Rehearing Parties of an opportunity to seek rehearing and limit their ability to petition for judicial review. The

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<sup>25</sup> Computation of Time During Emergencies, 84 Fed. Reg. 3982 (February 14, 2019) (codified at 18 C.F.R. § 385.2007(a)(2)); *Cities of Batavia v. FERC*, 672 F.2d 64, 72, 217 U.S. App. D.C. 211, 219 (D.C. Cir. 1982) (interpreting a previous version of the agency's regulations—which, like the current regulations, provided that a statutory time period could not expire on a “legal public holiday”—to find that the statutory period in question had not expired).

<sup>26</sup> *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 387, 438 U.S. App. D.C. 194, 203 (D.C. Cir. 2018) (“An agency's unannounced departure in practice from a written regulation is a distinct form of agency action that is challengeable, separate and apart from adoption of the regulation itself.”)

<sup>27</sup> 18 C.F.R. § 385.2007(a)(2).

December 10th Order is an abrupt departure from well-established agency practice of applying Rule 2007 to statutory periods established by the FPA, frustrates the Rehearing Parties' reasonable expectations,<sup>28</sup> and works a manifest injustice.<sup>29</sup>

### III. REQUESTS FOR REHEARING

#### A. The December 10th Order Violates Rule 2007

The December 10th Order states that the time period for the Rehearing Parties to request rehearing began on October 11, 2021 because that was the last date that the Commission could act on the SEEM Agreement before the 60-day period set by FPA Section 205(d) expired.<sup>30</sup> The Order ignores the fact that October 11, 2021 was a legal public holiday and that according to Rule 2007, the period set by FPA Section 205(d) may not expire on a legal public holiday. The Commission acted arbitrarily, capriciously, and not in accordance with law when it abandoned its own regulations and past precedent to determine that the Requests for Rehearing were time-barred.

FPA Section 205(d) provides that “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 section 8251(a) of this title[.]”<sup>31</sup> Section 8251 in turn states

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<sup>28</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 202, 67 S. Ct. 1575 (1947) (explaining that the “ill effect of the retroactive application of a new standard” must be balanced against “the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles”); *Retail, Wholesale, & Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 388-93, 151 U.S. App. D.C. 209, 217-22 (D.C. Cir. 1972) (setting forth a balancing test to determine whether retroactive application of administrative rules is permitted); *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152, 255 U.S. App. D.C. 122, 127 (D.C. Cir. 1986) (applying the test articulated in *Retail Wholesale* to the Commission’s new interpretation of an existing rule).

<sup>29</sup> As the United States Court of Appeals for the D.C. Circuit has explained, retroactive application of a new rule to past conduct or prior events will be held unlawful when such retroactive application will work a manifest injustice. *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc).

<sup>30</sup> FPA 205(d) is codified at 16 U.S.C. § 824d.

<sup>31</sup> 16 U.S.C. § 824d(g)(1)(A).

that “[a]ny person . . . aggrieved by an order under this chapter . . . may apply for rehearing within thirty days after the issuance of such order.”<sup>32</sup> The Commission first adopted Rule 2007 in 1982, as part of an effort to “make procedural rules more easily understood by those affected by Commission action.”<sup>33</sup> Rule 2007 “address[es] computing periods of time prescribed or allowed by the statute or Commission rule or order.”<sup>34</sup> When revising Rule 2007 in 2019, the Commission explained that the purpose of Rule 2007 is to “prevent unintended Commission action by operation of law and . . . provide clarity as to filing deadlines and deadlines for action by the Commission.”<sup>35</sup> Rule 2007 states in part:

The last day of any time period is included in the time period, unless it is a Saturday; Sunday; a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business, even though some official duties may continue through telework-ready employees; part-day holiday that affects the Commission; or legal public holiday as designated in section 6103 of title 5, U.S. Code. In each case ***the period does not end until the close of the Commission business of the next day which is not a Saturday; Sunday;*** a day on which the Commission closes due to adverse conditions and does not reopen prior to its official close of business even though some official duties may continue through telework-ready employees; part-day holiday that affects the Commission; ***or legal public holiday*** as designated in section 6103 of title 5, U.S. Code.<sup>36</sup>

For decades, Rule 2007 has been crystal clear: when the last day of a time period prescribed by statute falls on a Saturday, Sunday, or legal public holiday, the period does not end until close of business the next day that is not a Saturday, Sunday, or legal public holiday.

Rule 2007 applies not just to filing deadlines for parties, but also to “deadlines for action by the Commission.”<sup>37</sup> In 2003, the Commission revised Rule 2007 and explained that:

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<sup>32</sup> 16 U.S.C. § 8251(a).

<sup>33</sup> Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings, 47 Fed. Reg. 18,847, 19,014 (May 3, 1982).

<sup>34</sup> Computation of Time During Emergencies, 84 Fed. Reg. 3982, 3982.

<sup>35</sup> *Id.*

<sup>36</sup> 18 C.F.R. § 385.2007(a)(2) (emphasis added).

<sup>37</sup> Computation of Time During Emergencies, 84 Fed. Reg. 3982, 3982.

[S]ituations could arise in which the Commission is required to take action by a date certain but cannot do so because its offices are closed. For example, *the Commission must act by a specified time on a rate proposal filed by a public utility*, or an oil or natural gas pipeline, *or the filing becomes effective by operation of law. See 16 U.S.C. § 824d (Federal Power Act) (60 days); 15 U.S.C. § 717c (Natural Gas Act) (30 days); 49 App. U.S.C. § 6(3) (Interstate Commerce Act) (30 days)*. It is therefore in the public interest to revise the Commission’s rules to ensure that a day on which it is closed . . . does not count as the last day of the time period for a deadline.<sup>38</sup>

The 2003 Final Rule addressed the exact situation at issue here and determined that the Commission’s last day to act on a rate proposal filed by a public utility under FPA Section 205(d) cannot fall on a legal public holiday.

Here, the statutory period began on August 11, 2021, and the sixtieth day fell on October 11, 2021—Columbus Day.<sup>39</sup> Therefore, pursuant to Rule 2007, the last day of the time period was October 12, 2021—“the next day which is not a Saturday, Sunday, or a holiday.”<sup>40</sup> The thirty-day statutory period for requests for rehearing to be filed did not expire until November 12, 2021 because the thirtieth day, November 11, 2021 was also a legal public holiday—Veterans Day.<sup>41</sup> The Rehearing Parties reasonably relied on the plain text of Rule 2007 and the 2003 Final Rule when they filed requests for rehearing in this matter.

The December 10th Order directly contradicts the 2003 Final Rule’s declaration that the 60-day period established by Section 205(d) is subject to Rule 2007. In an unexplained departure from Rule 2007’s plain language, the Order states that “a filing can go into effect on a weekend or holiday if the statutory period established in section 205(d) expires on a weekend or holiday.”<sup>42</sup> The December 10th Order makes no effort to support or explain this claim. Nor can

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<sup>38</sup> Emergency Closures, 105 FERC ¶ 61,296 at 2 (Dec. 18, 2003) (emphasis added).

<sup>39</sup> 5 U.S.C. § 6103(a) (“Columbus Day, the second Monday in October”).

<sup>40</sup> 18 C.F.R. § 385.2007(a)(2).

<sup>41</sup> 5 U.S.C. § 6103(a) (“Veterans Day, November 11”).

<sup>42</sup> December 10th Order, 177 FERC ¶ 61,178 at n.24.



it: the 2003 Final Rule explicitly stated that Rule 2007 applies to the 60-day statutory period set by FPA Section 205(d).<sup>43</sup> The December 10th Order’s unacknowledged and unjustified inconsistency with the Commission’s 2003 Final Rule is by definition arbitrary and capricious.<sup>44</sup>

Moreover, the D.C. Circuit has already rejected the Commission’s argument that statutory periods established by the FPA may expire during legal public holidays. In *Cities of Batavia v. FERC*, the Commission claimed that a petition for rehearing under the FPA was filed one day late because the final day for filing was January 15, 1980—sixty days after the order issued.<sup>45</sup> The Commission failed to note that January 15 was Dr. Martin Luther King Jr. Day, and thus a legal public holiday.<sup>46</sup> Applying a predecessor of Rule 2007, 18 C.F.R. § 1.13(a), the Court determined that the statutory period for filing a petition for review ran until “the next day which is not a Saturday, Sunday, or a holiday”—January 16, 1980—and rejected the Commission’s jurisdictional challenge.<sup>47</sup> The Commission has not provided any justification for its departure from the D.C. Circuit’s precedent.<sup>48</sup>

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<sup>43</sup> Emergency Closures, 105 FERC ¶ 61,296 at 2 (Dec. 18, 2003). Likewise, the December 10th Order’s assertion that the utilities’ proposal became the filed rate “in the first moments of October 12, 2021” has no bearing on the tabulation of the filing deadline, as it directly contradicts Rule 2007’s declaration that “the period does not end *until the close of the Commission business* of the next day which is not a Saturday; Sunday; . . . or legal public holiday.” 18 C.F.R. § 385.2007(a)(2) (emphasis added).

<sup>44</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 1811 (2009) (“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”).

<sup>45</sup> 672 F.2d 64, 72, 217 U.S. App. D.C. 211, 219 (D.C. Cir. 1982).

<sup>46</sup> *Id.* 672 F.2d at 73, 217 U.S. App. D.C. at 220.

<sup>47</sup> *Id.*; see *Rochester Gas & Electric Corp.*, 24 FERC ¶ 61,135 (July 27, 1983) (“Initially, we note that RG&E’s request for rehearing was filed in a timely manner, pursuant to Rule 2007(a)(2) of the Commission’s Rules of Practice and Procedure (18 C.F.R. §385,2007), since the thirtieth day of the period for filing requests for rehearing in this case fell on a Sunday and RG&E’s pleading was submitted on the following day.”).

<sup>48</sup> Moreover, the D.C. Circuit has established that when a statute is enacted subsequent to the adoption of a Rule regarding time computation, Congress “intended its time periods to be computed in accordance with the federal rule.” *United Mine Workers of Am., Intern. Union v. Dole*, 870 F.2d 662, 665, 276 U.S. App. D.C. 248, 251 (D.C. Cir. 1989). Rule 2007 was already in effect when Congress enacted 16 U.S.C. § 824d(g)(1)(A) in 2018, therefore it must be presumed that Congress did not intend to exempt its enactment from the time computations rules adopted by the agency. See also *Tenn. Gas Pipeline Co.*, 95 FERC 61,169, 61,547 n.9 (May 3, 2021) (“The Commission’s Procedural Rule 2007 is consistent with Rule 26(a)(3) of the Federal Rules of Appellate Procedure.”).

The Commission's claimed "general practice" of issuing orders early when "a statutory deadline falls on a weekend or holiday"<sup>49</sup> is irrelevant. The Commission has in fact waited until "the first business day after . . . [a] statutory time period" expires to act in other contexts.<sup>50</sup> For example, the Commission has issued tolling orders on "the first business day after the thirty-day statutory time period for the Commission to act on the first rehearing application."<sup>51</sup> If Rule 2007 did not apply and the statutory period had expired over the weekend, then the Commission would not have been able to issue a tolling order the next business day.<sup>52</sup> Regardless, if the Commission had acted before the statutory period expired—on a holiday or otherwise—then the deadline for a request for rehearing would be calculated from the date of the Commission's order. But the Commission did not act here, and its lack of action cannot shorten the statutory period set by the FPA. As the Order admits, the deadline for requests for rehearing must be calculated from the day that the statutory period established in Section 205(d) expires.<sup>53</sup>

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<sup>49</sup> December 10th Order, 177 FERC ¶ 61,178 at n.24.

<sup>50</sup> See, e.g., *Allegheny Defense Project v. FERC*, 964 F.3d 1, 6, 448 U.S. App. D.C. 1, 6 (D.C. Cir. 2020) ("On March 13, 2017—the first business day after the thirty-day statutory time period for the Commission to act on the first rehearing application, see 18 C.F.R. § 385.2007(a)(2)—the Commission issued what is known as a 'tolling order' that applied to all three rehearing applications."); *Louisiana Pub. Serv. Comm'n*, Order Granting Rehearing for Further Consideration (Jan. 21, 2020), Docket No. EL19-50 (the rehearing request in this docket was filed on December 20, 2019. The Commission, noting that in absence of Commission action within 30 days of such rehearing request, the request would be deemed denied, issued a tolling order on January 21, 2020 to afford additional time for consideration. The 30th day after December 20, 2019, however, is January 19, 2020, but this day was a Sunday. The next day, January 20, 2020 was a legal holiday – Martin Luther King, Jr. Day. While the Commission did not explain its reason for waiting until January 21 to issue the order, it clearly believed it to be timely even though it was issued 32 days after the rehearing request. The only reasonable explanation of this requires the Commission to have believed it was appropriate to wait until the first business day after the time period would have expired absent the Sunday and holiday); *Vermont Transco, LLC*, Order Granting Rehearing for Further Consideration (July 30, 2018), Docket No. ER18-1259 (similarly, the rehearing request in this docket was filed on June 28, 2018, 32 days prior to the date the Commission issued its tolling order to enable further consideration. The 30th and 31st days, July 28 and July 29, respectively, fell on a Saturday and a Sunday in 2018); *Alabama Power Co.*, Order Granting Rehearing for Further Consideration (July 16, 2012), P-2146-137 (similarly, the rehearing request in this docket was filed on June 15, 2012, 31 days prior to July 16, the date that the Commission issued its tolling order to enable further consideration. July 15, the 30th day, fell on a Sunday in 2012).

<sup>51</sup> *Allegheny Defense Project*, 964 F.3d at 6, 448 U.S. App. D.C. at 6.

<sup>52</sup> *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 935, 382 U.S. App. D.C. 12, 22 (D.C. Cir. 2008) ("To maintain two irreconcilable policies, one of which . . . enables the agency . . . to circumvent the other . . . is arbitrary and capricious.").

<sup>53</sup> December 10th Order, 177 FERC ¶ 61,178 ¶ 10.

The Commission asserts that applying Rule 2007 would impermissibly “extend the statutory deadline for Commission action pursuant to section 205(d).”<sup>54</sup> But as the Commission itself explained in 2019, “[a]lthough the Commission does not have the authority to change . . . statutory deadlines, the Commission has the authority to determine how such deadlines are computed.”<sup>55</sup> Rule 2007 “does not operate to waive” requirements established by statute; “it describes the procedures by which time is computed.”<sup>56</sup> The December 10th Order offers no explanation for the Commission’s sudden reversal of this longstanding position.

Moreover, the D.C. Circuit has repeatedly applied the Commission’s time computation rules to statutory deadlines in the FPA and Natural Gas Act. In *Dayton Power & Light Co. v. Federal Power Commission*, the D.C. Circuit explained that an application for rehearing received by the Commission on July 30, 1956 was timely because the last day of the statutory period fell on July 29, 1956, a Sunday.<sup>57</sup> Likewise, in *Cities of Batavia*, the Court concluded that when the statutory period for filing a request for rehearing fell on Dr. Martin Luther King Jr. Day, a filing made on the next day was timely.<sup>58</sup> The courts have never questioned the Commission’s authority to prescribe procedures by which statutory deadlines are computed.

Rule 2007 and its predecessors have for decades established a simple principle: when “periods of time prescribed or allowed by the statute,” including “deadlines for action by the

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<sup>54</sup> *Id.* ¶ 12.

<sup>55</sup> Computation of Time During Emergencies, 84 Fed. Reg. 3982, 3982 ¶ 4.

<sup>56</sup> *Tenn. Gas Pipeline Co.*, 95 FERC at 61,547 (May 3, 2021); *Emergency Closures*, 105 FERC ¶ 61,296 n.1 (Dec. 18, 2003) (“Commission may not extend 30-day rehearing deadline, although it can provide rules for computing time as it has done in Rule 2007.”); see *Cameron LNG LLC and Cameron Interstate Pipeline LLC*, 148 FERC ¶ 61,237 (2014) (“Rule 2007(a)(2) . . . does not extend the 30-day deadline, but rather provides a means for the Commission to calculate the end of the statutory period, in a manner similar to the federal courts.”).

<sup>57</sup> 251 F.2d 875, 877, 102 U.S. App. D.C. 164, 166 (D.C. Cir. 1957).

<sup>58</sup> *Cities of Batavia*, 672 F.2d at 73, 217 U.S. App. D.C. at 220; see *Nat’l Fuel Gas Supply Corp.*, 154 FERC ¶ 61,098 n.5 (“Pursuant to Rule 2007 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2007(a)(2) (2015), when a deadline falls on a weekend or legal public holiday, the deadline is extended to the close of the next business day.”).

Commission,”<sup>59</sup> expire on a weekend or legal public holiday, “the period does not end until the close of the Commission business of the next day which is not a Saturday; Sunday . . . or public holiday.”<sup>60</sup> The Commission violated its own rules when it determined that absent any Commission action, the time period set by Section 205(d) expired on a legal public holiday. The Commission cannot alter or rescind Rule 2007 without notice-and-comment rulemaking—which it has not conducted here.<sup>61</sup> Moreover, the Commission’s failure to acknowledge, much less justify, its sudden departure from its own well-established rules and precedent is arbitrary and capricious.<sup>62</sup>

**B. The December 10th Order’s Retroactive Application of a New Approach to Time Tabulations Frustrates the Rehearing Parties’ Reasonable Reliance upon Past Commission Practice**

The Commission admits that it “has not previously explained in an order the proper calculation of the deadline for rehearing requests following the failure of the Commission to act within the time period prescribed by section 205(d) of the FPA[.]”<sup>63</sup> Nevertheless, the December 10th Order rejected the Rehearing Parties’ Requests for Rehearing based on this brand-new interpretation of the law. As discussed above, the Commission’s interpretation is not only novel, but violates Rule 2007 on its face. But even if the Commission’s interpretation were permissible, it would be a “substitution of new law for old law that was reasonably clear” and

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<sup>59</sup> Computation of Time During Emergencies, 84 Fed. Reg. 3982, 3982.

<sup>60</sup> 18 C.F.R. § 385.2007(a)(2) (emphasis added).

<sup>61</sup> 5 U.S.C. § 553; *Env’t Integrity Project v. EPA*, 425 F.3d 992, 995, 368 U.S. App. D.C. 116, 119 (D.C. Cir. 2005) (“[A]n interpretation of a legislative rule cannot be modified without the notice and comment procedure that would be required to change the underlying regulation—otherwise, an agency could easily evade notice and comment requirements by amending a rule under the guise of reinterpreting it.”) (internal citations omitted).

<sup>62</sup> *New England Power Generators Ass., Inc. v. FERC*, 881 F.3d 202, 211–12, 434 F.3d 225, 233–34 (D.C. Cir. 2018) (“It is textbook administrative law that an agency must provide[ ] a reasoned explanation for departing from precedent or treating similar situations differently.”) (quoting *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014)); *Fox Television Stations, Inc.*, 556 U.S. at 515, 129 S. Ct. at 1811.

<sup>63</sup> December 10th Order, 177 FERC ¶ 61,178 ¶ 9.

“raises problems of fairness to those who have relied on the old law.”<sup>64</sup> A new interpretation may be applied retroactively to parties in an ongoing adjudication only if “the parties before the agency are given notice . . . and the affected parties have not detrimentally relied on the established legal regime.”<sup>65</sup> In determining whether retroactive application of a new interpretation is permissible, courts consider several factors, including,

(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice . . . (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden by which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.<sup>66</sup>

Each of these factors favors limiting the retroactivity of the Commission’s new interpretation.

The Commission’s Order represents an abrupt departure from Rule 2007 and from the Commission’s statement in the 2003 Final Rule that Rule 2007 applies to Section 205(d) of the FPA.<sup>67</sup> The Rehearing Parties reasonably relied upon Rule 2007 and the Commission’s past statements and practices when filing their Requests for Rehearing, and retroactively imposing the Commission’s new interpretation would impose a heavy burden on the Rehearing Parties by denying them an opportunity to seek rehearing and limiting their ability to challenge the approval of the SEEM Agreement in federal court. Allowing the Rehearing Parties to seek rehearing would further the statutory interests of the FPA by promoting public participation and additional scrutiny to ensure that rates proposed by public utilities are just and reasonable.

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<sup>64</sup> *Aliceville Hydro Assocs. v. FERC*, 800 F.2d 1147, 1152, 255 U.S. App. D.C. 122, 127 (D.C. Cir. 1986).

<sup>65</sup> *Consolidated Edison Co. of New York, Inc. v. FERC*, 315 F.3d 316, 323, 354 U.S. App. D.C. 235, 242 (D.C. Cir. 2003).

<sup>66</sup> *Retail, Wholesale & Dept. Store Union, AFL-CIO v. N.L.R.B.*, 466 F.2d 380, 390, 151 U.S. App. D.C. 209, 219 (D.C. Cir. 1972).

<sup>67</sup> *Emergency Closures*, 105 FERC ¶ 61,296 ¶ 2.

Moreover, the Commission did not give notice to the Rehearing Parties that it would be departing from its standard practice of applying Rule 2007 to time periods established by FPA Section 205(d). Indeed, the Commission did not even provide notice that the SEEM Agreement had been “deemed approved” until its October 13, 2021 Notice of Filing Taking Effect by Operation of Law.<sup>68</sup> The D.C. Circuit has found that, when the Commission’s failure to take action within a statutory period results in denial of a petition by operation of law, the date interested parties receive notice, rather than the date an application was “deemed” denied, may be considered the first day of the statutory period for the purpose of filing a petition for review.<sup>69</sup> The same principle should be applied here to ensure that the Commission’s failure to provide notice of its new approach to time tabulation does not have unjustifiably harsh results.<sup>70</sup>

Even once the Notice was issued, the Rehearing Parties had no way of knowing that the Commission intended to jettison Rule 2007 and adopt the unprecedented new position that Commission orders, through no action taken by the Commission, may be “deemed issued” in the middle of the night when the Commission is closed for business for a legal public holiday. Prior to the Order, the Commission never stated or even insinuated that the “order issued by the Commission accepting the change” was deemed issued on October 11, 2021.<sup>71</sup> In fact, Commissioner Christie’s Fair Rates Act Statement, issued on October 20, 2021, explained that a Notice or “order accepting the OATT filings” should have been issued “as of October 12, 2021.”<sup>72</sup> Commissioner Danly’s Statement likewise noted that the Commission Staff’s last deficiency letter “reset the 60-day statutory clock, this time to October 11, 2021, a federal

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<sup>68</sup> Notice of Filing Taking Effect by Operation of Law (Oct. 13, 2021), Accession No. 20211013-3010.

<sup>69</sup> *Texas-Ohio Gas Co. v. Fed. Power Comm’n*, 207 F.2d 615, 617, 93 U.S. App. D.C. 117, 119 (D.C. Cir. 1953).

<sup>70</sup> *Smiley v. Citibank*, 517 U.S. 735, 742, 116 S. Ct. 1730, 1734 (1996) (“[C]hange that does not take account of legitimate reliance on prior interpretation . . . may be arbitrary and capricious.”).

<sup>71</sup> 16 U.S.C. § 824d(g)(1)(A).

<sup>72</sup> Statement of Comm’r Christie ¶ 25 (Oct. 20, 2021).

holiday” and “extended . . . the acceptance by operation of law on October 12, 2021.”<sup>73</sup> Since Section 205(d)(g)(1)(a) states that “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,” the Rehearing Parties reasonably interpreted these Commissioner statements as agreeing that the “order” they sought rehearing on was issued on October 12, 2021.<sup>74</sup>

In sum, even if the Commission’s newly fabricated approach to calculating the deadline for rehearing requests is lawful—and it is not—retroactive application of the new interpretation is not appropriate here.

#### **IV. RELIEF REQUESTED**

For the aforementioned reasons, the Rehearing Parties respectfully request that the Commission grant this request for rehearing and reverse its determination that the November 12, 2021 Requests for Rehearing filed by the Public Interest Organizations and Clean Energy Coalition were not timely filed.

#### **V. CONCLUSION**

WHEREFORE, for the foregoing reasons, the Rehearing Parties respectfully request that the Commission grant this request for rehearing and reverse its unlawful determination that the November 12, 2021 Requests for Rehearing filed by the Public Interest Organizations and the Clean Energy Coalition were not timely filed.

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<sup>73</sup> Statement of Comm’r Danly ¶¶ 6-7.

<sup>74</sup> 16 U.S.C. § 824d(d)(g)(1)(a) (emphasis added).

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 7th day of January, 2022.

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