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 Duke Energy Carolinas, LLC	)	ER21-1115-000
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)

PROTEST OF PUBLIC INTEREST ORGANIZATIONS

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Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission") rules of Practice and Procedure, 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, Southern Partnership for Equity, North Carolina Sustainable Energy Association, Sustainable FERC Project, and Natural Resources Defense Council ("Public Interest Organizations" or "PIOs") respectfully submit this protest in response to the Petitioners' June 7, 2021 response to the May 4, 2021 deficiency letter and the Southeast Energy Exchange Market ("SEEM") Proposal submitted by Alabama Power Company for acceptance under Section 205(c) of the Federal Power Act ("FPA") and Part 35 of the Commission's regulations. The entire proposal includes related filings in the above captions by members of the SEEM Proposal[1],[2] to modify their Open Access Transmission Tariffs ("OATT") or concur with the Proposal, including Applicants' June 7, 2021 Response to the Deficiency Letter[3] issued by FERC Staff on May 4, 2021 (together, "SEEM filings" or "filings").[4] The PIOs filed a Motion to Intervene and Protest on March 15, 2021[5] and a Motion for Leave to Respond and Response on April 12, 2021,[6] which are incorporated by reference herein.

[1] The SEEM member utilities included in the filing are: Alabama Power Company, Georgia Power Company, and Mississippi Power Company (collectively, "Southern Companies"); Associated Electric Cooperative, Inc. ("AECI"); Dalton Utilities ("Dalton"); Dominion Energy South Carolina, Inc. ("Dominion Energy SC"); Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together with DEC, "Duke"); Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU") (and LG&E and KU Services Company and LG&E and KU Energy LLC, when acting as the agent or representative of LG&E/KU) (collectively, "LG&E/KU"); North Carolina Municipal Power Agency Number 1 ("NCMPA Number 1"); PowerSouth Energy Cooperative ("PowerSouth"); North Carolina Electric Membership Corporation ("NCEMC"); and Tennessee Valley Authority ("TVA") (collectively referred to hereinafter as "Applicants").

[2] Southeast Energy Exchange Market Agreement, Accession No. 20210212-5033 (Feb. 12, 2021) ("SEEM Proposal" or "Proposal").

[3] Deficiency Letter, Accession No. 20210504-3015 (May 4, 2021) ("Deficiency Letter").

[4] Resp. to Deficiency Letter, Accession No. 20210607-5164 (June 7, 2021) ("Deficiency Response").

[5] Mot. to Intervene and Limited Protest and Comment of Public Interest Organizations, Accession No. 20210315-5405 (Mar. 15, 2021) ("PIO March 15 Protest").

[6] Mot. for Leave to Respond and Resp. of Public Interest Organizations, Accession No. 20210412-5876 (Apr. 12, 2021).

Applicants were given an opportunity to explain how their Proposal would benefit customers in the Southeast and amend their filing to ensure that the SEEM would satisfy the region's need for a transparent, nondiscriminatory wholesale market. Instead of taking this opportunity, Applicants responded to Intervenors' concerns and the Commission's Deficiency Letter by doubling down on a flawed, self-serving proposal, dodging Commission questions, and making only minimal improvements to transparency that do not address concerns about market power or provide the public with critical information about how SEEM would function in practice. The SEEM filings do not resolve, and in some cases reveals additional concerns about undue discrimination, market power, transparency, and governance.

Furthermore, none of the Applicants' proposed changes to the SEEM Proposal alter SEEM's status as a loose power pool or a multilateral trading agreement that contains transmission rates, terms, and conditions. The Commission would need to change its power pool regulations, 18 C.F.R. § 35.28(c)(3), to find that the public utilities in SEEM are not required to file a pool-wide or system-wide OATT, as the definition in the regulations matches exactly with the SEEM Proposal characteristics. Many of the Applicants are public utilities that own transmission and under the terms of the SEEM Proposal they would become members of a "multi-lateral trading arrangement or agreement," that "contains transmission rates, terms or conditions."[7] Accordingly, these public utilities must file a pool-wide or system-wide tariff before any transactions occur pursuant to the SEEM Proposal.[8] Contrary to Applicants' arguments, the policy driving the power pool regulations is not targeted only at pools that

[7] 18 C.F.R. § 35.28(c)(3).
[8] *Id*. at § 35.28(c)(3)(i).

coordinate the operation of their systems or plan transmission together.[9] Rather, as the Commission explained, it "defined pooling arrangements in the broadest terms possible" so as to eliminate undue discrimination.[10] In Order No. 888, the Commission recognized that implementation of OATTs by public utilities would not cure undue discrimination "if those public utilities can continue to trade with a selective group within a power pool that discriminatorily excludes others from becoming a member and that provides preferential intra-pool transmission rights and rates."[11] That, as explained in PIO's March 15 Protest, April 12 Answer, and this Protest, is exactly what Applicants propose here. The Commission cannot allow such undue discrimination; nor can it ignore its own regulations that require a pool-wide OATT in these circumstances before any transactions occur pursuant to the SEEM Proposal.

For all these reasons, the Commission can and should reject the SEEM Proposal and issue guidance as described in PIO's March 15 Protest, April 12 Response, and this Protest. If the Commission does not reject the filing outright, the PIOs request that the Commission issue another deficiency letter seeking additional information and requiring the Applicants to fully answer all the inquiries included in the May 4, 2021 Deficiency Letter. The PIOs also request that the Commission accept and suspend the filings for the maximum five-month period, subject

[9] Mot. for Leave to Answer and Answer of the Southeast EEM Members, at 11 n.25, Accession No. 20210330-5322 (Mar. 30, 2015) ("SEEM Answer"); *see also MidContinent Area Power Pool*, 78 FERC ¶ 61,203 (1997) (accepting and suspending requisite submissions of pool-wide tariffs, subject to further orders, including the tariff of Western Systems Power Pool); *W. Sys. Power Pool*, 83 FERC ¶ 61,099 at 61,476–77 (1998) (approving with modifications pool-wide tariff under which "pool members are not required to provide power or transmission services," establishing "standardized terms and rates for discretionary short-term (up to one year) and nonfirm (up to one month) power and transmission services among the members," and unbundling "transmission prices from [ ] capacity and energy prices").

[10] *Wolverine Power Supply Coop., Inc.*, 85 FERC ¶ 61,099, 61,355 (1998).

[11] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,593 (May 10, 1996) ("Order No. 888").

to the outcome of a technical conference on the SEEM Proposal and/or convene a technical conference or joint regional meeting on market reform in the Southeast.

I. SEEM PARTICIPATION IS NOT OPEN TO ALL RESOURCES ON A NON-DISCRIMINATORY BASIS

The Applicants' Deficiency Response does not cure, and in fact underscores, the discriminatory aspects of the SEEM Proposal raised in the PIO's original Protest. As previously discussed, participation in the SEEM is limited to parties that have entered into three or more Enabling Agreements with existing Participants.[12] These Enabling Agreements are not standardized and Participants are permitted to individually negotiate terms and conditions without limitation.[13] As explained in the PIO's original Protest, nothing prevents Applicants from selectively entering into Enabling Agreements or negotiating terms and conditions of the agreements in an unduly discriminatory manner in violation of the Federal Power Act[14] and the Commission's rules governing power pools.[15]

FERC's Deficiency Letter honed in on this issue, asking the Applicants whether there are any limitations on a Participant's ability to refuse to enter into an Enabling Agreement with a prospective or current Participant and whether Participants are required to provide a reason for refusing to sign an Enabling Agreement with a prospective or current Participant.[16] The Applicants concede that neither the existing bilateral market nor the SEEM Proposal contains

[12] SEEM Proposal, Attach. A ("SEEM Agreement") at App. B. ("SEEM Market Rules"), Section III.B.5 ("Participation").
[13] *See* Deficiency Response at 21.
[14] 16 U.S.C. § 824d(b) ("no public utility shall, with respect to any transmission . . . make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage"); *see also* Order No. 888; *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997); *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997); *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998); *aff'd in relevant part sub nom. Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).
[15] PIO March 15 Protest at 10–13.
[16] Deficiency Letter at 7.

any limitations on a party's ability to refuse to enter into an Enabling Agreement with a prospective or current party,[17] and does not require Applicants to state any explicit reason for refusing to enter into an Enabling Agreement with another Participant.[18] In other words, Applicants admit that there is nothing in the existing bilateral market or the SEEM Proposal that addresses PIO's concern that Applicants could selectively enter into or negotiate Enabling Agreements in a discriminatory manner, for example, favoring their current preferred bilateral partners or other SEEM members.

The Applicants point to the existence of several Enabling Agreements in the existing bilateral market as evidence they lack the incentive to enter into the agreements in an unduly discriminatory manner.[19] But the SEEM creates a new free transmission service that is only available to Participants who have entered into a sufficient number of Enabling Agreements and is not one of the *pro forma* services required under the Commission's regulations. In a bilateral market that is as closed to competition as the Southeast, the new transmission service that encompasses service across the entire SEEM territory and eliminates rate pancaking has significant value to owners of generation resources in the territory. By controlling access to the transmission service by exclusionary practices related to Enabling Agreements, the Applicants have the *ability* to exercise market power over transmission service. The Applicants already have incentive to exercise such market power because they compete to serve load with resources in the SEEM territory.[20] This exercise of market power may be as simple as exclusion of access

[17] Deficiency Response at 20.
[18] *Id.* at 21.
[19] *Id.*
[20] *See Report To Congress On Competition In Wholesale And Retail Markets For Electric Energy* at 23 ("FERC recognized the potential for control of transmission to create market power and the challenge such control created in moving to greater reliance on market-based rates."), https://www.ferc.gov/sites/default/files/2020-04/epact-final-rpt_0.pdf.

to the Non-Firm Energy Exchange Transmission Service ("NFEETS"). It could also take the form of extraction of concessions from resource owners unrelated to participation in the SEEM that may help solidify the existing market power of SEEM's member utilities.

The only way to counteract these perverse incentives and ensure that the Enabling Agreements are not entered into or negotiated in an unduly discriminatory manner is to establish a *pro-forma* agreement that is part of the SEEM Participant Agreement and available to any prospective Participant. This is standard practice for other organized markets and a requirement for non-discriminatory access.[21] Even where the Commission finds that a joint dispatch agreement is not a loose power pool, it requires that resources located in the joint dispatch area sign the Joint Dispatch Agreement that is on file with the Commission to participate in the market and receive access to the free transmission service.[22] The same should be true for the SEEM. The Commission has found that market participant agreements are a necessary prerequisite for submission of bids into a market and spell out the rights and obligations of the market participant.[23] But the SEEM Participant Agreement contains an inherent barrier to entry in its requirement for at least three executed Enabling Agreements, depriving potential market participants of their rights. For these reasons and because this barrier is controlled by the competitors of any new entrant, the SEEM Participation Agreement should contain *pro forma* requirements for the purchase and sale of energy that provides for Energy Exchanges between buyers and sellers; the Commission should not allow non-standardized Enabling Agreements.

[21] *See Sw. Power Pool, Inc.*, 114 FERC ¶ 61,289 at P 209 (2006) (directing SPP to file a market participant agreement "[b]ecause the imbalance market participant service agreement will contain important rate-related obligations and rights of market participants").
[22] *Pub. Serv. Co. of Colorado Black Hills/Colorado Elec. Util. Co.*, 154 FERC ¶ 61,107 at P 85 (2016) ("to the extent any resource only needs the transmission resources of Parties to join the Joint Dispatch Agreement, it only needs to sign the Joint Dispatch Agreement to receive Joint Dispatch Transmission Service").
[23] *Sw. Power Pool, Inc.*, 116 FERC ¶ 61,053 at P 16; *order on reh'g and compliance*, 117 FERC ¶ 61,110 (2006).

At a very basic level, the SEEM Proposal lacks any protections for prospective Participants seeking to enter into Enabling Agreements: there is no deadline requiring counter-parties to respond to or enter into a proposed Enabling Agreement, no guidelines regarding collateral requirements, and no obligation to explain unreasonable proposed terms or an outright rejection to enter into an agreement. This means prospective Participants could be stuck in limbo for an indefinite amount of time waiting for a counter-party to respond to a proposed Enabling Agreement or provide reasonable terms, depriving them of valuable transmission service access in the meantime.

The Applicants argue that there is no need to standardize Enabling Agreements because Participants can file complaints with the Commission under Section 206 of the FPA or submit complaints to the Market Auditor.[24] Both of these so-called remedies are inadequate. First, an aggrieved party may only file a complaint with the Commission under Section 206 if the Participant who has refused to enter into an Enabling Agreement is a jurisdictional Public Utility—nearly half of the potential SEEM utilities are non-jurisdictional.[25] Second, the procedure for submitting complaints to the Market Auditor does not provide any real protections: for example, there is no deadline for the Market Auditor to respond to a complainant, refer the complaint to the Membership Board ("Board") for investigation, and no standard criteria used by the Board to evaluate complaints and determine if action is necessary.[26] Furthermore, the internal complaint route is only available to SEEM Participants, not to prospective Participants.[27]

[24] Deficiency Response at 22.
[25] SEEM Answer at 4 n. 8 ("Six of the current fourteen Southeast EEM Members are non-jurisdictional, as are the five additional entities that are in the process of or are contemplating seeking the necessary approvals to execute the Southeast EEM Agreement and become Members.").
[26] Deficiency Response at 26–27 and Attach. A, Proposed Revision to Southeast EEM Agreement at 62.
[27] Deficiency Response at 22. *Compare* "*Southeast EEM Participants* can submit complaints to the Market Auditor" *with* "if a *prospective or current Participant* wants to challenge the refusal by another Jurisdictional Participant to enter into an Enabling Agreement, it may file a complaint with the Commission . . ." (emphasis added).

As a result, a prospective Participant with a grievance against a non-jurisdictional SEEM Participant that prevented them from entering into enough Enabling Agreements to join SEEM would not have access to even this paltry complaint mechanism.

In sum, the Applicants' Deficiency Response does not cure, and in fact highlights the lack of non-discriminatory access to the new free transmission service. Non-discriminatory access to transmission service, including the NFEETS proposed here, is required by the FPA for wholesale markets generally and is also central to the Commission's power pool requirements.[28] The SEEM's failure to conform to this basic prerequisite to establishment of a new market means that the proposal is unjust, unreasonable, and unduly discriminatory and must be rejected.

II. DESPITE APPLICANTS' ASSERTIONS TO THE CONTRARY, MARKET POWER AND MANIPULATION CONCERNS PERSIST

The Applicants recognize that the Deficiency Letter's questions indicate Commission concerns about "market power, market manipulation, and market oversight."[29] Although Applicants offer to address some of the oversight concerns by making marginal increases in data transparency, they also fail to meaningfully address Commission and Intervenor concerns about the ability of SEEM members to exercise market power and to manipulate the SEEM market.

[28] Order No. 888 at 21,541 ("The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to whom electricity can be transported in interstate commerce."); *see id*. ("systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others"); *see also* Order No. 888-A at 12,313 ("[W]e do not find it to be unduly discriminatory to provide some pool-wide transmission services to members under a pooling agreement and to provide other transmission services to members under the individual tariff of each member, as long as members and non-members have access to the same transmission services on a comparable basis and pay the same or a comparable rate for transmission."); *Wolverine Power Supply Coop.*, 85 FERC ¶ 61,099, 61,355 ("the filing of open access transmission tariffs by public utilities [will] not cure undue discrimination 'if those public utilities can continue to trade with a selective group within a power pool that discriminatorily excludes others from becoming a member and that provides preferential intra-pool transmission rights and rates.'"

[29] Deficiency Response at 2.

The Applicants respond to these concerns by essentially denying that they exist—drawing inapposite comparisons that seek to avail themselves of case law pertaining to organized markets without taking on any of their foundational responsibilities and asserting repeatedly and with much fanfare that there is nothing to see behind its bilateral contracting curtain, despite having crafted what is clearly an organized market with preferential member treatment, no-cost transmission, rates set by a separate entity (the SEEM algorithm), and a generalized set of rules and terms governing all trades, members, and participants.[30]

Applicants continue to rely on Dr. Pope's initial and supplemental analyses to support their arguments that there is no risk of market power abuse or manipulation. Unfortunately, Dr. Pope perpetuates the cognitive dissonance of pretending SEEM is really just "a voluntary, residual, bilateral market"[31]—which, if it true, would not require a tariff filing under Section 205—while ignoring the concerns raised by PIOs and reflected in the Commission's Deficiency Letter questions about how the toggle function in particular could be used by those with market power to manipulate the market.

Instead of delving into the core of the questions that were asked by the Commission as to the expected function and reasonable expectations of market use based on existing supply and expected demand of 15-minute residual energy, the Applicants largely dodge these questions by focusing primarily on what SEEM is not[32] and what other services people will use,[33] without

[30] *See, e.g.*, Deficiency Response at 4–7.
[31] *Id.* at Attach. D, Suppl. Aff. of Susan L. Pope at ¶ 59 ("Suppl. Pope Aff.").
[32] Applicants assert that SEEM "is not a balancing market," Deficiency Response at 12 and Suppl. Pope Aff. at ¶¶ 27–50, despite publicly stating that the SEEM is intended to "assist with imbalances." Wholesale Electricity Markets Study Group Work Products at PDF p. 24 (2020), https://files.nc.gov/ncdeq/climate-change/clean-energy-plan/Wholesale-Markets-Product-Final.pdf.
[33] Despite vehemently asserting that it is *not* a balancing market, Dr. Pope admits that SEEM actually *is* a balancing market, just not one with much incentive to use. *See* Suppl. Pope Aff. at ¶ 37 ("The Southeast EEM will provide a new alternative for prospectively managing imbalances known 15 minutes before the Delivery Interval, but because

really focusing on what SEEM is and why there is a valid need for it. Dr. Pope in fact spends the bulk of her analysis explaining the unasked and irrelevant question of how SEEM differs from real-time balancing markets with must-offer requirements and Security Constrained Economic Dispatch, and uses the inapposite comparison of how market power is exercised in those other, very different markets as the primary basis for her conclusion that the potential for market power abuse in SEEM is "unlikely."[34]

But as PIOs have explained, SEEM's toggling function and governance structure—neither of which Applicants propose to change—creates additional opportunities for market power abuse and manipulation by large actors with incentives to do so and who will maintain control of the SEEM market through the voting structure and membership requirements.[35] As Dr. Paul Sotkiewicz points out in his initial and supplemental affidavit, the kind of market power at issues in Regional Transmission Organizations ("RTOs") and must-offer energy imbalance markets ("EIMs") are not particularly relevant to the structure of SEEM, which is composed primarily of monopoly utilities with very different incentives.[36] The primary incentive of monopoly utilities, like those in SEEM, is not to minimize costs, but to protect their monopoly position and to foreclose competition.[37] This means that the Applicants will have different bidding incentives than those relied on by Dr. Pope.[38] Their incentive will primarily be to prevent competition, which they can achieve in the SEEM structure by toggling off competitors

matches are not guaranteed, Participants will continue to rely on the same mechanisms for handling imbalances that they use today.").
[34] *See generally*, Suppl. Pope Aff. at ¶¶ 27–57 (and especially ¶ 48).
[35] Mot. for Leave to Respond and Resp. of Public Interest Organizations, at 17, Accession No. 20210412-5876 (Apr. 12, 2021) ("PIO April 12 Response").
[36] Suppl. Aff. of Paul M. Sotkiewicz, PhD at ¶¶ 10–38 ("Suppl. Sotkiewicz Aff.") (attached hereto as Attach. A).
[37] *Id.* ¶ 25.
[38] *Id.* ¶¶ 26–38.

and choosing not to submit all demand that could be met with lower cost resources.[39] As Dr. Sotkiewicz concludes:

> The Filing Parties are all franchise monopolies whose incentives are to retain their monopoly positions. The proposed SEEM design that allows Participants to toggle on/off competitors and does not have must offer for supply or must bid for demand requirements creates the ability to exercise market power and manipulation that cannot be captured by horizontal market power tests. Based on these incentives, the design leads to outcomes that are likely to be unjust and unreasonable.[40]

The Applicants and Dr. Pope have countered this criticism by asserting that Applicants would not go through the trouble of creating a market they do not intend to use.[41] They have thus asserted, without demonstration of demand for the SEEM product or likelihood of its use, that SEEM will attract robust participation.[42] In fact, Dr. Pope's relies on this assumption for her conclusion that market power in SEEM will be sufficiently mitigated.[43] But as Dr. Sotkiewicz points out, the experience of gross underutilization of the Southern Company Energy Auction exemplifies the issues raised by Dr. Sotkiewicz and supports PIOs' concerns that SEEM will not only fail to deliver the promised benefits, but is primarily an effort to distract from or derail state- and community-led efforts in the Southeast to push for more meaningful and much-needed market reform.[44] As PIOs and others have pointed out, efforts to consider wholesale market reforms underway in North Carolina, South Carolina, Kentucky, Mississippi, Georgia, and areas served by TVA are building pressure in the Southeast for significant market reform and SEEM offers Applicants the opportunity to try and stay ahead of and control that reform.[45] Applicants thus have every incentive to craft a proposal that protects their existing market power and

[39] *Id.* ¶¶ 31–38.
[40] *Id.* ¶ 38.
[41] SEEM Answer at 36–37.
[42] Suppl. Pope Aff. at ¶17, n.5.
[43] *Id*. It is also of note that Dr. Pope relies on the assumption that SEEM will be widely used, but that parties will rely on firm balancing products *outside of the SEEM market* to mitigate market power. *Id.* at ¶ 50.
[44] Suppl. Sotkiewicz Aff. at ¶¶ 63–71; PIO March 15 Protest at 4–6, 51–56.
[45] PIO March 15 Protest at 51–56; PIO April 12 Response at 17–18.

control, and it is critical that the Commission prevent SEEM from becoming a dead-end for those reform efforts.[46]

III. THE MARGINAL INCREASE IN TRANSPARENCY DOES NOT MITIGATE MARKET POWER CONCERNS

As noted in the PIO's Protest, the lack of transparency in the SEEM Proposal sabotages any effort to identify and prevent market power abuse in this untested of market structure. Without access to market data, including data on unconsummated trades, the Commission cannot ensure just and reasonable rates and members of the public cannot detect potential market abuses and report them to the Commission. [47]

The SEEM Proposal originally lacked any provisions requiring the meaningful dissemination of market information to the Commission or members of the public.[48] The PIOs argued that to prevent market power abuses SEEM must publish non-aggregated market data identifying individual transactions and parties, allow third-party access to the Market Auditor reports, and make data related to the operation of the algorithm publicly available.[49] The Applicants responded by increasing access to some market data to the Commission, other regulators, SEEM Participants, and the Market Auditor, and increasing public access to the Market Auditor's Report.[50] In doing so, the Applicants foist the independent market monitor role on the Commission while simultaneously denying it sufficient information about the operation of the algorithm—such as unconsummated trades—necessary to effectively perform that function.[51] Combined with the absence of an independent, full-time market monitor, the

[46] PIO March 15 Protest at 4–5, 51–56;
[47] PIO March 15 Protest at 32–34 & 37–38.
[48] *Id.* at 37–38.
[49] *Id.* at 38.
[50] Deficiency Response at 27–28.
[51] *See* Suppl. Sotkiewicz Aff. at ¶¶ 55, 57.

continued lack of public access to non-aggregated market data hampers any efforts to identify and address potential market power abuses.[52]

A. THE PROPOSED IMPROVEMENTS TO TRANSPARENCY ARE INSUFFICIENT WITHOUT AN INDEPENDENT MARKET MONITOR

While the Applicants increased the amount of market data made available to the Commission, other regulators, and SEEM Participants, these changes are inadequate without the presence of a robust market monitoring rules to limit potential market power abuse. The Applicants proposed and codified the following changes in the filing: (1) providing confidential data to the Commission comparable to RTO requirements under Order No. 760, and (2) allowing the Commission, other regulators, and SEEM Participants to access to Market Auditor reports.[53] These additional transparency measures mirror some of the requirements for RTOs and are a positive development. However, these requirements are designed to be supplemental to review by a market monitor with independent authority to act on such information, which the SEEM proposal still lacks. It is inappropriate and impractical to leave the burden of closely watching a market to the Commission and other regulators.[54] Moreover, as Dr. Sotkiewicz explains, even if the Commission was conceptually able to act as a full-time market monitor, the Applicants' additional transparency measures do not disclose important market data such as information regarding matched but physically unconsummated transactions.[55] Information on matches that did not flow is critical to identifying market manipulation and/or transmission modeling

[52] Deficiency Response at 38; Suppl. Sotkiewicz Aff. at ¶ 57.
[53] Deficiency Response at 3.
[54] Suppl. Sotkiewicz Aff. at ¶ 57.
[55] *Id.* at ¶ 57.

problems.[56] Therefore, even as modified the SEEM Proposal falls short of the transparency and monitoring requirements that the Commission requires in other types of organized markets.

The Applicant's first transparency modification is based on reporting requirements to FERC for RTOs and Independent System Operators ("ISOs") as established in Order No. 760.[57] The Commission issued Order No. 760 as a means for the Commission to review market operations and monitor for market manipulation.[58] However, the Commission was careful to note that it "did not seek to displace or modify any of the existing market monitoring functions or any evaluations of market rules and designs performed by the [market monitors.]"[59] The Commission went on to note that market monitors "perform a vital and necessary function in market oversight" and provide "an additional means of detecting market power abuses" to the Commission's own review.[60] The transfer of data under this provision solely improves transparency for the Commission, not any other entity interested in the SEEM's operation. Although the Commission can and should review markets for manipulation, the burden of constant and granular monitoring should not, and cannot as a practical matter, solely fall on the Commission.[61] Instead, FERC relies on market monitors to review the terabytes of complex data generated each year as an additional independent check.[62] The data available under this provision must be more widely available to other entities, and specifically a robust market monitor, to perform this much-needed monitoring function.

[56] *Id.* at ¶¶ 54–55.
[57] Deficiency Response at 17–18.
[58] *Enhancement of Elec. Mkt. Surveillance & Analysis Through Ongoing Elec. Delivery of Data from Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 760, 139 FERC ¶ 61,053 at P 11 (2012).
[59] *Id*.
[60] *Id*.
[61] Suppl. Sotkiewicz Aff. at ¶ 57.
[62] *Id*.

The Applicant's second transparency modification is modelled on the requirement that market monitor reports be disseminated to the Commission, other regulators, and market participants.[63] Here too, the adequacy of this reporting as a means of transparency is premised on the report being prepared by an independent market monitor with clear roles and responsibilities regarding monitoring for market deficiencies and abuses. Moreover, the proposed Market Auditor report provides the Market Auditor's analysis of SEEM data, not the data itself.[64] Although providing public access to this report is an improvement on the original proposal, it does not provide enough information to allow other regulators or market participants to make their own review and analysis of the data and identify potential market abuses. Other markets make available almost all of their data, either close to real time or, where necessary to protect market integrity and sensitive confidential information, on a delayed basis.[65] Access to the Market Auditor report alone does not increase opportunities for meaningful monitoring by jurisdictional regulators, market participants, or other interested parties.

The SEEM Proposal does not have a market monitor.[66] So although the additional transparency requirements mirror some Commission-sanctioned RTO requirements in form, they do not adequately increase transparency or prevent market manipulation. Even with these improvements, critical market information is still not available to the public; the entire burden of market monitoring is placed on the Commission; and other jurisdictional regulators and participants have no access to market data, just analysis performed by the Market Auditor.

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[63] *See Wholesale Competition in Regions with Organized Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071 (2008).
[64] SEEM Proposal at 30–31.
[65] *See e.g.* MISO, *Market Reports*, https://www.misoenergy.org/markets-and-operations/real-time--market-data/market-reports/#nt=&t=10&p=0&s=MarketReportPublished&sd=desc (providing access to publicly available monthly and daily market data).
[66] SEEM Proposal at 17.

Absent the additional and concurrent review by a dedicated and independent market monitor with access to the necessary information, the modified SEEM Proposal is still unjust and unreasonable on the issue of transparency as a protection against market manipulation.

B. MARKET AUDITOR REPORTS DO NOT PROVIDE A SUFFICIENT LEVEL OF TRANSPARENCY TO MITIGATE MARKET POWER CONCERNS

In addition to marginally increasing access to regulators, the Applicants also increased the Market Auditor's access to data by adding a new provision to the SEEM Agreement requiring the Market Administrator to provide the Market Auditor with the same confidential data it is required to provide the Commission.[67] However, the Market Auditor's only role is to review the market's operation.[68] In contrast, market monitors evaluate a market for market power abuse and market design flaws and the responsibility to report those findings to the Commission.[69] The Market Auditor is not tasked with reviewing the market for abuse or design flaws.[70]

Although the proposed additional data will help the Market Auditor review the market, without addressing the lack of independence, functional mandate, and authority of the Market Auditor to act on such information, the Market Auditor will not be able to serve as a market monitor.[71] Even with this additional data, the Market Auditor is not an adequate substitute for a

[67] Deficiency Response at 24.
[68] *Id.*; SEEM Proposal at 17.
[69] "The monitoring plan must be designed to ensure that there is objective information about the markets that the RTO operates or administers and a vehicle to propose appropriate action regarding any opportunities for efficiency improvement, market design flaws, or market power identified by that information. The monitoring plan also must evaluate the behavior of market participants, including transmission owners, if any, in the region to determine whether their behavior adversely affects the ability of the RTO to provide reliable, efficient and nondiscriminatory transmission service." *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 810, 904 (2000).
[70] "[The Market Auditor] will not monitor Participant behavior." SEEM Proposal at 17.
[71] Suppl. Sotkiewicz Aff. at ¶¶ 58–62.

market monitor and the SEEM Proposal's continued lack of an independent market monitor makes it unjust and unreasonable.

C. THE APPLICANTS SHOULD RELEASE ADDITIONAL DATA THAT WOULD REVEAL THE UNIQUE OPPORTUNITIES FOR MARKET MANIPULATION PRESENT UNDER THE PROPOSED MARKET AGREEMENT

The PIOs and other organizations have an interest in reviewing market data to ensure for possible market manipulation and impacts on market trends in the Southeast. This data is unavailable to the public under both the original and modified SEEM proposal. Specifically, the PIOs are interested in data that would reveal unconsummated matches and the associated opportunities for manipulation. It is particularly important that the public can monitor the SEEM as it currently lacks a market monitor. Without making that data publicly available, the SEEM Proposal is unprotected from market manipulation and is unjust and unreasonable.

First, the Commission should require the SEEM to release energy market offer and demand bid data with an appropriate time lag. ISO and RTO markets release this data publicly to allow interested parties to analyze data for market power and manipulation.[72] This type of data was also required in the Southern Company Energy Auction when the market was opened to third-party offers.[73]

Second, the Commission should require SEEM to publicly report data related to the SEEM algorithm calculations. Detailed market data with masked identities is typically publicly available as a means of transparency and public monitoring.[74] The need for visible data is particularly high for the SEEM because the ability to toggle participants on or off is a unique

[72] Suppl. Sotkiewicz Aff. at ¶ 48.
[73] *Id.* ¶ 49.
[74] *Id.* ¶¶ 52–54.

feature to the SEEM Market that is not prevalent in ISO or RTOs.[75] As proposed by Dr. Sotkiewicz, adequate transparency requires the release of: (1) The numbers of total possible matching participants as evidenced by Enabling Agreements, and the number of those for which matches were allowed in each interval; (2) Whether bids or offers were "all-or-nothing" or could be partially filled; (3) Available Transmission Capability ("ATC") on an interval basis as this should already be public based on postings to each Balancing Authority ("BA") and Transmission Provider site; (4) A pipe and bubble representation of the ATC between each BA in SEEM; (5) Matched bids and offers and the "split the savings price" used for the match; (7) binding transmission paths along with the marginal value of the transmission constraint as proposed by Dr. Pope; (8) all matches in the SEEM algorithm that did not actually flow including the masked identities of the counterparties and the reason the transaction did not flow; and (9) The detailed posting of the auction algorithm so that interested parties could run various scenarios to see how market outcomes might differ under various conditions.[76] Providing this information is consistent with the type of market data publicly available under other markets.[77]

IV. SEEM GOVERNANCE DOES NOT PROVIDE DUE PROCESS TO PARTICIPANTS

As discussed above in the context of Enabling Agreements, the internal complaint process proposed by the Applicants is insufficient to protect Participants' rights.[78] Several critical questions remain unanswered about how the SEEM Auditor and Board would handle complaints, including:

[75] *Id.* ¶¶ 53–54.
[76] *Id.* ¶ 53.
[77] *Id.* ¶¶ 52–54.
[78] *See supra* Part I.

1. How will a Participant know if the Auditor has been directed by the Board to investigate their complaint? How will a Participant know if the Board declines to have the auditor investigate their complaint?
2. What is the time frame for the Auditor to refer a complaint to the Board?
3. Is the Auditor required to refer all complaints to the Board? If not, can a Participant appeal a decision by the Auditor not to refer a complaint to the Board?
4. What is the time frame for the Board to issue a decision or provide a remedy to the aggrieved Participant once the Board receives a complaint from the Auditor?
5. If the Board is not required to respond to the Auditor's reports and reported complaints[79] how will Participants know whether they need to bring the complaint to the Commission's attention to have it resolved?
6. With no set criteria for the Board to use to evaluate the auditor's reports and referred complaints to determine whether further action is necessary, how will the Board and/or the Auditor ensure that these decisions are consistent and do not have a discriminatory effect?
7. Can a Participant appeal a decision by the Board not to investigate a complaint?

The Commission should seek answers to these important questions through issuance of another deficiency letter. Without this information, the internal complaint process fails to provide minimum due process protections to aggrieved Participants and may contribute to undue discrimination.[80] This concern is exacerbated by the fact that the Membership Board is entirely

[79] Deficiency Response at 26.

[80] For example, the Applicants argue that there is no need to report transactions that fail to be physically consummated to the Commission because a pattern of unconsummated transactions could trigger complaints to the Market Auditor or the Commission. Deficiency Response at 22–23. But as previously noted, an aggrieved Participant may only complain to the Commission if the SEEM Member or Participant that wronged them is FERC

composed of monopoly utilities and excludes certain classes of Participants from participating in the market.[81]

Although constitutional due process obligations may or may not expressly apply to a non-governmental actor like the SEEM, the Supreme Court's test in *Mathews v. Eldridge,* 424 U.S. 319 (1976), provides an appropriate framework here for what constitutes just and reasonable process under all the circumstances. The *Mathews* balancing test weighs the decision-maker's interest, the private party's interest that would be affected by an adverse decision, "the risk of an erroneous deprivation of such interest through the procedures used," and any "additional or substitute procedural safeguards."[82] The Commission has applied this standard to its own activities before, and it can be a useful guide to whether a party has received fair process.[83] The Commission should employ this balancing test to identify fundamentally fair procedural processes under the circumstances and direct the adoption of fair process in the SEEM. At a minimum, Applicants owe prospective SEEM Participants just and reasonable notice of their actions taken, timeframes for responses, and opportunity to respond to any adjudications.[84]

Another flaw in the SEEM proposal that heightens the risk of undue discrimination is the Applicants' failure to include a mathematical formula rate in the proposed tariff. The Commission disfavors formula rates "written out in words" because they may be subject to different interpretations.[85] The "split-the-savings" rate proposed by the Applicants is only

jurisdictional. *See supra* note 25. In such a case, the wholly inadequate Market Auditor complaint process would be the aggrieved Participant's only potential remedy.

[81] PIO March 15 Protest at 28–32.

[82] 424 U.S. at 334–35.

[83] *See*, *e.g.*, *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy and Ancillary Servs. Into Mkts. Operated by the California Indep. Sys. Operator, Inc.*, 127 FERC ¶ 61,269 at PP 74–76 (2009).

[84] 16 U.S.C. § 824d(a) ("all rules and regulations affecting or pertaining to [public utility] rates or charges shall be just and reasonable").

[85] *ISO New England Inc.*, 153 FERC ¶ 61,343 at P 9 (2015).

articulated in the SEEM Agreement in narrative form.[86] The Applicants' transmittal letter does include a mathematical formula rate,[87] but this is insufficient to meet Commission requirements because an affidavit is not part of the filed tariff. If any disputes were to arise regarding this rate the Commission would be required to rely on the narrative rate in the tariff, which may be susceptible to multiple interpretations. As Dr. Sotkiewicz points out, the algorithm is the cornerstone of the filed rate for SEEM.[88] Without a mathematical formula, it cannot be determined wither the algorithm is working as intended and it will be impossible for the Commission, let alone SEEM participants or the Market Auditor, to evaluate whether the market rates are just and reasonable.

V. NFEETS WILL INCREASE COSTS FOR FIRM POINT-TO-POINT SERVICE WITH NO OFFSETTING BENEFIT FOR ENTITIES THAT DO NOT SERVE LOAD IN SEEM TERRITORY

The Applicants' Deficiency Response continues to gloss over the cost impacts that the SEEM Proposal would have on independent power producers. The Applicants acknowledge that the creation of a zero-cost transmission service, NFEETS, may result in a "slight decrease in Point-to-Point revenues, which in turn would lessen revenue credits used to offset" charges to network service transmission customers.[89] However, when asked by Commission Staff to explain how the availability of NFEETS would impact firm point-to-point transmission customers[90] the Applicants dodged the question. The Applicants responded with a non-sequitur

[86] *See* SEEM Market Rules, Section IV(C)(5)(a) ("Each Energy Exchange Price will be the sum of: 1) the average of the Bid Price and Offer Price for the Energy Exchange, and 2) half the net Losses for all Transmission Service Providers along the Contract Path, where net Losses equals the Losses paid for by Seller minus the Losses paid for by Buyer.").
[87] *See* SEEM Proposal at 29.
[88] Suppl. Sotkiewicz Aff. at ¶¶ 41–42.
[89] SEEM Proposal, Attach. B, Aff. of Aaron Melda and Lonnie Bellar ¶ 23.
[90] Deficiency Letter at 11–12 ("To the extent the increase in network service transmission rates due to an erosion of point-to-point transmission service reservations exceeds benefits to network service transmission customers resulting from the Southeast EEM, please explain how the zero-rate for NFEETS is consistent with cost causation.").

that "firm point-to-point load will receive the benefits of the Southeast EEM, so it is. . . consistent with . . . cost causation to ask such load to shoulder any incremental transmission system revenue requirements network load is exposed to as a result of any erosion of non-firm point-to-point revenues . . ."[91] This response assumes that all transmission customers are load-serving entities when this simply is not the case. In fact, as Dr. Sotkiewicz explains in his Affidavit, independent power producers wheeling out of SEEM to sell energy into neighboring RTO markets such as PJM Interconnection, L.L.C. ("PJM"), Midcontinent Independent System Operator, Inc. ("MISO"), and Southwest Power Pool, Inc. ("SPP"), will be forced to pay higher firm Point-to-Point transmission rates and will not get any of the benefits because they do not serve load in SEEM territory.[92] In other words, the vertically integrated monopoly utilities serving load in SEEM will receive most, if not all of the benefit and the independent producers selling into RTOs will pay the cost. This outcome is not consistent with cost-causation principles, is unjust and unreasonable and unduly discriminatory.[93]

The Commission should issue another deficiency letter requiring the Applicants to answer the question posed in full and justify the shifting of costs from SEEM members to independent power producers in the Southeast.

VI. THE APPLICANTS MAY NOT APPLY DIFFERENT STANDARDS TO DIFFERENT PARTS OF THE FILING

Applicants continue, as they have throughout this proceeding, to dress its tariff rate up in contract rate clothes in order to avoid having to establish that their proposed tariff rate is just and reasonable. When pressed by the Commission in Questions 12a-c to explain their view

[91] Deficiency Response at 37.
[92] *See* Suppl. Sotkiewicz Aff. at ¶¶ 75–77.
[93] *Id.* at ¶ 77; *see also Old Dominion Electric Cooperative v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2018) ("the cost-causation principle requires 'comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.'" (citing *Midwest ISO Transmission Owners*, 373 F.3d at 1368)).

regarding the appropriate standard of review, Applicants continue to attempt to avoid Section 205's just and reasonable standard by mischaracterizing their proposed energy market as "bilateral in nature."[94] Of the 22 Articles, Exhibits, and Appendixes establishing the terms of the proposed SEEM tariff, the Applicants argue that only seven of them should be fully subject to the just and reasonable standard. Rather, Applicants essentially propose a new standard for 205 tariffs that splits the standard of review, with the more favorable *Mobile-Sierra* presumption of reasonableness[95] normally applicable only to contract rates as the new default standard for tariff agreements unless a line-by-line review by the Commission reveals a particular provision of general applicability.[96] The Applicants' rationale is that while "certain portions" of the SEEM tariff agreement may be generally applicable, other provisions "are more bilateral in nature, govern key rights and obligations among the Southeast EEM Members (such as cost allocation provisions and exit provisions, among others)," are "central to the negotiated terms the Members agreed upon," and must "provide for contractual certainty to Members."[97]

But these types of provisions are inherent to both tariff rate agreements and contract rate agreements. Looking through the list of provisions Applicants would characterize as "bilateral in nature" include provisions that are central to all tariff agreements, including defining core market elements, establishing membership criteria, governance structure, appointment and scope of the market agent, budgeting and cost allocation, and reliability obligations. Moreover, when examining the question of whether provisions governing exit fees of the SPP membership agreement were subject to the *Mobile-Sierra* doctrine, the Commission held that:

[94] Deficiency Response at 39–40.
[95] This presumption was established in *United Gas Pipe Line Co. v. Mobile Sierra Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).
[96] *Id.* at 40.
[97] *Id.*

> [The Commission] need not apply different presumptions to different provisions of the membership agreement, and as a form contract, the membership agreement must be viewed in its entirety as containing rates, terms, or conditions that are generally applicable to all entities seeking SPP membership, and as a result, the agreement is not subject to a *Mobile-Sierra* presumption.[98]

The Applicants' inexplicable proposal to try to hold such integral elements to a different standard of review suggests that they have confused the concept of an agreement solely involving contract rates with one involving contract terms.

Notably, Applicants provide no case law to support the idea that tariff rate agreements filed under Section 205 should be treated akin to contract rates that benefit from the *Mobile-Sierra* doctrine. Nor do they address the directly relevant case law laying out the differences between what qualifies as a contract versus a tariff rate and rejecting the application of *Mobile-Sierra* to tariff rates.[99] Instead, Applicants draw an inapposite comparison between SEEM and a regional transmission organization's operating agreement and misapply the holdings in those cases.[100]

Applicants rely primarily on two cases for its proposed hybrid standard of review. Both of these cases[101] examined claims of RTO/ISO transmission owners that certain provisions within their RTO originating agreements (and specifically their transmission *operating agreements*) represented negotiated, contractual terms protected by the *Mobile-Sierra* doctrine.[102] As a preliminary matter, the comparison of SEEM—an agreement creating a rate

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[98] *Am. Wind Energy Ass'n v. Sw. Power Pool, Inc.* 167 FERC ¶ 61,033 at P 72 (2019).
[99] *See Devon Power LLC*, 134 FERC ¶ 61,208, 62,043–44 (2011).
[100] Deficiency Response at 40–41. PIOs note as well the Applicants' continued pattern of pointing to organized market agreements that require the types of pricing, transparency, independence, governance, and monitoring provisions Applicants' strenuously reject requiring of SEEM that also underlie the bases for the kinds of benefits and assumptions extended by the Commission to organized markets to which Petitioners would avail themselves.
[101] *Id.* (citing *PJM Interconnection, LLC* 142 FERC ¶ 61,214 (2013), *reh'g denied*, 147 FERC ¶ 61,128 (2014); *ISO New England Inc.*, 106 FERC ¶ 61,280 at P 128 (2004), *reh'g granted in part, denied in part*, 109 FERC ¶ 61,147 (2004)).
[102] *PJM Interconnection, LLC*, 142 FERC ¶ 61,214 at PP 154, 156; *ISO New England Inc.*, 109 FERC ¶ 61,147 at PP 67–68.

and setting the rules for a voluntary residual market of 15-minute energy blocks—to the breadth and complexity of foundational RTO or ISO operating agreement covering all aspects of transmission owner membership and operations is entirely inapposite. These are not "similarly complex agreements;"[103] this is like comparing an amoeba to a whale. Critically, the Applicants fail to address the threshold question the Commission posed when evaluating which standard was appropriate, namely whether SEEM can be classified in its entirety as containing contract rates or tariff rates. The Applicants do not even ask this threshold question, identify a contract rate in the Agreement, nor try to explain why SEEM cannot be classified one way or the other and thus do not warrant the Commission's assumption that SEEM cannot be classified entirely as a tariff rate.

Further, as acknowledged by the Applicants, the Commission in *PJM* found that "where 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."[104] Petitioners have argued repeatedly that it need not meet the requirement to file a pool-wide OATT because each FERC-jurisdictional member of SEEM is filing a Certificate of Concurrence and amendments to their transmission tariffs to offer zero-charge transmission service for SEEM transactions.[105] Thus, SEEM is properly classified as a tariff rate and not subject to the *Mobile-Sierra* presumption.

Even if one were to accept Applicants' implied theory that SEEM defies categorization, Petitioners' hand-waving application of *Mobile-Sierra* to the bulk of SEEM provisions without

[103] *Id.* at 41.
[104] 142 FERC ¶ 61,214 at P 184 (emphasis added).
[105] SEEM Proposal at 3; SEEM Answer at 8 ("the Southeast EEM Agreement binds each signatory to implement the same non-discriminatory rules for zero-charge NFEETS for all transmission customers and thereby permits region-wide transactions on uniform, non-discriminatory terms").

any attempt to explain in detail, provision by provision, why its proposed list of SEEM provisions are deserving of that presumption, does not meet the burden for establishing that *Mobile-Sierra* should apply to specific provisions required by the Commission in *ISO New England*.[106] To the contrary, the entire SEEM agreement, including the provisions Petitioners would carve out, [107] are all fundamental pieces of the overall structure of the tariff rate and are of general applicability over which future members or participants of SEEM will have little or no ability to negotiate.

VII. CONCLUSION

The minimal revisions to the SEEM Proposal do not remedy the lack of transparency, due process, and independent monitoring in this untested market construct. Nor do these small changes mitigate potential for monopoly utilities to exercise market power or alter the fact that the SEEM could exclude independent power producers from accessing free transmission services while increasing the existing transmission costs they must incur to sell into existing wholesale markets outside of the Southeast. As proposed, the SEEM Proposal is unjust, unreasonable, and prone to undue discrimination and therefore must be rejected. In alternative, the Commission should issue another deficiency letter seeking additional information and requiring the Applicants to fully answer all the inquiries included in the May 4, 2021 Deficiency Letter. The PIOs also request that the Commission accept and suspend the filings for the maximum five-month period, subject to the outcome of a technical conference on the SEEM Proposal and/or convene a technical conference or joint regional meeting on market reform in the Southeast.

[106] *See generally,* 106 FERC ¶ 61,280.
[107] *See* Deficiency Response at 40-41.

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 this proceedings listed above, by email.

Dated at Washington, D.C. this 28th day of June, 2021.

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ATTACHMENT A

SUPPLEMENTAL AFFIDAVIT OF PAUL M. SOTKIEWICZ, PH.D.

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 **Duke Energy Carolinas, LLC**	)	**ER21-1115-000**
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)**

SUPPLEMENTAL AFFIDAVIT OF PAUL M. SOTKIEWICZ, PH.D.

I. INTRODUCTION AND QUALIFICATIONS

1. My name is Dr. Paul M. Sotkiewicz. I am the President and Founder of E-Cubed Policy Associates, LLC ("E-Cubed") and formerly served as the Chief Economist in the Market Service Division of PJM Interconnection, L.L.C. ("PJM"). I have been retained by the

Natural Resource Defense Council ("NRDC") and Southern Environmental Law Center ("SELC") (collectively "Public Interest Organizations") to submit this affidavit in support of the Public Interest Organizations' protest regarding the Southeast Energy Exchange Market ("SEEM") Agreement response filing to the FERC deficiency letter[1] filing made in ER21-1111 on June 7, 2021 by Southern Company Services, Inc. ("Southern Company") on behalf of the Members of SEEM[2] and other potential SEEM Members[3] ("SEEM Filing Parties").

2. I have previously provided testimony in this proceeding and provided my professional background therein. I incorporate that prior testimony and my professional qualification by reference.[4]

II. EXECUTIVE SUMMARY: KEY CONCLUSIONS

3. I have been asked by Public Interest Organizations to provide an examination and analysis of the SEEM filing made in response to the FERC Deficiency Letter[5] as it relates to the potential exercise of market power, contrary to the assertions made by the Filing

[1] Resp. to Deficiency Letter, Accession No. 20210607-5164 (June 7, 2021) ("Deficiency Response").

[2] As of February 12, 2021 "SEEM Members" include Alabama Power, Georgia Power Company, and Mississippi Power Company (collectively, "Southern Companies"); Associated Electric Cooperative, Inc. ("AECI"); Dalton Utilities ("Dalton"); Dominion Energy South Carolina, Inc. ("Dominion SC"); Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") with DEC and DEP collectively referred to as ("Duke"); Louisville Gas & Electric Company ("LG&E") and Kentucky Utilities Company ("KU") collectively, ("LG&E/KU"); North Carolina Municipal Power Agency Number 1 ("NCMPA Number 1"); Power South Energy Cooperative ("PowerSouth"); North Carolina Electric Membership Corporation ("NCEMC"); and Tennessee Valley Authority ("TVA"). Southeast Energy Exchange Market Agreement, Accession No. 20210212-5033, at 1 n.1 (Feb. 12, 2021) ("SEEM Filing").

[3] Potential SEEM Members as cited in the filing are Georgia System Operations Corporation ("GSOC"); Georgia Transmission Corporation ("GTC"); Municipal Electric Authority of Georgia ("MEAG Power"); Oglethorpe Power Corporation (An Electric Membership Corporation) ("Oglethorpe"); and South Carolina Public Service Authority ("Santee Cooper"). *Id.*

[4] Protest of Public Interest Organizations, Accession No. 20210315-5405, Ex. A at ¶¶ 1–4 (Mar. 15, 2021) ("Sotkiewicz Affidavit").

[5] Deficiency Letter, Accession No. 20210504-3015 (May 4, 2021) ("Deficiency Letter").

Parties regarding the lack of market power. Furthermore, I am providing publicly available evidence of the lack of liquidity in the current Southern Company Auction Market and what this portends for the use of SEEM and the possible exercise of market power in ways designed to retain the monopoly positions of the SEEM Filing Parties. While not horizontal market power in which suppliers can withhold capacity from the market to raise prices above competitive levels, the kind of market power and manipulation that can take place under SEEM is still effective in achieving the goals of market power which is to raise prices (or keep them high) and extract extra economic rents from other market customers at the expense of other market participants.

4. First, I address the idea of market power/manipulation designed to retain a monopoly position by "toggling off" participants and not bidding demand into SEEM. I show this is an effective strategy to retain the monopoly position when done through tacit collusion with other similarly situated franchise monopolies.
5. Second, I explain the SEEM Filing Parties have failed to fully grasp the complexity of the proposed market clearing algorithm which has yet to be fully defined mathematically, let alone be developed by a vendor. This complexity is a good reason to have the algorithm expressed mathematically so interested parties and a market monitor can evaluate the accuracy and effectiveness of the algorithm to deliver what is promised.
6. Third, I explain the need for greater public release of data in a manner that is identical to what is provided in ISO-RTO markets and even in the Southern Company Energy Auction as well as a need for an independent market monitor to analyze the data and be the eyes and ears of FERC with regard to SEEM.

7. Fourth, the experience with the Southern Company Energy Auction that operates on similar principles previews the lack of actual matches that are to be had under SEEM and provides a case study on how withholding demand can be just as damaging in bilateral matching models to competitive outcomes with the result being little or no beneficial trades being executed.
8. The last section discusses how the SEEM Filing Parties seem to conflate and confuse the concepts of Firm Point-to-Point service resource adequacy and cost causation (as it relates to the erosion of firm transmission revenues) with the ability to use zero cost transmission known as Non-Firm Energy Exchange Transmission Service ("NFEETS") under SEEM.
9. The key conclusions are the following:
    1) Absent a good market power/manipulation analysis of the kind I discuss, there is no way in which the SEEM Proposal can be found just and reasonable in its current form. It would take must offer and must bid requirements to improve this design and help deter market power/manipulation designed to preserve the monopoly status of SEEM Filing Parties.
    2) SEEM Filing Parties must be able to provide a mathematical expression of the algorithm both for transparency and vendor implementation purposes. This is also necessary as the algorithm is the cornerstone of the filed rate. The Commission must know that the rate they are asked to approve will actually be the one implemented, and that market participants must be able to replicate and model market outcomes.

3) More public release of data and the appointment of an independent market monitor is essential for transparency and to be the Commission's eyes and ears on SEEM if it is approved and to ensure just and reasonable outcomes that are free from market power and manipulation. Absent a robust and independent market monitoring function, no market design can be considered just and reasonable.

4) Given the Southern Company Energy Auction experience where very few executed trades are executed, it would appear unlikely SEEM would result in the kind of robust participation and trading assumed by the Filing Parties and Dr. Pope and shown in the cost-benefit analysis.

5) Finally, the design of the market, if trading is as robust as hoped, will lead to the likely erosion of firm transmission revenues that would impose costs on transmission customers who do not benefit from the SEEM benefits. The SEEM Filing Parties have not attempted to demonstrate that the costs associated with an increase in firm transmission rates are outweighed by the benefits (energy market savings to customers), nor have they attempted to show which parties would actually bear the costs of the eroding transmission revenue through higher rates.

III. MARKET POWER AND MANIPULATION THROUGH THE LENS OF MONOPOLISTS' INCENTIVES TO RETAIN THEIR MONOPOLY POSITION IN SEEM

10. Filing Parties and their Affiant, Dr. Susan Pope, both assert that Filing Parties cannot exercise horizontal market power due to FERC oversight and the fact that Filing Parties have Market-based Rates ("MBR"), or Filing parties are relegated to cost-based rates for

transactions within their own Balancing Authority ("BA") or other BAs. Furthermore, they also assert they have no incentive to exercise the type of horizontal market power more common to uniform clearing price "balancing markets" as argued by Dr. Pope.[6] But what Dr. Pope describes is what I will call "vanilla brand" horizontal market power as it results from the withholding of supply from the market to drive up the uniform clearing price in order to increase overall profits for the generation supplier. The idea that SEEM is not a typical North American balancing market is irrelevant to the market power/manipulation discussion.

11. Unfortunately, neither the Filing Parties nor Dr. Pope have addressed the concerns I have provided in my earlier affidavit in which market power is more than just "vanilla brand" horizontal market power that is measured through conventional means in MBR filings.[7] Furthermore, neither the Filing Parties nor Dr. Pope have directly addressed the concerns implicit in the questions asked by Commission Staff in its Deficiency Letter regarding the use of toggles on/off of various market participants, but only commits to providing *ex post facto* toggle use information to the Commission on a regular basis. Moreover, the information provided by the Filing Parties reveals nothing about the true reasons for using the toggle, thus leaving Participants with the ability to use it in a discriminatory fashion.

12. Dr. Pope argues that imposing the three-counterparty requirement will solve the problems.[8] But what happens if there are 25 possible counterparties, as there are in the

[6] Deficiency Response at Attach. D, Suppl. Aff. of Susan L. Pope at ¶¶ 43–49 ("Suppl. Pope Aff.").

[7] Sotkiewicz Affidavit at ¶¶ 53–79.

[8] Suppl. Pope Aff. at ¶ 49.

Southern Company Energy Auction ("SCEA") for any one participant, and all but three of these counterparties are toggled off? This does not appear to be a possibility contemplated by Dr. Pope. But what is also omitted in their analysis is that all the Filing Parties have load to serve, and those related incentives and possible pathways for market power and market manipulation have been totally ignored by Filing Parties and Dr. Pope.

A. Market Power is Not Limited to Seller Market Power but Can Also be Buyer-side Market Power Through Different Means.

13. The view of the world offered by Filing Parties and Dr. Pope is that horizontal market power is the "vanilla brand" supplier market power where withholding can increase prices and profits. And they point out that the "split the savings" formula used by SEEM does not easily accommodate "vanilla brand" supply-side withholding because each transaction is priced based on the difference between the cost and the willingness to pay. But vanilla is far from the only flavor of market power and manipulation and Filing Parties do not consider any of the others.

14. The Filing Parties, all being vertically integrated utilities, may find times when they are not sellers of energy, but also buyers of energy. The Commission has not examined the ability for any of the Filing Parties to act as single buyers, or monopsonists, in their own BAs, nor has the Commission examined any possible tacit collusion of the Filing Parties as buyers, an oligopsony or a small set of buyers, that can foreclose trading opportunities for IPPs.

15. Monopsonists and oligopsonists traditionally try to withhold demand from the market or bid demand with an extremely low willingness to pay to keep prices down and reduce

their expenditures.[9] But what may happen, and has been observed already in the SCEA, is this is not monopsony or oligopsony in the traditional sense of trying to reduce prices below competitive levels. This is a game of restricting trading to a small set of players to protect the monopoly position of each of the oligopsonists by not bidding demand, or by bidding strategies designed to restrict supply only to a select few other similarly situated parties.

16. For example, the ability to "toggle off" IPPs or certain SEEM participants while still meeting the minimum threshold of at least three participants can still be an exercise of market power and manipulation to protect the monopoly position. Filing Parties can simply toggle on only other vertically integrated filing parties and leave off IPPs and still meet the three-party threshold. In this way, the apparent trading opportunities would not expose the franchise monopoly to the possibility that they are showing their regulators there is much lower cost power available in the market than they can provide themselves, or through other similarly situated franchise monopolies.
17. What are the incentives of such actions? One is to assure they have asymmetric information about their true costs and the costs of others while keeping regulators and other interested parties "in the dark." This asymmetric information allows the franchise monopoly to continue to ask for self-build and self-generate opportunities under the guise of being "low cost."
18. Moreover, since the Filing Parties, as franchise monopolies, are likely to satisfy their respective native loads with their lowest cost resources first, the remaining available

[9] Call this the "chocolate flavor" of market power…more interesting and different than vanilla, but market power nonetheless.

generation is of higher cost, and almost certainly higher cost than IPPs which have no native load to serve. Franchise monopolies have an incentive to make this information opaque as it would call into question past, current, and future decisions on self-build and operational decisions to their regulators.

19. In short, the kind of buyer-side market power than can be exercised is not one of artificially driving prices down below competitive levels, but one of excluding potential competition from lower cost resources by not bidding demand, or bidding demand but toggling off low-cost IPP suppliers.[10]

B. The Combination of Buyer-side Market Power Combined with Dynamic and Repeated Nature of Markets Creates Means to Preserve the Monopoly Positions under the Fig Leaf of Markets

20. The real issue of market power in SEEM has been largely ignored by the Filing Parties. All the major net suppliers of energy in SEEM are monopolists, and the competitiveness and market power issues must be observed through the lens of those monopolists.

21. No structural test for market power (Herfindahl-Hirschman Index or "HHI", pivotal supplier(s), or concentration ratios) captures the fact that market participants are monopolists in their own franchise service territories. The delivered price test used in Market-Based Rate authority analyses cannot capture the underlying incentives of monopolists, but only address "vanilla brand" horizontal market power. If anything, the structural market power tests and the delivered price test assume that these monopolists compete against each other to sell surplus power, but they ignore the incentives to preserve their monopoly positions.

[10] This can be thought of as the exotic, "mint-chocolate chip" flavor of market power or manipulation.

22. The incentives of a legally granted monopoly (franchise monopoly) are the following:

    1) Retain that monopoly to the extent possible and not let it slip away or be eroded by competition from any other market players including other monopolies.

    2) Once a monopoly, earn monopoly rents or profits that are far above what could be earned if the money were in a competitive market. By definition, a monopolist possesses market power in its own service territory.

    3) Foreclose any potential competition that may enter the monopoly market because such competition erodes monopoly rents and provides the state and its regulator information that there are lower cost alternatives available.

23. From the perspective of new merchant generation in the Southeast, especially new renewables, franchise monopolies are also in the position of being monopsonists or single buyers with buyer market as discussed above, but in ways that are different than reducing the price paid for new or excess generation below competitive levels. Franchise monopolies are also, given limited sites, the gatekeepers of access to the bulk power transmission system.

24. Game theory is often used in economics to understand market dynamics and evaluate how participant behavior is likely to affect and be affected by market design and the incentives market designs present. In a game theoretic sense, markets are repeated games. The strategies of each stage of a repeated game must be consistent with the overall long-term strategies that maximize the objective function of the players. Economists learning game theory learn about cooperative games and the strategies that are cooperative equilibria. Clearly if there is cooperation whether tacit or explicit, overall the players may be better off.

25. Applying this in the context of SEEM, the end game for a monopolist is to retain its monopoly and its monopoly profits. They do this by foreclosing competition. This is especially true for embedded transmission dependent utilities ("TDU") that serve load within their franchise areas, and if such customers were able to find lower costs, they are likely to defect to other sources of supply that are lower cost. As currently designed, SEEM would make this easier as the cost of transmission is zero and rates are unpancaked.

C. The Ability to Toggle off Market Participants Can Help Preserve Monopoly Positions

26. Monopolists will want to prevent transactions from occurring. Hence the ability to toggle off market participants. Transactions cannot occur if they have been blocked *ex ante*.

27. For example, in a scenario where there was no ability to toggle off market participants all possible matches of buyers and sellers could occur in SEEM where there is sufficient transmission capability. Consequently, net loads in SEEM could get the benefit of lower cost resources from other areas, without the need to pay for firm transmission across multiple balancing authorities, and not have to pay pancaked rates. Over time, this signals to market participants the ability to shed long-term contracts with the monopoly utility and rely more upon the spot market where there is a deeper pool of resources available.

28. As such long-term contracts expire, firm transmission is turned back and there is more unused transmission available, making the pool of possible resources even more available due to increased available transmission capability that would have zero cost under SEEM. This becomes a virtuous cycle in which the monopoly position is eroded by the availability of more competitive sources of generation. But this is exactly what the monopolist does not want to have happen.

29. Monopolist/monopsonist/oligopsonist have two primary means of avoiding such outcomes under the SEEM design:

    1) Toggle off potential market participants. In this case the monopolists, when they are net short and need to buy energy, could toggle off generation resources known to be least cost so that they end up buying only from more expensive resources, which allows the monopolist to show their state regulator that they need to build more supply, which enhances their rate base and returns.

    2) Each monopolist offers at prices above their marginal cost as a strategy where they can use their MBR authority. This is part of a tacit collusive strategy to ensure that they are not purchasing power at a cost lower than they can generate it for itself, and in turn, helps each franchise monopoly retain its position and not be poached by other franchise monopolies.

D. Monopolists' Strategies as a Repeated Game

30. Cooperative game theory helps to explain how and why monopolists can and will likely use the toggle function to exert market power in SEEM. Starting with the simplest example, one starts by assuming there are only two franchise monopolists in the SEEM market along with other players including merchant generation that will always be net sellers and TDUs that are almost always going to be net short and will be buyers of power. Also, we assume that neither the TDUs nor the merchant generators are large enough to affect the decisions of the two franchise monopolists.

31. A simple example that assigns game values that roughly mimic the ordinal expected market outcomes drives this point home. If the franchise monopolies tacitly collude or coordinate/cooperate to play to their incentives as monopolists, whereby they toggle off

all potential competitors and do not submit all demand that could be satisfied by lower cost resources, each gets a payoff or profit of 10.

32. If the franchise monopolists both truly compete in the sense of not toggling off any participants and offering both available supply and demand that could be satisfied by lower cost resources, each gets a payoff or profit of 6.
33. Clearly, collusion or cooperation leads to higher payoffs profits for both franchise monopolies (10) than competing against each other where payoffs are only 6.
34. Now suppose that one of the franchise monopolists competes in the sense of not toggling off participants and offers its demand where it thinks it can reduce overall costs, while the other franchise monopoly acts as a monopoly. In this situation the payoff to the "competing" monopolist is 13, while the payoff to the non-competing monopolist falls to 5. This reflects the competing monopolist eroding the other monopoly and taking away market share and profits.
35. If this game were only played one time, the dominant strategy would be to always compete as the payoffs to competing are always higher, regardless of what the other monopolist does (payoff is 13 which is greater than 10 when the other monopolist acts as a monopoly, and if the other monopolist also competes, the payoff is 6 which is greater than 5 by playing the monopoly strategy). Table 1 shows the payoffs from the game just described where the top row are the strategies for Franchise 1 and the left column contains the strategies for Franchise 2.

Table 1: Simple Game of Competing vs. Monopoly Retention

Franchise 1 / Franchise 2	Monopoly	Compete
Monopoly	**(10,10)**	**(13, 5)**
Compete	**(5,13)**	**(6,6)**

36. But markets are not one-time games. They are repeated hourly and daily. Over time, the profit outcomes shape participant behavior and provide incentives to cooperate to preserve their respective franchise monopoly positions. In the simple example, if this were a repeated game, what would be the optimal strategy over time for these franchise monopolists? If they compete, they will reveal information about their true costs and erode their monopoly positions and receive payoffs of 6 each time they play the game. However, if they cooperate, and each act in their interests to protect their monopoly status, each will earn a payoff of 10 over time, which is far better that earning a payoff of 6 from competing.

37. If at any point in time one of the franchise monopolies deviated from the monopoly strategy, they would be "punished" by the other payer who would then also compete. This "punishment" sends a signal to not deviate from monopoly interests and thus, lead back to each player protecting their monopoly interests as it is in their long-term best interest. So, the repeated game equilibrium would be the monopoly strategy.

38. How does this example translate to SEEM? The Filing Parties are all franchise monopolies whose incentives are to retain their monopoly positions. The proposed SEEM design that allows Participants to toggle on/off competitors and does not have must offer for supply or must bid for demand requirements creates the ability to exercise

market power and manipulation that cannot be captured by horizontal market power tests. Based on these incentives, the design leads to outcomes that are likely to be unjust and unreasonable.

IV. SEEM FILING PARTIES HAVE FAILED TO ADDRESS THE COMPUTATIONAL COMPLEXITIES OF THE MATCHING ALGORITHM

39. In my Affidavit, I pointed out the computational complexities and in implementing the conceptual algorithm as outlined in the Appendix B Market Rules.[11] SEEM Filing Parties still have not addressed these issues, and they are simply assumed away by their Affiant, Dr. Susan Pope despite her own acknowledgment of these complexities in her Supplemental Affidavit in various places.[12]

40. SEEM Filing Parties, responding to Commission Staff question 10a acknowledge the complexity of the algorithm in that they appear to have not yet contracted with a vendor, nor do they plan on publishing the mathematical optimization expression of the algorithm:

> The Southeast EEM Manuals will not include a mathematical statement of the optimization problem solved by the Algorithm (i.e., the software platform implementing the Southeast EEM), ***because this could be a significant undertaking and possibly an additional material Southeast EEM Member expense*** in addition to the planned cost of hiring a software vendor. Further expense and administrative burden also would be incurred to check the mathematical specification and modify it, if needed, with every change to the Market Rules, if and when these occurred and even if the change appeared to be minor.[13]

41. As a practical matter, the Filing Parties' assertion that it could be easier and less expensive to develop the software algorithm than it would be to actually mathematically

[11] Sotkiewicz Affidavit at ¶¶ 84–91.

[12] Suppl. Pope Aff. at n.10, ¶ 26.

[13] Deficiency Response at 38 (emphasis added).

express the algorithm makes no sense and defies logic. It would not be possible to develop the software algorithm without an optimization problem upon which to base the software. Without transparency and oversight by other interested parties, there is no ability to know whether the algorithm matches the intended design.

42. As a purely tariff and filed rate matter, it is almost unthinkable to be unable to provide a mathematical expression of the algorithm since ***it is the cornerstone of the filed rate for SEEM.*** Without this information it is impossible for the Commission, let alone SEEM participants or the Market Auditor, to evaluate the just and reasonableness, correctness, and implementation of the algorithm.

43. This lack of transparency and ability to evaluate the algorithm is just another example of the need for greater data transparency and need for a truly independent market monitoring function as discussed in Section V below.

V. GREATER PUBLIC DATA TRANSPARENCY AND AN INDEPENDENT MARKET MONITOR ARE ESSENTIAL TO ENSURE BEHAVIOR AND MARKET OUTCOMES IN SEEM ARE FREE FROM MARKET POWER AND MANIPULATION

44. In response to the Commission Staff questions 4.a. and 4.b. regarding information to be provided to the Commission to guard against market power and market manipulation, SEEM Filing Parties Dr. Susan Pope explain they will provide the data enumerated in a newly created Appendix D to the Commission through the Market Auditor every seven (7) days and commit to answer any follow up question to FERC, and this is memorialized in updated language to a new Section 2.5 in the SEEM Rules.[14]

45. These data are:

[14] Deficiency Response at 16–18 (Sect. 2.5 of redlined rules in response to Deficiency Letter Question 4a).

- Participant, bid/offer price, quantity, location, and All or Nothing information for each bid and offer in each interval;
- Specific parameter data for each Participant for all 15-minute intervals, including counterparties the Participant has elected to not be matched with for an interval and Balancing areas for which the Participant has elected not to be matched with a counterparty during an interval;
- Enabling Agreement counterparties for each Participant;
- The Network Map, updated as necessary;
- For each interval, ATC made available to the Southeast EEM by each Participating Transmission Provider, as well as the amounts of such ATC that are not used by the Southeast EEM;
- Price caps, as relevant for each Participant;
- Matched bids and offers with their associated scheduled MWh quantity and Energy Exchange Price;
- Implied marginal benefit information for each ATC limit for each interval, to the extent such information can reasonably be produced by the Southeast EEM Algorithm; and
- Descriptive information, such as market participant names and unique identifiers.[15]

46. It should be noted that under the proposed SEEM Agreement, these data will not be made publicly available, but only available to the Commission and other regulators and authorities. In response to Commission Staff question 7.d.i. and 7.d.ii., the Filing Parties commit to add language in the market rules that require responses from the Market Auditor to FERC, NERC, state regulators, and the TVA IG when requested to do so within 30 days of the request, and to post this information to the SEEM website and provide this simultaneously to the Membership Board.[16]

47. These proposed changes were necessary but are hardly sufficient to provide robust market monitoring along with public information transparency to allow other interested

[15] Deficiency Response at 17.

[16] *Id.* at 27–29 and Attach. A, Proposed Revision to Southeast EEM Agreement at 62.

parties to undertake analysis of the SEEM paradigm to look for possible anomalous patterns that may be consistent with market power or market manipulation.

A. Public Release of More Data Hiding Participant Names Should be Available for Interested Parties to Analyze.

48. All FERC-approved ISO-RTO markets require the public release of energy market offer and demand bid data with an appropriate lag between the submission of offers and the release of bids offers masking the entities submitting.[17] In some ISO-RTO markets the release of capacity market offer data is also required, such as in MISO.[18] One reason the Commission gave for this policy going back to the start of ISO-RTO markets was to allow interested parties to analyze data and put another set of eyes on the market to detect any possible market power or market manipulation as the Commission noted it is Order conditionally accepting the market design of the New York ISO in 1999:

> We agree that the ISO should maintain data on prices and load forecast for at least three months and should make these data available to market participants. Markets operate better under full information, and the availability of this information would help the market function more efficiently. We will also require that all information regarding energy bids be kept confidential for six months to help prevent collusive behavior.
> After a six-month delay, information on individual bids should be released to the public to help interested parties monitor the market.[19]

49. Even in the Southern Company Energy Auction ("SCEA"), when SOCO moved to the so-called Phase II SCEA that allowed third party offers of energy along-side of those

[17] For example, *see* PJM Interconnection's Data Miner2 application, where the offer data is provided with offer identities are masked. PJM, *Data Miner 2,* https://dataminer2.pjm.com/feed/energy_market_offers/definition (last updated June 1, 2021).

[18] *See*, MISO, *2020-2021 PRA Detailed Report*, https://cdn.misoenergy.org/2020-2021%20PRA%20Detailed%20Report446950.xlsx (last visited June 28, 2021).

[19] *See* 86 FERC ¶ 61,062, ¶ 61,224 (Jan. 27, 1999) (FERC's approval of the NYISO market design).

from SOCO, the market rules were changed to require the public release of offer and bid data after a six (6) month lag.[20] This lag was later reduced to 4 months,[21] and all bid and offer data are publicly available on the SCEA website.[22] A snapshot of these available bids and offers is provided below as an example from January 2021.

50. Figure 1 provides the Hour Ahead Energy ("HAE") demand bids and supply offers for January 1, 2021. Bids and offers are provided for each hour of the day for the HAE product. Figure 2 provides the Day-ahead Energy ("DAE") Liquidated Damages ("LD") which is firm energy for the 16-hour peak block of the day running from 6am Central Prevailing Time ("CPT") to 10pm CPT. There is also a DAE Recallable product that is non-firm that can be examined by the screen shot of not provided here.

[20] Southern Company Services, Inc. submits Fifth Revised Sheet No. 1 et al, Second Revised Volume No. 4, Docket No. ER09-88 (Oct. 19, 2009), Accession No. 20091022-0292 (market rules 4.2.4, redlined version).

[21] *See* Southern Company, *Auction Information – Announcement*, (Feb. 21, 2017), https://www.southerncompany.com/about/energy-auction/auction-information-page.html.

[22] Southern Company, *Historical Bid and Offers*, https://www.southerncompany.com/about/energy-auction/historical-bids-and-offers.html (last visited June 28, 2021).

Figure 1: Hour Ahead Energy (HAE) Bids and Offers Posted in the Southern Company Energy Auction

Delivery Date ▲	Delivery Hour	Bid Information				Offer Information			
		Ent	Total MW	Max Pri	Min Pr	Ent	Total MW	Min Pr	Max Pri
1/1/2021	1					2	4000	16.06	52.46
1/1/2021	2					2	4000	18.37	52.16
1/1/2021	3					2	4000	18.05	51.7
1/1/2021	4					2	4000	18.05	52.13
1/1/2021	5					2	4000	18.21	55.02
1/1/2021	6					2	4000	18.75	56.19
1/1/2021	7	2	200	12	12	2	4000	19.29	77.76
1/1/2021	8	2	200	12	12	2	4000	18.84	56.08
1/1/2021	9	2	200	12	12	2	4000	19.53	77.44
1/1/2021	10	2	200	12	12	2	4000	19.93	163.6
1/1/2021	11	2	200	12	12	2	4000	19.29	163.61
1/1/2021	12	2	200	12	12	2	4000	19.42	78.89
1/1/2021	13	2	200	12	12	2	4000	25.54	163.73
1/1/2021	14	2	200	12	12	2	4000	20.06	78.39
1/1/2021	15	2	200	12	12	2	4000	26.49	163.77
1/1/2021	16	2	200	12	12	2	4000	28.05	238.15
1/1/2021	17	2	200	13	13	2	4000	53.08	238.02
1/1/2021	18	2	200	13	13	2	4000	28.82	237.88
1/1/2021	19	2	200	13	13	2	4000	27.34	192.59
1/1/2021	20	2	200	13	13	2	4000	22.84	163.77
1/1/2021	21	2	200	13	13	2	4000	20.19	163.84
1/1/2021	22					2	4000	19.21	57.37
1/1/2021	23					2	4000	17.24	57.35
1/1/2021	24					2	4000	17.16	57.46

Figure 2: Day-ahead Energy (DAE) Bids and Offers Posted in the Southern Company Energy Auction

Delivery Date ▲	Bid Information				Offer Information			
	Entity	Total MW	Max Price	Min Price	Entity	Total MW	Min Price	Max Price
1/4/2021	2	200	18.5	18.5	2	100	40.99	40.99
					2	100	41	41
					2	100	41.99	41.99
					2	100	42	42
					2	100	43	43
					2	100	44.05	44.11
					2	100	44.35	44.71
					2	100	44.73	44.74
					2	50	44.9	44.9
					2	50	45.52	45.52
					2	50	46.21	46.21
					2	250	48.3	48.4
					2	250	49	49.09
					2	250	49.61	49.74
					2	250	49.77	49.79
					2	250	54.28	57.94
					2	250	58.26	58.75
					2	250	59.43	61.75
					2	50	61.86	61.86

51. Of course, the SCEA also provides energy prices for which transactions are done in the market. The most recent report of the IMA covering April 24, 2019 to April 23, 2020 showed that only 17,595 MWh of HAE energy were transacted, and transactions only took place in 219 hours out of 8,768 hours for the year (2.5% of all hours),[23] and no DAE transactions occurred.[24] This information can be verified by the bid ask spreads in the bid and offer data as well as other pertinent market information.

B. SEEM Limits Transparency of Publicly Available Data Making it More Difficult for Interested Parties to Analyze the Market.

52. SEEM Filing Parties have only committed to the release of the following data publicly through various reports as shown in Appendix B Southeast EEM Market Rules, Section V. However, these omit the following data that is currently available in the SCEA with a four (4) month lag as noted in Section IV.A above: (1) Interval by interval offer prices and quantities with identities masked. This alone is an enormous omission and must be corrected to bring greater transparency necessary to ensure the SEEM design is just and reasonable.

53. However, the SEEM algorithm's computational requirement is much more complex than those used for ISO-RTO energy markets due to the "toggle on/off" ability of market participants. Given this, the following data should be provided publicly, but with identities masked: (1) The numbers of total possible matching participants as evidenced by Enabling Agreements, and the number of those for which matches were allowed in

[23] Eleventh Annual Informational Report for the Independent Auction Monitor, at 2, Docket Nos. ER09-88, ER17-514 (June 30, 2020), Accession No. 20200630-5318.

[24] *Id.* at 2.

each interval; (2) Whether bids or offers were "all-or-nothing" or could be partially filled; (3) ATC on an interval basis as this should already be public based on postings to each BA and Transmission Provider site; (4) A pipe and bubble representation of the ATC between each BA in SEEM; (5) Matched bids and offers and the "split the savings price" used for the match; (7) binding transmission paths along with the marginal value of the transmission constraint as proposed by Dr, Pope; (8) all matches in the SEEM algorithm that did not actually flow, including the masked identities of the counterparties and the reason the transaction did not flow; and (9) The detailed posting of the auction algorithm so that interested parties could run various scenarios to see how market outcomes might differ under various conditions. This information can be used as a means to check against the EQR data for interested parties in the public who want to do their own analysis.

54. Information on matches that did not flow can help ferret out possible manipulation and/or transmission modeling problems. Modeling problems will almost assuredly arise since SEEM is part of the Eastern Interconnect in which all BAs, including large ISO/RTO systems, experience unexpected loop flows. If matched transaction does not flow because it is curtailed, it says something about the transmission model and that the ATC value along the contract path is not right for either loop flow reasons from outside SEEM (highly likely) or the model is too basic and does not account for internal loop flows within SEEM (also highly likely with the contract path method).

55. If matched transactions do not flow because the seller did not flow it, it could be because of a problem at the resource (forced outage), or potential withholding (for the reasons I have described already). If is the buyer does not take it or cancels it, it could because the short-term load forecast changed and they do not need the power, or it could be strategic

withholding of demand if one its own resources "suddenly becomes available." No matter the reason, information on unconsummated matches helps in monitoring the market.

56. In ISO-RTO markets, there is no "toggling on/off" participants, so this data is not needed in those markets to monitor for market power or discrimination. And in ISO-RTO markets, the use of standardized security constrained unit commitment ("SCUC") and security constrained economic dispatch ("SCED") is widely known and available in software packages for parties to replicate market outcomes. In this way SEEM is unique in allowing potential trading partners to be toggled on/off and the matching mechanisms is not standard, nor has an algorithm yet been developed as acknowledged by Dr. Susan Pope in her affidavit.[25] Thus, having this information available will be essential to help other interested parties monitor the markets.

C. SEEM Lacks an Independent Market Monitor which is Essential to Guard Against Market Power and Market Manipulation.

57. Each ISO/RTO has a market monitor. Some have both internal and external monitors (CAISO, SPP, ISO-NE) while others have only external and totally independent market monitors (MISO, PJM, NYISO). The role of external, and independent market monitors is to act as the eyes and ears of FERC. All markets are complex and generate terabytes of data each year and it is implausible that FERC would have the bandwidth to act as a full-time market monitor for SEEM. It is in no way reasonable or even possible for FERC staff to be asked to be the only entity undertaking the market monitoring role, and even if they could, the failure to disclose additional information regarding matched, yet unconsummated transactions, would not allow Commission staff to fully monitor the

[25] Suppl. Pope Aff. at n.10, ¶ 26.

market design and implementation flaws of exercise of market power and manipulation. Moreover, market monitors also provide another independent check on organized markets to ensure compliance with market rules.

58. In 2008 when FERC initially approved the Phase I version of the SCEA, it conditioned its approval on two crucial matters: (1) Allow for third parties to make energy offers into SCEA to enhance competition; and (2) establish an Independent Auction Monitor (IAM).[26]

59. With regard to the duties of the IAM, the Commission stated:

> Southern Companies must ensure that the Independent Auction Monitor is authorized to:
>
> (1) verify Southern Companies' Available Capacity calculations, including the companies' inputs into those calculations; (2) confirm that any transmission service necessary to accommodate a purchase under the auctions is not unreasonably withheld; and (3) independently file reports with the Commission regarding the auction process as described herein.
>
> Specifically, for the next three years the Independent Auction Monitor must report to the Commission every twelve months regarding the functioning of the auctions. At a minimum, such reports should include the following: (1) the clearing price for each auction; (2) the amount of energy offered and sold by each seller (identified by name) in each auction; and (3) the amount of energy bid on and purchased by each buyer in each auction. In addition, the Independent Auction Monitor's report must identify any instances where it was unable to verify Southern Companies' Available Capacity calculations and inputs or where issues arose involving availability or the terms of transmission service needed to accommodate an auction purchase. The Independent Auction Monitor must also report any complaints relating to the auctions or other serious concerns to the Commission as soon as possible rather than waiting for the next report. The Independent Auction Monitor must have independent authority to prepare and submit all such reports without any prior review or approval by Southern Companies or any other outside sources.
>
> In addition, Southern Companies must also file, as part of the compliance filing described below, the contract governing the relationship between them and the

[26] *Southern Company Services, Inc.*, 125 FERC ¶ 61,316, PP 48–52 (Dec. 18, 2008).

> Independent Auction Monitor, including the conditions under which Southern Companies may dismiss the Independent Auction Monitor.[27]

60. Under the SEEM proposal, no such IAM or monitoring entity exists, which is a fatal flaw. Given the extreme complexity of the yet to be developed and implemented algorithm, and the lack of transparency offered up by the SEEM Filing Parties, the equivalent of the IAM is essential to ensure just and reasonable market outcomes. All that the SEEM Filing Parties have offered to date is a Market Auditor who lacks independence and merely serves as a data reporting function to the Commission and reports to the Board on whether the market algorithm is reporting as intended.[28]

61. The only other role envisioned for the Market Auditor is in receiving complaints and referring them to the Membership Board; the Market Auditor has no investigative power or the authority to make a referral to the Commission's Office of Enforcement if it believes such complaints brought to it has resulted in exercises of market power or market manipulation.

62. The Market Auditor, if it is to serve the same role as an IAM, needs to have the power and obligation to analyze and report abuses to FERC. Participants on their own may be hesitant to report problems via a Section 206 Complaint for fear of being toggled off or having their Enabling Agreement terminated, which SEEM Filing Parties admit can happen for any reason,[29] and means such actions could be used to silence dissent or

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[27] *Id.* at PP 48–50.

[28] Deficiency Response at 25.

[29] *Id.* at 19–20 (responding to Deficiency Letter Question 5a). Filing Parties stating, "In the current bilateral market, there are no prescribed limitations on a party's ability to refuse to enter into an Enabling Agreement with a prospective or current party. Likewise, the Southeast EEM Agreement does not contain any such limitations, but it does require Participants to have an Enabling Agreement with three or more other Participants. This is purely a safeguard against market manipulation, as explained by Dr. Pope." But this

opposition. No such actions can be undertaken in ISO-RTO market transactions between parties in the Day-ahead or Real-time Energy and Ancillary Service Markets or Capacity Markets since those transactions are conducted through centralized clearing markets, but such actions can easily occur in SEEM.

VI. PROSPECTS FOR ROBUST PARTICIPATION AND BENEFCIAL TRANSACTIONS APPEAR LIMITED GIVEN CURRENT EXPERIENCE OF THE SOUTHERN COMPANY ENERGY AUCTION

63. Filing Parties claim that they want and expect robust participation on the SEEM.[30] Yet, current evidence from the Southern Company Energy Auction ("SCEA") indicates such expectations will not be met. Moreover, "participation" does not imply anything about the prospects for consummating beneficial matches and transactions as had been the experience in SCEA.

64. The Brattle Group, serving as the IAM for the SCEA, in its latest reports for 2020 shows that of the 26 registered participants, 99.9 percent of the offered energy for HAE, and 100 percent of recallable DAE and 99.5 of Firm Liquidated Damages ("LD") DAE.[31] It would be expected that SOCO would be the largest offeror of energy given it must offer all available capacity as energy into the auction, but it shows that few of the other participants are offering energy, even though many are IPPs.

65. The public version of the report does not provide any information on the breakdown of energy demand bid into the market, but for context the load entities only bid a total of

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only accounts for seller side market power, and not buyer-side market power or other forms of manipulation which Dr. Pope was never asked to examine.

[30] Deficiency Response at n.12 (citing Suppl. Pope Aff. at ¶ 47). *See also id.* at n.28 (citing Suppl. Pope Aff. at ¶ 70).

[31] Eleventh Annual Informational Report for the Independent Auction Monitor, at 7–8, Docket Nos. ER09-88, ER17-514 (June 30, 2020), Accession No. 20200630-5318.

118,211 MWh over the Month of January 2021. Generation offered 2,962,527 MWh. That bid load was only 4% of the total energy offered.

66. Even more shocking, in January 2021, 99.95% of energy offered was by one participant (likely SOCO), and if the identities in the data are correct, it also bid in 97% of the demand. Thus, despite there being 26 registered participants, there is not robust participation in SCEA, so there is no reason to believe this would change with SEEM given the similar rule sets.

67. The lack of demand and cleared transactions is not a new phenomenon in the SCEA. As noted by the Commission in 2015:

> Although the Auction is intended to serve as tailored mitigation, we are not persuaded that the Auction, even with the proposed enhancements, provides adequate mitigation of Southern Companies' presumed potential to exercise market power, ***particularly given the paucity of cleared transactions since the start of the Auction and the low level of third-party participation.*** The dearth of participation in the Auction could be an indication that it is ineffective because there are few suppliers willing to sell in the Auction, ***and few buyers interested in purchasing what is being offered. A robust Auction is one in which there are a large number of buyers and sellers, of which this Auction has neither.*** The most recent Informational Report for The Southern Companies' Energy Auction states that only Southern Companies offered hour-ahead energy in the hour-ahead auction, and two participants, including Southern Companies, offered Firm Energy in at least one day-ahead auction. Only Southern Companies offered Recallable Energy. Southern Companies acknowledge that the day-ahead and hour-ahead auction matches have not attained a level of frequency sufficient in the view of index developers to produce a price index for the products sold in the Auction. ***The scarcity of transactions in both the day-ahead and hour-ahead auctions has been consistent since the commencement of the Auction, and we are not persuaded that the enhancements described above will result in a robust Auction.***[32]

[32] *Alabama Power Company, et. al.*, 151 FERC ¶ 61,071, P 18 (Apr. 27, 2015) (footnotes omitted and emphasis added).

68. In response, SOCO filed changes in ER17-514 to modify the SCEA following feedback from Southeast stakeholders and also described non-tariff changes to the SCEA framework.[33] None of these changes addressed the issue of bid in demand for energy. While the Commission approved these changes,[34] and eventually terminated the 206 proceeding,[35] nothing was done to address the issue of a lack of demand in the SCEA and the continued low transaction volumes as described above as the focus was solely upon seller-side market power.

69. SOCO has never been required to bid in any demand as they are required to do for supply. Thus, it should not be surprising that the bid in demand in SCEA is quite low. This observation is also consistent with the objectives discussed above in Section III where the franchise utility is acting as a monopsonist/oligopsonist in the more traditional sense of withholding demand from the market, physically or economically, which keeps prices artificially low or keeps transactions from occurring, and also discourages more price discovery from other lower cost resources than those owned by SOCO used to serve load.

70. In response to the FERC Deficiency Letter, the Filing Parties acknowledge that 15-minute transactions are already permissible but are rare.[36] So given the decade-plus lack of transactions in the SCEA in which there is more lead time, and the fact that 15-minute transactions might be even rarer still, the prospect for a robust, liquid trading market in

[33] For a summary of these changes, *see*, Enhancements to the Southern Company Energy Auction, at 1–2, Docket No. ER17-514 (Dec. 9, 2016), Accession No. 20161209-5103.

[34] *Alabama Power Company, et al.*, 158 FERC ¶ 61,131 (Feb. 2, 2017).

[35] *Alabama Power Company, et al.*, 163 FERC ¶ 61,090 (May 4, 2018).

[36] Deficiency Response at 10 (in response to Deficiency Letter Question 3).

SEEM appears to be more wishful thinking than it is based on any kind of empirical evidence that mitigation of seller-side market power alone, along with NFEETS, is the panacea for unlocking a liquid short-term market that has alluded the region for decades.

71. However, buyer-side mitigation measures and general market manipulation along with seller-side market power are all concerns for the Commissions when thinking about market design and its competitiveness and just and reasonableness. The extension of low to non-existent bid in demand into SEEM is easy to infer from the experience of SCEA. But in this case, the Commission is in a position to mandate mitigation such as "must bid in demand" to ensure against the withholding of demand that leads to uncompetitive, unjust, and unreasonable market outcomes.

VII. SEEM FILING PARTIES CONFLATE EROSION OF FIRM TRANSMISSION REVENUES WITH RESOURCE ADEQUACY NEEDS OF LOAD SERVING ENTITIES AND COST CAUSATION OF THOSE USING FIRM TRANSMISSION

72. Commission Staff in its Deficiency Letter asked the SEEM Filing Parties to explain how the erosions of firm transmission revenues, if they are eroded more than the benefits from SEEM participation would be consistent with cost causation.[37] SEEM Filing parties confirm that such erosion is possible, but argue that NFEETS will not lead to such a large erosion of firm transmission revenues and increases in network transmission rates since NFEETS is not a firm transaction that can be used for resource adequacy.[38] Further, SEEM Filing Parties aver this is consistent with cost causation principles as those paying

[37] *Id.* at 11 (in response to Deficiency Letter Question 9.a.).

[38] SEEM Proposal at 36–37.

for firm point-point and network transmission are those parties that would benefit from NFEETS service.[39]

A. SEEM Filing Parties Confuse Firm Transmission Revenue Erosion with Resource Adequacy

73. Firm Network Service allows the holders (almost always load) to have access to all resources interconnected to the Transmission Provider's transmission system to serve load when needed. Resource Adequacy is related to the ability to have sufficient resources to serve all firm load at the expected peak while accounting for load forecast error, generators outages, and weather variation.

74. Generators that are interconnected to the transmission system of any of the FERC jurisdictional SEEM Filing Parties as a Network Resource, have already been through the generator interconnection process, and already paid for transmission upgrades to be deliverable to the system and do not pay for transmission beyond those upgrades. This is true for IPPs as well as those generating facilities owned by the SEEM Filing Parties used to serve their native load and Network Loads. Once interconnected, generators that are Network Resources are deliverable to the Network Load by design to help ensure resource adequacy.

75. Resource adequacy has no bearing on the use of Firm Point-to-Point transmission service. The only time this would come into play is for a resource located in one BA that is providing energy and capacity to load in another BA and requires Firm Point-to-Point to reach the border of the neighboring system. But given the way in which each SEEM Filing Parties' system has been developed, it is unlikely they will have much use for Firm

[39] *Id.* at 37.

Point-to-Point Transmission to deliver firm energy and capacity. In this sense, the transmission systems and designated Network Resources having gone through the interconnection process are no different than ISO-RTO systems. Firm Point-to-Point transmission would not be used for local resource adequacy.

B. Those Facing Higher Costs for Firm Point-to-Point Transmission Would Not Benefit from SEEM, and the Assertion Of Benefits Outweighing Additional Costs Has Not Been Supported.

76. The only parties that would be interested in Firm Point-to-Point Transmission Service are those generators looking for transmission to the border to sell into neighboring ISO-RTO Markets. The SEEM footprint borders on PJM, MISO, and SPP that have transparent and open markets for energy, and in MISO's and PJM's case capacity, the one economically rational reason to hold Firm Point-to-Point Transmission is to access those markets.

77. So, erosion of Firm transmission revenues from the use of SEEM leading to higher charges for other Firm Point-to-Point and Network Integration Transmission Service would fall on holders of Firm-Point-to-Point Service looking to access other markets and not participate in SEEM, and thus are not beneficiaries of the alleged, and highly uncertain benefits of SEEM. This would not be consistent with cost causation principles.

78. With regard to Network Integration Transmission Service, these customers may benefit from short term energy transactions in SEEM ***only if*** the transmission owning SEEM Filing Parties would offer that load into SEEM as bid-in demand and allow some of their own generation to be displaced by lower cost generation. Otherwise, there would be little benefit to SEEM load, and yet they could also face increases in their transmission costs without the commensurate benefits. This is likely to be the outcome if SEEM works like

the SCEA has, and franchise monopolies act to reserve their positions as discussed Section III above.

* *

79. This concludes my affidavit.

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 **Duke Energy Carolinas, LLC**	)	**ER21-1115-000**
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)**

AFFIDAVIT OF PAUL M. SOTKIEWICZ, PH.D.

Pursuant to 28 U.S.C. § 1746, I, Paul M. Sotkiewicz, Ph.D., declare under penalty of perjury under the laws of the United States of America that the statements contained in the foregoing Affidavit of Paul M. Sotkiewicz, Ph.D. are true and correct to the best of my knowledge and belief.

Paul M. Sotkiewicz, Ph.D.

Executed on
this 28 day of June 2021