

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Alabama Power Company	)	Docket No. ER21-1111-000
Dominion Energy South Carolina, Inc.	)	Docket No. ER21-1112-000
Louisville Gas and Electric Company	)	Docket No. ER21-1114-000
Duke Energy Progress, LLC	)	Docket No. ER21-1115-000
Duke Energy Carolinas, LLC)	
Duke Energy Carolinas, LLC	)	Docket No. ER21-1116-000
Duke Energy Progress, LLC	)	Docket No. ER21-1117-000
Louisville Gas and Electric Company	)	Docket No. ER21-1118-000
Georgia Power Company	)	Docket No. ER21-1119-000
Kentucky Utilities Company	)	Docket No. ER21-1120-000
Mississippi Power Company	)	Docket No. ER21-1121-000
Alabama Power Company	)	Docket No. ER21-1125-000
Dominion Energy South Carolina, Inc.	)	Docket No. ER21-1128-000
	)	(Not Consolidated)

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE
SOUTHEAST EEM MEMBERS**

Noel Symons
Julia Dryden English
Katlyn A. Farrell
Carrie A. Mobley
McGuireWoods LLP
888 16th Street NW, Suite 500
Black Lives Matter Plaza
Washington, DC 20006
(202) 857-2929
nsymons@mcguirewoods.com
jenglish@mcguirewoods.com
kfarrell@mcguirewoods.com
cmobley@mcguirewoods.com

*Counsel for the Members of the
Southeast Energy Exchange Market*

March 30, 2021

TABLE OF CONTENTS

	Page
I. Motion for Leave to Answer.....	2
II. Executive Summary	3
III. Some intervenors improperly seek to expand the scope of the proceeding beyond consideration of whether the actual Southeast EEM proposal is just, reasonable and not unduly discriminatory.	7
A. The Southeast EEM is not a loose power pool, and in any event transmission will be provided on a non-discriminatory basis.....	8
B. This is not the proceeding for considering whether some other form of market should be implemented in the Southeast.....	14
1. Under Section 205, the Southeast EEM proposal cannot be denied or modified merely because some would prefer an alternative approach.....	14
2. The Southeast EEM is not subject to RTO rules.	16
3. Intervenors’ arguments in favor of alternative approaches are not persuasive and provide no basis for the Commission to deny the Southeast EEM Filings.	17
4. Approval of the Southeast EEM does not preclude future market development.	19
C. Arguments regarding the functioning of the current Southeast market are incorrect.	20
IV. Arguments that address issues within the scope of the Southeast EEM Filings do not justify rejection of the proposal.	22
A. The Southeast EEM will produce net benefits.....	22
B. Requests for market monitors and market power studies are not premised on the facts pertinent to this market and should be rejected.	29
C. It is appropriate for the LSEs that fund the Southeast EEM to govern it, subject as needed to Commission oversight.	37
D. The proposed governance structure is sufficiently transparent, but the Members will adopt some intervenor suggestions.....	41
E. The minor requirements of and limitations on participation in the Southeast EEM are not unduly discriminatory and are necessary from an operational perspective.	41
F. Intervenors generally support the proposed \$0 rate for NFEETS, and minimal concerns about losses and imbalance charges appear to be based on misconceptions.....	45
G. The proposal includes the appropriate level of market data transparency.....	48

H.	The Market Rules include the terms and conditions necessary to determine how the Algorithm should function – nothing further is necessary in the filed rate.	48
I.	No intervenor raised any real reliability concerns.	51
V.	Requests for further process should be rejected.	54
A.	Consolidation is unnecessary.	54
B.	There is no need for a technical conference in this proceeding.	55
C.	The Southeast EEM Members provided sufficient evidence in the record for the Commission to accept the proposal without a deficiency letter, and intervenors raise no real factual issues.	58
VI.	Conclusion	58

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Alabama Power Company	)	Docket No. ER21-1111-000
Dominion Energy South Carolina, Inc.	)	Docket No. ER21-1112-000
Louisville Gas and Electric Company	)	Docket No. ER21-1114-000
Duke Energy Progress, LLC	)	Docket No. ER21-1115-000
Duke Energy Carolinas, LLC)	
Duke Energy Carolinas, LLC	)	Docket No. ER21-1116-000
Duke Energy Progress, LLC	)	Docket No. ER21-1117-000
Louisville Gas and Electric Company	)	Docket No. ER21-1118-000
Georgia Power Company	)	Docket No. ER21-1119-000
Kentucky Utilities Company	)	Docket No. ER21-1120-000
Mississippi Power Company	)	Docket No. ER21-1121-000
Alabama Power Company	)	Docket No. ER21-1125-000
Dominion Energy South Carolina, Inc.	)	Docket No. ER21-1128-000
	)	(Not Consolidated)

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE
SOUTHEAST EEM MEMBERS**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”), the Southeast EEM Members¹ hereby move for leave to answer and answer (“Answer”) the March 15, 2021 comments to the

¹ For purposes of this Filing, the Southeast EEM Members 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”) (each a “Member” and collectively, the “Members”). In addition, the following entities have participated in the creation of the Southeast EEM and are in the process of or are contemplating seeking the necessary approvals to execute the Southeast EEM Agreement and become Members: 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”).

Southeast EEM Members' February 12, 2021 filings to implement the Southeast Energy Exchange Market ("Southeast EEM").² The Southeast EEM Agreement Filings requested the Commission accept the Southeast EEM Agreement, without modification, to become effective on May 13, 2021, and to accept related changes to the Commission-jurisdictional Members' open access transmission tariffs ("OATT").

The protests and comments filed largely are not about the actual rate proposed in this proceeding, and none identify any flaws that would require rejection, modification, or further process. Accordingly, the Southeast EEM proposal should be accepted without further process.

I. Motion for Leave to Answer

Rule 213(a)(2) of the Commission's regulations prohibits answers to answers unless otherwise ordered by the decisional authority.³ The Southeast EEM Members respectfully move to answer the comments and protests filed by the intervenors in the above-captioned dockets.⁴

² The Southeast EEM Members made twelve separate filings: the Southeast EEM Agreement Filing (Docket No. ER21-1111-000); certificate of concurrence filings for Georgia Power (Docket No. ER21-1119-000), Mississippi Power (Docket No. ER21-1121-000), Dominion Energy SC (Docket No. ER21-1112-000), DEC (Docket No. ER21-1116-000), DEP (Docket No. ER21-1117-000), KU (Docket No. ER21-1120-000), and LG&E (Docket No. ER21-1114-000) (the "Concurrence Filings"); and open access transmission revision filings for Southern Companies (Docket No. ER21-1125-000), Dominion Energy SC (Docket No. ER21-1128-000), DEC (Docket No. ER21-1115-000), and LG&E (Docket No. ER21-1118-000) (the "OATT Filings") (collectively, "Southeast EEM Filings"). Capitalized words used in this Answer that are not otherwise defined have the meaning ascribed to them in the Southeast EEM Filings.

³ 18 C.F.R. § 385.213(a)(2) (2020).

⁴ Specifically, the Southeast EEM Members are responding to the following intervenors: Public Citizen, Inc. ("Public Citizen Protest"); Entergy Operating Companies ("Entergy Protest"); Carolina Clean Energy Business Association ("CCEBA Comments"); Advanced Energy Economy, Advanced Energy Buyers Group, and Renewable Energy Buyers' Alliance (together the "CEC") ("CEC Comments"); American Forest and Paper Association ("AFPA Comments"); Voltus, Inc. ("Voltus Protest"); Environmental Defense Fund ("EDF Comments"); Southern Renewable Energy Association ("SREA Comments"); the Georgia Association of Manufacturers ("GAM Comments"); Pine Gate Renewables, LLC ("Pine Gate Comments"); R Street Institute ("R Street Institute Comments"); PJM Interconnection, L.L.C. ("PJM Comments"); Tennessee Valley Public Power Association, Inc. ("TVPPA Intervention"); Senator Tom Davis; Representative Nathan Ballentine; Energy Alabama, Sierra Club, South Carolina Coastal Conservation League, GASP, Southern Alliance for Clean Energy, Southface

Good cause exists to grant this motion because this answer clarifies issues in dispute, corrects incorrect or misleading statements, and otherwise provides information to assist the Commission in its decision-making process.⁵

II. Executive Summary

The sole purpose of these Section 205 proceedings is to determine whether the Southeast EEM Filings propose rates that are just, reasonable and not unduly discriminatory. However, various intervenors either request that the Commission consider their preference for an alternative approach, such as a Regional Transmission Organization (“RTO”) or Energy Imbalance Market (“EIM”), or mischaracterize the nature the Southeast EEM, confusing it for a loose power pool.

The Southeast EEM proposal offers two small but significant enhancements to the existing bilateral market in the Southeast, without changing the fundamental nature of the existing market. Indeed, the Southeast EEM will enhance, not replace, the existing bilateral market by providing an opportunity to leverage automation and zero-cost transmission, facilitating beneficial non-firm, sub-hourly bilateral transactions. Consistent with the purpose of

Energy Institute, Inc., Vote Solar, Georgia Interfaith Power and Light, Georgia Conservation Voters, Partnership for Southern Equity, North Carolina Sustainable Energy Association, Sustainable FERC Project, and Natural Resources Defense Council (together, the “PIOs”) (“PIOs Protest”); and Midcontinent Independent System Operator, Inc. (“MISO Comments”).

⁵ See, e.g., *Ne. Utils. Servs. Co. v. NRG Energy, Inc.*, 101 FERC ¶ 61,327 at P 17 (2002) (accepting an answer clarifying the issues); *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229 at P 102 (2012) (accepting an answer that “corrected the record” and informed the Commission’s decision-making); *Sw. Power Pool, Inc.*, 172 FERC ¶ 61,179 at P 22 (2020) (accepting an answer that aided in decision-making); *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,171 at P 27 (2020) (same); *Midcontinent Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,169 at P 52 (2020) (same).

the Southeast EEM, most regional transactions will still be conducted through existing bilateral market mechanisms that will not be impacted by the Southeast EEM proposal.⁶

Looking only to some of the protests as guideposts, one might think the Southeast EEM Members had filed a very different proposal. The lengthiest protests in particular attempt to shoehorn arguments and issues into this proceeding that are irrelevant to the Southeast EEM Filings. At their core, these filings request a more fundamental reshaping of the Southeast market, *e.g.*, creation of an RTO, as an alternative to the Southeast EEM proposed in this proceeding.⁷ To that end, these intervenors urge the Commission to either reject the actual filing before it or apply concepts that are only relevant to those other frameworks. Such arguments are little more than a collateral attack on the existing Southeast bilateral wholesale markets and their underlying retail regulatory framework.

In addition to perpetuating a logical fallacy, these arguments are also outside the scope of these proceedings. The Southeast EEM Members filed their proposal under Federal Power Act (“FPA”) Section 205, which means this proceeding is about the proposal before the Commission, not alternatives proffered by intervenors. More specifically, debates about whether an RTO, EIM, or other major changes to the utility industry should or could be imposed on the jurisdictional entities in the Southeast⁸ are beyond the scope of this Section 205 proceeding because: 1) the Southeast EEM Filings do not seek approval of the current market structure in

⁶ Southeast EEM Agreement Filing, Overview Aff. at P 6.

⁷ See Section III below.

⁸ As discussed in Section V.B below, the Southeast is a honeycomb of jurisdictional and non-jurisdictional providers, such that any effort that does not cooperatively include non-jurisdictional entities would lead to a far less cohesive footprint than the Southeast EEM proposal. 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.

the Southeast, and 2) in any event, it is black letter law that the Commission must evaluate the proposal before it, without considering the merits of other proposals.⁹

Looking at the full set of pleadings submitted in response to the Southeast EEM proposal, several themes emerge:

- Perhaps the most important thing shown (or more precisely, not shown) by the interventions is that no party identified any meaningful design flaw in the Southeast EEM proposal. While certain concerns regarding governance, transparency, and potential to exercise market power are within the scope of the proceeding, for the most part these concerns either misunderstand the proposal, or are unfounded as a matter of facts, law and public policy.
- Some intervenors try to advance policy agendas by calling for wholesale changes to aspects of the Southeast bilateral construct that are not at issue. These intervenors attempt to circumvent that scope problem by arguing that the Southeast EEM proposal is a loose power pool under Order No. 888. As previous Commission decisions make clear, that is incorrect. In any event, the Southeast EEM fully addresses the primary Order No. 888 issues associated with loose power pools by providing service to all customers within the Southeast EEM footprint (including independent power producers (“IPPs”) and Members) on the same non-discriminatory terms and conditions.
- Many of the same intervenors also seek to impermissibly broaden the scope of the proceeding by asking the Commission to consider whether the existing Southeastern bilateral market should be replaced. Those requests are accompanied by requests for technical conferences to address that extraneous issue and deficiency letters. However, while these intervenors sometimes attempt to cast their requests in terms of the proposal before the Commission, none identify any real factual deficiencies in the support provided for the Southeast EEM Filings.
- Overall the Southeast EEM proposal was well received. Of the 67 pleadings¹⁰ submitted in the case, over 80% supported the proposal in whole or substantial part, or did not

⁹ See Section III.B below.

¹⁰ Counting a document-less intervention and a substantive filing by the same intervenor or group of intervenors as one pleading.

oppose it.¹¹ Importantly, none of the public utility commissions from the states in which the Southeast EEM would operate objected, while six intervened.¹²

In sum, the proposal before the Commission in this proceeding is for two important, but narrow, additions to the existing bilateral market, as further discussed below. Importantly, as expressly affirmed by many intervenors, this is a positive progression for the Southeast.¹³ This positive, pro-competitive change should be assessed on its own merits, as the law requires. The requests for a deficiency letter or a technical conference in this docket should be rejected because the record in the case strongly supports approval of the actual proposal before the Commission. The Southeast EEM proposal is just, reasonable, and not unduly discriminatory, and should be approved, without suspension, hearing or modification, effective May 13, 2021, as requested.

As to arguments for a technical conference to explore policy issues related to the general restructuring of the Southeast markets, the Southeast EEM Members take no position in the current case, but note that this proceeding is not the forum to debate the larger issues that have been raised. These broad policy debates will implicate a wide range of complex and far-reaching issues, including but not limited to potential intrusions on State regulatory jurisdiction.

¹¹ By the Southeast EEM Members' count, 10 intervenors (or groups of intervenors) oppose or seek major modifications to the Southeast EEM Filings, and 57 either support, do not oppose, or seek only minor modifications to the Southeast EEM Filings.

¹² Specifically, the South Carolina Public Service Authority, North Carolina Public Utilities Commission, Mississippi Public Service Commission, Missouri Public Service Commission, Georgia Public Service Commission, and the Kentucky Public Service Commission intervened but did not oppose the filings. Additionally, staff of the North Carolina Utilities Commission, Mississippi Public Utilities Staff, South Carolina Office of Regulatory Staff, and the North Carolina Department of Justice intervened, but did not oppose the filings.

¹³ See R Street Institute Comments at 3 ("R Street supports the initial step of the utilities included in this proposal. The Southeast has long been reluctant to embrace the potential benefits of Regional Transmission Organizations (RTOs), so this imbalance, bilateral market proposal can be seen as a step in the right direction."); SREA Comments at 2 ("[T]he Southeastern Energy Exchange Market (SEEM) is a step towards better market efficiency . . ."); AFPA Comments at 6 ("AF&PA supports this step towards the use of a more economically efficient regional transmission system to facilitate short-term opportunity sales of energy."); EDF Comments at 4 ("[T]he Southeast EEM represents a step in the direction of a more coordinated and efficient electric system.").

Moreover, potentially interested parties and the public at large are not on notice that such broader issues could be considered in this proceeding. Further, there are additional issues regarding the extent to which a broad restructuring would be feasible given the many non-Commission-jurisdictional Southeast EEM Members. Finally, and perhaps most importantly, implementation of the instant proposal in no way will impede or restrict a broad market restructuring if the appropriate federal and state policy makers elect to go in that direction. Consequently, there is no reason to delay the real gains proposed here while such extraneous issues are considered.

III. Some intervenors improperly seek to expand the scope of the proceeding beyond consideration of whether the actual Southeast EEM proposal is just, reasonable and not unduly discriminatory.

Most arguments against the implementation of the Southeast EEM misunderstand or mischaracterize the proposal before the Commission. The Southeast EEM is solely a mechanism to more efficiently trade *residual* energy using *residual* transmission for 15-minute intra-hour bilateral transactions. This is accomplished through two small but significant additions to the existing bilateral market: 1) unutilized Southeast EEM Participating Transmission Providers' transmission capacity will be made available on an intra-hour basis at no charge (other than financial losses) for 15-minute Southeast EEM Energy Exchanges under the Participating Transmission Providers' tariffs; and 2) the Southeast EEM will use a computer algorithm that considers load bids, generation offers, and constraints to match buyers and sellers in transactions, settled on a split-the-savings basis, that benefit both the buyer and the seller.¹⁴

All existing trading mechanisms will be preserved, and in addition, buyers and sellers will have a new, additional avenue to sell and purchase energy through the Southeast EEM. There will be no change to the way that entities in the region will maintain reliability and

¹⁴ Southeast EEM Agreement Filing, Transmittal Letter at 8-9.

resource adequacy, or plan their systems, which will continue to be overseen under local (state and non-jurisdictional) authority.

In short, while the proposal represents a beneficial addition to the existing bilateral market in the Southeast, one of its key virtues is its simplicity. There are those who wish for a more aggressive change in the Southeast, such as formation of an RTO, a power pool, or some other form of organized market. But the Southeast EEM proposal is an exercise of the Section 205 filing rights of the jurisdictional Members. Efforts to make the Southeast EEM proposal something it is not, and judge it by standards applied to different sorts of arrangements, must be rejected.

A. The Southeast EEM is not a loose power pool, and in any event transmission will be provided on a non-discriminatory basis.

The CEC and the PIOs argue that the Southeast EEM amounts to a loose power pool because Non-Firm Energy Exchange Transmission Service (“NFEETS”) will be used to effectuate Energy Exchanges.¹⁵ But these arguments mistake both the letter and the purpose of the power pool principles articulated in Order Nos. 888 and 888-A.¹⁶ The Southeast EEM is not a loose power pool. And in any event, 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

¹⁵ See CEC Comments at 9-15; PIOs Protest at 8-13.

¹⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. & Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (“Order No. 888”), Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (“Order No. 888-A”), *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 Policy 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).

and conditions, and so addresses the undue discrimination concerns the Commission identified in Order Nos. 888 and 888-A¹⁷ without requiring a separate OATT.

A loose power pool only exists if there is a multilateral arrangement discounting transmission; if a public utility “excise[d] all discounted and/or special arrangements transmission service from the pooling arrangement,” then the arrangement “would cease to be a loose pool for purposes of Order No. 888.”¹⁸ Therefore, central to the question of whether Order No. 888 and 888-A principles apply to an arrangement is whether the arrangement contains a discounted transmission rate.

NFEETS is not discounted transmission, so the Southeast EEM is not a loose power pool. In similar circumstances in *Public Service Co. of Colorado*,¹⁹ the Commission rejected arguments that the Public Service Company of Colorado (“PSCo”) Joint Dispatch Agreement (“JDA”) was a loose power pool, finding that the use of a zero-rate transmission product that relied on otherwise unused transmission capacity did not constitute a discount. The Commission stated that because the transmission service would otherwise go unused, there would be no opportunity costs associated with the transmission. The Commission also noted that the parties would not have discretion as to whether and how the transmission, called Joint Dispatch Transmission Service (“JDTS”), was used. Instead, the Commission found that it was a “function of least cost dispatch” and therefore was not a discount to non-firm transmission

¹⁷ “The primary goal of Order No. 888’s requirements for pooling arrangements, including ‘loose’ pools, is to ensure comparability regarding transmission services that are offered on a pool-wide basis.” Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 30,241.

¹⁸ *See id.*

¹⁹ *See Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at PP 84-85 (2016).

service, and did not serve as a replacement of that service.²⁰ Thus, the Commission rejected arguments that the PSCo JDA created a discount on transmission.

Like JDTS, NFEETS is based on use of otherwise unused transmission with no opportunity costs.²¹ Additionally, similar to the PSCo JDA, the Southeast EEM Members and Participants will not have discretion as to whether and how NFEETS is used. Much like the allocation of JDTS on the basis of least cost dispatch, NFEETS will be awarded only to those offers and bids paired through the Algorithm.²² The matching (and resulting scheduling of NFEETS) will be performed by the Algorithm in a way that maximizes benefits for the region, thus taking the determination of matches and the related access to NFEETS out of the control of the Southeast EEM Members.²³ Finally, NFEETS also does not serve as a replacement to any existing transmission service. It is a new transmission service with the lowest priority and, as the Southeast EEM Agreement Filing made clear, Participants will need to have alternative

²⁰ See *id.* at P 84.

²¹ Southeast EEM Agreement Filing, Overview Aff. at P 23 (“Since the Southeast EEM will only use transmission that is not otherwise being used, it will not result in underfunding of transmission, which will still be paid for through current rate constructs, *i.e.*, through revenues received from customers of Network Service and Point-to-Point Service, or their equivalent.”); *id.*, Economics Aff. at P 66 (“Hence, if that charge is not collected when NFEETS is used, it does not constitute a failure to recover direct variable costs from NFEETS customers. Furthermore, NFEETS utilizes transmission that would otherwise go unused; in the absence of NFEETS, no transmission revenue would be paid to the Participating Transmission Provider for use of this transmission.”).

²² *Id.*, Operations Aff. at P 32 (noting that NFEETS “may be obtained only using the reservation, scheduling and tagging functions of the Southeast EEM System (rather than directly through Open Access Same Time Information System or other reservation, scheduling or tagging requirements applicable to other forms of transmission service offered by the Participating Transmission Provider”).

²³ *Id.*, Economics Aff. at P 52 (“The Algorithm’s determination of which bid and offer to pair together as a transaction and the transmission path for the transaction will depend on all of the other bids and offers made in the same interval, all of the counterparty constraints, all transmission loss rates, and all transmission limits. A change in any input could alter which bids the Algorithm matches with which offers and the associated transmission paths. Even small changes in inputs, such as the addition of a counterparty constraint, could cause ripple effects in the Algorithm’s determination of the set of Energy Exchanges that maximizes total benefits in an interval.”).

arrangements in place to ensure that they remain resource adequate if supply is not available in the NFEETS to serve their load, if such supply cannot be scheduled in NFEETS due to transmission limitations, or if NFEETS is curtailed.²⁴ Therefore, NFEETS, like JDTS, is not a discounted transmission service, and neither NFEETS nor the Southeast EEM Agreement are subject to the requirements applicable to loose power pools.²⁵

In any event, the Southeast EEM structure prevents undue discrimination, thereby addressing the Commission's primary concern in issuing the loose pool requirements in Order Nos. 888 and 888-A. As the Commission said in Order No. 888, filing 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."²⁶ In the only case cited by intervenors that orders the creation of a joint OATT, the Commission found that a multi-lateral trading agreement necessitated filing of a joint OATT because, among other things,

²⁴ *Id.*, Transmittal Letter at 38 (explaining that "generators serving native load will never be redispatched to accommodate intra-hour Southeast EEM transactions – Southeast EEM transactions would be curtailed instead" and that "[t]his means that every load-serving entity participating in the market needs a plan to serve its own load outside and independent of the Southeast EEM.").

²⁵ The attempt to label the Southeast EEM as a power pool is also at odds with the common understanding of the term. While the Commission stated in Order No. 888 that it intended the term to have broad reach, *see* Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,726 & n. 415, in a prior Notice of Inquiry proceeding specific to the issue, the Commission said that in a loose pool, "the participating utilities work together to establish principles and practices for interconnected operation, review area power supply problems and establish criteria for power supply adequacy, exchange generation and transmission construction plans, and plan coordinated efforts to attain optimal economy and reliability, [but] there is no central dispatch and there may be less joint planning." *Inquiry Concerning Alternative Power Pooling Institutions under the Fed. Power Act*, 59 Fed. Reg. 54,851, 54,854 (Nov. 2, 1994). The Southeast EEM does none of these things.

²⁶ Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,726; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at 31,241 ("The primary goal of Order No. 888's requirements for pooling arrangements, including 'loose' pools, is to ensure comparability regarding transmission services that are offered on a pool-wide basis.").

it “provides a transmission rate that is available for the delivery of power and energy between the parties to the agreement only.”²⁷

In other words, a joint OATT can be a cure to undue discrimination arising from selective provision of a transmission discount. But it is not the only cure. An equally effective measure is for every participating public utility (and non-public utility for that matter) to agree to embed in their OATTs (or equivalent) the same exact terms and conditions for providing the new form of transmission service to all transmission customers. That was the express holding in *Western Systems Power Pool*.²⁸ And that is exactly what the Southeast EEM Agreement does. As explained in the Southeast EEM Agreement Filing, zero-cost NFEETS will be made available to all Participants on non-discriminatory terms, not just the Southeast EEM Members who are parties to the Southeast EEM Agreement.²⁹ The OATT Filings in the unconsolidated dockets

²⁷ See *Wolverine Power Supply Coop., Inc.*, 85 FERC ¶ 61,099, at 61,355 (1998).

²⁸ See *W. Sys. Power Pool*, 83 FERC ¶ 61,099, at 61,478 (“In Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, at p. 30,242, the Commission clarified that it was acceptable to rely on the Individual Open Access Tariffs of pool members as long as the pool members themselves are required to obtain access for pool transactions under the terms and conditions of the Individual Open Access Tariffs and pay the rates under those tariffs WSPP proposes that, in lieu of a joint pool-wide open access tariff, WSPP power sellers will be required to obtain transmission for use of their own systems under their Individual Open Access Tariffs In addition, transmission service by other WSPP members would be provided under their Individual Open Access Tariffs Consistent with our findings in Order Nos. 888 and 888-A we find WSPP’s proposal, to have pool members use their Individual Open Access Tariffs where filed and available, to be acceptable.”).

²⁹ See Southeast EEM Agreement Filing, Transmittal at 24-25; *id.* at 16 ((Participation is open to “any entity that “own[s] or otherwise control[s] a Source within the Territory and/or is contractually obligated to serve a Sink within the Southeast EEM footprint,” as well as any entities that can physically transact in the future.”) (citing Market Rules at Part III)). See also Section IV.E below (explaining why the minor limits on participation are necessary and appropriate). In *Public Service Co. of Colorado*, after rejecting arguments that the PSCo JDA constituted a loose power pool, the Commission also noted that “nonetheless . . . the Joint Dispatch Agreement allows any entity to join, provided, as relevant here, it makes arrangements with its transmission provider to have access to unused ATC at a zero dollar rate,” and further found that “PSCo and other Parties are not attempting to restrict access to their own transmission resources; rather, 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.” See *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 at P 85.

further establish that NFEETS will be provided on non-discriminatory terms to all Participants, regardless of whether they are a Southeast EEM Member.

In addition to being unwarranted (because the Southeast EEM is not a power pool) and unnecessary (because NFEETS is offered under non-discriminatory terms and conditions), a single OATT would be impractical and perhaps unworkable. Given the fact that the Southeast EEM only affects residual transmission, such that even under intervenors' reading there is no reason for a "pool"-wide agreement for *all* transmission service, the Southeast EEM Agreement is the appropriate vehicle for preventing undue discrimination because it dictates a uniform approach to provision of NFEETS by each transmission provider while otherwise preserving each transmission provider's authority over the rest of its OATT.³⁰ The result will be that Participants will be able to enter into a single NFEETS transaction, through the Southeast EEM System, that will be scheduled through each Participating Transmission Providers' OASIS. Such a single transaction could cross the entire 1,100 mile length of the footprint, just as if there were a single joint OATT in place. Intervenors' seeming call for there to be *two* tariffs and *two* transmission service providers for each transmission system (*i.e.*, a joint OATT for NFEETS and individual OATTs for other service) would not provide any increase in functionality or benefits, and therefore is unnecessarily costly and perhaps impossibly complicated.³¹

Finally, remaining arguments supporting classification as a pool are based on misconceptions or mischaracterizations about the way that other aspects of the proposal will work. Refutation of arguments that the Southeast EEM is insufficiently "open to any bulk power

³⁰ TVA has transmission service guidelines that are equivalent to a tariff.

³¹ Doubling up on operators would increase costs and would also add administrative and operational complications.

market participant in the Southeast, including independent power producers,”³² and that the Southeast EEM governance structure “allows for control entirely by vertically integrated utilities”³³ are provided in the discussions of market power and governance, below in Sections IV.B and IV.C.

B. This is not the proceeding for considering whether some other form of market should be implemented in the Southeast.

1. Under Section 205, the Southeast EEM proposal cannot be denied or modified merely because some would prefer an alternative approach.

Some of the intervenors filed comments requesting that the Commission reject or modify the proposed Southeast EEM in favor of creating an organized wholesale electric market in the form of an RTO or EIM, or delay approval until a technical conference to explore alternatives to the Southeast EEM can be held. None of these requests are properly before the Commission. Because the Southeast EEM was filed under Section 205 of the FPA, the Commission may not direct substantial changes to the filing.³⁴ Furthermore, when determining whether to accept a filing, the test is whether the proposal is just and reasonable, not whether it is superior to other possible proposals.³⁵

³² CEC Comments at 16.

³³ CEC Comments at 19; *id.* at 17 (citing to *Cent. Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979); *Mid-Continent Area Power Pool*, 87 FERC ¶ 61,075, at 61,317 (1999), *petitions for review denied*, *Alliant Energy Corp. v. FERC*, 253 F.3d 748 (D.C. Cir. 2001)). *See also* PIOs Protest at 12-13.

³⁴ *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 110 (D.C. Cir. 2017) (“*NRG*”) (“Section 205 does not allow FERC to make modifications to a proposal that transform the proposal into an entirely new rate of FERC’s own making.”).

³⁵ *See, e.g., Sw. Power Pool, Inc.*, 158 FERC ¶ 61,063 at P 13 (2017) (citing *Cities of Bethany v. FERC*, 727 F.2d 1131 (D.C. Cir. 1981) (“FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable — and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs”), *cert denied*, 469 U.S. 917 (1984)); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (“[T]he Commission may approve the methodology proposed in the settlement agreement if it is ‘just and reasonable’; it need not be the only reasonable methodology or even the most accurate.”); *See also Am. Elec. Power Serv. Corp.*, 44 FERC ¶ 61,206, at 61,749 (1988) (“The Commission’s task is to determine

Despite the well-established law on this issue, some of the intervenors attempt to persuade the Commission to reject the proposed Southeast EEM not because it is unjust and unreasonable, but because they prefer the creation of an organized wholesale electric market in the form of an RTO or EIM.³⁶ For example, CEC asks the Commission and the Southeast EEM Members “to think more ambitiously” and consider creating an RTO, asserting that an RTO would provide superior financial benefits.³⁷ SREA asserts that a regional market using Locational Marginal Pricing (“LMP”) would be superior to Southeast EEM.³⁸ The PIOs’ witness, Paul Sotkiewicz, argues that a different market design could achieve additional savings from generation unit commitments and dispatch changes.³⁹ Likewise, the R Street Institute and AFPA suggest that a Southeast EIM would provide more benefits than the Southeast EEM.⁴⁰ While these intervenors favor market designs other than the one before the Commission, the Commission has been clear that when considering a Section 205 filing, it considers whether the proposed rate is just and reasonable; it does not consider whether there is a superior approach.⁴¹

whether AEP’s proposal is just and reasonable. It is not required to find that the proposal is the ‘best’, or ‘superior’ to all others, in order to adopt it. Since AEP Service has shown that its method is just and reasonable, it is entitled to use it.”).

³⁶ Of course, the Southeast EEM Members do not represent all the entities necessary to establish an RTO in the Southeast. The Commission in Order No. 2000 recognized that state action was necessary for RTO formation. *See, e.g., Reg’l Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285 (1999) (“Order No. 2000”), *order on reh’g*, Order No. 2000-A, 90 FERC ¶ 61,201 (2000) (“Order No. 2000-A”), *aff’d sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (“*Snohomish*”) (“[M]ost states must approve a utility joining an RTO, and several states have required their utilities to turn over their transmission facilities to an independent transmission operator. Also, states must approve the siting of transmission facilities that are called for in an RTO expansion plan.”).

³⁷ CEC Comments at 32-33.

³⁸ SREA Comments at 6.

³⁹ PIOs Protest, Exhibit A, Affidavit of Paul M. Sotkiewicz at PP 46-49.

⁴⁰ R Street Institute Comments at 8-9; AFPA Comments at 2, 12.

⁴¹ *See supra* note 35.

Furthermore, although the Commission may approve minor modifications if the utility consents to the modification,⁴² the Commission may not impose an entirely different scheme.⁴³ The Commission must reject intervenors' requests to turn a tariff filing into a "broad redesign" of the Southeast market.⁴⁴

2. The Southeast EEM is not subject to RTO rules.

As an indirect way of trying to argue that the Commission should ignore the filing before it and require the Southeast EEM Members to create what is essentially an RTO or organized market, certain intervenors urge the Commission to impose concepts and requirements on the Southeast EEM that have been applied to RTOs and similar entities. However, contrary to the PIOs' implications in suggesting the Southeast EEM is an "organized market," the bilateral transactions under the Southeast EEM are not subject to RTO rules.⁴⁵ RTO rules come from Order No. 2000.⁴⁶ Because RTO membership is voluntary,⁴⁷ the Commission incentivizes RTO

⁴² *NRG*, 862 F.3d at 115.

⁴³ *Id.* at 114.

⁴⁴ *See, e.g., ISO New England Inc.*, 123 FERC ¶ 61,021 at P 56 (2008) (in a Section 205 proceeding, intervenors unsuccessfully sought to turn a tariff filing into an open season to redesign the ISO's distributed energy resources program).

⁴⁵ *See* PIOs Protest at 13-16.

⁴⁶ *See generally* Order No. 2000, 89 FERC ¶ 61,285 (establishing, among other things, the minimum characteristics and minimum functions required of RTOs).

⁴⁷ *See N.C. Waste Awareness & Reduction Network, Inc. v. Duke Energy Carolinas, LLC*, 151 FERC ¶ 61,079 at P 64 (2015) ("The Commission's longstanding policy is that RTO participation is voluntary." (citing Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092, at 31,357 and *Snohomish*, 272 F.3d at 615)).

membership – and adherence to RTO rules – with an incentive return on equity (“ROE”).⁴⁸ The Southeast EEM Members have not voluntarily elected to join an RTO, nor have they sought the incentive ROE reward for doing so. So they have not opted in to RTO rules, and the PIOs have no basis for forcing them to do so. There also is not some other set of rules for “organized markets” that apply here.⁴⁹ The proposal must be judged on its own merits.

3. Intervenor’s arguments in favor of alternative approaches are not persuasive and provide no basis for the Commission to deny the Southeast EEM Filings.

In an effort to justify rejection of the Southeast EEM, the PIOs identify what they perceive as market deficiencies in certain states and TVA, and limited activities in some states to explore reforms in their respective electric regulation. The Southeast EEM proposal does not propose to change the underlying bilateral market structure in the Southeast; the proposal is to

⁴⁸ In Order No. 2000, the Commission determined that the most appropriate approach for facilitating the creation and efficient expansion of RTOs/ISOs was to make membership in the organizations voluntary for public utilities. *See* Order No. 2000, 89 FERC ¶ 61,285, at 31,033 (“we continue to believe . . . that at this time we should pursue a voluntary approach to participation in RTOs”). In Order No. 679, the Commission stated that it would “approve, when justified, requests for ROE-based incentives for public utilities that join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization.” *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 at P 326 (2006) (“Order No. 679”). It also stated that “[t]he basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact continuing membership is generally voluntary.” *Id.* at P 331.

⁴⁹ CEC’s and PIOs’ expositions on *Devon Power, LLC*, 134 FERC ¶ 61,208, 62,043 (2011) (“*Devon*”) and *Automated Power Exchange, Inc.*, 84 FERC ¶ 61,020, 61,090 (1998), *petition denied sub nom. Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000) make little sense. The Southeast EEM Members have not contested the Commission’s jurisdiction – after all, they made the filings at issue here. *Devon* concluded that market clearing price transactions are not bilateral transactions, which is irrelevant here because there is no market clearing price. *Automated Power Exchange, Inc.* concluded that the entity running a power exchange was a public utility because it had discretion to alter clearing price rates. Again, this is irrelevant because the Southeast EEM Administrator will have no discretion to change the prices established when the Southeast EEM System matches buyers and sellers based on splitting the savings between the buyer offer and seller bid. So if these entities are arguing that some other level of review applies as a result of those cases, the argument fails. If they are arguing that the cases establish a need for review, the point is moot: this proceeding already exists.

add two new features to the market. The critiques of market features that are not changing therefore are collateral attacks on Commission orders approving those features. The benefits of the fully realized proposal actually before the Commission in this proceeding should not be delayed to pursue other aspirations.

The examples provided by the PIOs demonstrate only one thing: there is no consensus in the Southeast for market restructuring other than the Southeast EEM.⁵⁰ The Commission is aware that attempts to organize an RTO in the Southeast have failed in the past.⁵¹ Yet, the Southeast EEM proposal does represent consensus to enhance the existing bilateral market.

Some intervenors point to a 16-year old study that suggested that an EIM in the Southeast would provide hundreds of millions in dollars of savings to transmission owners over a ten-year period.⁵² Some point to other studies in their urging that greater market reforms take place in the Southeast.⁵³ Requests for FERC to review or to require the Southeast EEM Members to study the benefits of a proposal different than the one proposed is no different than asking FERC to approve “an entirely different” rate, which it cannot do under FPA Section 205.⁵⁴

Two intervenors assert that “ideal” regional energy markets use LMP, which would produce better price signals.⁵⁵ Such arguments recommending LMP or other RTO-type market

⁵⁰ PIOs Protest at 51-56.

⁵¹ See, e.g., Electric Energy Market Task Force, Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy, https://www.ferc.gov/sites/default/files/2020-04/epact-final-rpt_0.pdf. (“In other regions, including most of the Southeast, the West outside of California, and other parts of the Midwest, RTOs have been considered, but formation has stalled. State regulators and utilities in these regions have found it difficult to assess the potential benefits and costs of establishing RTOs. They have been reluctant to create new institutional arrangements that could diminish local control over transmission facilities and could impose additional costs on retail customers.”).

⁵² R Street Institute Comments at 8; CEC Comments at 50-51.

⁵³ SREA Comments at 7.

⁵⁴ *NRG*, 862 F.3d at 114.

⁵⁵ SREA Comments at 6; see also R Street Institute Comments at 6.

changes amount to a collateral attack on the existing market. LMP would not be a residual market added to the existing bilateral market like the Southeast EEM. An LMP market would be a full-scale replacement of the existing market, even though the existing market has not been placed at issue in this proceeding. Other changes of similar scale would be required for an RTO, like the transfer of operational control of transmission assets to the RTO. Because such matters have not been placed in issue by the Southeast EEM Filings, arguments against them are a collateral attack on the many prior orders finding the existing market structure to be just and reasonable.⁵⁶

4. Approval of the Southeast EEM does not preclude future market development.

Underlying many protests appears to be an incorrect assumption that approval of the Southeast EEM will preclude further evolution or market reform in the Southeast. This is simply not true. The Southeast EEM will enhance the existing bilateral market but does nothing that would interfere with or impede consideration of other changes in an appropriate forum. Should lawmakers and stakeholders in the Southeast determine that some other structure or market design is appropriate, nothing about the Southeast EEM prevents such changes.

Ultimately, the irony should not be lost on the Commission that the very entities that are calling for change in the Southeast are opposing or questioning the positive changes being proposed with the Southeast EEM. Nevertheless, nothing in the Southeast EEM proposal

⁵⁶ These would include, among other things, orders approving the individual open access tariffs of the jurisdictional utilities. *See, e.g., Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005) (rejecting a collateral attack on the CAISO Tariff and stating that “[t]he Commission proceedings approving the California ISO tariff and the firm transmission rights proposal took place in 1997 and 1999, respectively. Because the time for seeking judicial review has long passed, Sacramento’s argument amounts to an impermissible collateral attack on the previously approved [CAISO] tariff.”); *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007) (rejecting another collateral attack on the CAISO Tariff).

prevents further changes or evolution of the electric markets in the Southeast. Indeed, should the Commission approve the Southeast EEM and allow it to operate for some time, data from its operations may better inform discussion about future market evolution. However, the Southeast EEM must be allowed to move forward to enable such an evaluation.

C. Arguments regarding the functioning of the current Southeast market are incorrect.

The Southeast EEM Members believe that the existing market functions well and reliably serves customers at electricity prices that are generally below the national average. Though these issues are beyond the scope of the proceeding for the reasons discussed above, the Southeast EEM Members correct several statements for purposes of ensuring an accurate record.

The PIOs claim that the Southeast EEM proposal fails to address its own goals because it does not address “high electricity bills and low renewable penetration.”⁵⁷ In support of its claim that “[r]esidential customers in states in the Southeast EEM footprint are burdened with some of the highest electricity bills in the nation,” they provide a chart showing average monthly bills and corresponding national rankings, and try to exaggerate the import of this data by identifying percentages of poverty rates and low-income earners in those states.⁵⁸ But the data the PIOs present is misleading. When looking at electricity costs, average monthly bills are not the best metric. By definition, average monthly bills are a function of the amount of electricity used, in addition to cost. Of course, in the Southeast, usage likely will be greater because of hotter weather and the resulting greater use of air conditioning.⁵⁹

⁵⁷ PIOs Protest at 45.

⁵⁸ *Id.* at 45-46.

⁵⁹ See, e.g., U.S. Energy Information Admin., *The South anchors growth in use of electricity for air conditioning since 1993*, (Aug. 15, 2003), <https://www.eia.gov/todayinenergy/detail.php?id=12551#:~:text=Homes%20in%20the%20South%20are,homes%20in%20any%20other%20region>

When examined instead using the metric of average price in cents per kWh – a metric that is not dependent on usage and instead is isolated to cost – the Southeast fares *better* than the national average, including most states with RTOs. Using the same Energy Information Administration data that the PIOs use, below is the PIOs’ chart with the addition of data and rankings for average price per kWh (shaded area represents new information).

State	Average Monthly Bill (Dollar and cents)	National Ranking for Monthly Bill [1 Being Most Expensive]	Average Price (cents/kWh)	National Ranking for Average Price [1 Being Most Expensive]
Alabama	150.45	3	12.53	23
South Carolina	144.73	4	12.99	18
Mississippi	135.87	5	11.27	36
Virginia	135.46	6	12.07	29
Tennessee	132.33	8	10.87	42
Georgia	131.84	9	11.76	31
North Carolina	123.25	15	11.42	35
Missouri	117.82	24	11.14	39
All Southeast EEM*	133.97	9.2	11.75	31.75
Nationwide	115.49	-	13.01	-

* It should be noted that the PIOs did not include the portions of Kentucky, Oklahoma and Florida that are in the Southeast EEM footprint.

Shaded areas are additional data regarding average price per kWh. All data is from same source as used by the PIOs: https://www.eia.gov/electricity/sales_revenue_price/pdf/table5_a.pdf

(“Over the past 20 years, the use of air conditioning has increased in all regions of the United States, but this increase has been most pronounced in the South Census region Air conditioning has been widespread throughout most of the South for many years, but many households in the South have shifted from room air conditioning to central air conditioning Central air conditioners often consume more energy because they cool more of the area within a home and home size in the South has grown faster than the country as a whole almost all new homes in the South have central air conditioning. Homes in the South are also more likely to have central air conditioning than homes in any other region.”).

In short, this data shows that all-in (generation, transmission and distribution), residential customers in the Southeast have lower rates than the national average.⁶⁰ In any event, the issue in this proceeding is whether the Southeast EEM Agreement Filing is just and reasonable, which it is. Therefore, it must be approved, and arguments about market features that are not at issue here must be rejected.⁶¹

IV. Arguments that address issues within the scope of the Southeast EEM Filings do not justify rejection of the proposal.

A. The Southeast EEM will produce net benefits.

The Southeast EEM Agreement Filing included more evidence regarding benefits than necessary to support the Southeast EEM proposal, including qualitative and quantitative analysis of anticipated benefits from implementation of the Southeast EEM. In particular, Dr. Pope explained how the “Southeast EEM’s combination of zero-cost, non-pancaked transmission service and automated 15-minute trading” will arrange beneficial transactions “in ways that are unlikely to occur today.”⁶² Further, she explained how the design seeks to maximize the sum of the benefits (as measured by the seller’s offer minus the buyer’s bid) of Southeast EEM matches⁶³ and that it “will only arrange Energy Exchanges with a positive benefit to both the

⁶⁰ SREA states that the “lack of competition has led to massive infrastructure failures” citing the VC Summer nuclear reactor, the Kemper IGCC facility, the Plains and Eastern HVDC transmission project, and the Atlantic Coast Pipeline. SREA Comments at 2. Each of these projects have long histories and specific reasons (legal, business and economic) for their status. Merely stating that those projects were sited in some of the Southeast EEM states is not proof that a Commission organized wholesale market would be superior to the Southeast EEM proposal or that the existing structure is not working for the benefit of customers as judged by the states with the authority to make those determinations.

⁶¹ See *supra* note 35.

⁶² Southeast EEM Agreement Filing, Economics Aff. at P 32; see also generally *id.* at PP 29-33.

⁶³ *Id.* at PP 33-34.

buyer and the seller,” considering transmission losses.⁶⁴ The Southeast EEM Agreement Filing also included a quantitative benefits analysis prepared by two independent parties – Guidehouse and Charles River Associates (“CRA”) (“Benefits Analysis”). The Benefits Analysis provides evidence of the potential magnitude of benefits under two scenarios, a “base case” and a “carbon constrained case.”⁶⁵

Most intervenors acknowledge that the proposal produces benefits over the status quo.⁶⁶ The PIOs do claim that the proposal may be worse than the status quo, but that argument is premised entirely on the incorrect notion that the Southeast EEM will increase opportunities to exercise market power.⁶⁷ That argument is baseless and fully addressed by the Southeast EEM Filings, as discussed in the next subsection.

A number of the intervenors question whether the Benefits Analysis overstates the *level* of benefits that the Southeast EEM would provide.⁶⁸ Even if the Commission were to find these

⁶⁴ *Id.* at P 34.

⁶⁵ *See id.*, Transmittal Letter at 32-33 (describing Benefits Analysis).

⁶⁶ AFPA Comments at 2, 15 (“AF&PA supports the Southeast EEM proposal because it appears to be a modest improvement over the status quo.”); CEC Comments at 49 (comparing perceived “modest benefits” of Southeast EEM to preferred model); EDF Comments at 4 (“EDF generally agrees that the Southeast EEM will promote the efficient use of the existing transmission system and has the potential to support decarbonization of the electric grid by facilitating energy transactions to balance intermittent resources across the Southeast EEM footprint and prevent curtailment of renewable resources.”); GAM Comments at 2 (“GAM is encouraged by any plan that would help reduce the costs of production for its members and for domestic manufacturing generally.”); PJM Comments at 2 (“The Southeast EEM appears to provide a potentially helpful modification to the existing bilateral market by providing for balancing authority-to-balancing authority transactions utilizing 15-minute intervals and price matched transactions on a ‘split-the-savings’ basis.”); R Street Institute Comments at 8 (comparing anticipated Southeast EEM benefits to preferred model); and TVPPA Comments at 5 (“The SEEM Agreement’s basic construct – an algorithm-driven, bilateral market based on shared savings for energy imbalance transactions among the SEEM’s Members and Participants – appears capable of providing modest levels of economic benefit to the SEEM Members.”).

⁶⁷ PIOs Protest at 21-26.

⁶⁸ *See, e.g.*, CEC Comments at 30-31; PIOs Protest at 27; TVPPA Comments at 6.

claims credible, they would not be a basis to reject the Southeast EEM proposal. As the CEC acknowledges,⁶⁹ the Commission recently affirmed when evaluating Southwest Power Pool's ("SPP") Western Energy Imbalance Service ("WEIS") proposal, the Commission "does not require a quantified cost-benefit analysis of proposals."⁷⁰ Likewise, no quantified cost-benefit analysis is required for the Southeast EEM proposal.

In any event, the Benefits Analysis is a reasonable and conservative estimation of the Southeast EEM's potential benefits, and there is not any "fatal flaw"⁷¹ in the report. The Benefits Analysis was not an after-the-fact justification of a decision already made. Rather, the Southeast EEM Members retained Guidehouse and CRA as independent third parties while deciding whether to pursue development of the Southeast EEM.⁷² The purpose of the Benefits Analysis was to help the Southeast EEM Members decide whether the proposed construct would produce net benefits above the costs that they would agree to incur to implement it.⁷³

The CEC appears to not understand how benefits were calculated under the Benefits Analysis and generally what the term "benefits" refers to in the Southeast EEM Agreement

⁶⁹ CEC Comments at 28.

⁷⁰ *Sw. Power Pool, Inc.*, 173 FERC ¶ 61,267 at P 30 (2020) ("*WEIS Order*") (citing *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 49 (2015) ("[T]he Commission does not generally require the mathematical specificity of a cost-benefit analysis to support a market rule change."), *order on reh'g*, 155 FERC ¶ 61,157 at P 30 (2016) ("[W]hile the Commission is required to consider all relevant factors and make a 'common-sense assessment' that the costs that will be incurred are consistent with the ratepayers' overall needs and interests, the Commission's finding need not be accompanied by a quantitative cost-benefit analysis."), *aff'd sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 660-61 (D.C. Cir. 2017); *see also Sw. Power Pool, Inc.*, 141 FERC ¶ 61,048 at P 57 (2012) ("[W]e note that our approval of the Integrated Marketplace proposal is not based on any specific cost-benefit amount. A cost-benefit analysis is largely a tool for stakeholders to evaluate different market designs and to determine their interest in moving forward with a market proposal.").

⁷¹ PIOs Protest at 27.

⁷² Southeast EEM Agreement Filing, Overview Aff. at P 29.

⁷³ *Id.* at PP 29-30.

Filing.⁷⁴ The term, “benefits” has a consistent meaning in all of the Southeast EEM Filings, including the Benefits Analysis. The benefits of the Southeast EEM are the cumulative savings from substituting supply sources with a lower short-run marginal cost for supply sources with a higher short-run marginal cost that would have otherwise been used to serve load during a 15-minute period.⁷⁵ The Benefits Analysis states, at one point, that Guidehouse/CRA derived its benefits estimation based on production cost modeling, which takes into account “heat rate, fuel cost, and other operating costs, expressed as a function of output” and included its production cost modeling assumptions in Appendix A to the analysis.⁷⁶

The CEC argues that benefits may be overstated because the Benefits Analysis does not consider curtailment of NFEETS.⁷⁷ The PIOs similarly note that the Benefits Analysis does not consider transmission constraints.⁷⁸ As an initial matter, the Benefits Analysis notes that use of 2019 available transfer capability (“ATC”) may actually be conservative, because “actual market

⁷⁴ CEC Comments at 29-30.

⁷⁵ See Southeast EEM Agreement Filing, Economics Aff. at P 21 (“In the context of the Southeast EEM Proposal, a transaction is considered economically efficient if it reduces the total production costs to serve demand in the Southeast EEM Territory during a 15-minute interval; that is, if it enables lower cost supply to be used instead of higher cost supply); *id.*, Overview Aff. at P 9 (explaining that load serving entities (“LSEs”) pursue “short-term purchases . . . for economic purposes to displace more expensive generation”) and at P 25 (explaining that the Southeast EEM’s split-the-savings pricing was implemented to match the existing bilateral markets, i.e., “[p]urchases of power produce savings when the allow a generator with higher marginal costs to be backed down, and sales of power produce savings by allowing crediting of markings from sales against customer costs”); *id.*, Benefits Analysis at 7; *id.*, Transmittal Letter at 8-9.

⁷⁶ *Id.*, Benefits Analysis at 12; 24-28. The Benefits Analysis does inartfully says in one place that benefits will result from “fuel cost savings,” which the CEC notes as the source of its confusion, CEC Comments at 30 (citing Southeast EEM Agreement Filing, Benefits Analysis at 7), and it is true that short-run marginal cost of some supply resources might not be directly tied to fuel usage. That very same sentence of the Benefits Analysis, however, makes the more general point that the Southeast EEM “gives participants access to a lower cost, more efficient pool of resources in managing subhourly load and renewable uncertainty.” Southeast EEM Agreement Filing, Benefits Analysis at 7.

⁷⁷ CEC Comments at 30-31.

⁷⁸ PIOs Protest at 50.

operation could result in more transmission capacity being released.”⁷⁹ In addition, Guidehouse/CRA conducted a sensitivity test capping ATC at 200 MW, which represents “significantly less than what was observed in 2019 for some pathways.”⁸⁰ Even with the significant ATC restriction, “benefits only decreased by about 10% for the year.”⁸¹ Based on the sensitivity test Guidehouse/CRA concluded that the benefits were unlikely to have been materially overestimated due to the ATC assumptions employed.⁸²

With respect to the CEC’s concern about the potential for benefits to be diminished due to curtailments resulting from Transmission Loading Relief (“TLR”) procedures, Dr. Pope explained in the Economics Affidavit that “NFEETS is unlikely to be curtailed once a 15-minute transaction has begun due to the time required to invoke [TLR] procedures.”⁸³ Neither NFEETS nor any other transmission schedule flowing within a 15-minute interval is likely to be curtailed within the interval due to the short schedule time. Further, Participating Transmission Providers consider congestion on the transmission system when calculating the availability of NFEETs. Furthermore, with non-firm hourly ATC being determined each hour, this refresh rate should provide dependable unreserved non-firm hourly ATC to be utilized for Southeast EEM transactions. Thus, it is unlikely that Southeast EEM transactions will create congestion.

⁷⁹ Southeast EEM Agreement Filing, Benefits Analysis at 15.

⁸⁰ *Id.* at 19.

⁸¹ *Id.*

⁸² It appears that the PIOs misunderstand the import of the statement in Table 3 of the Benefits Analysis that states “potential transmission constraints are not considered in the sub-hourly trades.” Southeast EEM Agreement Filing, Benefits Analysis at 7. The quoted phrase explains that the Benefits Analysis sub-hourly model did not consider transmission constraints of the type applied in running a transmission power flow model. This is logical, since the Southeast EEM will not run a power flow model in arranging 15-minute Energy Exchanges. As also reported in Table 3, the sub-hourly model employs ATC constraints instead, which is consistent with proposed Southeast EEM operations.

⁸³ *Id.*, Economics Aff. at P 65 & n. 35.

Therefore, intervenors' concerns regarding curtailments and transmission constraints are misplaced and ignore the evidence presented.

TVPPA questions the level of benefits that TVA customers may obtain in light of TVA's counterparty limitations.⁸⁴ The Benefits Analysis included TVA's restrictions – both the “TVA Fence” and its counterparty limitations.⁸⁵ TVA's decision to participate in the evaluation of its costs compared to anticipated benefits was therefore based on the appropriate assumptions of expected benefits. The CEC similarly raises a concern that the Benefits Analysis did not consider the “toggle,” *i.e.*, the ability to set counterparty specific constraints, which could result in lower levels of participation.⁸⁶ The Benefits Analysis makes clear that it considered “market-based rate restrictions for sales within BAs” where Southeast EEM Members are mitigated.⁸⁷ In other words, the Benefits Analysis considered known geographical and counterparty restrictions for which the toggle would be used.

The PIOs criticize the Benefits Analysis because it used a “modeling tool that does not have the ability to dispatch” in 15-minute intervals.⁸⁸ Their witness admits that PROMOD, the modeling tool used, “is a widely used and vendor-supported production cost software package . . . that allows the transmission system to be modeled with economic dispatch of generation

⁸⁴ TVPPA Comments at 6.

⁸⁵ Southeast EEM Agreement Filing, Benefits Analysis at n. 8 (“Any market-based rate [(“MBR”)] restrictions for sales within [Balancing Authorities (“BAs”)] that were identified in discussions with Southeast EEM participants are incorporated in the sub-hourly bilateral trade modeling, including the TVA “fence” (TVA, under the 1959 Bond Act, is prohibited from selling electricity outside its congressionally mandated territory, with the exception of 14 power generators on TVA's borders with whom it already was exchanging electricity as of July 1, 1957).”).

⁸⁶ CEC Comments at 30-31.

⁸⁷ Southeast EEM Agreement Filing, Benefits Analysis at 12.

⁸⁸ PIOs Protest at 27; *id.*, Exhibit A, Affidavit of Paul M. Sotkiewicz at P 98.

sources.”⁸⁹ Further, the Benefits Analysis makes clear that PROMOD was used as a starting point for an internally developed “sub-hourly model” that “incorporates load and renewables generation uncertainty, ATC, and the \$0/MWh non-firm transmission product.”⁹⁰ The report further includes a “modeling flow diagram.”⁹¹ That Guidehouse and CRA did not include proprietary details about their sub-hourly modeling tool is neither surprising nor a basis to conclude that the Benefits Analysis is flawed.

The PIOs’ witness incorrectly asserts that the Benefits Analysis “leaves to the imagination” how base cases were developed and whether Guidehouse/CRA assumed for the base cases that “each BA dispatches its own resources to satisfy the load and reserves needs in isolation.”⁹² However, the Benefits Analysis explicitly states that PROMOD was first used “under status quo conditions,”⁹³ *i.e.*, it assumes that BAs dispatch their own resources to serve their load requirements.⁹⁴ The Benefits Analysis model was run consistently with the fact that under the Southeast EEM model, implementation of the Southeast EEM does not change the traditional roles of BAs and LSEs. It is a residual market.

⁸⁹ *Id.*, Exhibit A, Affidavit of Paul M. Sotkiewicz at P 95.

⁹⁰ *See* Southeast EEM Agreement Filing, Benefits Analysis at 5; 12.

⁹¹ *See id.* at 5.

⁹² PIOs Protest, Exhibit A, Affidavit of Paul M. Sotkiewicz at P 97.

⁹³ Southeast EEM Agreement Filing, Benefits Analysis at 5.

⁹⁴ The Benefits Analysis also states: “[O]nce the commitment schedule is set and units are dispatched to satisfy BA load, PROMOD next simulates bilateral trading among BAs, including BAs outside of the Southeast EEM footprint.” *Id.*, Benefits Analysis at 4. In relation to its modeling approach, the Benefit Analysis further states that its PROMOD runs simulated “unit-commitment and dispatch provide schedules for energy and sufficient operating reserves and other ancillary services, based on requirements specified by the participants.” *Id.* at 12.

B. Requests for market monitors and market power studies are not premised on the facts pertinent to this market and should be rejected.

Most of the arguments about market power and market manipulation are arguments, like others discussed above, that the Southeast EEM should be treated like an RTO. As explained above, the Southeast EEM is not an RTO, and it is particularly inapt to treat it like one when it comes to market power and manipulation. The core functioning of the Southeast market is not being changed by this proposal. The Southeast will remain a market where bilateral transactions largely take place under market-based rates, except where market power mitigation applies. The Southeast EEM adds an opportunity for residual bilateral transactions. Those residual transactions likewise will take place under market-based rates, except where market power mitigation applies.

Because the Southeast EEM is adding automated functions, in the form of the Southeast EEM System and its Algorithm, the Southeast EEM Agreement appropriately adds an auditing function to ensure that the added market functions are working properly.⁹⁵ The auditing function is appropriately scaled to the additions to the bilateral market proposed here. Market power studies and market monitors, on the other hand, are illogical over-responses, and thus would require unnecessary, unjust and unreasonable costs.

The Southeast EEM Members have demonstrated, through logical exploration of the actual facts applicable to this case and the expert testimony of Dr. Susan Pope, that no new

⁹⁵ Southeast EEM Agreement Filing, Operations Aff. at P 52 (the “purpose [of the auditor] is to ensure that the Southeast EEM functions in accordance with the Market Rules.”).

market power studies or anti-manipulation measures are needed based on the proposed enhancement to the bilateral market. The reasons for this are straightforward:

- The Commission already mitigates the exercise of market power by each jurisdictional entity by limiting or conditioning as necessary those entities' ability to sell power at market-based rates.⁹⁶
- That mitigation will apply to each jurisdictional entity's sale of power in Energy Exchange transactions, which must be executed under existing market-based rate tariffs (subject to all applicable mitigation).⁹⁷
- Energy Exchange transactions are residual 15-minute transactions, meaning that "[t]he Southeast EEM cannot be used to meet a LSE's resource adequacy obligations," which must instead be met by the LSE "independently of their Southeast EEM participation."⁹⁸ Because every LSE should always have other resources available, no LSE can be forced to enter into an Energy Exchange transaction at a price higher than it could obtain in the existing hourly or longer markets. This means that existing mitigation measures, which already prevent the exercise of market power in such markets, will prevent it in the Energy Exchange as well.⁹⁹
- If anything, NFEETS could be considered as broadening relevant geographic markets and diluting market power.¹⁰⁰
- Withholding cannot work to the benefit of larger market participants because there is no market clearing price.¹⁰¹
- Market manipulation does not appear to be possible: related positions cannot be gamed because the average published clearing price for Energy Exchange transactions will be unpredictable and is not locational;¹⁰² the three-eligible-counterparty rule prevents schemes to create artificial benefits to obtain \$0

⁹⁶ *Id.*, Economics Aff. at P 69; *see also id.*, Operations Aff. at P 40.

⁹⁷ *Id.*

⁹⁸ *Id.*, Operations Aff. at P 56.

⁹⁹ *Id.*, Economics Aff. at P 69.

¹⁰⁰ *Id.*, Transmittal Letter at 38 (explaining that the proposal "will enhance efficiencies and reduce opportunities to exercise market power by allowing more buyers to transact with more sellers over a much bigger region." (citing to *id.*, Economics Aff. at PP 20-31)).

¹⁰¹ *Id.*, Economics Aff. at P 71.

¹⁰² *Id.* at PP 86-87.

NFEETS;¹⁰³ and Dr. Pope does not see potential for other manipulative schemes based on the Southeast EEM design.¹⁰⁴

Proponents of market power studies and market monitors rely primarily on the argument that what applies to RTOs and EIMs should apply here. That contention is particularly unavailing given that it ignores all of the differences between the current proposal and an RTO or EIM and also ignores the fact that the Commission approved the PSCo JDA, which did not have a market monitor.¹⁰⁵ Intervenors fail to explain factually and logically why, when it comes to this specific rate proposal, the reasoning of Dr. Pope and the Southeast EEM Members was wrong. Their thin attempts to construct scenarios in which the Southeast EEM proposal might require a market power study or a market monitor fail, usually because they are based on misconceptions about how critical market mechanisms will work.

Besides the “RTOs and EIMs have them” rationale, the arguments for a market monitor and market power studies¹⁰⁶ rest exclusively on the idea that the Southeast EEM creates new opportunities for exercise of market power.¹⁰⁷ The CEC says “[a]s the vertically integrated SEEM Members rely more on Energy Exchanges, the bilateral market and hourly trading may diminish” such that “more sellers may be forced into the SEEM.”¹⁰⁸ This “offers vertically

¹⁰³ *Id.* at PP 83-85.

¹⁰⁴ *Id.* at P 89.

¹⁰⁵ *See generally Pub. Serv. Co. of Colo.*, Proposed Revised Joint Dispatch Agreement, Docket No. ER16-180-000 (filed Oct. 30, 2015); *Pub. Serv. Co. of Colo.*, 154 FERC ¶ 61,107 (2016).

¹⁰⁶ *See* PIOs Protest at 17-18, 32-34, 39-41; CEC Comments at 17, 26-27; R Street Institute Comments at 5-6; SREA Comments at 5.

¹⁰⁷ CEC Comments at 23; PIOs Protest at 32-34.

¹⁰⁸ CEC Comments at 23.

integrated utilities an opportunity to negotiate among themselves” which is “especially harmful to independent power providers.”¹⁰⁹

This argument is flawed in a number of ways. First, there is no basis for presuming the “vertically integrated SEEM Members” will rely so heavily on the Southeast EEM so as to diminish other bilateral trading. As noted, all LSEs must arrange for energy sufficiency prior to the running of the Southeast EEM using OATT service.¹¹⁰ Because LSEs cannot be guaranteed to be matched via the Southeast EEM System and even matched Energy Exchanges will have the lowest priority transmission service, heavily relying on the Southeast EEM to satisfy load-serving obligations, rather than entering into longer-term bilateral trades supported by higher priority transmission, is too risky.

The CEC argument is also fundamentally flawed because utilities can negotiate among themselves today, subject to mitigation that will still apply under the Southeast EEM. As explained by Dr. Pope, because the Southeast EEM market is a residual, lowest priority market, no one can be forced into it.¹¹¹ Participants like IPPs will have the same opportunity to participate in these pre-Southeast EEM markets as they do today. Moreover, the Southeast EEM will allow Participants like IPPs to make sales they would not otherwise make which will result in increased benefits. Split-the-savings pricing ensures that generators will benefit equally with loads.

The PIOs’ witness takes the opposite tack from CEC. He worries that instead of forcing IPPs into the Southeast EEM market, the system will be manipulated to keep them out, by

¹⁰⁹ *Id.*

¹¹⁰ Southeast EEM Agreement Filing, Operations Aff. at P 52

¹¹¹ *Id.*, Economics Aff. at P 71.

toggling them off as counterparties.¹¹² He suggests that vertically integrated utilities will use the toggles to keep out their competitors, which could eventually force the competitors to sell their businesses to the vertically integrated utilities.¹¹³ This argument, too, does not hold up to close consideration.

To begin with, the same witness who appears to be saying here that the Southeast EEM will become such an important element of bilateral trading in the Southeast that lack of successful participation in the Southeast EEM could be a pivotal cause of the failure of an IPP investment, elsewhere claims that the Southeast EEM might have a low level of benefits due to having lower participation than the Benefits Analysis assumes.¹¹⁴ This internal inconsistency entirely undercuts the credibility of both arguments, and the Commission should not afford them any weight.

In any event, a Southeast EEM “toggle” is just a manifestation of a decision that any market participant can make today, as the PIOs concede.¹¹⁵ The Commission already ensures that market power is mitigated, and if anything under the Southeast EEM large participants would have even less ability to “block” transactions than they ostensibly might have today, because of the significantly expanded access to potential counterparties provided by \$0 NFEETS.¹¹⁶

¹¹² PIOs Protest, Exhibit A, Affidavit of Paul M. Sotkiewicz at P 63.

¹¹³ *Id.* at P 64.

¹¹⁴ *Id.* at PP 102-105.

¹¹⁵ PIOs Protest at 25.

¹¹⁶ Additionally, the level of collusion among the utilities that the PIOs witness posits could occur in an attempt to exclude an IPP from trading in the Southeast EEM is not reasonable. Such attempted collusion would risk severe penalties for little or no gain, since the Algorithm would still be likely to match a low-cost IPP with a non-colluding counterparty.

Further, the toggles serve a real and important function for Participants in the Southeast EEM. Participants can use toggles to implement counterparty specific constraints, including whether they have enabling agreements with certain entities, whether they are affiliated with entities, and whether they have exceeded credit thresholds. Whether some other way of accomplishing this goal could have been used is beyond the scope of this proceeding – the question is whether this proposal is just and reasonable, and the record shows that it is.

Counterparty credit exposure is an extremely important element of risk management, and entails limiting total exposure by limiting the amount of credit extended. Once that credit limit is reached, a party typically will not enter into a new transaction with that party. Because the Southeast EEM transactions are bilateral, a toggle is needed to allow parties to ensure that credit limits with particular counterparties are not exceeded.

Participants also are expected to use the toggle to ensure their own compliance with applicable regulations and commercial agreements, just as they do today in the bilateral market. To require the Southeast EEM Administrator to approve a Participant's individual constraints or to involve Commission oversight to this function¹¹⁷ would be a collateral attack on their existing MBR authority, which leaves compliance up to the company. The Commission, for good reason, leaves compliance with its rules in the hands of each entity, because each entity is structured differently and needs its own tailored compliance measures. Further, it would place an unreasonable burden on the Southeast EEM Administrator – not even RTOs are tasked with ensuring their participants are complying with regulations like the Affiliate Restrictions or their MBR tariffs.

¹¹⁷ See AFPA Comments at 10-11.

These are the main expected uses of toggles. Others may arise from time to time that are not foreseeable today. The Southeast EEM Members concluded that it would not be prudent to limit the use of toggles in future contingencies. Such limitations would be problematic, inconsistent with existing bilateral trading practices upon which the Southeast EEM builds, and could lead to an intrusive oversight of risk management and compliance measures that would be unhelpful at best.

A variation on the toggling-as-market-power theory is the concern that the three-counterparty rule can be used to box entities out of the Southeast EEM, if large counterparties toggle off IPPs.¹¹⁸ The PIOs say that “[g]iven the 3 counterparty requirement for trades to go through, it would only take three of the five largest generation owning entities to not offer their generation that would likely block trades with lower cost parties.”¹¹⁹ But the three-counterparty rule is satisfied if there are three *eligible* counterparties, *i.e.* parties with whom an IPP has an enabling agreement, and does not depend on having offers from each potential counterparty.¹²⁰

The PIOs also rather confusingly argue that the Southeast EEM Members will want to undermine the functioning of the Southeast EEM because it is contrary to certain incentives that the PIOs assign to such Members. Most of these incentives also suppose a willingness to create a market with the intention of subverting it by taking on substantial risk to collude with other Members for rather speculative gains. For example, the PIOs argue that Southeast EEM Members are incentivized to deny certain parties access to zero-cost transmission “as a way of forcing them to pay for higher-priced firm transmission.”¹²¹ If such incentive was real, the

¹¹⁸ PIOs Protest at 25.

¹¹⁹ *Id.*

¹²⁰ Southeast EEM Agreement Filing, Operations Aff. at P 39.

¹²¹ PIOs Protest at 25-26.

simplest way to act on it would have been to not file the Southeast EEM proposal. The PIOs further assert that “transmission owning utilities do not want to appear as if they have excess capacity,”¹²² perhaps having missed that one of the two central purposes of the Southeast EEM is to utilize capacity that is not being used, as the filing materials say repeatedly.¹²³

At bottom, there is no credible theory or consistent logic to the arguments about incentives for exercising market power claimed by the PIOs. If utilities in the Southeast were driven, when it came to consideration of the Southeast EEM, by the idea that “competition and the availability of lower cost suppliers erodes the potential profits that come from a monopoly’s main source of revenue: building additional generation,”¹²⁴ then again, there would be no Southeast EEM proposal. According to the PIOs, this supposed incentive supports their claim that IPPs will be excluded while utilities trade with one another. But “lower cost suppliers” are not limited to IPPs. Other utilities can be lower cost suppliers. Utilities can and do compete in the wholesale market. And at any given moment one might be a lower cost provider, while being a higher cost provider before or after as the regional load and generation mix shifts.

So if the PIOs were right about the incentives, and that the way to act on the incentives is to toggle off competitors, the generation and transmission owning members of the Southeast EEM would toggle off everyone, not just IPPs, making the whole exercise a bizarre waste of time. Applying Occam’s razor here, it should be evident that the Southeast EEM Members

¹²² *Id.*

¹²³ Southeast EEM Agreement Filing, Transmittal Letter at 2, 4, 5, 37; *id.*, Operations Aff. at P 9; *id.*, Economics Aff. at PP 32, 66.

¹²⁴ PIOs Protest at 24.

created the Southeast EEM because they do intend to use it, and benefit from it, and benefits will be at their greatest with eligible counterparties maximized.

Finally, the PIOs argue that the Commission's holdings in *PacifiCorp* and *Nevada Power* require use of market power studies here.¹²⁵ These arguments misrepresent the explanation already provided as to why those cases do not apply here.¹²⁶ Rather than repeat that explanation, we instead respectfully refer the Commission back to it.

In sum, the market power arguments offered by intervenors are illogical, and the other arguments are either based on mischaracterization of testimony and precedent, or unsupported claims that market power studies or a market monitor are warranted for the Southeast EEM because RTOs have them. The arguments should be rejected.

C. It is appropriate for the LSEs that fund the Southeast EEM to govern it, subject as needed to Commission oversight.

Several intervenors question the Membership requirements and the principle that decisional authority is vested in the Southeast EEM Members.¹²⁷ However, consistent with the Commission's recent findings on the SPP WEIS, the Southeast EEM Members' governance of the Southeast EEM is appropriate since they are the entities that are funding its creation and operation.¹²⁸

Intervenors may see Southeast EEM governance as being more than it is. For the most part, governance rights are merely rights to propose rate changes to the Commission. To the

¹²⁵ See PIOs Protest at 34-35.

¹²⁶ See Southeast EEM Agreement Filing, Transmittal Letter at n. 149.

¹²⁷ See Public Citizen Protest at 2-3; SREA Comments at 4-5; R Street Institute Comments at 4; CEC Comments at 19-21; and PIOs Protest at 30.

¹²⁸ See *WEIS Order*, 173 FERC ¶ 61,267 at P 66 ("limiting voting rights to WJDA signatories is reasonable because only WJDA signatories have made a financial commitment to the WEIS Market.").

extent that intervenors are suggesting that they should have a hand in deciding what changes are proposed to the Commission under FPA Section 205, they misunderstand Section 205, which does not require utilities to cede their filing rights, or permit the Commission to require them to do so.¹²⁹ Moreover, the Commission's oversight of any changes that are proposed to be made to the Southeast EEM Agreement will ensure that fairness is preserved. By statute, any changes to that agreement can only be approved if they are just, reasonable, and not unduly discriminatory.¹³⁰ To suggest that more is necessary to meet the statutory standard is illogical. Intervenor, and all others, will retain their rights under Section 206 – the same rights they have, for example, when they take any other form of transmission service under any other OATT.

Intervenor's arguments are, again, conflating the Southeast EEM with other structures, like RTOs, and are ignoring or misunderstanding the limited nature of this endeavor. This is not an RTO subject to Order No. 2000 standards.¹³¹ It is not a loose power pool.¹³² It is a small but important addition to the existing framework for bilateral transactions. If two Southeast EEM Members entered into a bilateral transaction today there would be no third parties involved in governing that transaction. If one of those Southeast EEM Members then procured transmission to effectuate the transaction there again would be no third party "governance" involved – that would be a transaction between the customer and the transmission owner under the transmission

¹²⁹ See *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (the Commission does not have jurisdiction to "require the utility petitioners to cede rights expressly given to them in section 205[.]").

¹³⁰ See 16 U.S.C. § 824d(a). In addition, under the rule of reason, any change that materially affects rates, terms and conditions of the Southeast EEM must be filed. See 16 U.S.C. § 824d(c); *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985) (interpreting the statute to require filing of those "practices that affect rates and service *significantly*, that are realistically *susceptible* of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous.") (emphases in original).

¹³¹ See PIOs Protest at 17-18.

¹³² CEC Comments at 10-15.

owner's OATT. In that example, if the transmission owner wanted to make changes to its OATT, its election to do so would not be subject to a vote of its customers. Instead, it would make a filing with the Commission, just as the Southeast EEM Members have done here, to seek permission to make the change, and the customers would have the opportunity to comment, just as some have done here.¹³³ The statutory process is working as Congress intended.

The governance proposed for the Southeast EEM is also in line with the way the region functions today. It is emphatically the nature of the existing market system in the Southeast that LSEs can design their transactions to meet their goals (including who to transact with, and under what circumstances). It is unremarkable and unobjectionable that in designing a system to increase benefit to their customers, LSEs should choose to ensure that they can maintain that flexibility. None of those requesting a role in "governing" facilities for which they do not have Section 205 rights explain why the market additions proposed here warrant that intrusion. In fact, nothing about the process of matching entities in a bilateral transaction, or the subsequent provision of NFEETS under an OATT, provides a basis for third party involvement in governance.

Some commenters argue that governance should be broadened to explicitly include state regulatory bodies, among others.¹³⁴ Notably, no state commission requested a role in governance, even though six intervened in this proceeding. The Southeast EEM Members who

¹³³ The Southeast EEM Members note that even though customers would not have a vote, the current structure does not in any way bar stakeholder outreach prior to filing a change, just like the extensive outreach the Members undertook prior to making the Southeast EEM Filings. *See* Southeast EEM Agreement Filing, Transmittal at 12; *id.*, Overview Aff. at P 20 (Stakeholder outreach has included "governmental entities and non-governmental entities such as environmental groups, trade associations, and individual customers. In many cases, there were multiple discussions with the same entity. The resulting exchanges of ideas were robust and welcome.").

¹³⁴ *See* Voltus Protest at 3; SREA Comments at 3-5; CEC Comments at 16; PIOs Protest at 30.

are subject to state authority are of course mindful of that, meaning that states will have a role through their relationship with Southeast EEM Members.

The CEC argues that the proposed governance and voting structure creates opportunities for the Southeast EEM Members to exercise market power and manipulation.¹³⁵ This claim is based upon a fundamental lack of understanding of how the Southeast EEM will work – in fact, Southeast EEM Members will participate in the Southeast EEM the same way that all other Participants do: they will have no advantage or unique ability to exercise market power or manipulate prices. Per the Southeast EEM Agreement, Southeast EEM Members will participate in the Southeast EEM as Participants.¹³⁶ There are not different classes of participation that would give Southeast EEM Members an advantage.

The Southeast EEM Agreement also contains limitations on the use of transmission information and market information¹³⁷ that will bind all Southeast EEM Members to requirements comparable to the Affiliate Restrictions and Standards of Conduct. And, as discussed above, any attempt by the Southeast EEM Members to change the rules or structure of the Southeast EEM must first be submitted to and reviewed by FERC under Section 205, subject to review and comment by all interested parties, thereby ensuring that market power and manipulation cannot take root through rules changes.

¹³⁵ See CEC Comments at 26.

¹³⁶ See Southeast EEM Agreement Filing, Transmittal Letter at 16 (explaining that “[e]ntities that submit bids and offers into the Southeast EEM System are called ‘Participants’ under the Southeast EEM Agreement” and that “Participation is open to all entities that can physically transact in bilateral markets in the Southeast today, i.e., any entity that ‘own[s] or otherwise control[s] a Source within the Territory and/or is contractually obligated to serve a Sink within the Southeast EEM footprint,’ as well as any entities that can physically transact in the future”); see also *id.*, Southeast EEM Agreement, Market Rules at III (listing Participant requirements).

¹³⁷ *Id.*, Southeast EEM Agreement Article 3.5.

D. The proposed governance structure is sufficiently transparent, but the Members will adopt some intervenor suggestions.

Several commenters request more transparency in governance, for example by making meetings of the Membership Board observable by the public and or publishing meeting minutes.¹³⁸ The Southeast EEM Members do not believe these measures to be necessary for the Commission to find the Southeast EEM proposal just and reasonable, but are amenable to those specific requests and commit to allow for public observation of Board meetings, sometimes limited in attendance for confidentiality purposes,¹³⁹ and to make meeting minutes public. The Southeast EEM Members further commit to including those requirements in the business practice manuals to be developed.¹⁴⁰

E. The minor requirements of and limitations on participation in the Southeast EEM are not unduly discriminatory and are necessary from an operational perspective.

Intervenors argue that the Participant criteria do not constitute the bare minimum necessary to maximize participation, thus presenting unduly high barriers to participation and restrictions on the services that Participants can offer.¹⁴¹ In fact, the Participant criteria were developed to be as inclusive as possible and conform to the requirements for entities transacting in the bilateral market today, which is a physical market. The requirements for participation are as follows:

- A Participant must execute a Participant Agreement and deliver the executed Participant Agreement to the Secretary and the Southeast EEM Administrator;

¹³⁸ See EDF Comments at 5, 8-10; R Street Institute Comments at 4.

¹³⁹ See *WEIS Order*, 173 FERC ¶ 61,267 at P 53, n. 90 (“Portions of the WMEC meetings may be limited in attendance for confidentiality purposes . . .”).

¹⁴⁰ Further, the Southeast EEM Members commit to posting any applicable business practice manuals and meeting minutes on the Southeast EEM Website, <https://southeastenergymarket.com/>.

¹⁴¹ See *Voltus Protest* at 4; see also EDF Comments at 4-5, 7-8.

- A Participant must execute and deliver a Non-Firm Energy Exchange Transmission Service Agreement with each Participating Transmission Provider who requires delivery of such agreement, or otherwise have access to Non-Firm Energy Exchange Transmission Service from each Participating Transmission Provider;
- A Participant must have or enter into an Enabling Agreement with at least three (3) or more Participants; and
- A Participant must own or otherwise control a Source within the Territory and/or be contractually obligated to serve a Sink within the Territory.¹⁴²

Contrary to Voltus' claims, these requirements constitute the bare minimum necessary to maximize participation and each is fundamental to the proper functioning of the market. First, the Participant Agreement terms and conditions (with which not even Voltus takes issue) are quite standard and do not even require Participants to contribute to the start-up costs or operating expenses of the Southeast EEM.¹⁴³ Second, since NFEETS is a core element of the Southeast EEM, it would be impossible for the Algorithm to function without Participants having service agreements in place with each of the Participating Transmission Providers. Third, the three-counterparty rule is not a barrier to entry.¹⁴⁴ Rather, as described above, it is intended to balance the desire to allow maximum participation while addressing a potential avenue of market manipulation.

The final requirement, that Participants own or control a Source and/or Sink within the Territory, is likewise a fundamental criteria needed to ensure technical feasibility and to ensure that the Southeast EEM is able to function reliably within the parameters of the larger existing Southeast bilateral market. Yet intervenors claim that this requirement wrongfully prohibits three categories of transactions and resources from participating: 1) demand response ("DR")

¹⁴² Southeast EEM Agreement Filing, Southeast EEM Agreement, Market Rules at III.

¹⁴³ *See id.*, Transmittal Letter at 16.

¹⁴⁴ *See* Voltus Protest at 4.

and distributed energy resources (“DER”); 2) financial transactions; and 3) transactions with a source or sink outside of the Southeast EEM Territory.¹⁴⁵

EDF seeks further analysis of participation of DR and DER resources.¹⁴⁶ While the Southeast EEM Members are not opposed to the inclusion of these resources in principle, the requirement that entities have contractual rights to, or control over, a Webregistry source and/or sink is fundamental to the functioning of the Algorithm because that information is needed for completion of e-Tags to effectuate an Energy Exchange.¹⁴⁷ If DR or DER is included in the Webregistry as a source or sink, such resources can participate in the Southeast EEM.

Introducing financial transactions would fundamentally change the Southeast EEM proposal. The Southeast EEM is a residual real-time physical market that results in tagged transmission transactions. It does not run day-ahead followed by a real-time market like the day-ahead financial energy markets run by RTOs. Because it is a residual market intended to make use of unused physical transmission, this market runs last, with tags generated 15 minutes before power flows for the physical flow of energy. At the point that the schedules occur, BAs are only dealing with physical schedules.¹⁴⁸ In day-ahead markets in RTOs, which typically accommodate financial transactions, there is a subsequent market in real-time in which day-ahead financial transactions are cleared; there is no market for arranging financial schedules after

¹⁴⁵ See Voltus Protest at 4; EDF Comments at 4-5, 7-8.

¹⁴⁶ See EDF Comments at 7-8.

¹⁴⁷ Southeast EEM Agreement Filing, Operations Aff. at P 17; *Id.*, Southeast EEM Agreement, Market Rules at IV.B.3.v (requiring “For all Offers, a Source and for all Bids, a Sink”); *id.*, Market Rules at II (defining a “Source” as “a pre-approved and validated OATI webRegistry source point” and a “Sink” as “a pre-approved and validated OATI webRegistry sink point.”).

¹⁴⁸ To ensure reliability, BAs must confirm the Net Balancing Authority Area Scheduled Interchange (*i.e.*, scheduled physical flows between Balancing Authorities), which is a fixed parameter each BA operates to by managing real-time imbalances within the BA control area. Reliability is supported by each BA operating the assets under its control to maintain the agreed-upon Net Balancing Authority Area Scheduled Interchange.

the day-ahead market. The output of all RTO real-time markets is physical schedules. The Southeast EEM also operates to determine real-time schedules, so all of the schedules must be physical. A financial product in the Southeast EEM simply would not work.

Allowing transactions with resources from outside of the Southeast EEM Territory would present a level of operational and reliability complexity that is beyond the Southeast EEM's ability to solve at the current time. Among other things, unless coordination agreements are developed that change tagging practices of Southeast EEM neighbors, transactions from outside the region will have a similar timing issue to the one described above: outside transactions will be tagged before Southeast EEM transactions. For transactions entirely within the Southeast EEM Territory, bidders' submission of quantity, price, source and sink information will allow the Southeast EEM algorithm to build an e-tag. Any transactions involving the use of transmission outside of the Territory, however, would require the coordination of e-tags with non-NFEETS transmission providers in the less-than-20 minute timeframe required, which is not possible at this time. The Southeast EEM Members are willing to discuss these complex issues with MISO, PJM and SPP for possible future expansion of Southeast EEM transaction eligibility, but for now it is not feasible to implement out-of-Territory transactions within the current framework of the Southeast EEM proposal.

It is worth noting, however, that the Southeast EEM Territory is always open to expansion when a potential new Member that provides transmission service is willing to join and implement NFEETS. And nothing in the Southeast EEM design prohibits a load from importing generation from a neighboring region on an hourly or longer basis, and selling in-region output from generation freed up by such a transaction through the Southeast EEM.

F. Intervenor generally support the proposed \$0 rate for NFEETS, and minimal concerns about losses and imbalance charges appear to be based on misconceptions.

Unsurprisingly, there was little opposition to the \$0 NFEETS rate. The CEC did take aim at the rate, claiming it could harm network load.¹⁴⁹ But substantial actual network loads supported the proposal, including of course the Members of the Southeast EEM, who are all LSEs.¹⁵⁰ The CEC similarly argues that the Southeast EEM proposal may “lead to cost shifts among SEEM Members.”¹⁵¹ This “we know what’s best for you better than you do” positioning by the CEC illustrates that arguments they make are based on their desired outcome of stopping the Southeast EEM, rather than principled evaluation of each issue.

The merits of this issue were thoroughly explained by Mr. Melda and Mr. Bellar:

Since Southeast EEM will only use transmission that is not otherwise being used, it will not result in underfunding of transmission, which will still be paid for through current rate constructs, *i.e.*, through revenues received from customers of Network Service and Point-to-Point Service, or their equivalent. It is possible that availability of the new free service will lead to some slight decrease in Point-to-Point revenues, which in turn would lessen revenue credits used to offset Network Service charges. However, today, Participating Transmission Providers’ revenues from short-term wheeling transactions of the type that could be replaced by Southeast EEM transactions are minimal. In general, we expect that any small increase in Network Service charges will be more than offset by reductions in overall customers’ costs attained through the Southeast EEM.¹⁵²

No contrary evidence was offered. The CEC claims that Firm Point-to-Point customers may be harmed because their costs may increase but, according to the CEC, “they would be

¹⁴⁹ CEC Comments at 39-40.

¹⁵⁰ *See also generally* AFPA Comments (industrial customers generally supporting Southeast EEM proposal). While it appears that the CEC may include some businesses that are end-use customers, the purpose of those customers belonging to the CEC is because “[t]hey share a common interest in expanding the use of advanced energy.” CEC Comments at 3.

¹⁵¹ CEC Comments at 41.

¹⁵² Southeast EEM Agreement Filing, Overview Aff. at P 23.

unlikely to benefit from Energy Exchange sales, because presumably they would use their firm rights to complete transactions.”¹⁵³ This speculation is illogical. First, the only evidence in the record is that foregone revenues from non-firm transmission will be minimal. Second, any rational load, whether served by Network Service or Point-to-Point Service, will view its transmission costs as sunk, and still make Energy Exchange transactions where such transactions reduce the delivered cost of power. Indeed, native load will not be relieved of its requirement to pay for network service when it takes NFEETS for a particular transaction.¹⁵⁴ Thus, all customers have the same opportunities to obtain the same benefits on the same terms and conditions. That is the opposite of undue discrimination.

The CEC also questions why financial losses are used,¹⁵⁵ arguing that the change has not been explained. The explanation is in the Affidavit of Mr. Sellers and Mr. McGeeney,¹⁵⁶ and stands unrefuted. The CEC maintains they would be willing to accept financial losses if the Southeast EEM Members agreed to an EIM or RTO.¹⁵⁷ But this is not an exercise in haggling; the jurisdictional Southeast EEM Members are exercising their statutory right to propose a rate, and the Commission’s role in reviewing it is passive and reactive.¹⁵⁸ The CEC does not offer a

¹⁵³ CEC Comments at 39-40.

¹⁵⁴ Southeast EEM Agreement Filing, Transmittal Letter at 37 (“[E]ach LSE must maintain adequate firm NITS and Point-to-Point Service on the transmission system where it is located in the amount of its entire wholesale and retail native load.”).

¹⁵⁵ CEC Comments at 45-46

¹⁵⁶ See Southeast EEM Agreement Filing, Operations Aff. at P 33.

¹⁵⁷ CEC Comments at 45.

¹⁵⁸ *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,019 at P 31 (2019) (“[T]he Commission’s charge under FPA section 205 [is] to determine whether [a] proposal [is] just and reasonable and not unduly discriminatory. The courts have described this role as ‘essentially passive and reactive,’ restricted to ‘evaluating the confined proposal.’) (citing *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (citing *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984))).

substantive reason why the explanations provided in support of financial losses are insufficient, nor do they attempt to distinguish the cases cited in support of the use of financial losses.¹⁵⁹

The CEC's arguments about imbalance charges¹⁶⁰ also lack merit. The CEC argues that there should be only one transmission charge, and hence one imbalance charge, per Energy Exchange.¹⁶¹ But transmission across multiple systems today must pay for imbalance on both the source and sink systems. Eliminating some of those imbalance charges would unjustly and unreasonably require transmission owners to subsidize imbalances. As to applying imbalance charges on an hourly basis,¹⁶² again that is how it occurs today, even when there are 15-minute transactions, as there sometimes are. Imbalances are integrated across the hour, and that will continue with imbalances resulting from Energy Exchanges.

The CEC's concern that NFEETS creates opportunities for undue discrimination because it "forbids" Participants from obtaining NFEETS through OASIS¹⁶³ is also incorrect. The Southeast EEM Agreement Filing made clear that NFEETS necessary for matched transactions will be scheduled through OASIS on all impacted transmission systems, which will be done by the Southeast EEM System, rather than directly by individual counterparties.¹⁶⁴ Moreover, as discussed above, access to NFEETS will be comparable for all similarly situated resources.

¹⁵⁹ See, e.g., *Louisville Gas & Elec. Co.*, Revisions to LG&E/KU Joint OATT Transmission Tariff, Transmittal Letter at 10, Docket No. ER21-1118-000 (citing to *Ariz. Pub. Serv. Co.*, 143 FERC ¶ 61,280 at P 28 (2013); *Ariz. Pub. Serv. Co.*, 155 FERC ¶ 61,112 at P 125 (2016)).

¹⁶⁰ CEC Comments at 36-39.

¹⁶¹ *Id.* at 37.

¹⁶² *Id.* at 37-38.

¹⁶³ *Id.* at 34-35.

¹⁶⁴ See, e.g., Southeast EEM Agreement, Market Rules at IV.C.8.iv (requiring that information to be submitted through OASIS).

G. The proposal includes the appropriate level of market data transparency.

Some commenters request that more granular data be published.¹⁶⁵ They argue generally that this will send potentially useful price signals.¹⁶⁶ But Southeast EEM transactions are not locational, and the results of the matching algorithm will be unpredictable.¹⁶⁷ The usefulness of additional information therefore is limited. Moreover, Southeast EEM Members are concerned that offering to provide more specific data identifying pricing of individual transactions, or bids and offers, could raise concerns among antitrust regulators.¹⁶⁸ The Southeast EEM Members have given careful consideration to these requests for publication of additional information, and continue to believe that the proposed data disclosures, as supplemented by information reported in Electric Quarterly Reports, strike the best balance.

H. The Market Rules include the terms and conditions necessary to determine how the Algorithm should function – nothing further is necessary in the filed rate.

The Market Rules provide Southeast EEM Participants with the rules by which the market will operate and do so with sufficient specificity. Intervenor's concerns with the computer algorithm that will actually implement those rules – both in terms of specificity and feasibility¹⁶⁹ – are not a basis to find that the proposal is not just and reasonable.

¹⁶⁵ EDF Comments at 5-7; R Street Institute Comments at 6-8; CEC Comments at 21-22; PIOs Protest at 37-38; Voltus Protest at 5.

¹⁶⁶ R Street Institute Comments at 8.

¹⁶⁷ Southeast EEM Agreement Filing, Economics Aff. at PP 49-50.

¹⁶⁸ Without appropriate safeguards, price information exchanges among competitors may facilitate collusion or otherwise reduce competition. *See*, U.S. Dep't of Justice & Fed. Trade Comm'n, Statements of Antitrust Enforcement Policy in Health Care at 49 (1996), <http://www.justice.gov/atr/public/guidelines/1791.htm>; *see also, e.g., In re Coordination Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-50 (9th Cir. 1990) (exchanges of price information treated as plus factor from which jury could infer agreement among rivals to fix prices).

¹⁶⁹ Entergy Protest at 7; CEC Comments at 42; PIOs Protest at 21.

The CEC and Entergy argue in some form that the Algorithm should be included in the Market Rules. The CEC makes several general allegations that the Market Rules do not contain sufficient detail.¹⁷⁰ The CEC requests that the Southeast EEM Agreement be revised to include the “formula rate for calculating the Energy Exchange Prices.” The Market Rules already present the mathematical equation for how Energy Exchange prices will be calculated.¹⁷¹ Demanding that it be written in numbers and symbols rather than words is the epitome of elevating form over substance. The CEC’s further request that the agreement include “detailed examples of how the Algorithm will solve given different scenarios of inputs, constraints, and transmission limitations,”¹⁷² is well beyond the scope of what is required under FPA Section 205. The CEC even refers to these allegedly missing provisions as “implementation details,”¹⁷³ which are exactly the type of information that the Commission regularly finds are best left to unfilled business practice manuals.¹⁷⁴ Entergy’s request that the Algorithm be included in the filed rate to permit assessment of impacts on MISO fares no better; as explained below the Southeast EEM proposal passes the test for impacts on neighboring systems recently established in a proceeding regarding the SPP WEIS.

¹⁷⁰ CEC Comments at 42-44.

¹⁷¹ Southeast EEM Agreement, Market Rules at 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.”).

¹⁷² CEC Comments at 43.

¹⁷³ *Id.* at 44.

¹⁷⁴ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 154 FERC ¶ 61,200 at P 4 (2016) (“Decisions on whether to place an item in CAISO’s tariff or the business practice manual are shaped by the Commission’s ‘rule of reason’ policy, which dictates that provisions that ‘significantly affect rates, terms, and conditions’ of service must be included in the tariff, while items better classified as **implementation details** may be included only in the business practice manual.” (emphasis added)).

The PIOs allege that the proposed Southeast EEM design “may not be computationally feasible” and that the Southeast EEM Members “appear not to have considered” whether or not the design was feasible.¹⁷⁵ As explained in the Operations Affidavit, the Southeast EEM Members took the job of designing the Southeast EEM seriously and dedicated substantial personnel hours from various roles across the Southeast EEM Member companies to develop the proposal, including a dedicated subgroup on “algorithm issues.”¹⁷⁶ The Southeast EEM Members decided, for example, not to include “linked” bids in the design due to possible impacts on feasibility. The Southeast EEM Members also did initial outreach to potential vendors in the early stages of planning as part of their due diligence “to test the feasibility and cost of creating the Southeast EEM System.”¹⁷⁷

In any event, the feasibility of the Algorithm is a necessary precondition to Southeast EEM start up, rendering the PIOs’ argument moot. The platform cannot function without it. The Southeast EEM Members initiated an RFP process in early February and has received proposals from several vendors that are competing to design the Southeast EEM System. The Southeast EEM Members remain optimistic that their proposed Q1 2022 go-live date for the Southeast EEM is realistic, provided, of course, that the Commission’s order is not delayed. That date, however, is designed to be flexible to allow time to address any issues that arise. The Southeast EEM Agreement and the Southeast EEM Filings recognize the potential for delays and so do not

¹⁷⁵ PIOs Protest at 20-21.

¹⁷⁶ Southeast EEM Agreement Filing, Operations Aff. at P 5.

¹⁷⁷ *Id.* at P 31 (emphasis added); *see also id.*, Overview Aff. at P 31. The Southeast EEM Members also note that none of the vendors, in their responses to the Request for Proposals, expressed concerns surrounding the implementation of the Algorithm in the time allotted.

include a hard-wired Commencement Date.¹⁷⁸ The Southeast EEM Members have committed to make a filing with the Commission at least 30 days prior to the Commencement Date. These precautions provide the necessary flexibility to ensure that the system will not go live until it is technically feasible to do so.

I. No intervenor raised any real reliability concerns.

In its comments, PJM noted that the proposal appears to “provide for a potentially helpful modification to the existing bilateral market” and that it does not at this time “anticipate any negative effects to PJM’s system.”¹⁷⁹ Similarly, MISO noted that it “appreciates the efficiencies that the Southeast EEM is expected to create for its members” and that it does not wish to “delay or obstruct” the Commission’s review of the proposal.¹⁸⁰ MISO says that “no formal coordination [between MISO and Southeast EEM] is needed at this time,”¹⁸¹ but is requesting a commitment that the Southeast EEM Members coordinate with it should there be “an expansion of scope of market activities or operations within the Southeast EEM” in the future.¹⁸²

The Southeast EEM Members agree with PJM and MISO, that based on the current proposal, there is not an immediate need for any type of additional seams or operating agreement. Several Southeast EEM Members have existing coordination agreements with PJM and/or MISO and will continue to coordinate in the future as necessary. Like PJM and MISO,

¹⁷⁸ Southeast EEM Agreement Filing, Southeast EEM Agreement at Article 1.1 (defining “Commencement Date” as “the date upon which the Southeast EEM commences operation” separately from the definition of the “Effective Date” of the agreement); *id.*, Transmittal Letter at 42.

¹⁷⁹ PJM Comments at 2.

¹⁸⁰ MISO Comments at 3.

¹⁸¹ *Id.* at 7.

¹⁸² *Id.* at 4.

those Southeast EEM Members have concluded that the Southeast EEM proposal does not necessitate any changes to those agreements, which are beyond the scope of this proceeding.

Nonetheless, the CEC¹⁸³ and Entergy¹⁸⁴ argue that more is necessary. In particular, they draw inaccurate comparisons to Entergy's integration into MISO.¹⁸⁵ However, the Southeast EEM proposes to observe all physical and contractual limits on the transmission system of the Southeast EEM Members. To put it simply, an Energy Exchange would never be matched if it needed to rely on a neighboring systems transmission system. Thus, Southeast EEM flows are not comparable to flows under the MISO Settlement Agreement. Indeed, the Southeast EEM does not alter how transmission availability is calculated for bilateral transactions today and will not adversely affect the MISO Settlement Agreement.

Additionally, the Southeast EEM proposal passes the test recently stated by the Commission in two cases with respect to the SPP WEIS. In the first case, the Commission rejected SPP's approach, finding that the "proposal incorrectly presume[d] that [non-participants'] transmission is SPP's to use for the WEIS Market in the first instance, and that the obligation to ensure that the WEIS Market respects non-participating entities transmission rights

¹⁸³ CEC Comments at 47-48.

¹⁸⁴ *See generally*, Entergy Protest.

¹⁸⁵ When Entergy integrated into MISO in 2013, it was (and still is) connected to the rest of MISO through a 1,000 MW contract path. Despite this physical limitation, at the time of Entergy's integration, MISO did not consider the 1,000 MW contract path as a limitation to its market-wide joint dispatch, based on its interpretation of a disputed contract provision, resulting in significant excess flows on systems neighboring MISO. *See generally Sw. Power Pool, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, Complaint and Request for Fast Track Processing and Motion to Consolidate, Docket No. EL14-21-000 (filed Jan. 28, 2014). MISO, Entergy and others subsequently entered into a settlement agreement whereby MISO makes payments when its system dispatch exceeds that 1,000 MW contractual limitation. *See generally, Sw. Power Pool, Inc.*, Offer of Settlement, Docket No. EL14-21-000 (filed Oct. 13, 2015), *accepted* 154 FERC ¶ 61,021 (2016) ("MISO Settlement Agreement").

rests with those entities, rather than with the WEIS Market itself.”¹⁸⁶ In other words, initially the WEIS approach failed because it looked like the MISO approach, but without the settlement and resulting payments for use of neighboring transmission systems that allowed the MISO approach to go forward. In response, SPP tightened its approach, proposing use of a security constrained economic dispatch (“SCED”) that would reflect transmission constraints based on transmission availability information provided by WEIS participants. The Commission found this was sufficient to ensure that the market solution would be “forced to respect” the transmission rights held by participants.¹⁸⁷

Because the Southeast EEM likewise will rely only on Participating Transmission Providers’ transmission system and reflect transmission constraints based on transmission availability, the second WEIS decision controls the outcome here. As Mr. McGeeney and Mr. Sellers made clear in the Operations Affidavit, the data inputs for the Southeast EEM System “ensure that Energy Exchanges can only use transmission that is voluntarily made available to the Southeast EEM.”¹⁸⁸ The Algorithm will be designed to “prevent unauthorized use of transmission systems,”¹⁸⁹ including those that border the Southeast EEM Territory. Such commitments are sufficient.¹⁹⁰ So while MISO’s approach was to use transmission it did not have rights to use, the Southeast EEM will: 1) limit NFEETS to the physical capabilities of

¹⁸⁶ See *Sw. Power Pool, Inc.*, 172 FERC ¶ 61,115 at P 42 (2020).

¹⁸⁷ *WEIS Order*, 173 FERC ¶ 61,267 at PP 124-25 (“We find that SPP’s proposed modeling of transmission rights will limit flows resulting from WEIS Market dispatch, and we disagree with protesters that this is unclear. Because transmission constraints reflecting transmission rights made available by WEIS Participants will be integrated into the SCED market prior to the market running, the market solution will be forced to respect those rights.”).

¹⁸⁸ Southeast EEM Agreement Filing, Operations Aff. at P 35.

¹⁸⁹ *Id.*

¹⁹⁰ *WEIS Order*, 173 FERC ¶ 61,267 at PP 124-25.

Member systems by relying on a “Network Map” that includes only Participating Transmission Providers’ systems,¹⁹¹ and 2) take those physical limitations into account to match up individual transactions,¹⁹² just as occurs in the bilateral market today, and just as the Commission recently approved in the WEIS.¹⁹³

V. Requests for further process should be rejected.

A. Consolidation is unnecessary.

It is not necessary to consolidate the Southeast EEM proceedings as some request.¹⁹⁴ Despite intervenors’ arguments that multiple dockets are an administrative burden, all intervenors in the proceeding managed to appropriately file their comments in each docket with a caption that the proceedings are not consolidated. Therefore, whatever burden that presented is now in the past. It is also not appropriate to consolidate proceedings. Notwithstanding the common nexus of facts, the filings are by different entities who retain their individual Section 205 rights. Moreover, the Commission’s general rule is that consolidation is only appropriate where further process is necessary,¹⁹⁵ and here further process is neither necessary nor appropriate.

¹⁹¹ See Southeast EEM Agreement Filing, Operations Aff. at PP 35-36 (describing data inputs that “prevent unauthorized use of transmission systems”).

¹⁹² See *id.* For these reasons, MISO’s note (at 7-8) that AECI is connected to TVA (which further connects it to the rest of the Southeast EEM footprint) via a single contract path with up to 700 MWA of contract path capacity does not raise the same reliability and transmission usage concerns as Entergy’s integration into MISO.

¹⁹³ *WEIS Order*, 173 FERC ¶ 61,267 at PP 124-25.

¹⁹⁴ Public Citizen Protest at 2; Voltus Protest at 7.

¹⁹⁵ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 123 FERC ¶ 61,142 at P 22 (2008).

B. There is no need for a technical conference in this proceeding.

While several intervenors acknowledge any technical conference can occur separately from this proceeding,¹⁹⁶ certain intervenors improperly urge the Commission to delay its ruling on this Section 205 filing until a technical conference can be held to determine if the creation of an organized wholesale market such as an RTO or EIM would be a superior alternative.¹⁹⁷ For the same reasons discussed above in Section III.B, these requests should be rejected. The Commission considers whether *this* Section 205 filing is just and reasonable, not whether some potential alternative—even one that might arise from a technical conference—may be superior.¹⁹⁸ There is nothing about the merits of this proceeding that warrants the sort of fact finding that would take place at a technical conference.

If the Commission elects to hold a technical conference on the future of the Southeast, there is no reason to do it in this docket and impede realization of the benefits of the Southeast EEM. It is worth reiterating here the delicate balance represented by the proposal before the Commission, and that previous attempts to develop an RTO in the Southeast have not been successful.¹⁹⁹ In this context, the proposed Southeast EEM is a significant step to increasing

¹⁹⁶ Tom Davis Letter at 2; Nathan Ballentine Letter at 2; SREA Comments at 8; CEC Comments at 2.

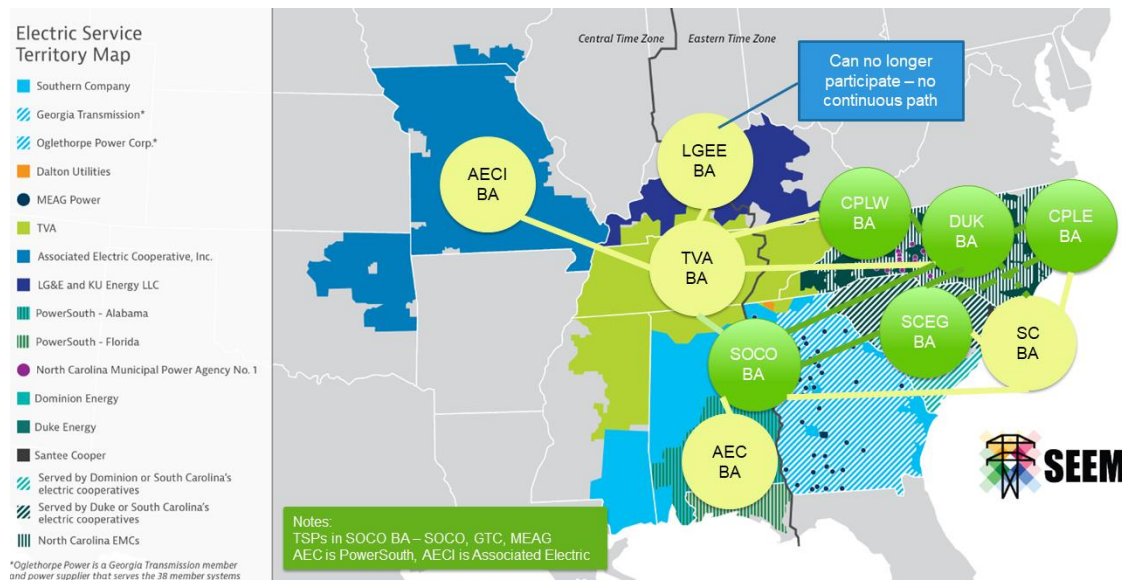
¹⁹⁷ Voltus Protest at 6; PIOs Protest at 59-63.

¹⁹⁸ *NRG*, 862 F.3d at 115. *See also supra* note 35.

¹⁹⁹ For example, in 2002, numerous Southeastern utilities made joint filings at FERC related to a proposed “SeTrans Regional Transmission Organization.” *See, e.g., Cleco Power LLC*, 101 FERC ¶ 61,008 (2002), *order on reh’g*, 103 FERC ¶ 61,272 (2003). Creation of the SeTrans Regional Transmission Organization failed because “[t]he retail commissions in the [Southeast] region have expressed significant concerns about the role of an RTO and its effects on matters subject to their jurisdiction, including concerns about native load protection and cost impacts. They have expressed their concerns in numerous public forums, letters to FERC and Congress, and in SEARUC resolutions. In recent weeks, it has become increasingly apparent that most of the public service commissions continue to have these concerns. The jurisdictional Sponsors have now concluded that it is highly unlikely that consensus support and acceptance for the SeTrans RTO will be forthcoming from all applicable state and federal agencies. In light of this determination, the Sponsors have decided unanimously to suspend the

cooperation, utilization, and achieving benefits in the Southeast, as many intervenors recognized.²⁰⁰

As the Commission examines the requests for a technical conference, it may also wish to consider the practicalities that would confront any effort to force an all-at-once leap to an organized wholesale electric market and transmission sharing system, as opposed to building through consensus, step-by-step. A simple look at the regional map shows a comprehensive Southeastern market cannot be achieved by Commission fiat,²⁰¹ because the transmission grid needed for regional integration is substantially under the control of non-jurisdictional entities like TVA:



SeTrans effort.”). *Cleco Power LLC*, Status Report Regarding the SeTrans RTO Proposal, Docket No. EL02-101-000 (filed Dec. 11, 2003).

²⁰⁰ See *supra* note 13.

²⁰¹ Even leaving aside, for present purposes, whether the Commission could order jurisdictional utilities to take such a step.

Moreover, half the expected net energy for load in the footprint is either non-jurisdictional, or not able to connect to the rest of the region without using non-jurisdictional transmission:

Member/Prospective Member	NEL	Percentage of Total
AECI	23,474,005	4%
Dalton Utilities	2,067,319	0%
Dominion Energy SC	23,120,146	4%
Duke Energy Carolinas	86,663,827	14%
Duke Energy Progress	46,402,556	8%
GSOC, GTC, OPC	41,261,927	7%
LG&E & KU	33,165,655	5%
MEAG	11,326,212	2%
NC Municipal Power Agency 1 (Electricities)	4,921,479	1%
NCEMC	13,323,038	2%
PowerSouth	9,228,988	1%
Santee Cooper	8,728,235	1%
Southern Companies	153,910,118	25%
TVA	159,328,344	26%
Total	616,921,849	100%
Southeast EEM if Non-jurisdictional Members & utilities that connect through non-jurisdictional Members are removed	310,096,647	50%

The existing Southeast market is built on sound decision-making by various jurisdictions that each review and select the generation mix that best reliably serves load. The result is a regional grid that enjoys below-average costs of electricity²⁰² and above-average reliability.²⁰³ So the

²⁰² See *supra* at 21 (chart comparing state versus national averages of electricity prices).

²⁰³ See NERC, 2020 Long-Term Reliability Assessment at 123 (Dec. 2020), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf (Describing NERC’s assessment of the SERC region, including that: “ARMs are at or above 20% in all assessment areas and do not fall below the NERC 15% target reference margin at any point during the

central idea that worked for building a consensus in the Southeast was to build upon and enhance the successful foundation that already exists in the Southeast. The resulting Southeast EEM proposal is based on thoughtful region-wide dialogue and exchanges of ideas between jurisdictional and non-jurisdictional entities resulting in the consensus filing made here. In short, the Southeast EEM proposal represents a success where prior plans have failed. The Southeast EEM Members ask the Commission to respect that successful collaborative decisional process by acting on this proposal separately from any other Southeastern initiative the Commission may decide to undertake.

C. The Southeast EEM Members provided sufficient evidence in the record for the Commission to accept the proposal without a deficiency letter, and intervenors raise no real factual issues.

Several intervenors argue that the Commission should issue a deficiency letter or reject the filing.²⁰⁴ They generally allege that more information is necessary related to stakeholder and consumer protections and compliance with open access requirements. Each of these critiques has been addressed and disposed of above. Therefore, there are no open questions of fact, and so no need for a deficiency letter. The Southeast EEM Members provided substantial information in support of their proposal, and the Commission should act on the record before it.

VI. Conclusion

For the reasons set forth above, the Southeast EEM Members respectfully request that the Commission accept this Answer and accept the Southeast EEM Agreement, without suspension,

assessment period. Additionally, all assessment areas maintain ten-year reserve margins above SERC's internally calculated reference reserve margin . . . SERC entities have sufficient generation to meet demand over this assessment period . . . No reliability issues are expected within the assessment area.”).

²⁰⁴ CEC Comments at 6, 21-22, 27, 41, 43; PIOs Protest at 56-59.

hearing or modification, to become effective on May 13, 2021, and accept the associated OATT Filings to become effective as of the Commencement Date of the Southeast EEM.

Respectfully submitted,

/s/ Noel Symons

Noel Symons
Julia Dryden English
Katlyn A. Farrell
Carrie A. Mobley
McGuireWoods LLP
888 16th Street NW, Suite 500
Black Lives Matter Plaza
Washington, DC 20006
(202) 857-2929
nsymons@mcguirewoods.com

*Counsel for the Members of the
Southeast Energy Exchange Market*

March 30, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served a copy of the foregoing upon all parties on the service list in these proceedings in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2020).

Dated at Washington, D.C. this 30th day of March, 2021.

/s/ Carrie A. Mobley

Carrie A. Mobley

McGuireWoods LLP

888 16th Street NW, Suite 500

Black Lives Matter Plaza

Washington, DC 20006

cmobley@mcguirewoods.com

*Counsel for the Members of the
Southeast Energy Exchange Market*

Document Content(s)

Southeast EEM Motion for Leave to Answer and Answer.PDF.....1