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By Electronic Filing

Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 950
Montgomery, Alabama 36130

Attention: Mr. Walter L. Thomas, Jr.
Secretary

**Re: Docket No. 32767, James H. Bankston, et al. v. Alabama Power Company and
Docket No. U-4226 Rate Rider RGB (Supplementary, Back-Up, or Maintenance
Power)**

Secretary Thomas:

On behalf of Alabama Power Company ("Alabama Power or "Company"), enclosed for filing is a responsive submission to the December 21, 2018 motion in the above-captioned dockets.

We are tendering this submission to the Commission through its e-filing system, consistent with the applicable rules and practices. To this end, an original and one copy of this filing are being delivered to the Commission by overnight mail (a copy of each filing also has been served on counsel for complainants contemporaneously herewith). To the extent additional information is required, please do not hesitate to contact the undersigned.

Yours very truly,

A handwritten signature in blue ink, appearing to be "S. Grover", with a long horizontal flourish extending to the right.

Scott B. Grover

SBG:etb

Encl.

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION**

JAMES H. BANKSTON, ET AL.,)	DOCKET NO. 32767
)	
Petitioners/Complainants)	
)	
v.)	
)	
ALABAMA POWER COMPANY)	
)	
Respondent)	
)	
and)	
)	
ALABAMA POWER COMPANY)	DOCKET NO. U-4226
)	
Petitioner)	
)	
In re: Rate Rider RGB (Supplementary,)	
Back-Up, or Maintenance Power))	

ALABAMA POWER COMPANY’S RESPONSE TO MOTION FOR HEARING

Alabama Power Company (“Alabama Power” or “Company”), by and through its undersigned counsel, hereby submits this response to the pending motion of James Bankston, Ralph Pfeiffer, and Gasp, Inc. (“Complainants/Intervenors”) in the above-captioned dockets. As demonstrated below, the motion should be denied.

The premise of the motion is that a complaint filed under Ala. Code § 37-1-83, particularly one challenging a rate that has been filed by the Company under Ala. Code § 37-1-81,¹ necessarily requires the Commission to hold a hearing. Alabama Supreme Court precedent holds otherwise. The mere filing of such an action is but the first procedural step *potentially*

¹ As the records in the captioned proceedings reflect, Alabama Power filed a motion to dismiss the April 26, 2018 complaint in Docket No. 32767 on June 15, 2018. On that same day, Alabama Power filed, in accordance with Alabama Code § 37-1-81, modifications to Rate Rider RGB in Docket No. U-4226. The Complainants/Intervenors intervened in the Rate Rider RGB docket on July 3, 2018, and on July 6, 2018 amended their complaint to include allegations directed to the proposed modifications.

leading to a hearing. The statutory obligation of the Commission to fix a time and place for a hearing on a complaint in such a situation *does not trigger* until the Commission determines to investigate the rate or service made subject of the complaint. See Ala. Code § 37-1-85 (“Whenever the commission shall determine to conduct an investigation either with or without complaint, as in this title provided, it shall fix a time and place for public hearings of the matters under investigation.”); see also *Choctaw Co. v. APSC*, 368 So. 2d 280, 282 (Ala. 1979) (“We conclude that, once the Commission decides to suspend operation of the proposed charges or rates in order to conduct an investigation, the foregoing statutes evidence an intent to provide a full, fair, and public hearing for all parties.”); cf. *Ala. Metallurgical Corp. v. APSC*, 441 So. 2d 565, 572 (Ala. 1983); *State v. APSC*, 307 So. 2d 521, 533 (Ala. 1975).

Complainants cite two cases purporting to hold the contrary, but both are in line with the law referenced above. In the *South Central Bell* case, the Commission had consolidated the rate proceeding at issue with a pending complaint, *after it had suspended the rate filing for investigation and hearing*. See *S. Cent. Bell Tel. Co. v. APSC*, 425 So. 2d 1093, 1095 (Ala. 1983). And nowhere in the *Airco* case did the Supreme Court state that a complaint filed under Ala. Code § 37-1-83 automatically requires the Commission to hold a hearing. Rather, the Court observed that the complaint mechanism was a potential means to challenge a rate, where the utility had not otherwise made a filing under Ala. Code § 37-1-81 to modify the rate or propose a new one. See *Airco, Inc. v. APSC*, 496 So. 2d 21, 24 (Ala. 1986) (“Thus, of the two statutes which *might have* afforded the appellants relief, § 37-1-81(b) was inapplicable because the requirements for its use were not met, and § 37-1-83 was simply not used.” (emphasis added)).

Here, rather than immediately ruling on the Company’s motion to dismiss the complaint in Docket No. 32767 or the Company’s modifications to Rate Rider RGB filed in Docket No. U-

4226, the Commission held the motion in abeyance and directed the parties to provide additional information regarding the Company's proposal in the latter docket. Specifically as to Complainants/Intervenors, the Commission directed them to submit "any such testimony and evidence they desire no later than sixty (60) days from the date of the procedural ruling." August 23, 2018 Procedural Ruling, p. 5.² In connection therewith, the Commission further afforded them rights of discovery under the Commission's Rules of Practice. Complainants/Intervenors availed themselves of such rights. They propounded more than fifty (50) interrogatories and requests for production (including subparts), and held a Rule 30(b)(6) deposition of the Company.³ Intervenors then submitted more than fifty (50) pages of sworn written testimony, along with many pages of exhibits. Thereafter, in accordance with the Commission's Procedural Ruling, the Company submitted reply testimony and evidence. Following the Company's submittal, the Commission issued a second Procedural Ruling stating that it was in a position to render a determination on the matters under consideration. *See* December 18, 2018 Procedural Ruling.

The Commission, however, could have chosen an alternative course. With the information before it as of the August Procedural Ruling,⁴ *along with its knowledge of the prevailing legal principles*, the Commission could have found the Company's proposal to warrant approval as just and reasonable and in the public interest, and the complaint as amended to lack merit as a matter of law and warrant dismissal. The law is settled that the Commission

² This deadline to submit responsive testimony and evidence was later extended by agreement of the parties to November 13, 2019.

³ The corporate representative put forward by the Company for the subjects listed in the Rule 30(b)(6) notice was the same witness who submitted sworn testimony in support of the proposed modifications in Docket No. U-4226.

⁴ That is, the support provided by the Company with its June 15 modifications to Rate Rider RGB and the corresponding details regarding that support obtained through Staff data requests.

need not adhere to a singular approach to rate design. “‘Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling.... It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.’” *Ala. Metallurgical Corp., supra*, at 572 (quoting *Federal Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (ellipsis in original)); *see also Alabama Gas Corp. v. APSC*, 425 So. 2d 430, 439 (Ala. 1982). The law is equally clear that Alabama Power can seek authorization from the Commission to recover costs associated with the provision of back-up power service. *See* 18 C.F.R. § 292.305(b) & (c); *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, 45 Fed. Reg. 12214, at pp. 12217, 12228-29 (Feb. 25, 1980); Ala. Code § 37-4-140(c)(1). These tenets, coupled with the substantial evidentiary support before the Commission regarding the justness and reasonableness of the Company’s modifications to Rate Rider RGB, readily supported dispositive action by the Commission on both fronts.⁵

As noted at the outset, Complainants/Intervenors do not have an automatic right to a hearing. Nevertheless, with the procedural course implemented here, the Commission afforded Complainants/Intervenors ample opportunity to demonstrate that the proposed modifications should be investigated and set for hearing. *Cf.* Ala. Code § 37-1-85. This action readily comports with basic principles of due process and fundamental fairness. What Complainants/Intervenors made of their opportunity, and more precisely, whether they offered compelling reasons to support the institution of an investigation and the fixing of a hearing, is

⁵ And as to the allegations in the amended complaint challenging the Commission’s approval of modifications to Rate Rider RGB in 2013, those would be properly dismissed as an impermissible collateral attack on a final Commission order or as moot. *See* June 15, 2018 Motion to Dismiss of Alabama Power Company, Docket No. 32767.

now properly before the Commission to assess. Alabama Power submits, however, that it has carried its burden of demonstrating the justness and reasonableness of the proposed modifications to Rate Rider RGB, and that the complaint pending in Docket No. 32767 is due to be dismissed as a matter of law.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the counsel of record in this public proceeding by electronic transmission on this the 11th day of January, 2019.



Of Counsel