600 North 18th Street
14N-8195
Birmingham, AL 35203

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Mr. Daniel Cohen
Assistant General Counsel for Legislation, Regulation, and Energy Efficiency
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue SW
Room 6A245
Washington, DC 20585

Southern Company's Comments in Response to DOE's Request for Information on Reducing Regulation and Controlling Regulatory Cost ("Regulatory Burden RFI")

Southern Company appreciates the opportunity to offer comments in response to the Department of Energy's ("DOE") May 30, 2017 Request for Information on Reducing Regulation and Controlling Regulatory Costs,[1] which seeks public input to assist the Agency's evaluation of existing regulations pursuant to Executive Orders 13771, 13777, and 13783 ("Executive Order(s)" or "Order(s)").[2] These comments are submitted on behalf of Southern Company and each of its following subsidiaries—Alabama Power, Georgia Power, Gulf Power, Mississippi Power, Southern Power, Southern Company Gas, and PowerSecure.

Southern Company is America's premier energy company, with 46,000 megawatts of generating capacity and 1,500 billion cubic feet of combined natural gas use and throughput volume serving nine million electric and gas utility customers through its subsidiaries. The

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[1] 82 Fed. Reg. 24582 (May 30, 2017).
[2] Exec. Order 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017); Exec. Order 13777, 82 Fed. Reg. 12285 (Mar. 1, 2017); Exec. Order 13783, 82 Fed. Reg. 16093 (Mar. 31, 2017).

company provides clean, safe, reliable and affordable energy through electric utilities in four states, natural gas distribution utilities in seven states, a wholesale generation company serving customers across America and a nationally recognized provider of customized energy solutions. Through an industry-leading commitment to innovation, Southern Company and its subsidiaries are inventing America's energy future by developing the full portfolio of energy solutions—including nuclear energy, 21st-century coal technologies, natural gas, renewable energy resources and energy efficiency—and creating new products and services for the benefit of customers. We are committed to meeting our customers' energy needs today and bringing customers energy solutions that will drive growth and prosperity tomorrow.

Southern Company believes that responsible regulation is consistent with economic growth and the continued production of reliable and affordable energy. We believe that sound government policies are essential to ensure energy is generated, transmitted, and sold in a way that is clean, safe, reliable and affordable. Further, policies designed to promote any of these goals individually should not impede the ability to optimally balance the collective goals—clean, safe, reliable and affordable. Moreover, policies must consider other federal and state laws and regulation that, over time, established federal and state energy policy as it affects electric and gas utilities. Regulation must effectively co-exist with other federal and state statutory and regulatory schemes that affect the industries being regulated and respect the relevant jurisdictional roles and responsibilities under those laws and regulations. In some instances, regulations adopted without this holistic approach can constrain economic growth, impose unnecessary costs on those who can least afford it and confuse jurisdictional boundaries. Fortunately, there are ways to formulate policies that continue to protect the environment while alleviating the potential for substantial economic harm to the American people—for example, adopting policies that align with technological advancement and innovation that support safe, reliable and affordable energy.

Southern Company therefore supports the policy established by the Executive Order 13777 of "alleviat[ing] unnecessary regulatory burdens placed on the American people."[3] To carry out this policy, the Order directs agencies to review their existing rules and identify those that may be appropriate for "repeal, replacement, or modification."[4] In particular, the Executive Order directs agencies to identify those existing regulations that, among other things:

- eliminate jobs or inhibit job creation;
- are outdated, unnecessary, or ineffective;
- impose costs that exceed benefits; or
- rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility.[5]

As DOE undertakes its review and any subsequent actions, Southern Company's main objective is to ensure that DOE regulations promote—rather than hinder—the generation, transmission, and sale of energy in a way that safe, reliable, and affordable. A variety of regulations can be improved to achieve this balance while also reducing the burdens imposed on the American people and the economy. As part of this review, we encourage DOE to consider the following fundamental principles and ensure they are reflected in DOE's actions:

- **Constructive regulation**: Regulations should provide constructive solutions to real problems affecting people, the environment, and the economy. DOE should avoid imposing requirements that are duplicative, not supported by sound data and analysis, or otherwise unduly burdensome. In evaluating potential regulation,

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[3] Id. § 1.
[4] Id. § 3(d).
[5] Id.

DOE should take into consideration other statutes and regulation, both federal and state, that will affect the implementation and impacts of the potential regulation.

- **Regulatory certainty**: For many regulated industries, including our industry, regulatory certainty is essential to inform the long-term business planning and substantial capital investments required to effectively operate today and plan for tomorrow. Southern Company values clear, predictable requirements and consistent application of the law. Regulatory uncertainty can impose significant costs on the American people with minimal or no tangible benefits.

- **Cooperative federalism**: Regulation is most effective when the federal government works in partnership with the states rather than imposing one-size-fits-all federal regulations. Departments and Agencies should defer to the states with regard to matters for which the states have traditionally been delegated authority.

- **Realistic assessments of costs and benefits**: Analyses of proposed or existing regulations must properly weigh the relevant costs and benefits imposed by those rules. When evaluating costs and benefits, DOE should avoid reliance on speculative or scientifically unproven benefits and use sound, commonly accepted methods to make predictions about future costs and benefits.

- **Realistic technology-based standards**: DOE should not adopt standards based on unsupported conclusions or on unproven, unreliable, or excessively costly technologies. Requiring sources to implement technologies that are unproven or not commercially available can actually hinder further technological development.

With these principles in mind, Southern Company supports DOE's efforts to review its existing regulations pursuant to the Executive Orders and offers the following comments on DOE's existing regulations. In our comments, we discuss ways in which some of DOE's (or agencies organized as part of DOE) existing or proposed regulations relate to the criteria specified in the Order. These comments provide examples of rules that raise the concerns outlined in the Executive Orders and are not an exhaustive list of the regulations that Southern Company believes are appropriate for review.

We encourage DOE to take its next steps quickly but carefully to minimize the regulatory uncertainty that may result in the near term. Simple but thoughtful changes can improve rules significantly in a way that minimizes disruption to long-term business planning and ongoing construction and compliance activities.

I. DOE Should Review Regulations Establishing Impractical or Unachievable Standards, Including Standards Not Based on Sound Data and Analysis, Adequately Demonstrated Control Technologies or Not Developed in a Transparent Manner.

DOE should streamline and improve certain efficiency regulations. DOE has some discretion on choosing whether consumer products need to have minimum efficiency standards established (42 USC § 6292(b), but once that determination has been made, there is no apparent path to "un-regulate" these products. For non-consumer products, efficiency standard regulations are a complex interaction of ASHRAE Standard 90.1 and actions of DOE, which can either:

- Ratify and affirm the efficiency levels set by ASHRAE Standard 90.1 (42 USC § 6313(a)(6)(A)(ii)(I));
- Override the ASHRAE Standard 90.1 efficiency levels and set more stringent standards (42 USC § 6313(a)(6)(A)(ii)(II)); or
- Update efficiency levels for non-consumer products where DOE has been given authority by legislation to directly set efficiency levels without consulting ASHRAE Standard 90.1.

The major areas of concern are:

- The Technical Support Documents produced for efficiency standard rulemakings are unnecessarily complex, and key economic assumptions are either hidden or difficult to interpret. The cost effectiveness studies should be simpler, with clearly stated economic modeling assumptions, with these assumptions provided to stakeholders early enough in the NOPR process to allow feedback from stakeholders to be incorporated in the NOPR decision making.
- OMB Guidance on the social cost of carbon has been used in ways inconsistent with appliance efficiency standards legislation, which clearly states that operating costs for consumers, not externalities such as carbon costs, are the basis for cost-effectiveness tests.

- DOE in recent years has devoted few of its resources to test procedures, which are the measure of efficiency in the standards. Several test procedures are suspected to have serious flaws which could misstate energy savings. Test procedure changes should also be finished before the NOPR process for deciding efficiency levels. Deciding efficiency levels at the same time as the efficiency performance standard is illogical, and in violation of appliance standard legislation.

II. DOE Should Review Regulations That Are Outdated, Unnecessary, or Ineffective, Including Those That Interfere with Cooperative Federalism, Minimize State Authority, Conflict with Other Federal Statutory Schemes, or Do Not Properly Account For Regional Differences.

Southern Company agrees that DOE should take action to address regulations that are "outdated, unnecessary, or ineffective."[6] In particular, regulations may be unnecessary and ineffective if they conflict with the principle of cooperative federalism, or if they impose monitoring, recordkeeping or reporting requirements that are duplicative, costly, or add little value. Federal policies should not blur the federal-state jurisdictional boundaries and hinder states' efforts to account for important regional and intrastate differences.

For example, consider some of actions of the Federal Energy Regulatory Commission ("FERC"), an independent agency organized under the DOE, listed below.

- **Public Utility Regulatory Policies Act (PURPA) Implementation.**

  Enacted in 1978, PURPA encouraged the development of Qualifying Facilities ("QFs") through mandatory purchase obligations while protecting consumers by specifying that QFs be paid the host utility's avoided costs. However, PURPA's current implementation provides few benefits, and FERC could provide certain clarifications to assist in correcting certain practices that are harming customers today. FERC should continue to provide State Commissions flexibility in

[6] Exec. Order 13777, § 3(d)(ii).

implementing PURPA, including making avoided cost determinations, not only because PURPA requires it, but also because the State Commissions are best situated to incorporate the local considerations that are inherent in calculating the local utility's avoided costs. Electric utilities should not be required to provide QFs with a rate based upon projected estimates of long-term energy and/or capacity costs. Additionally, QFs should be provided a curtailment priority commensurate with the level of service provided, with QFs being responsible for ensuring their output is deliverable. Regarding the "one-mile rule," FERC should make the one-mile presumption rebuttable and clarify that facilities are considered to be located at the same site as the facility for which qualification is sought if they are, or reasonably should be, electrically connected through a common collector system or common interconnection facilities. Reasonable size thresholds should be used in determining QF eligibility when QFs have non-discriminatory access to the wholesale markets absent evidence to the contrary. Further, the current RTO-only exemptions for qualifying markets should be expanded to allow recognition of other market structures that meet certain parameters (e.g., independently administered, voluntary and auction-based).

- **Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (FERC Order No. 1000, July 2011)**.

  The key requirements of this Order involve an expansion of existing regional planning rules to address: public policy requirements, development of criteria for submission and evaluation of proposals offered by non-incumbent transmission developers, and development of cost allocation methods for projects selected in the regional transmission plan for purposes of cost allocation. The rule also requires development of inter-regional coordination, information sharing and inter-regional cost allocation methodologies. While these high-level descriptions may sound harmless, the actual requirements are not. The processes required by Order No. 1000 are burdensome, costly and inefficient, and often serve to distract from actual transmission planning. For example, the Order's requirement that public utilities must consider public policy requirements in transmission planning is the perfect illustration of an unnecessary, duplicative and overreaching regulation. This requirement implies that public utilities previously did not comply with their legal obligations. Applicable public policy requirements established by federal, state or local laws or regulations were already addressed in transmission planning processes since they are existing legal obligations. The result of such a burdensome requirement only distracts from transmission planning by allowing the process to be abused by those who use it to try to re-litigate established laws or regulations that are outside the scope of transmission planning and the regulatory authority of FERC.

The burdens and costs imposed by Order No. 1000 are not justified by off-setting benefits, as Order No. 1000 has not resulted in more efficient or cost effective projects and has not resulted in the implementation of new technologies[7]. The establishment of an unworkable, "food fight" approach to transmission planning has only resulted in restricting the ability of public utilities,

[7] Southeastern utilities were, for example, already engaged in robust transmission planning before the adoption of Order No. 1000.

who retain duty to serve obligations, to ensure reliable service for their customers. Accordingly, Order 1000 creates unnecessary roadblocks to effective transmission planning, inhibiting the ability to provide customers reliable, affordable power and thus is a prime example of not only a burdensome and ineffective regulation, but one that is impeding the development of domestic energy resources.[8]

- **Reform of Generator Interconnection Procedures and Agreements (FERC Generator Interconnection NOPR, December 15, 2016)**.

  This NOPR attempts to address issues that do not exist on a nationwide basis. For instance, bi-lateral, vertically integrated markets continue to process generator interconnection requests effectively under the current pro-forma transmission tariff procedures. Others may have amended their generator interconnection processes in an attempt to address the number of requests in the queue. However, the NOPR proposals would impose bureaucratic responsibilities upon the Transmission Providers, transfer risks and unreasonable cost shifts to Transmission Providers, and tend to hinder and delay the interconnection process. Such proposals seem to be counter to the objectives on the Commission. Additionally, the FERC Generator Interconnection NOPR does not propose any potential decision points for the generator that would encourage decisions at an appropriate point in time and thereby allow later queued requests an opportunity to advance in the interconnection process. FERC should not move forward with a Final Rule based on the NOPR proposals which fail to maintain balance in the interconnection process. Adopting this NOPR would, thus, be inconsistent with

[8] *See* Exec. Order 13783 (requiring the review of regulations that potentially burden the development or use of domestically produced energy resources).

the Executive Orders as the NOPR's proposals would serve to increase regulatory burdens and hamper the development of electric generation.

- **Review of Dispositions of Property Under Federal Power Act Section 203.** FERC's application of Section 203 of the Federal Power Act has led to burdensome and time-consuming filings to seek approval for relatively small commercial transactions. In 2005, Congress amended the Federal Power Act to increase the threshold value of a jurisdictional property disposition transaction that would require FERC approval from $50,000 to $10 million. Public Law 109-58 (EPAct 2005). However, due to the phrasing of the statute, the $10 million threshold has been interpreted by FERC as applying to the *sale* of jurisdictional facilities but not the *purchase* of jurisdictional facilities to merge or consolidate the facilities. This interpretation has resulted in many filings at FERC for approval of small transactions that cause unnecessary delay and expense. In 2016, then-General Counsel for FERC, Max Minzner, testified before a Congressional Subcommittee endorsing an amendment to the Federal Power Act to clarify that the $10 million threshold should apply to the purchase of jurisdictional facilities to merge or consolidate them. He stated, "Transactions below the proposed threshold are unlikely to impose a significant negative impact on competition or the rates of utility customers."[9]

- **Availability of Certain North American Electric Reliability Corporation Databases to the Commission (FERC Order No. 824, June 16, 2016).**

[9] Amending Section 203 of the Federal Power Act: Hearing Before the Energy and Power Subcommittee of the Committee on Energy and Commerce, 114th Cong. (Feb. 2, 2016) (Statement of Max Minzner).

In Order No. 824, FERC mandated that FERC is to be provided direct access to certain North American Electric Reliability Corporation ("NERC") databases so that, among other things, FERC will be provided information to allow it to determine the need for new or modified reliability standards. As such, Order No. 824 constitutes a gross regulatory over-reach by FERC into the domain that Congress specified in FPA Section 215 should belong to the Electric Reliability Organization ("ERO"). Specifically, that statute allows for the certification of an ERO to develop mandatory reliability standards for the electric industry, with FERC having oversight authority thereof "for purposes of approving reliability standards established under this section and enforcing compliance…" Not only is Order No. 824 a gross invasion of the role contemplated by Congress for the ERO, but the industry, which was unified in its opposition to FERC mandating such access, further explained in its comments that the prescribed access to the NERC databases will not provide FERC information that will allow it to achieve its stated goals (meaning that FERC almost inevitably will be seeking additional information). In addition, the industry also explained that FERC's obtaining such access will have a chilling effect upon the voluntary submission of information to NERC, which will thereby harm reliability.

- **Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information; Availability of Certain North American Electric Reliability Corporation Databases to the Commission (FERC Order No. 833, Nov. 17, 2016).**

  Order No. 833 implements additional Critical Energy Infrastructure Information ("CEII") protections and processes required to be adopted by Section 61003 of the

Fast Act. This Order should be rescinded because it is expressly linked to the above-discussed Order No. 824 and because rescinding Order No. 833 will provide FERC the opportunity to adopt more rigorous protections to implement the Congressional directives adopted in the FAST Act. With regard to the links between these two orders, in adopting the above-described Order No. 824 that provides FERC access to NERC databases, FERC attempted to assuage concerns that the information will not be sufficiently protected against the risk of inappropriate disclosure by tying the effective date of Order No. 824 to FERC's implementation under Order No. 833 of the Fast Act's CEII-related requirements. Reinforcing the appropriateness of rescinding Order No. 833 is that there is some concern within the industry that in implementing the Fast Act's CEII requirements, FERC did not go far enough to adequately protect CEII, meaning that rescinding Order No. 833 will allow for more meaningful protections to be adopted.

- **Data Collection for Analytics and Surveillance and Market-Based Rate Purposes (FERC Revised Connected Entity NOPR, July 21, 2016).**

  As a revision to a previously issued NOPR on the Collection of Connected Entity Data from Regional Transmission Organizations and Independent System Operators, FERC issued the Connected Entity NOPR proposing to collect currently filed market-based rate (MBR) information and new Connected Entity information through a relational database. The breadth and scope of the information in an entirely new format is significant and burdensome. Additionally, FERC does not explain why it needs the proposed information or what it intends to do with the information. In fact, the Revised Connected Entity NOPR does not even fully define the data that will be required in the draft data dictionary included as part of the NOPR and does not address the software that will be need to be developed, training required, or the expense for filing entities. Instead of imposing new and potentially duplicative requirements that are not fully defined in this NOPR, FERC should rely upon existing regulatory and reporting requirements to the maximum extent possible.

- **FERC Overlap With the Commodity Futures Trading Commission ("CFTC") Jurisdiction.**

  The CFTC was established as an independent agency in 1974 to regulate futures and option markets, extending beyond the traditional physical and agricultural commodities. The CFTC's jurisdiction extends to energy markets as well. On October 12, 2005, the CFTC and FERC entered into a memorandum of understanding regarding the sharing of information and the confidential treatment of proprietary energy trading data, pursuant to the Energy Policy Act of 2005. In many cases, the CFTC and FERC are opening investigations into the same matters or both introducing regulation to address the same issues simultaneously. For example, in July 2007, both the CFTC and FERC opened investigations into whether Amaranth and its former head energy traded attempted to manipulate the price of natural gas futures in 2006. Going forward, the regulatory overlap between the CFTC and FERC needs to be stopped to prevent conflicting and additional regulations.

- **The FERC Form No. 552: Annual Report of Natural Gas Transactions.**

The submission of FERC Form No. 552 is largely unnecessary and far more burdensome than originally expected. The original purpose of FERC Form No. 552 was to gather transactional information from market participants in order to provide information on the size of the physical gas market, the use of natural gas spot markets and the use of fixed- and index-priced transactions. At the time, FERC estimated a 4-hour annual burden per respondent.

Since its inception in 2007, the FERC Form No. 552 has not provided the benefit outlined in the Final Rule nor has the burden estimated by the Commission in the Final Rule reflected the actual burden for the preparation and submittal of the final report. The actual reporting burden has demonstrated to have been grossly underestimated. The burden can easily surpass 150 hours per report for a large volume market participant, with even the smaller reporting entities easily surpassing the burden estimate by ten-fold. Each report must be prepared and reviewed by numerous internal employees prior to submission. There is also great expense and time invested for large volume market participants to build and maintain software programs to extract the data to prepare the report in accordance with the detailed requirements of FERC Form No. 552. This data also can be audited by the Commission staff which can result in numerous additional hours of employee time and expense to market participants that are not reflected in the burden.

The same participants that submit FERC Form No. 552 are also submitting various natural gas survey reports to the U.S. Energy Information Administration (EIA). The EIA provides daily, weekly, and monthly data from information derived from its surveys, Exchanges, Price Index Publishers, and other sources to arrive at a more complete picture of the size of the physical gas market and the activities in the market regionally and at spot level than what is provided in a compilation of annual FERC Form No. 552 data.

III. DOE Should Review Regulations That Inordinately Impact the Economy or Fail to Adequately Compare Costs and Benefits.

DOE rulemaking must account for the costs that regulation imposes on society. Likewise, constructive rulemaking requires DOE to weigh the costs of regulation against the relevant benefits to ensure consumers are made better off. Many of the items mentioned in section II above also fail to adequately account for the cost of complying with such regulations. Order 1000, the FERC Generator Interconnection NOPR, and the Revised Connected Entity NOPR are all examples of regulations that increase or shift costs unnecessarily. Two additional examples are included below.

- **Presidential Memorandum – Establishing a Quadrennial Energy Review (issued January 9, 2014 by President Obama) ("QER").**

  The QER was linked to President Obama's Climate Action Plan and provides for a review of federal energy policy and recommendations for executive and legislative actions. The QER also assesses and recommends priorities for research, demonstration and development projects, as well as identifying analytical tools and data needed to support further policy development and implementation. The first QER issued in 2015 included over 60 recommendations and the second installment issued in 2017 resulted in 76 recommendations. Additionally, DOE "commissioned an extensive suite of analyses" as support for QER 1.2 recommendations, most of which were developed by the National Labs (8 baseline reports, 32 analytical reports, 5 workshop reports, plus additional pending reports based on the recommendations). The QER process has resulted in several new requirements, processes and reports which did not necessarily add value to existing processes. Although frameworks such as the QER may at times provide some benefit, care should be taken to ensure that recommendations and resulting requirements, processes, and reports are truly necessary. DOE may be able to offer more value by focusing on its core mission of research, demonstration, and development.

- **EIA Electricity Survey Forms – 2017 Triennial Review (Comments Requested at 81 Fed. Reg. 31623, May 19, 2016).**

  The U.S. Energy Information Administration ("EIA") proposed to ask the Office the Office of Management and Budget (OMB) to renew authorization of EIA's existing electricity survey forms EIA-63B, 411, 826, 860, 860M, 861, 861S, 861M, 923, and 930 for another three years with changes. EIA invited comments on whether the forms are necessary for proper performance of EIA's functions, the accuracy of EIA's estimates of the reporting burden the forms impose, ways to enhance the information collected, and ways to minimize the burden of the information collection. The changes proposed by EIA are burdensome and create additional work that is not offset by the proposed reductions in some other areas. Additionally, some of the information contained in the EIA forms is sensitive either from a commercial or security perspective but is not being given confidentiality protection by EIA. As a member of the Edison Electric Institute

("EEI"), Southern Company supports the detailed comments that EEI filed with EIA on this matter.

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Southern Company appreciates the opportunity to provide input on the DOE's review of existing regulations pursuant to the Executive Orders. Southern Company encourages the DOE and its associated agencies to take thoughtful, constructive steps to ensure that all of its rules reflect the core principles fundamental to effective regulation: certainty and clarity; respect for the principle of cooperative federalism; meaningful consideration of both costs and benefits; and emphasis on scientifically and technically sound standards. If the DOE remains mindful of these values, it can best serve the American people by optimally balancing safety, reliability, the environment, and affordability in the energy industry. If you have any questions regarding these comments please contact Wayne Moore at (205) 257-6208 and dwmoore@southernco.com or Molly Edwards at (205) 257-6016 and mmgibson@southernco.com.

Sincerely,

/s/ Jeffrey A. Burleson

Jeffrey A. Burleson
Vice President
Environmental & System Planning