COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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COMMISSION

In The Matter Of:

The Application Of Kentucky Power Company To Withdraw Its Tariff RTP Pending Submission By The Company And Approval By The Commission Of A New Real-Time Pricing Tariff.	)))))	Case No. 2012-00226

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RESPONSE OF KENTUCKY POWER COMPANY TO KENTUCKY INDUSTRIAL UTILITY CUSTOMERS, INC.'S MOTION TO DISMISS APPLICATION TO WITHDRAW TARIFF R.T.P.

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For its Response to Kentucky Industrial Utility Customers, Inc.'s Motion to Dismiss Kentucky Power Company states:

Introduction

KIUC argues Kentucky Power's Application to Withdraw Tariff R.T.P. should be dismissed because, according to KIUC, it violates the May 19, 2010 Settlement Agreement in Case No. 2009-00459.[1] KIUC also argues that withdrawing Tariff R.T.P. is not in the public interest. Both arguments in large part turn – and hence fall – on a fundamental misunderstanding of Tariff R.T.P. Tariff R.T.P., which until very recently was substantially ignored by all industrial customers, including those represented by KIUC in this matter (the "KIUC Customers"), during the four years it has been offered, was never intended to permit large industrial customers to switch to market based rates without a concurrent shift in customers' usage from higher-cost to lower cost periods.

[1] Order, *In The Matter Of: Application of Kentucky Power Company For General Adjustment Of Rates*, Case No. 2009-00459, Appendix A (Ky. P.S.C. June 28, 2009).

KIUC's motion should be denied.

Argument

A. Tariff R.T.P. Is Limited To That Portion Of An Eligible Customer's Load That Is Shifted From Higher-Cost To Lower Cost Periods.

KIUC argues that "[t]he notion R.T.P. should only benefit a customer that changes its production schedule is contrary to the Tariff and is a new theory presented by AEP in this case as an after-the-fact justification for changing the existing program."[2] This argument, which focuses on only two of the five sentences of the Program Description provision of the tariff, fundamentally misconstrues the provision. In its entirety, the Program Description provision of Tariff R.T.P. provides:

> **PROGRAM DESCRIPTION**.
>
> The Experimental Real-Time Pricing Tariff is voluntary and will be offered on a pilot basis for a three-year period. The R.T.P. Tariff will offer customers the opportunity to manage their electric costs by shifting load from higher cost to lower cost pricing periods or by adding new load during lower price periods. The experimental pilot will also offer the customer the ability to experiment in the wholesale electricity market by designating a portion of the customer's load subject to standard tariff rates with the remainder of the load subject to real-time prices. The designated portion of the customer's load is billed under the Company's standard Q.P. or C.I.P.-T.O.D. tariff. The remainder of the customer's capacity and energy load is billed at prices established in the PJM Interconnection, L.L.C. (PJM) RTO market.[3]

KIUC limits its argument to the third and fifth sentences of the provision. They provide:

> The experimental pilot will also offer the customer the ability to experiment in the wholesale electricity market by designating a portion of the customer's load subject to standard tariff rates with the remainder of the load subject to real-time prices.... The remainder of the customer's capacity and energy load is billed at prices established in the PJM Interconnection, L.L.C. (PJM) RTO market.

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[2] Response And Motion To Dismiss Of Kentucky Industrial Customers, Inc. In Opposition To Application To Withdraw Tariff RTP, *In The Matter of: Application Of Kentucky Power Company To Withdraw Its Tariff RTP Pending Submission By The Company And Approval By The Commission Of A New Real-Time Pricing Tariff*, Case No. 2012-00226 at 8 (Filed June 7, 2012) ("KIUC Motion").

[3] Tariff R.T.P. at Sheet 30-1.

Neither of these sentences can be read in isolation from the remainder of the provision. Rather, Kentucky law is clear that a tariff, like a contract, must be construed in its entirety and parties are not free to parse out those provisions they wish to ignore.[4] In particular, KIUC's restricted reading ignores the second sentence of the Program Description, which unambiguously links shifting load from higher-priced periods to lower priced periods to obtaining the benefits of real-time pricing:

> The RTP Tariff will offer customers the opportunity to manage their electric costs ***by shifting load from higher cost to lower cost pricing periods or by adding new load during lower price periods.***[5]

The language that follows, and upon which KIUC premises its argument, simply describes the fact that by shifting load customers could gain experience in the wholesale electricity market.[6] Nothing in the third or fifth sentences of the Program Description, or the tariff as a whole, suggests that customers could assign load to Tariff R.T.P. without shifting load. Indeed, to do so as KIUC attempts, would read the second sentence out of the provision.

B. The Commission's Orders Make Clear That Tariff R.T.P. Is Limited To Load That Is Shifted From Higher-Priced Periods To Lower-Priced Periods.

Any ambiguity in the language of Tariff R.T.P. – and there appears to Kentucky Power to be none – may be resolved by the Commission's Order in Case No. 2007-00166[7] approving

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[4] *Louisville Water Co. v. Louisville, H. & St. Louis Ry. Co.*, 110 S.W.2d 668, 670 (Ky. 1937) (The issue "involves an interpretation of tariffs, and in this task the same rules apply as do in the interpretation of other contracts or instruments, that is, treat and consider all their provisions and conditions together in an effort to ascertain their meaning and to determine the applicable rate.")

[5] Tariff R.T.P. at Sheet 30-1. (emphasis supplied).

[6] The fact that load-shifting and providing customers with an opportunity to experiment in the wholesale electricity markets are inextricably bound is underscored by the Company's Response Data Request No. 8. It provides in pertinent part: "The Company's intent for the program is to introduce customers to real-time market pricing and to test the ability of customers to react to the real time pricing signals, ***i.e. test the customer's ability to shift load from higher priced hours to lower priced hours.***" (emphasis supplied). Moreover, customer plans to shift all but a small fraction of their contract load to Tariff R.T.P., as discussed below, can hardly be termed an "experiment."

[7] Order, *In the Matter of: The Application Of Kentucky Power Company For An Order Approving A Pilot Real-Time Pricing Program For Large Commercial And Industrial Customers*, Case No, 2007-00166 (Ky. P.S.C. February 1, 2008).

Tariff R.T.P.[8] Describing the tariff, the Commission explained that "[t]he proposed program will be a market-based, hourly RTP program in which the customers will have the opportunity to manage their electric costs ***by shifting load periods***."[9] That is, the Commission understood the tariff exactly as Kentucky Power does, so that any savings under Tariff R.T.P. must be tied to shifting load periods.

Even more telling is the Commission's resolution of the Attorney General's objection to Tariff R.T.P. The Attorney General asked the Commission to reject Tariff R.T.P. because of his concerns that it would provide no benefit to most high load factor commercial and industrial customers who could not shift their load to lower-priced periods.[10] The Commission nevertheless approved Tariff R.T.P., explaining again that the program was designed for customers who *could* and *would* shift their load:

> This profile, according to Kentucky Power, may benefit participants since the demand charge is much lower under the proposed tariff even though the energy charges are significantly higher and that more savings could result if a customer lowers its overall demand. For high load factor customers, it may not be beneficial to participate. They are using power evenly throughout the time period and thus are less likely to be able to shift their usage pattern to put more usage off-peak. Lower load factor customers, on the other hand, may benefit if they ***can modify their usage pattern to reduce their peak load or move load to off-peak time periods which is the intent of the program.*** They also would generally have more of an opportunity to change their usage patterns.[11]

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[8] *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 107 (Ky. 2003) ("'If an ambiguity exists, 'the court will gather, if possible, the intention of the parties from the contract as a whole, and in doing so will consider the subject matter of the contract, the situation of the parties and the conditions under which the contract was written,' by evaluating extrinsic evidence as to the parties' intentions.")

[9] *Id.* at 3 (emphasis supplied).

[10] Attorney General's Comments, *In the Matter of: The Application Of Kentucky Power Company For An Order Approving A Pilot Real-Time Pricing Program For Large Commercial And Industrial Customers*, Case No, 2007-00166 at 7 (Filed July 12, 2007) ("Attorney General's Comments").

[11] Order, *In the Matter of: The Application Of Kentucky Power Company For An Order Approving A Pilot Real-Time Pricing Program For Large Commercial And Industrial Customers*, Case No, 2007-00166 at 10-11 (Ky. P.S.C. February 1, 2008) (emphasis supplied).

The Attorney General likewise recognized that the intent of RTP programs in general, including Tariff R.T.P., was "to encourage participants to reduce their demand during critical peak hours and to shift their variable demand to low peak hours."[12]

Nothing in the Commission's order approving Tariff R.T.P., nor the Attorney General's comments on the tariff, suggests that either understood the tariff to permit customers to receive the benefits of Tariff R.T.P. without either increasing their load during lower-priced periods, or shifting their usage from higher-priced periods to lower-priced periods. Significantly, while KIUC participated in Case No. 2007-00166 on behalf of three of the five KIUC Customers it represents in this proceeding, it did not object to the tariff, seek rehearing of the Commission's Order making clear that the Tariff was intended for customers "to manage their electric costs by shifting load periods,"[13] or in any way argue the broader application of the tariff it now urges.

C. The KIUC Customers Seek To Reap The Advantages Of Tariff R.T.P. Without Fulfilling Its Purpose Of Shifting Load To Lower-Priced Periods.

Service under Tariff R.T.P. has been available since June 1, 2008. Yet, until early this year no Kentucky Power customers sought service under the tariff. Since then, Kentucky Power has received executed addenda to the Catlettsburg Refining LLC, AK Steel Corporation, Inc., and seven EQT Gathering LLC customers service contracts.[14]

In its addendum, Catlettsburg Refining seeks to move approximately 95% of its contract capacity from Tariff C.I.P.-T.O.D. to Tariff R.T.P. Yet, Catlettsburg Refining's failure to take service under Tariff R.T.P. during the first four years of the program's operation, coupled with the company's extremely high load factor strongly indicates that Catlettsburg Refining will be

[12] Attorney General's Comments at 8.

[13] *Id.* at 3 (emphasis supplied).

[14] EQT Gathering LLC sought to shift an additional EQT Gathering customer to Tariff R.T.P. Kentucky Power declined to shift the eighth EQT customer because its demand was less than the 1 MW required under the tariff.

unable to shift more than a token portion, if that, of its 137.5 MW of Tariff R.T.P. load to lower-priced hours. Indeed, in discussions with Kentucky Power, Catlettsburg Refining indicated it will shift little or none of its Tariff R.T.P. load to lower-priced periods.[15]

AK Steel similarly will move all but 1 MW (less than three percent) of its 35 MW load to Tariff R.T.P. Yet, AK Steel has indicated it can shift only 10 MW of its 34 MW Tariff R.T.P. load to lower-priced periods.[16] Thus, it appears AK Steel is without the operating flexibility required to shift two-thirds of its Tariff R.T.P. load to lower-priced periods.

On June 14, 2012 seven EQT Gathering customers tendered executed addenda seeking to transfer the entirety of their contract loads, ranging from 1 MW to 4.7 MW, to Tariff R.T.P. The EQT customers have not indicated whether they will be able to shift any of their load to lower-priced periods.

The apparent inability of Catlettsburg Refining and AK Steel to shift any but a fraction of their Tariff R.T.P. load to lower-priced pricing periods is directly contrary to language of the tariff, as well as the purpose of the tariff identified by the Commission by its February 1, 2008 Order in Case No. 2007-00166 and the Attorney General in his Comments. Neither should be permitted to profit by violating the express language of the tariff or the intent of the experimental program.[17]

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[15] While suggesting AK Steel and Air Products & Chemicals, Inc. may "reduce usage during high priced hours," KIUC notably omits Catlettsburg Refining from its list of KIUC Customers likely to shift load.

[16] Air Products and Chemicals, Inc. indicated it intends to take the ***entirety*** of its load under Tariff R.T.P. but unlike Catlettsburg Refining and AK Steel is unwilling to enter into the Company's standard contract addendum.

[17] The same holds true for the EQT Gathering customers in the absence of any indication they can and will shift their Tariff R.T.P. load to lower-priced periods.

D. The Requested Withdrawal Of The Tariff Is Not A Violation Of The Settlement Agreement In Case No. 2009-00459.

Kentucky Power's Application to withdraw Tariff R.T.P. does not violate the May 19, 2010 Settlement Agreement in Case No. 2009-00459. The pertinent provision of the Settlement Agreement provides:

> 9. QP, RTP and CIP-TOD Rate Design And Tariffs.
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> (a) The existing RTP Tariff shall be extended for an additional three-year period; further the tariff shall be amended to permit customers to enroll at any point during a year for a minimum twelve consecutive month period.[18]

Nothing in this language (or any other portion of the Settlement Agreement) authorizes Kentucky Power's customers to take service under the tariff in direct contravention of the express language of Tariff R.T.P.:

> The RTP Tariff will offer customers the opportunity to manage their electric costs by shifting load from higher cost to lower cost pricing periods or by adding new load during lower price periods.[19]

Nor does the Settlement Agreement require that the tariff be offered for three years in contravention of the Commission's express explication of Tariff R.T.P.'s purpose. Yet the KIUC Customers seek to transfer almost the entirety of their service to Tariff R.T.P. without shifting any but a fraction of their Tariff R.T.P. load "to lower cost pricing periods or by adding new load during lower price periods." It is the abuse of the tariff by KIUC's Customers, rather than any breach of the Settlement Agreement, that has led to the current proceeding.

KIUC also points to paragraphs 14(a) and 14(d) of the Settlement Agreement. But Paragraph 14, styled "Good Faith And Best Efforts To Seek Approval," pertain to the approval

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[18] Order, *In The Matter Of: Application of Kentucky Power Company For General Adjustment Of Rates*, Case No. 2009-00459 at Appendix A (Ky. P.S.C. June 28, 2010).

[19] Tariff R.T.P. at Sheet 30-1 (emphasis supplied).

of the Settlement Agreement and any subsequent appeal from the Commission's approval or enforcement of the Settlement Agreement:

> 14. Good Faith And Best Efforts To Seek Approval.
>
> (a) This Unanimous Settlement Agreement is subject to approval by the Public Service Commission.
>
> . . .
>
> (d) Kentucky Power and the Intervenors further agree to support the reasonableness of this Unanimous Settlement Agreement before the Commission, and to cause their counsel to do the same, including in connection with any appeal from the Commission's adoption or enforcement of this Settlement Agreement.[20]

Kentucky Power acted in good faith and fully supported the Settlement Agreement in connection with the Commission's review and approval of the agreement. Certainly, nothing in KIUC's Motion to Dismiss argues to the contrary. Moreover, there were no appeals from the Commission's June 28, 2010 Order adopting or enforcing the Settlement Agreement.

While misreading paragraph 14 of the agreement, KIUC also overlooks Paragraph 16 of the Settlement Agreement:

> 16. Continuing Commission Jurisdiction.
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> This Unanimous Settlement Agreement shall in no way be deemed to divest the Commission of jurisdiction under Chapter 278 of the Kentucky Revised Statutes.[21]

That jurisdiction extends to ensuring that Kentucky Power's rates are fair, just and reasonable, KRS 278.030(1), and ensuring that service is offered and taken in accordance with the Company's tariffs in their entirety, KRS 278.160, and not, as KIUC and its members would have it, a selective parsing of a tariff.

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[20] Order, *In The Matter Of: Application of Kentucky Power Company For General Adjustment Of Rates*, Case No. 2009-00459 at Appendix A (Ky. P.S.C. June 28, 2010).

[21] *Id.*

Finally, KIUC argues that permitting Kentucky Power "to renege on this part of the Settlement…" will compromise the willingness of parties to Commission proceedings to "resolve matters by negotiation."[22] But Kentucky Power is not reneging, violating, or in any way acting in contravention of the Settlement Agreement. More importantly, requiring parties to settlement agreements to abide by the corresponding tariffs in their entirety will aid settlement by providing certainty to the obligations being assumed through settlement.

E. KIUC Errs In Arguing That Kentucky Power's Application Is Not In The Public Interest.

KIUC puts forth three additional arguments[23] in support of its claim that withdrawal of Tariff R.T.P. is not in the public interest. Specifically, KIUC contends that: (a) Kentucky Power was aware of the drop in capacity prices beginning June 1, 2012 prior to entering into the Settlement Agreement[24]; (b) that other customers will not be harmed by the action of the industrials[25]; and (c) KIUC's members relied upon the availability of Tariff R.T.P.[26] KIUC errs.

1. Kentucky Power's Knowledge Prior To Entering Into The Settlement Agreement Of The 2012-2013 PJM Planning Year Capacity Prices Is Irrelevant.

Kentucky Power agrees it knew the PJM RPM capacity price for the 2012-2013 PJM Planning Year prior to entering into the Settlement Agreement. But the assertion proves nothing. In fact, it is as irrelevant as it is true because of what was unknown. At the time it entered into the Settlement Agreement Kentucky Power had no way of knowing that the KIUC Customers would transfer almost the entirety of their load to Tariff R.T.P. without, in contravention of the

[22] KIUC Motion at 3.

[23] KIUC also argues that Tariff R.T.P. does not require that a customer shift its load to reduce its costs. KIUC Motion 7-8. That premise, as discussed above, is contrary to the express language of the tariff Program Description as well as the Commission's Order approving the tariff.

[24] *Id.* at 3-5.

[25] *Id.* at 5.

[26] *Id.* at 5-7.

express language of the tariff and the Commission's Order approving it, shifting the Tariff R.T.P. load from higher-priced periods to lower-priced periods. Indeed, Kentucky Power had no reason to suspect that the KIUC Industrial Customers would do so in light of the fact that in the two years prior to the Settlement Agreement no customer had ever taken service under Tariff. R.T.P.

Also unknown at the time of the Settlement Agreement was that the price of energy during the 2012-2013 PJM Planning Year would be at near record lows. As KIUC candidly concedes, the financial impact of the KIUC Customers transferring almost the entirety of their load to Tariff R.T.P. also is affected by the depressed PJM LMP energy market.[27] These prices change hourly and Kentucky Power had no way of knowing in 2010 that the 2012-2013 prices would be at the levels currently forecast. Likewise, in May, 2010 the Company had no way of knowing the magnitude of the downward pressure exerted on LMPs by low natural gas prices resulting from the onset of widespread shale gas drilling. Finally, whatever risk Kentucky Power assumed with respect to the low capacity and energy prices, it was limited by the express language of the tariff limiting Tariff R.T.P. load to that which would be shifted to lower-priced periods.

2. KIUC Fails To Support Its Claim That Kentucky Power's Other Customers "Stand to Lose" If The Application Is Granted.

KIUC also argues that "customers stand to lose if the Application is granted."[28] Having made the assertion KIUC never identifies the nature of the loss to Kentucky Power's other customers if the Application is granted. Nor can it because Tariff R.T.P. is available only to customers taking service under Tariff C.I.P.-T.O.D or Tariff Q.P. with loads of 1 MW or greater. More than 99% of Kentucky Power's customers, including all of its 140,000 residential

[27] *Id.* at 4.

[28] *Id.* at 5.

customers, do not qualify for Tariff R.T.P. and thus could not be harmed by granting the Company's application.

Instead, KIUC argues by non sequitur that Kentucky Power's *shareholders* should be forced to absorb the loss. Even if that were the case, and it is not, it does not change the fact that Kentucky Power, and consequently its ability to fund needed improvements to its system, and perhaps even its credit rating, could be impaired. Moreover, while the outcome of any such application lies with the Commission, Kentucky Power reserves the right to seek accounting treatment for the losses so that they may be recovered in Kentucky Power's next general rate case.[29]

3. The KIUC Customers' Claimed Reliance On Tariff R.T.P. Has Been Short-Lived At Best.

The KIUC Customers finally argue that they "relied on the existence of the RTP Tariff and the integrity of the Settlement process."[30] The evidence is to the contrary.

Tariff R.T.P. has been available to the KIUC Customers since June 1, 2008 and they presumably have been aware of it since at least February 1, 2008 when the Commission approved the tariff. Yet, it was not until earlier this year that any KIUC Customers seriously indicated any interest in the tariff. As such, they hardly can be heard to assert any meaningful reliance on the existence of the Tariff.

Moreover, the KIUC Customers' interest in executing the addenda that gave rise to this proceeding is recent in origin. For example, the first communication between Catlettsburg Refinery and Kentucky Power leading to the execution of the tendered addenda was February 17,

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[29] The KIUC Customers also argue that "nonparticipating customers could very well benefit from the RTP Program through increased profits from off-system sales that are automatically passed through its System Sales Tracker." KIUC Motion at 5. Even ignoring the speculative nature of the KIUC Customers' argument, the claim ignores the fact that "native load energy" will not be freed up simply because load is shifted to Tariff R.T.P.

[30] *Id.* at 6.

2012 – approximately three and one-half months prior to Kentucky Power's June 1, 2012 filing. In the case of AK Steel, the first communication between it and Kentucky Power was May 2, 2012, or less than one month before Kentucky Power's filing. Similarly, the earliest communication between Air Products and Kentucky was on April 27, 2012 The EQT Customers waited until May 31, 2012 – the day before the filing – before first opening the discussions leading to their execution of the seven addenda on June 14, 2012.

Most importantly, none of the KIUC Customers claim that they took action to their detriment based upon their claimed reliance. Claimed reliance standing alone – particularly reliance that is short-lived as that claimed here – is too thin a reed upon which to construct the public interest.

Conclusion

The effort of the KIUC Customers to shift most, if not all, of their load to Tariff R.T.P. without a concurrent shift in their usage from higher-cost to lower cost periods is contrary to the express terms of the tariff and the Commission's Order approving it. Nor has Kentucky Power breached the May 19, 2009 Settlement in Case No. 2009-00459. To the contrary, its Application in this proceeding seeks to ensure that the Company's experimental real-time pricing program operates in a fashion consistent the Commission's express statement of the tariff's purpose.

The KIUC Customers' Motion to Dismiss should be denied and Kentucky Power Company's Application granted.

This 15th day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, was served by First Class Mail upon the following parties of record, this 15th day of June, 2012.

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