COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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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

BRIEF OF KENTUCKY POWER COMPANY

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Brief Of Kentucky Power Company

Kentucky Power Company states for its brief to the Commission:

INTRODUCTION

> 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.***[1]
>
> – Public Service Commission Of Kentucky describing Tariff RTP

At issue is whether Kentucky Power Company's experimental Tariff RTP permits ten of Kentucky Power's largest commercial and industrial customers to take service at the lower of market or cost without modifying their load or conferring any benefit on the other 173,000 customers of the Company. The ten customers currently taking service under Tariff RTP argue they are entitled to a multimillion dollar windfall for doing nothing.

The plain language of the tariff itself, as well as the express terms of the two Commission Orders that first required the Company to file a real-time pricing tariff, and then approved the language of the tariff proposed by Kentucky Power, are to the contrary. Nothing in

[1] Order, *In the Matter Of: 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).

the tariff or the orders permits, much less encourages, the one-sided "roll of the dice" the ten customers claim they bought into.

BACKGROUND

A. Time-Based Rates Exist To Modify Customer Behavior In Response To Pricing Signals.

Time-based pricing is intended to provide an incentive for consumers to manage their energy use by shifting load from high-priced periods to lower-priced periods. This load-shifting in turn is a means to a well-defined and recognized end: to confer benefits on customers, including those savings resulting from avoided or deferred resource costs.[2] True wholesale rate time-based rates, such as offered by Kentucky Power, are available only in power markets such as PJM Interconnection LLC, and became feasible only with the recent widespread availability of digital metering.[3]

In such a market, digital metering enabled regulators, consumers, and utilities to link the price paid by the consumer for energy to the consumer's management of its load: "[a]mong many potential benefits offered by this new technology is the ability to provide innovative pricing schemes to retail electricity customers that help to foster more responsive customer demand."[4] In addition to the deferral or avoidance of resource costs, the Brattle Group identified five other potential benefits from the use of time-based pricing.[5] With each, the benefits can be achieved only if the customer shifts its load from higher priced periods to lower-priced periods. For example, in explaining the first identified benefit – avoided or deferred

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[2] A. Farqui, R. Hledik, & J. Palmer, *Time-Varying And Dynamic Rate Design* at 9 (Regulatory Assistance Project July, 2012) available online at http://www.hks.harvard.edu/hepg/Papers/2012/RAP_FaruquiHledikPalmer_TimeVaryingDynamicRateDesign_2012_JUL_23.pdf)

[3] *Id.*

[4] *Id.*

[5] *Id.* at 9-10.

resource cost – the Brattle Group explicitly linked the ability to avoid or defer such costs to load shifting:

> With prices that are higher during peak hours and lower during off-peak hours, time-varying rates encourage customers to shift consumption away from peak hours and therefore reduce system peak demand. This avoids the need to invest in expensive new peaking plants that are built to maintain a reserve margin but otherwise operate during very few hours of the year. Peak demand reductions can also lead to deferred transmission and distribution (T&D) costs that are peak driven.[6]

This same sort of linkage exists for each of the five other potential benefits flowing from the implementation of time-based rates: reduced wholesale market prices, fair retail pricing, reduced energy costs, deployment of distributed resources, and environmental benefits.[7] This explicit linkage exists – contrary to the proffered construction of Tariff RTP by Kentucky Industrial Customers, Inc. ("KIUC") – even in the case of reduced customer bills:

> [i]n the short run, time-based rates offer participants an opportunity to reduce their electricity bills by shifting consumption to hours that are priced lower than their otherwise applicable flat rate. In the long run, time varying-rates should improve the system load factor and lead to a lower revenue requirement, compared to what it would be without the demand response from time-varying rates.[8]

Without load-shifting there is no benefit to the customer or the electric system from time-based rates.

Even Mr. Baron, who testified on behalf of KIUC, recognized it is fundamental to real-time pricing that customers take action to obtain the economic benefits of time-based rates:

> RTP is a different structure for hopefully achieving economic benefits in the same fashion [as direct load control by the utility], and the difference is that the customers get to look at price signals. They look at real-time pricing rates on-

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[6] *Id.* at 9. *See also*, K. Gordon, W. Olson & A, Nieto *Responding To EPACT 2005: Looking At Smart Meters For Electricity, Time-Based Rate Structures And Net Metering* 23 (Edison Electric Institute May, 2006) available online at http://www.eei.org/whatwedo/PublicPolicyAdvocacy/StateRegulation/Documents/responding_to_epact.pdf .

[7] *Id.*

[8] *Id.* at 10.

> peak/off-peak. They make economic decisions as to whether it makes sense to produce on-peak at those prices or not – to not do that and maybe put a third shift on in the – on the on-peak hours because those look – those prices are going to stay high. Those – the RTP allows the customer to basically make the decision based on economic pricing.[9]

Absent load-shifting in response to price signals, time-based rates fail of their essential purpose..

B. The Energy Policy Act Of 2005 And The Commission's Investigation Of Time-Based Rates And Kentucky Power's Tariff RTP Repeatedly And Explicitly Linked Such Rates To Action By Consumers To Modify Their Usage.

1. <u>The Energy Policy Act Of 2005</u>.

The Energy Policy Act of 2005 ("EPAct 2005") became law on August 8, 2005.[10] Section 1252 of the Act amended the Public Utility Regulatory Policies Act of 1978 to require state Commissions to consider the imposition of the four statutorily identified time-based rate schedules.[11] Section 1252(a) of EPAct 2005 expressly linked the use of time-based rates to consumer action to manage energy use by mandating that "[t]he time-based rate schedule ***shall enable the electric consumer to manage energy use and cost*** through advanced metering and communications technology."[12]

2. <u>The Commission's Investigation Of Time-Based Rates</u>.

Pursuant to the federal mandate, the Commission established Administrative Case No. 2006-00045 to consider whether Kentucky jurisdictional utilities should be required to adopt the

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[9] Transcript of Hearing, Case No. 2012-00226 at 186-187 (Ky. P.S.C. November 1, 2012) (Stephen J. Baron).

[10] Order, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 at 1 (Ky. P.S.C. February 24, 2006).

[11] 16 U.S.C. § 2621(d)(14)(F).

[12] 1621 (d)(14)(A) (emphasis supplied).

federal time-based metering standards.[13] Like the statute requiring the investigation, the Commission's Order establishing the Administrative Case also recognized that time-based rates are intended "to allow the customer ***to manage energy use and cost*** through advanced metering and communications technology."[14] Kentucky Power, in explaining why time-based rates should not be mandated, similarly recognized that fundamental to time-based rates is the requirement that customers manage their load:

> It is apparent for a number of reasons, at the current price level of the Company's rates, most customers have decided that the economic rewards associated with participating in the various time-based programs do not outweigh the inconvenience or cost ***associated with changing their usage characteristics***.[15]

Common to the federal statute mandating the Commission's investigation of time-based rates, the Commission's Order establishing the investigation, and the testimony submitted by the Company in the investigation, is that time-based rates are intended to provide an incentive for customers to manage or to change their energy usage in response to changes in energy prices. Nothing in the statute or the Commission's Order suggests that time-based rates are designed to provide customers the opportunity to reap windfalls at the expense of the other customers. Indeed, why should the United States Congress mandate the investigation of time-based rates whose only purpose is to bestow windfalls on consumers for continuing behavior EPAct 2005 was designed to address?

The link between modification of consumption patterns and time-based rates also is explicit in the Commission's Order directing Kentucky Power, along with Louisville Gas &

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[13] Order, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005 Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 (Ky. P.S.C. February 24, 2006).

[14] *Id.* at 2 (emphasis supplied).

[15] Prefiled Testimony Of David M. Roush, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005 Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 at 5 (Filed May 18, 2006).

Electric Company, and Kentucky Utilities Company, to develop and implement real-time pricing tariffs. There, the Commission expressly linked "the ability to modify ... consumption patterns" to real-time pricing:

> The Commission believes that some of the large commercial and industrial customers of the other jurisdictional utilities may benefit from real-time pricing tariffs because ***such customers have greater operating flexibility and, therefore, greater ability to modify their consumption patterns. In addition, the cost of implementing real-time pricing may be cost effective for these larger customers****....* The Commission, therefore, directs Kentucky Power, KU and LG&E to develop voluntary pilot real-time pricing programs for their large commercial and industrial customers.[16]

Indeed, it was the greater flexibility of the larger commercial and industrial customers, as opposed to residential customers, in modifying their loads in response to price signals that in part led the Commission not to require the jurisdictional utilities to provide residential real-time pricing programs.[17]

3. The Filing And Review Of Tariff RTP.

In response to the Commission's December 21, 2006 Order in Case No. 2006-00045, Kentucky Power filed its proposed Tariff RTP and supporting testimony on April 20, 2007.[18] Consistent with the Commission's Order directing the filing of the experimental tariff for service to electing large commercial and industrial customers, Tariff RTP expressly ties the time-based

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[16] Order, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005 Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 at 13 (Ky. P.S.C. December 21, 2006) (emphasis supplied). *See also* Order, *In the Matter Of: 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 (Ky. P.S.C. February 1, 2008).

[17] *Id.* at 11 ("The testimony in this proceeding also showed that, taken as a whole, the jurisdictional electric utilities offer a broad array of time-based pricing products, some mandatory, ***predominantly to the large commercial and industrial classes that have a greater capability to modify their consumption.*** For residential customers, on-peak/off-peak time-of-use or critical peak pricing may hold more potential than real-time pricing products, which would require the use of smart meters, special communication software and perhaps modification of the utility's billing system." (emphasis supplied).

[18] *In the Matter Of: 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.)

rates offered under its terms to the obligation of the customers taking service under the tariff to shift load:

> 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***. 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 with the remainder of the load subject to real-time prices.[19]

During the Commission's review of Tariff RTP, Kentucky Power reiterated that Tariff RTP was designed to reduce the Company's demand through customer load-shifting in response to price signals. Thus, in response to Data Request No. 8, Staff's First Set of Data Requests, Kentucky Power underscored that the intent of the tariff was test the ability of customers to shift load in response to price signals:

> 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 real-time pricing signals, i.e. ***test the customer's ability to shift load from higher priced hours to lower priced hours***.[20]

Likewise, in its response to a data request from the Attorney General, Kentucky Power explained that it hoped to obtain a reduction in its peak from Tariff RTP because "[a] reduction in peak demand utilizes the Company's existing facilities more efficiently and delays the need for additional facilities."[21] Of course, without load-shifting the tariff could have no effect on peak demand.

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[19] Tariff RTP, Sheet 30-1, "Program Description." As discussed below at pages 22-24, the second sentence quoted does not, as claimed by KIUC, modify the first sentence to eliminate the requirement that customers taking service under Tariff RTP shift load.

[20] (emphasis supplied).

[21] Response, Attorney General's First Set of Data Requests, No. 14. *See also*, Responses of Kentucky Power Company to Comments Of Attorney General, *In the Matter Of: 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 (Filed July 23, 2007).

4. Approval Of Tariff RTP.

The Commission approved Kentucky Power's Tariff RTP by Order dated February 1, 2008. Significantly, in approving the tariff the Commission expressly concluded that the tariff was intended for customers who could and would shift load from higher priced periods to lower priced periods:

> For high load factor customers, it may not be beneficial to participate. They are using power evenly throughout the 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. A participant's ability to react to real-time prices and obtain benefits from the pilot program is enhanced by the fact that unlike other utilities subject to the Commission's Order, Kentucky Power, through its parent AEP, is a member of PJM.[22]

The Commission's Order approving the tariff is significant in two respects. First, this Commission explicitly found that the intent of the program was for participants to modify their usage patterns by reducing their peak load, or by shifting load to off-peak times.[23] Second, the Commission linked the ability to react to real-time prices to customers' receipt of benefits under the program.[24]

The Attorney General described Tariff RTP's purpose in a fashion similar to that noted by this Commission: "[t]he purpose of the program is to discern whether users within these customer classes [large commercial and industrial customers] will respond to posted next-day hourly pricing of electrical energy [prices] proposed under the program to reduce their overall

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[22] Order, *In the Matter Of: 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).

[23] *Id.* at 10 ("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.")

[24] *Id.* ("A participant's ability to react to real-time prices and obtain benefits from the pilot program....")

demand and/or shift their variable demand to low peak hours."[25] Indeed, the Attorney General recognized that "the objectives of these [real-time pricing] types of programs are to encourage participants ***to reduce their demand during critical peak hours*** and ***to shift their variable demand to low peak hours***."[26] Significantly, there was nothing in the Commission's Order approving the tariff, or the Attorney General's comments concerning the proposed tariff, that indicated the intent of the program was to allow participants to gain experience in wholesale electricity markets uncoupled from efforts to shift load. Likewise, KIUC, which was granted intervention in the proceeding,[27] never took issue with the Company's representations concerning the need to shift load to obtain benefits under the program, or the intent of the program as described by the Commission or the Attorney General. Indeed, Mr. Baron testified on behalf of KIUC that "encouraging customers to shift their load from higher-priced period to lower-periods" is an objective of Tariff RTP.[28]

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[25] Attorney General's Comments, *In the Matter Of: 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 1(Filed July 12, 2007). This same understanding is evident in the Attorney General's Data Requests to Kentucky Power. For example, Attorney General's First Set of Data Requests, Item 13, asked "[p]lease provide a graph, for each month of the year, demonstrating the projected or anticipated change in the average daily usage on the hour for all 24 hours ...."

[26] Attorney General's Comments, *In the Matter Of: 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).

[27] Order, *In the Matter Of: 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. May 25, 2007).

[28] Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 5 (Filed August 27, 2012).

C. May 19, 2010 Settlement Agreement.

On May 19, 2010, Kentucky Power and the parties to Case No. 2009-00549[29] entered into a Unanimous Settlement Agreement resolving the issues in the Company's 2009 rate case. Paragraph 9(a) of the agreement provided:

> 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.[30]

The effect of the agreement was to extend Tariff RTP for three years from the date of the Order approving the settlement until 2013.[31] That is consistent with the parties' understanding at the time the settlement was presented to the Commission for approval. Indeed, the proposed tariffs filed without challenge as Settlement Exhibit EKW-3 to Mr. Wagner's testimony in support of the settlement provided that Tariff RTP would continue through June 2013.[32] Similarly, following the Commission's Order approving the Unanimous Settlement Agreement the Company filed, and the Commission accepted, Tariff RTP modified in conformity with the settlement. It provided: "The Experimental Real-Time Pricing Tariff is voluntary and will be offered on a pilot basis through June 2013."[33] Subsequently, in 2011 and 2012 Kentucky Power filed, and the Commission accepted, tariffs with identical language indicating a June 2013 expiration date.[34]

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[29] *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549.

[30] Order, Appendix A, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010).

[31] *See, e.g.*, Transcript of Hearing, Case No. 2012-00226 at 16, 24, 32, 33, 36-37, 77-78 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[32] Transcript of Hearing, Case No. 2012-00226 at 77-78, 96 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas); *See also*, Kentucky Power Hearing Exhibit 1.

[33] Kentucky Power Company Tariff, Original Sheet 30-1 (June 29, 2010).

[34] Kentucky Power Company Tariff, 1st Revised Sheet 30-1 (July 29, 2011); Kentucky Power Company Tariff, 2nd Revised Sheet 30-1 (July 1, 2012).

Although the Unanimous Settlement Agreement extended the availability of Tariff RTP through June 2013, and provided participants with the ability to begin taking service under the tariff at times other than June 1 of any year, it did not otherwise modify the tariff. In particular, it did not abandon the requirement that customers use the tariff to shift load in response to price signals:

> The settlement agreement is ... a deal between all the parties that both must agree to and do their part of the deal. And in this case the company is of the opinion that the KIUC, the customers they represent have not held up their part of the bargain of that deal and the fact of – in the – being on the tariff RTP that they are not switching, managing load to lower price periods....[35]

In short, even under the settlement agreement the tariff should remain available only so long as it is being used in conformity with the terms of the tariff.

D. The Ten Tariff RTP Customers Are Unable Or Are Unwilling To Shift Load In Response To Price Signals.

Ten customers currently are taking service under Tariff RTP.[36] It is undisputed that not one of these ten customers is managing its energy costs by shifting load from high-priced periods to low-priced periods, or by adding load during low-priced periods:

- In response to the Staff's Third Set of Data Requests, Item 1(b), the Company explained: "There is no evidence of any load being shifted from higher-priced periods to lower-priced periods, or any new load being added in lower priced periods, by customers receiving service under Tariff R.T.P. in the month of August 2012. To the contrary, the data demonstrate that customers taking load under Tariff R.T.P. are not responding to price signals."[37]

- Mr. Wohnhas testified in pre-filed rebuttal testimony that based upon the Company's review of the operations under Tariff RTP (in July and August 2012)

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[35] Transcript of Hearing, Case No. 2012-00226 at 77-78 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[36] *Id.* at 60.

[37] Response by Kentucky Power Company to Commission Staff's Third Set of Data Requests, Item No. 1, *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 (Filed September 21, 2012).

that "no customer taking service under Tariff RTP has shifted or added load to lower price periods in response to price signals."[38]

- At the November 1, 2012 hearing in this matter Mr. Wohnhas confirmed his earlier pre-filed testimony and data request and updated both by noting there had been no shifting by the ten customers during September 2012.[39]

- KIUC confirmed on behalf of its member Air Products that "Air Products has neither shifted load nor added any new load to a lower-priced period since July 1, 2012 [the date Air Products began taking service under Tariff RTP]."[40]

- With respect to the other nine customers taking service under Tariff RTP, KIUC refused to indicate whether any of the nine had shifted load from a higher-priced period to a lower-priced period. Instead, KIUC stated that Kentucky Power was in possession of the information.[41]

- Mr. Baron, testifying on behalf of KIUC, confirmed at the November 1, 2012 hearing that nowhere in his testimony did he address whether any of the ten customers had shifted load since beginning to take service under Tariff RTP,[42] or whether they even had the capability of doing so.[43] In fact, Mr. Baron testified that in preparing his testimony he never spoke with representatives of the ten customers on whose behalf he testified.[44]

- Mr. Baron conceded on cross-examination that Kentucky Power "knows whether these customers shifted or not …."[45]

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[38] Pre-filed Rebuttal Testimony Of Ranie K. Wohnhas, *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 at 6-7 (Filed October 5, 2012).

[39] Transcript of Hearing, Case No. 2012-00226 at 71 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[40] Response by Kentucky Industrial Customers, Inc. to Kentucky Power Company's First Set of Data Requests, Item No. 32(a), *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 at 6 (Filed September 24, 2012).

[41] *Id.* at Items 30, 31, 33.

[42] Transcript of Hearing, Case No. 2012-00226 at 177-178 (Ky. P.S.C. November 1, 2012) (Stephen J. Baron) ("I did not review the question.")

[43] *Id.* at 177.

[44] *Id.* at 175-176.

[45] *Id.* at 180.

Also uncontroverted is Mr. Wohnhas' testimony that Catlettsburg Refining (Marathon) informed him that it lacked the ability to shift load,[46] while other of the ten customers indicated they did not intend to shift load taken under Tariff RTP.[47]

E. The Refusal Of The Ten Customers Taking Service Under Tariff RTP To Conform To The Terms Of The Tariff Is Costing And Will Continue To Cost Kentucky Power Millions Of Dollars And Threaten Its Ability To Provide Reasonable Service.

Although directed by the Commission to implement Tariff RTP,[48] the Company voluntarily agreed to extend the tariff until June 2013.[49] Moreover, at the time it agreed to the extension, the Company knew the value of the capacity price customers taking service under Tariff RTP would pay beginning July 1, 2012.[50] But two things were unknown.

First, "the decline in energy prices since the May 2010 settlement was not known."[51] In fact, energy prices in the first nine months of 2012 have averaged approximately 21.7% lower in the corresponding period of 2010, which includes the date of the settlement."[52]

Second, and more fundamentally, the Company never anticipated that customers would attempt to contravene the express terms of the tariff by taking service under Tariff RTP without shifting load in response to price signals. Kentucky Power was generally aware at the time of the settlement of the operating capabilities of its large commercial and industrial customers, and

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[46] Pre-filed Rebuttal Testimony Of Ranie K. Wohnhas, *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 at 5 (Filed October 5, 2012).

[47] *Id.*

[48] Order, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005 Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 at 13 (Ky. P.S.C. December 21, 2006).

[49] Transcript of Hearing, Case No. 2012-00226 at 16-17 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[50] *Id.* at 38-39.

[51] Pre-filed Rebuttal Testimony Of David M. Roush, *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 at 8 (Filed October 5, 2012).

[52] *Id.* at 9.

recognized that large blocks of load could not be shifted to Tariff RTP because of these operating capabilities. That is, given the inability of the larger commercial and industrial customers to shift substantial amounts of load, the risk of significant financial losses was minimal. Moreover, this risk was offset at least in part by the benefits to be gained by the Company and its other 173,000 customers as a result of reductions in the Company's peak load:

> [E]ven with the reduced energy prices such as occurred in mid-2009, the shifting of load and the resulting reduction of on-peak usage would benefit all customers and the Company. The Company considered this a reasonable bargain. What is neither reasonable nor in the public interest is for Kentucky Power to sustain lower revenues because of the most recent drop in energy prices without any offsetting benefit from load-shifting.[53]

This "reasonable bargain" was thwarted by the actions of the ten customers taking service under Tariff RTP. In lieu of placing only load that could be shifted in response to price signals, these ten customers placed all but slightly less than four percent of their 217 MW of contract load on Tariff RTP.[54] Moreover, they have shifted no load,[55] thereby depriving Kentucky Power and its other customers of the benefits associated with time-based pricing.

The result has been that in the first four months in which the ten customers have taken service under Tariff RTP, Kentucky Power suffered a net cumulative revenue loss of $3.65 million.[56] Indeed, but for certain high energy prices in July, the loss would have been greater.[57]

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[53] *Id.* at 10.

[54] Confidential Response by Kentucky Power Company to Commission Staff's First Set of Data Requests, Item No. 15, *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 (Filed July 13, 2012); Response by Kentucky Power Company to Commission Staff's Second Set of Data Requests, Item No. 5, *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 (Filed August 10, 2012).

[55] Transcript of Hearing, Case No. 2012-00226 at 71 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[56] Kentucky Power Response to Commission Staff Hearing Data Request, Item No. 3, *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 (Filed November 9, 2012).

[57] Transcript of Hearing, Case No. 2012-00226 at 37-38 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

More critically, based on the first three months of experience with the ten customers taking service under Tariff RTP, Kentucky Power continues to estimate its losses through June 2013 as a result of the ten customers' failure to abide by the express terms of Tariff RTP at $10-$20 million.[58] Revenue losses of this magnitude will reduce Kentucky Power's return on equity by approximately 230 basis points.[59]

Such a reduction will have a pernicious effect on Kentucky Power's ability to meet its statutory obligation to provide "adequate, efficient and reasonable service."[60] Based upon the Company's return on equity as of April 2012 of 8.9%, a 230 basis point reduction would result in Kentucky Power earning 6.6%.[61] Earnings at 62% of the return assumed for purposes of establishing Kentucky Power's current rates[62] threaten a constitutional taking, and certainly leave little or no funds available beyond the test year amounts for purposes of maintaining, much less improving, Kentucky Power's service to the other 173,000 customers who will not share in the multi-million dollar windfall KIUC seeks for ten of its members.

KIUC attempted to minimize the significance of Kentucky Power's financial loss by arguing that for the twelve months ended August 2012 (which notably included only two months of operations with the ten customers taking service under Tariff RTP) the Company's return on

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[58] *Id.* at 93-94.

[59] Pre-filed Testimony Of Ranie K. Wohnhas, *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 at 10 (Filed June 1, 2012).

[60] *See* KRS 278.030(2).

[61] 8.9% - 2.3% = 6.6%. (6.6%/10.5% =62%). *See* Pre-filed Testimony Of Ranie K. Wohnhas, *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 at 10 (Filed June 1, 2012).

[62] Order, Appendix A, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010).

equity as calculated by counsel for KIUC was 10.59%.[63] This is a red herring. The extrapolation as attempted by KIUC was based upon a period when customers were not taking service under Tariff RTP during 83.3% of the period. Indeed, it is a patent effort to extrapolate from apples to oranges. Moreover, KIUC's argument overlooks the fact that the locational marginal pricing ("LMP") energy prices in one of the two months (July) were high enough that Kentucky Power essentially "broke even" with a slight revenue gain of approximately $100,000.[64] Even then, eight of the ten customers provided reduced revenues under Tariff RTP in July.[65] The testimony is uncontroverted that the near breakeven results of July 2012 are unlikely to continue.[66]

In the face of Mr. Roush's unrebutted testimony showing it is improbable that the customers would pay more under Tariff RTP through June 2013 than they would pay under Tariff QP or Tariff CIP-TOD,[67] KIUC contented itself with speculation by counsel[68] and offered no evidence that July's high energy prices were likely to continue. Certainly, Mr. Baron never addressed likely LMP energy prices through June 2013, or their effect on Kentucky Power's revenues or earnings.

Likewise unrebutted were the facts that Mr. Wohnhas' calculation of a $10-20 million revenue loss was based on forward energy prices through June 2013, and that for the months of

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[63] *Id.* at 46. KIUC's argument, based upon its annualization of Kentucky Power's operating results for the first nine months of 2012, which included only three months of operations by the ten customers under Tariff RTP, suffers from the same flaws as its reliance upon the trailing twelve months results. Not only does KIUC seek to annualize six months of nine months of results when service was not being taken under Tariff RTP, it has no answer to Mr. Wohnhas' testimony that "if we lose nine more months of 1.2 million a month, there's not very much of a chance that we'll stay at 11 percent return on equity." *Id.* at 48.

[64] Transcript of Hearing, Case No. 2012-00226 at 37-38 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[65] *Id.* at 37.

[66] *Id.* at 151-152 (David M. Roush).

[67] *Id.*

[68] *See e.g.* Transcript of Hearing, Case No. 2012-00226 at 45-49 (Ky. P.S.C. November 1, 2012) (Cross-examination of Ranie K. Wohnhas); Transcript of Hearing, Case No. 2012-00226 at 151-152 (Ky. P.S.C. November 1, 2012) (Cross-examination of David M. Roush).

August through October 2012, the Company sustained actual reduced revenues of $1.2 million to 1.3 million each month.[69] Indeed, even borrowing a page from KIUC's book and annualizing the first four months of operations with the ten customers taking service under Tariff RTP, which would have the effect of including three months of July 2012 prices, the Company's total revenue shortfall for the twelve months ending June 2013 still would be nearly $11 million.[70]

In sum, KIUC's erroneously extrapolated returns of 10.59% and 11.18% are based on periods where the ten customers at issue were not taking service under Tariff RTP for most of the period from which the extrapolation was calculated.[71] As a result, even if the extrapolations could be considered in this proceeding they must be adjusted by the reduction in the Company's return on equity resulting from the customers' misuse of Tariff RTP. The only evidence of record concerning the reduction in the Company's return on equity as a result of the ten customers[72] taking service under Tariff RTP through June 2013 is Mr. Wohnhas' calculation of a 230 basis point reduction.[73] Even using KIUC's extrapolated returns on equity for the Company of 11.18% and 10.59% a 230 basis points yields returns on equity of 8.88%[74] and 8.29%.[75] Or if the 230 basis points were to be reduced on a pro rata basis to reflect the fact that the 11.18%,

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[69] Kentucky Power Response to Commission Staff Hearing Data Request, Item No. 3, *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 (Filed November 9, 2012).

[70] *Id.* The four months of operating results produced a cumulative revenue shortfall of $3.651 million. Multiplying that figure by three to annualize the four months' results yields an annual revenue loss of $10.953 million.

[71] *See* Transcript of Hearing, Case No. 2012-00226 at 46 (Ky. P.S.C. November 1, 2012).

[72] Significantly, Mr. Wohnhas' calculation of a 230 basis point reduction in the Company's return on equity assumed that only three, albeit the largest three, of the ten customers would take service under Tariff RTP. Pre-filed Testimony Of Ranie K. Wohnhas, *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 at 9- 10 (Filed June 1, 2012). "The additional revenue loss from other customers switching to Tariff RTP [, as subsequently occurred,] will further erode ROE and increase the significant financial impact on ..." the Company. *Id.*

[73] *Id.* at 10.

[74] Transcript of Hearing, Case No. 2012-00226 at 92-93 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[75] 10.59% - 2.3% = 8.29%.

10.59% extrapolations reflect three and two months of the ten customers taking service under Tariff RTP, which for reasons set about above still understate the reduction likely to be experienced, the comparable adjusted returns on equity for the Company would be 9.46%[76] and 8.67%[77] respectively. KIUC's extrapolated returns on equity, no matter how calculated, are significantly below the rate of return used to establish the Company's current rates. In sum, allowing the ten large industrial and commercial customers to continue to take service under Tariff RTP will have a deleterious effect on the Company's ability to provide reasonable and efficient service.

ARGUMENT

A. Tariff RTP Mandates That It Be Used To Shift Load In Response To Price Signals.

1. Applicable Standards For Interpreting Tariff RTP.

Kentucky law is clear: ***the rules applicable to the construction of contracts are equally applicable to tariffs***: "an interpretation of tariffs … [is subject to] "the same rules … [as] the interpretation of contracts or other instruments…."[78] Foremost among the applicable rules is that a body construing a tariff "treat and consider all … [of the] provisions and conditions together in an effort to ascertain their meaning and to determine the applicable rate."[79] Absent an ambiguity, the instrument is to be enforced in accordance with its terms and "by assigning language its ordinary meaning and without resort to extrinsic evidence."[80] But in reading the express language of unambiguous business instruments such as Tariff RTP, it "should be

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[76] 11.18% - (2.3% x (5 ÷ 6)) = 11.18% - (2.3% x 83.33%) = 11.18% - 1.92% = 9.46%.

[77] 10.59% - (2.3% x (3 ÷ 4)) = 10.59% - (2.3% x 75.0%) = 10.59% - 1.725% = 8.67%.

[78] *Louisville Water Company v. Louisville, H. & St. Louis Railway Co.*, 110 S.W.2d 668, 670 (Ky. 1937).

[79] *Id.*

[80] *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 (Ky. 2003).

construed in light of what intelligent business ... [persons] would reasonably expect. Literalism is not to be pushed too far."[81]

Where the instrument is ambiguous, it is construed in conformity with the intention of the parties as determined by considering circumstances surrounding the making of the instrument and "the object intended to be accomplished thereby."[82] An instrument is ambiguous "if a reasonable person would find it susceptible to different or inconsistent interpretations."[83]

2. Tariff RTP Expressly Limits Its Use To Customers Shifting Load In Response To Price Signals.

a. The Commission, The Attorney General, And Kentucky Power Interpret The Plain Language Of The Tariff To Require Load Shifting.

Whatever their other disagreements, the parties agree that this dispute turns on the meaning of two sentences from the Program Description section of Tariff RTP:

> 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 the lower price periods. The experimental pilot will also offer customers 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.[84]

Kentucky Power argues that the two sentences must be read in tandem and that effect must be given to both.[85] Doing so, and limiting their interpretation to the language of the tariff, both Messrs. Wohnhas and Roush testified that this portion of the tariff limited the tariff's applicability to those large commercial and industrial customers who could and would shift that

[81] *Thompson-Starrett Co. v. Mason's Administrators*, 201 S.W.2d 876, 881 (Ky. 1946).

[82] *Collings v. Scheen*, 415 S.W2d 589, 593 (Ky. 1967). *Accord*, *Frear*, 103 S.W3d at 106.

[83] *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 299 (Ky. 2010).

[84] Tariff RTP, Sheet 30-1 ("Program Description").

[85] Transcript of Hearing, Case No. 2012-00226 at 97-98 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas); Pre-filed Rebuttal Testimony Of David M. Roush, *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 at 8 (Filed October 5, 2012).

portion of their load placed on the tariff in response to price signals.[86] Moreover, Mr. Roush made clear that the second of the two sentences merely described an additional benefit of the tariff for those customers able and willing to shift load:

> It was never Kentucky Power's intent that customers take service under Tariff RTP without also shifting some portion of their load in response to pricing signals. This linkage between real-time pricing was made clear by me as early as my testimony in Case No. 2006-00045....[87]

While acknowledging that the first sentence of the controlling tariff language links service under Tariff RTP to load-shifting, KIUC and its witness Mr. Baron insist that the language of the first sentence is merely precatory.[88] Instead, they contend the second sentence opens service under the tariff to large commercial and industrial customers who wish to experiment with the wholesale electricity market without the intention, or even the ability, to shift load in response to price signals.[89] In addition, KIUC argues that nothing in the tariff expressly limits its applicability to load that is capable of being shifted.[90]

This is the second time the Commission has considered the meaning of the express language of Tariff RTP. In Case No. 2007-00166, as part of its review and approval of the tariff, the Commission found:

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[86] Transcript of Hearing, Case No. 2012-00226 at 97-98 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas); Transcript of Hearing, Case No. 2012-00226 at 142, 146 (Ky. P.S.C. November 1, 2012) (David M. Roush).

[87] Pre-filed Rebuttal Testimony Of David M. Roush, *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 at 5 (Filed October 5, 2012).

[88] Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 10, 11 (Filed August 27, 2012).

[89] *Id.* at 10.

[90] *Id.* at 11.

> 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.[91]

Thus, four years before this dispute erupted the Commission examined the language of Tariff RTP and came to the same conclusion as Kentucky Power had in preparing the tariff: Tariff RTP is limited to those customers who can and will shift load. The Attorney General reached the same conclusion. In fact, he concluded that most commercial and industrial customers could not shift load and thus could not benefit from the proposed tariff. As a result, the Attorney General recommended the Commission deny Kentucky Power's application seeking Commission approval of Tariff RTP.[92]

Nothing in the Commission's Order in Case No 2007-00166 suggests that customers can and should benefit from taking service under Tariff RTP by doing nothing. Indeed, while the Commission makes repeated reference throughout the Order to the need to shift load to benefit from Tariff RTP,[93] nowhere in its Order does the Commission even hint that the tariff permits large commercial and industrial customers to benefit – to the tune of millions of dollars – with no countervailing benefit to the other customers or the Company. Certainly, if the express language of the tariff permitted multi-million dollar windfalls by some of the largest corporations in Kentucky Power's service territory the tariff would have generated exacting scrutiny from the

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[91] Order, *In the Matter Of: 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).

[92] Attorney General's Comments, *In the Matter Of: 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 9 (Filed July 12, 2007).

[93] Order, *In the Matter Of: 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 2, 10, 11, 12. (Ky. P.S.C. February 1, 2008).

Commission in its Order. Here, like the dog that did not bark,[94] the absence of even a passing mention speaks volumes.

Equally telling is that the Commission nowhere mentions in its Order "the ability to experiment in the wholesale electricity market…," much less characterizes it, as KIUC and Mr. Baron now attempt, as a distinct objective of the tariff that is independent of the obligation imposed by the immediately preceding sentence to shift load. Nor did KIUC, which was a party to that proceeding, ever advocate such a construction, even in the face of the Attorney General's recommendation that the Commission disapprove the tariff because, in the Attorney General's analysis, it provided no benefits to participants.[95] Such a pusillanimous approach to protecting millions of dollars of benefits that, under KIUC construction, would now accrue to KIUC members for doing nothing, is directly at odds with the current contention of KIUC and Mr. Baron that the express language of tariff bestows such an unprecedented windfall.

b. KIUC's Post-Hoc Arguments That The Tariff Permits Large Commercial And Industrial Customers To Reap Millions Of Dollars In Windfalls Are Unavailing.

Even absent the clear language of the Commission in its Order and the Attorney General's Comments construing the express language of the tariff to require load-shifting to receive benefits, KIUC's arguments to the contrary lack merit. KIUC's contention that the ability to test the wholesale electric markets was a distinct objective of the tariff, even in the

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[94] "Is there any other point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.

Arthur Conan Doyle, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES (Doubleday Ed. 1930).

[95] Attorney General's Comments, *In the Matter Of: 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 9 (Filed July 12, 2007).

absence of load-shifting in response to price signals, leaves unanswered, and unanswerable, the question of to what purpose? As Mr. Roush testified without contradiction or cross-examination, because Kentucky law prohibits retail electric completion except in a few extraordinary circumstances, obtaining experience in the wholesale electricity markets in the absence of load-shifting, as KIUC argues, would be meaningless.[96] It would be the regulatory equivalent of the Department of Fish and Wildlife embarking on a program to teach desert survival skills to fish.

KIUC's argument also contravenes the requirement that the Commission construe the language of a contract or tariff as a whole[97] and to harmonize its provisions.[98] KIUC's contention that the Commission approved the tariff to permit large commercial and industrial customers to gain experience in the wholesale electricity markets even in the absence of any load-shifting ignores the immediately preceding language of the tariff which expressly addresses shifting load in response to price signals. Certainly nothing in the tariff suggests the two adjoining sentences should be read in the disjunctive, or that the second modifies the first to eliminate the requirement that customers taking service under Tariff RTP shift load. Rather, as Mr. Roush testified, the sentence refers to the fact that Kentucky Power was uniquely situated among Kentucky utilities in that it could provide its customers access to wholesale market real-time prices.[99] When the two sentences are read together, the ability to experiment in the

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[96] Pre-filed Rebuttal Testimony Of David M. Roush, *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 at 7 (Filed October 5, 2012).

[97] *Louisville Water Company v. Louisville, H. & St. Louis Railway Co.*, 110 S.W.2d 668, 670 (Ky. 1937).

[98] *Groupwell International (HK), Ltd. v. Gourmet Express, LLC*, 277 F.R.D. 348, 353 (W.D. Ky. 2011) (applying Texas law).

[99] Transcript of Hearing, Case No. 2012-00226 at 136 (Ky. P.S.C. November 1, 2012) (David M. Roush).

wholesale electricity market is simply a concomitant advantage of managing electricity cost by shifting load.[100]

Also, KIUC's argument regarding customers' ability to experiment in the wholesale electricity market fails to give effect to the very sentence upon which it is premised. Thus, in addition to providing that the pilot program will offer participants "the ability to experiment in the wholesale electricity market..." the sentence continues by making that ability contingent on "designating a portion of the customer's load subject to standard tariff rates with the remainder of the load subject to real-time prices."[101] Yet eight of ten customers taking service under Tariff RTP failed to designate any load as being subject to standard tariff rates.[102] If, as KIUC and Mr. Baron contend, the tariff permits customers to experiment in the wholesale electricity markets in the absence of load-shifting, their argument either rewrites the tariff to read out the final portion of the sentence in violation of rules of construction,[103] or this Commission must find that eight of the ten customers are ineligible to take service under Tariff RTP.

Mr. Baron also testified that even in the absence of load-shifting Tariff RTP permits the Company and the Commission to "collect data on how taking service under the tariff impacts customer usage."[104] Again left unanswered is "to what purpose?" If customers are not required to take any action under Tariff RTP then the same data can be collected and analyzed while they receive service under their former Tariff QP or Tariff CIP-TOD.

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[100] Pre-filed Rebuttal Testimony Of David M. Roush, *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 at 7 (Filed October 5, 2012).

[101] Tariff RTP, Sheet 30-1, "Program Description."

[102] Transcript of Hearing, Case No. 2012-00226 at 37-38 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[103] *Morganfield National Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992) (The "contract must be construed as a whole and whereby effect is to be given to all parties and every word of it, if possible.")

[104] Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 11 (Filed August 27, 2012).

KIUC and Mr. Baron also argue that absent the words "customers must place on Tariff RTP only that load that is price responsive," or "customers must shift load in response to price signals to take service under Tariff RTP," or something similar appearing in the tariff, the ten customers are free to take service under Tariff RTP, and to manage their load in the same fashion as they did, and would have, under their former Tariff QP or Tariff CIP-TOD but for Tariff RTP. That is, KIUC contends Tariff RTP, Tariff CIP-TOD, and Tariff QP are functional equivalents except in the manner in which they are priced. Under KIUC's construction of the tariff, large industrial and commercial customers in the Company's service territory, unlike any other retail customer of Kentucky Power or, to the Company's knowledge, any customer of any other utility in the Commonwealth, enjoy the right to choose on a yearly basis whichever they forecast will be lower: cost of service or market. The argument is a bridge too far.

Most fundamentally, the argument reduces Tariff RTP to a craps shoot where customers are able to manage their operations in the same fashion they would have under Tariff QP or Tariff CIP-TOD, and nevertheless be able to speculate on whether market prices for the designated 12-month period will be greater or less than the Company's embedded cost of service to the detriment of Kentucky Power and the other customers. Such a nearly unprecedented departure from the Commission's long-standing and nearly uniform adherence to cost-of-service ratemaking certainly would have garnered at least a passing mention in the Commission's Order approving the tariff. Yet there is not even a breath of a mention in the February 1, 2008 Order in Case No. 2007-00166 of this radical transformation of Commission policy.

Nor do KIUC or Mr. Baron explain why the Commission would approve a tariff whose claimed purpose is to permit, if not encourage, large commercial and industrial customers to speculate on the wholesale electricity market. Moreover, given the fact that the ten customers currently taking service under Tariff RTP stand to gain $10-$20 million between July 1, 2012 and June 30, 2013 for doing nothing, the Commission's endorsement of KIUC's construction of the tariff may lead other large industrial customers of other electric utilities across the Commonwealth to seek – either through the Commission or the General Assembly – the right to speculate in a similar fashion on the wholesale electricity markets.

Even when limited to the express language of a contract or tariff the Commission is not required to pay obeisance to the sort of slavish literalism advocated by KIUC.[105] Certainly, no such exacting drafting, or begrudging construction, is required of the Company's other tariffs. For example, under Tariff CIP-TOD and Tariff QP, off-peak demand and on-peak demand are billed at different rates. Yet, even though the on-peak and off-peak rates are included in the tariff, as well as the on-peak and off-peak hours, nothing in the tariff states that on-peak rates will be applied to on-peak demand, or that to obtain the lower off-peak rates the customer must have demand during off-peak periods. KIUC's strained construction of Tariff RTP, if applied to the Company's other tariffs, would result in a manifold increase in their size and complexity as the Company attempted to negate every possible misconstruction.

KIUC's argument that the Company's decision not to use the customer baseline ("CBL") approach is a further indication load-shifting is not required to obtain benefits under Tariff RTP[106] is likewise without merit. Indeed, the Commission addressed and rejected a related argument by the Attorney General in its Order approving Tariff RTP. There, the Attorney General argued that the tariff should be rejected because, as result of the Company's decision not to employ a CBL approach, "it appears the power usage of large industrial and commercial

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[105] *Thompson-Starrett Co. v. Mason's Administrators*, 201 S.W.2d 876, 881 (Ky. 1946).

[106] *See e.g.*, Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 11 (Filed August 27, 2012).

participants would not fit that profile [necessary to shift load and obtain benefits under Kentucky Power's non-CBL approach] and, therefore, most participants would not fit that profile under this program."[107] While sharing the Attorney General's concern, the Commission nevertheless approved the program in the face of the Attorney General's objection. In doing so, the Commission noted the Company's belief that it had customers with a load profile that would permit them to shift load and thereby benefit under the tariff from doing so.[108] It seems unlikely that the Attorney General would have raised, or that the Commission would have addressed, the concern if, as KIUC contends, the absence of a CBL tariff permitted customers to benefit under Tariff RTP without shifting load.

Finally, KIUC raises a related argument. It contends the tariff does not require load-shifting because in the absence of a CBL there is no way for a customer to know whether it has shifted load.[109] This argument is another red herring. Indeed, it strains credulity to suggest that the operator of an industrial or commercial facility is operating its facility while oblivious to whether it is taking down load during high-priced periods in favor of adding it during lower-priced periods.[110] As Mr. Roush testified, the customer will obviously know whether it has shifted load as it will have taken some action to change the way it is operating.[111] In fact, one of the ten customers admitted it had not shifted load, and thus presumably possessed sufficient

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[107] Attorney General's Comments, *In the Matter Of: 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).

[108] [108] Order, *In the Matter Of: 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 12 (Ky. P.S.C. February 1, 2008).

[109] *See e.g.*, Transcript of Hearing, Case No. 2012-00226 at 200-201 (Ky. P.S.C. November 1, 2012) (Stephen J. Baron).

[110] Transcript of Hearing, Case No. 2012-00226 at 145 (Ky. P.S.C. November 1, 2012) (David M. Roush).

[111] *Id.* at 159.

information to make the determination.[112] In any event, if as each of the ten KIUC customers freely admitted,[113] Kentucky Power had sufficient information to discern whether load is being shifted, the customers, who would be taking action to shift load, could do so easily.

3. Even If The Commission Were To Determine That Tariff RTP Is Ambiguous, The Subject Matter Of The Tariff And Circumstances Of Its Filing And Approval Make Clear That Service Under The Tariff Is Available Only To Those Customers Able And Willing To Shift Load In Response To Price Signals.

Kentucky Power understands the Commission's February 1, 2008 Order approving Tariff RTP, the Attorney General's comments in opposition to the tariff, as well as the Company's own construction of the plain language of the tariff, to be in agreement. That is, to receive benefits under Tariff RTP customers must shift load. But even if the Commission were to conclude Tariff RTP is "'capable of more than one different, reasonable interpretation'"[114] and hence is ambiguous, such a conclusion would only provide a second means of reaching the same conclusion the plain language of the tariff makes manifest: Tariff RTP was intended as a time-based rate designed to provide an economic incentive for customers to shift load in response to price signals. It was never intended by Kentucky Power, or approved by the Commission, as a means by which large commercial and industrial customers are encouraged to reap a windfall of millions of dollars at the expense of other customers.

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[112] Response by Kentucky Industrial Customers, Inc. to Kentucky Power Company's First Set of Data Requests, Item No. 32(a), *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 at 6 (Filed September 24, 2012).

[113] *Id.* at Items 30-33.

[114] *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 106 n. 12 (Ky. 2003) *quoting Central Bank & Trust Co. v. Kincaid*, 617 S.W.2d 32, 33 (Ky. 1981)..

If the Commission were to determine that Tariff RTP is ambiguous, its interpretive analysis changes.[115] In particular, the Commission is required to "'gather, if possible, the intention of the parties from the ... [tariff] as a whole, and in doing so will consider the subject matter of the ... [tariff], the situation of the parties, and the conditions under which the ... [tariff] was written.'"[116] In addition, the contract must be given a practical interpretation.[117]

Most telling are the subject matter of the tariff and context within which it was prepared, filed, and approved. Tariff RTP is a real-time pricing tariff intended to encourage large commercial and industrial customers to lower their peak load by shifting load from higher-priced periods to lower-priced periods.[118] It was prepared and filed by the Company at the direction of the Commission,[119] which in turn was acting in conformity with a federal mandate to investigate the imposition of time-based rates[120] as a means of providing an incentive for consumers to manage their energy use by shifting load from high-priced periods to lower-priced periods.[121] In investigating whether to require the Commonwealth's jurisdictional utilities to provide time-based rates, and investigating and approving Tariff RTP, the Commission initiated and conducted two formal proceedings stretching over nearly two years. In so doing, the Commission required Kentucky Power, along with other jurisdictional utilities, to file testimony

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[115] *Id.* at 106.

[116] *Id. quoting Whitlow v. Whitlow*, 267 S.W.2d 739, 740 (Ky. 1954).

[117] *Fisher v. Long*, 172 S.W.2d 545, 547 (Ky. 1943).

[118] Attorney General's Comments, *In the Matter Of: 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).

[119] Order, *In the Matter of: Consideration Of The Requirements Of The Federal Energy Policy Act Of 2005 Regarding Time-Based Metering, Demand Response And Interconnection*, Administrative Case No. 2006-00045 at 13 (Ky. P.S.C. December 21, 2006).

[120] 16 U.S.C. § 2621(d)(14)(F).

[121] A. Farqui, R. Hledik, & J. Palmer, *Time-Varying And Dynamic Rate Design* at 9 (Regulatory Assistance Project July, 2012) available online at http://www.hks.harvard.edu/hepg/Papers/2012/RAP_FaruquiHledikPalmer_TimeVaryingDynamicRateDesign_2012_JUL_23.pdf)

and answer data requests in the first proceeding so that the Commission could determine the usefulness of time-based rates as a means of assisting Kentucky jurisdictional utilities in lowering their peak demand. In the second proceeding, the Commission reviewed the specific time-based rate proposed by Kentucky Power to determine whether it was an appropriate vehicle for further investigation of the utility of real-time pricing in reducing Kentucky Power's peak load.[122]

KIUC and Mr. Baron nevertheless contend that the Commission at the end of this two-year process approved a real-time pricing tariff that, ***based upon the plain language employed in the tariff***, is not only utterly incapable of reducing Kentucky Power's peak demand because customers are not required to shift load, but also bestows millions dollars of benefits on ten large industrial and commercial customers with no commensurate benefit flowing to the Company and its other customers. Such an interpretation is far from the practical construction required by Kentucky law or common sense.

KIUC's construction of Tariff RTP also is undermined by one of the issues raised at the May 25, 2010 formal evidentiary hearing to consider the 2010 settlement agreement upon which the KIUC otherwise attempts to rely. In particular, KIUC overlooks the strong opposition to the settlement agreement posed by Pike County Senior Citizens Programs, Inc. That opposition in part was founded upon the contention that the rate increase had been unfairly allocated by the Commission because the CIP-TOD and QP customer class received a smaller percentage rate increase than the other classes including residential customers.[123] In fact, the allocation was

[122] Order, *In the Matter Of: 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).

[123] Order, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 at 6-7 (Ky. P.S.C. June 28, 2010).

changed to reduce the residential customer class subsidy, and as a result residential customers experienced a 16.84% increase, while the rate increases for the QP and CIP-TOD customer classes were 6.58% and 3.82% respectively.[124] The Commission ultimately approved the rate allocation under the settlement agreement, and rejected Pike County Senior Citizens' contention the increase should be allocated evenly among customer classes, because even with the new allocation revenues from the residential class still were less than the cost of providing service to the class.[125] Nevertheless, given the careful concern and attention demonstrated by the Commission in its Order with respect to the allocation issue, it is more than a stretch to assume, as KIUC's construction of the tariff would require, that the Commission would have sanctioned in the same Order the extension until June 2013 of a tariff that KIUC argues requires millions of dollars of rate decreases for ten members of the two customers classes with the smallest increases.[126]

In sum, whether the Commission limits its consideration to the plain language of Tariff RTP, or instead concludes the tariff is ambiguous and then examines the subject matter of the tariff and the circumstances surrounding its filing and approval, nothing in KIUC's arguments or testimony requires the Commission to abandon its February 1, 2008 determination that Tariff RTP is limited to those customers who can and will shift load.

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[124] *Id.* at Appendix C.

[125] *Id.* at 7-8.

[126] *Id.* at Appendix C.

B. The Commission Possesses Full Authority Under The Law To Grant The Relief Requested By Kentucky Power.

KIUC contends that the Commission may grant Kentucky Power its requested relief only by abrogating paragraph 9(a) of the May 19, 2010 Unanimous Settlement Agreement.[127] As a result, KIUC twice moved to dismiss Kentucky Power's application based upon the claimed breach.[128] Although KIUC acknowledges the Commission may modify the terms of the settlement agreement, it argues that it may do so only in conformity with the *Mobile-Sierra* doctrine.[129]

Kentucky Power filed a response to the motion to dismiss on June 15, 2012.[130] In addition, the Commission permitted Kentucky Power to address the motion to dismiss in this brief.[131] The Commission also instructed the parties to address its authority to modify the settlement agreement.[132]

KIUC's motion to dismiss must be denied.

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[127] Response And Motion To Dismiss Of Kentucky Industrial Utility Customers, Inc. In Opposition To Application To Withdraw Tariff RTP, *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 at 1 (Filed June 7, 2012); Transcript of Hearing, Case No. 2012-00226 at 7-9 (Ky. P.S.C. November 1, 2012) (Argument by Mr. Kurtz).

[128] *Id.*

[129] Response And Motion To Dismiss Of Kentucky Industrial Utility Customers, Inc. In Opposition To Application To Withdraw Tariff RTP, *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 at 3-8 (Filed June 7, 2012); Reply Of Kentucky Industrial Utility Customers, Inc. To Response Of Kentucky Power Company, *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 at 2 (Filed June 20, 2012).

[130] Response of Kentucky Power Company to Motion Of Kentucky Industrial Utility Customers, Inc.'s Motion to Dismiss Application To Withdraw Tariff R.T.P., *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 at 6 (Filed June 15, 2012).

[131] Transcript of Hearing, Case No. 2012-00226 at 58-59 (Ky. P.S.C. November 1, 2012) (Statement by Vice Chairman Gardner).

[132] *Id.* at 213.

First, the relief requested by the Company in its Application is not a breach of paragraph 9(a) of the Unanimous Settlement Agreement. Paragraph 9(a) of the Unanimous Settlement Agreement extended "[t]he ***existing*** RTP Tariff"[133] until June 2013. But the "RTP Tariff" that existed on May 19, 2010, the date of the agreement, like the one existing today, expressly requires the ten customers currently taking service under Tariff RTP "to manage their electric costs by shifting load from higher cost to lower cost pricing periods or by adding new load during lower price period."[134] By placing load they are unable or unwilling to shift in response to price signals on the tariff in contravention of its express requirements, the ten customers are seeking to take service under a would-be tariff fundamentally different than the subject of Paragraph 9(a): "the existing RTP Tariff."

The May 19, 2010 Unanimous Settlement Agreement is equally binding on Kentucky Power and the ten customers represented by KIUC.[135] The use of Tariff RTP by the ten customers to reap millions of dollars of benefits without shifting load contravenes the terms of Tariff RTP. By requesting that the Commission authorize the withdrawal of the tariff and its replacement by Rider RTP, the Company is doing no more than asking the Commission to limit the rights of the ten customers purporting to take service under Tariff RTP to what they bargained for in Paragraph 9(a) – Tariff RTP, which requires they shift load in response to price signals – and not the one they seek which did not then exist and does not exist now.[136]

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[133] Order, Appendix A, Unanimous Settlement Agreement at ¶ 17, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010).

[134] Tariff RTP, Sheet 30-1, "Program Description."

[135] Order, Appendix A, Unanimous Settlement Agreement at ¶ 17, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010) ("This Unanimous Settlement Agreement shall inure to the benefit of and be binding upon the parties to this Unanimous Settlement Agreement, their successors and assigns.")

[136] Kentucky Power acknowledges it could have refused to permit any of the ten customers to take service under Tariff RTP upon determining they could not or would not shift load as required by the express language of the tariff. Transcript of Hearing, Case No. 2012-00226 at 58-59 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas). Given

Second, even if the relief requested by the Company constituted an abrogation of the Unanimous Settlement Agreement, and it does not, the Commission enjoys broad "plenary ratemaking authority derived from KRS 278.030 and KRS 278.040 ... to ensure that rates are "fair, just and reasonable...."[137] KRS 278.030(1) likewise authorizes Kentucky Power to "demand, collect and receive" rates, including those rates collected under Tariff RTP, that are "fair, just and reasonable for services rendered or to be rendered ...." The Commission further "has 'such powers as are conferred ... by necessity or fair implication.'"[138] The Commission's authority is limited only by the constitutions of the United States and Kentucky, and the statutes of the Commonwealth.[139]

Nothing in Chapter 278 of the Kentucky Revised Statutes, or otherwise, limits the authority of the Commission to examine and modify contracts affecting the Company's rates. Certainly, KIUC has not cited any statutory impediment to the Commission's plenary authority. Nor does the Unanimous Settlement Agreement. To the contrary, paragraph 16 of the Unanimous Settlement Agreement expressly recognizes the Commission's continuing "jurisdiction under Chapter 278 of the Kentucky Revised Statutes."[140]

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the pendency of this previously filed proceeding, the uncertainty concerning whether the ten customers could or would shift load in response to price signals until after Kentucky Power had the opportunity to analyze two months operating data, and the inevitable collateral litigation that would have been spawned by the Company's unilateral refusal to permit the customers to demonstrate their willingness to conform to the tariff's terms, the Company believes it acted fairly and in good faith with the Commission and its customers by proceeding in the manner it did. In doing so, the Company also acted to allow the Commission adequate time to consider the issues in orderly fashion.

[137] *Kentucky Public Service Commission v. Commonwealth ex rel. Conway*, 324 SW.3d 373, 380-381 (Ky. 2010).

[138] *Public Service Commission of Kentucky v. Commonwealth*, 320 S.W.3d 660, 665 (Ky. 2010) *quoting Boone County Water and Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997).

[139] *See South Central Bell Telephone Co. v Utility Regulatory Commission*, 637 S.W.2d6949 (Ky. 1982).

[140] Order, Appendix A at ¶ 16, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010).

The Commission's continuing plenary authority to examine and to modify any rate, including Tariff RTP,[141] without regard to any claimed contrary provisions of a contract is hardly unprecedented. Indeed, the issue of the Commission's authority to do so notwithstanding the terms of a contract was put to rest by the Commission and, ultimately, the Kentucky Court of Appeals, in *Board of Education v. William Dohrman, Inc.*[142] There, the board of education entered into a contract for sewerage services from the utility. The rates were fixed by contract. The contract also required that the rates could only be modified by agreement, or failing that, arbitration. In lieu of proceeding as required by the contract, the utility filed an application with the Commission, which after a hearing, modified the rates. On rehearing, the board of education argued that the order violated its contract rights, and that under the terms of its contract with the utility the Commission lacked the authority to modify the rates.[143]

The Commission denied rehearing and the board of education appealed. The Court of Appeals affirmed, explaining that the Commission's plenary jurisdiction to ensure fair, just, and reasonable rates vested it with authority to modify rates, even where doing so was contrary to the terms of a contract between the parties:

> Strictly speaking, ***the Commission had the right and duty to regulate rates and services, no matter what a contract provided.***[144]

The Commission continues to follow the court of appeals' decision in *William Dohrman, Inc.* In *In The Matter Of: City Of Jeffersonville v. Montgomery County Water District No. 1*,[145]

[141] KRS 278.010(12) defines the term "rate" to include "any individual or joint fare, toll, charge, rental, or other compensation for service rendered or to be rendered by any utility, and any rule, regulation, practice, act, requirement, or privilege in any way relating to such fare, toll, charge, rental, or other compensation, and any schedule or tariff or part of a schedule or tariff thereof." This broad definition covers, and KIUC does not contend to the contrary, both the rates and the terms of Tariff RTP.

[142] 620 S.W.2d 328 (Ky. App. 1981).

[143] *Id.* at 329

[144] *Id.* (emphasis supplied).

the city filed a complaint with the Commission claiming the water district breached the contract by seeking rates different than those required under the contract.[146] Dismissing the city's complaint for failing as a matter of law to state a prima facie case, the Commission cited *William Dohrman, Inc.* and explained "[t]hat the parties have contracted for a certain rate ***does not immunize the agreed rate from modification***."[147]

The continuing vitality of the Commission's fealty to *William Dohrman, Inc.* was underscored as recently as two months ago in *In The Matter Of: Application Of Big Sandy Water District For An Adjustment In Rates Pursuant To The Alternative Rate Filing Procedure For Small Utilities*.[148] There, the water district and Overland Development, Inc. entered into a wholesale water purchase agreement. Under the terms of the agreement the rates could be amended only by mutual agreement or, failing that, following a determination by the Commission the contract was unreasonable.[149] On rehearing from an order adjusting the water district's rates, the Commission again cited *William Dohrman* and concluded that even a contract rate filed with and approved by the Commission was subject to subsequent revision by the Commission notwithstanding the fact that doing so was contrary to the terms of the contract.[150]

Each of these decisions make clear the Commission's continuing authority to grant Kentucky Power the relief it seeks in its pending applications. Indeed, they are indistinguishable

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[145] Case No. 97-377 (Ky. P.S.C. 1998). *Accord, In The Matter of: Application And Notice Of Kenton County Water District No. 1: (A) To Issue Revenue Bonds In The Approximate Principal Amount Of $16,600,00 (A Portion For Refunding Bond Anticipation Notes); (B) To Construct Additional Plant Facilities Of Approximately $8,317,000; (C) Notice Of Adjustment Of Rates Effective May 1, 1991; And (D) Approval, If Necessary, Of Continuing Miscellaneous Long-Term Indebtedness*, Case No. 91-046 at 2 (Ky. P.S.C. December 17, 1991) ("Assuming *arguendo* that it did conflict with the Agreement, the Agreement has no binding force.")

[146] *Id.* at 2-3.

[147] *Id.* at 3.

[148] Case No. 2012-00152 (Ky. P.S.C. September 17, 2012).

[149] *Id.* at 1-2.

[150] *Id.* at 2 ("A contract between a utility and a customer does not limit the Commission's authority to review and adjust the rate contained in that contract.")

from this case. In each of the earlier decisions, as here, a customer claimed that the relief sought in the utility's application then pending before the Commission was contrary to the terms of the contract between the utility and the customer, and that as a result the utility was not entitled to any relief inconsistent with the contract terms. In each, the Commission rejected the customer's arguments and granted the requested relief based upon the Commission's continuing authority under *William Dohrman, Inc.* The same result obtains here.

Third, KIUC's reliance upon the *Mobile-Sierra* Doctrine, and its public interest standard, is misplaced. The *Mobile-Sierra* Doctrine takes its name from two 1956 United States Supreme Court cases[151] construing the terms of the Natural Gas Act and the Federal Power Act respectively. As recently explicated by the United States Supreme Court, the *Mobile-Sierra* Doctrine provides that a federal regulatory body may modify rates established by contract only where the "'*rate is so low as to adversely affect the public interest* – as where it might impair the financial ability of the utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.'"[152]

The *Mobile-Sierra* Doctrine is a product of federal – not Kentucky – statutory law. Indeed, in *Mobile Gas Service Corp.* Justice Harlan explained "[t]he question presented ***is solely one of the proper interpretation of the Natural Gas Act*** ...."[153] Likewise, in *Sierra Pacific Power* the Court explained: "[t]his case presents questions under Title II of the Federal Power Act ...which are in part similar to those we have decided today under the Natural Gas Act ... [in

[151] *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[152] *NRG Public Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, *, 130 S.Ct. 693, 699 (2010) *quoting Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. at 354-355 (emphasis in original).

[153] *Mobile Gas Service Corp., 350 U.S.* at 337 (emphasis supplied).

Mobile Gas Service Corp.]"[154] KIUC does not contend, nor could it, that either the Federal Power Act or the Natural Gas Act are applicable to Tariff RTP, or that either statute controls the Commission's exercise of its plenary ratemaking authority under Chapter 278 of the Kentucky Revised Statutes in this case. The contours of the Commission's authority under Chapter 278 are a matter of state not federal law. Likewise, the reach of that state law-based authority is to be determined by the provisions of Chapter 278, including KRS 278.030 and KRS 278.040, as interpreted by the Kentucky courts in *Kentucky Public Service Commission v. Commonwealth ex rel. Conway* and *Board of Education v. William Dohrman, Inc.* and not federal law.

The *Mobile-Sierra* Doctrine is inapposite for a second reason. As explained in *NRG Public Marketing, LLC*, "[b]oth [*Mobile Sierra Gas Corp.* and *Sierra Pacific Power Co.*] ***concerned rates set by contract rather than by tariff.***"[155] Here, the rates under Tariff RTP are by definition a matter of tariff and not contract. Nor is it of any moment that the tariff was extended by contract from 2011 until 2013.[156] The rate, which is the focus of both the *Mobile-Sierra* Doctrine and this dispute, was not a matter of arms-length negotiation between KIUC and its members and Kentucky Power. It was unilaterally filed by Kentucky Power and approved by the Commission in connection with the Commission's review and approval of Tariff RTP.[157] Indeed, even though it was granted intervention in the case in which the Commission reviewed and approved Tariff RTP,[158] KIUC did not otherwise participate. Because the *Mobile-Sierra*

[154] *Sierra Pacific Power Co.*, 350 U.S. at 349.

[155] 558 U.S. at *, 130 S.Ct. at 698.

[156] Transcript of Hearing, Case No. 2012-00226 at 32-33 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[157] Order, *In the Matter Of: 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).

[158] Order, *In the Matter Of: 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. May 25, 2007).

Doctrine is limited to establishing a presumption that "'***the rate set out in a freely-negotiated wholesale energy contract*** meets the 'just and reasonable' requirement imposed by law,'"[159] nothing in the doctrine, even if it were otherwise applicable, forecloses the Commission from modifying *the tariff*, including the tariff rate, by permitting the withdrawal of Tariff RTP and approving Rider RTP in its stead.

Fourth, even if the Commission elected[160] to follow the *Mobile-Sierra* Doctrine and to treat the Company's Tariff RTP as a contract, there is substantial evidence of record that the higher "public interest" standard under the *Mobile-Sierra* Doctrine is satisfied. That standard requires a showing that the contract "'*rate is so low as to adversely affect the public interest* – as where it might impair the financial ability of the utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.'"[161]

Mr. Wohnhas testified that the $17.4 million net reduction in retail sales revenues that was estimated to result from customers transferring 200 MW of load from standard tariffs to Tariff RTP would reduce Kentucky Power's return on equity to 6.6% based on the April 2012 return on equity.[162] That is 62% of the 10.5% return on equity specified by the parties to the

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[159] *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 Of Snohomish Cty.*, 554 U.S. 527, 530 (2008) (emphasis supplied).

[160] The Commission's online data base includes one decision in which the Commission considered the *Mobile-Sierra* Doctrine. *See* Order, *In The Matter Of: An Investigation Of Big Rivers Electric Corporation's Rates For Wholesale Electric Service*, Case No. 9885 at 15 (Ky. P.S.C. August 10, 1987). There, the Commission found, in response to the argument of National Southwire Aluminum Company that Big Rivers Electric Corporation's rates could be changed only upon satisfaction of the public interest standard under *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956), that the standard had been satisfied). Kentucky Power is unaware of any decisions of the Commission holding that the Commission is bound by the *Mobile-Sierra* Doctrine.

[161] *NRG Public Marketing, LLC v. Maine Public Utilities Commission*, 558 U.S. 165, *, 130 S.Ct. 693, 699 (2010) *quoting Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. at 354-355 (emphasis in original).

[162] Pre-filed Testimony Of Ranie K. Wohnhas, *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 at 10 (Filed June 1, 2012).

Unanimous Settlement for purposes of calculating the Company's last general rate increase.[163] Under any definition of impairment, returns that low threaten Kentucky Power's ability to provide reasonable service. Certainly KIUC did not offer any evidence to the contrary. Nor did it suggest that the Company could continue to provide reasonable service with such earnings.

During cross-examination KIUC attempted to use extrapolations to argue that the Company's return on equity would be much higher than 6.6%.[164] But the extrapolations were premised upon only two or three months of operations under Tariff RTP, one of which saw high enough energy prices that the Company did slightly better than break even on Tariff RTP for the month.[165] The record is uncontroverted that such prices are unlikely to reoccur before the tariff expires.[166] Moreover, unlike the speculation by KIUC's attorney,[167] Kentucky Power's projection of LMP energy prices through June 2013, when Tariff RTP expires if it is not sooner withdrawn, were based on energy forwards.[168]

In the end, KIUC introduced nothing to rebut the Company's evidence that for the most recent three complete months during which the ten customers have taken service under tariff RTP Kentucky Power received between $1.2 million and $1.3 million a month less under Tariff RTP than it would have received under the standard tariffs, for a net total revenue reduction of

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[163] Order, Appendix A at ¶ 7, *In The Matter Of: General Adjustment of Rates Of Kentucky Power*, Case No. 2009-00549 (Ky. P.S.C. June 28, 2010).

[164] Transcript of Hearing, Case No. 2012-00226 at 44-49 (Ky. P.S.C. November 1, 2012) (Cross-examination of Ranie K. Wohnhas).

[165] Transcript of Hearing, Case No. 2012-00226 at 37-38 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

[166] *Id.* at 151-152 (David M. Roush).

[167] *See e.g.* Transcript of Hearing, Case No. 2012-00226 at 45-49 (Ky. P.S.C. November 1, 2012) (Cross-examination of Ranie K. Wohnhas); Transcript of Hearing, Case No. 2012-00226 at 151-152 (Ky. P.S.C. November 1, 2012) (Cross-examination of David M. Roush).

[168] Transcript of Hearing, Case No. 2012-00226 at 151 (Ky. P.S.C. November 1, 2012) (David M. Roush).

$3.65 million during the four-month period service has been taken under Tariff RTP.[169] Also unrebutted is Mr. Wohnhas' estimate that notwithstanding the July 2012 results the Company will experience a net revenue reduction of $10 million to $20 million if Tariff RTP is allowed to remain in effect through June 2013.[170]

In addition, the tariff is unduly discriminatory. As Tariff RTP is currently being misused, the ten customers currently taking service under it enjoyed the ability to choose to take service at the lower of market or cost without modifying their load or conferring any benefit on the other 173,000 customers of the Company. No other customers on Kentucky Power's system, or to Kentucky Power's knowledge, no other retail electric customers throughout the Commonwealth, were afforded such a choice. Yet the ten customers either cannot or will not shift the load being billed under Tariff RTP in response to price signals.[171] As a result, the Commission, Kentucky Power, and the other customers are receiving no benefits in return for the discriminatory opportunity afforded the ten customers. Without load-shifting, the purpose in requiring Kentucky Power to file a real-time pricing tariff – "to discern whether these customer classes [large commercial and industrial customers] will respond to posted next-day hourly pricing of electrical energy [prices] proposed under the program to reduce their overall demand and/or shift their variable demand to peak hours."[172] – is being thwarted. At the same time the Company's peak load is not being reduced, thereby denying Kentucky Power and the remaining customers

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169 Kentucky Power Response to Commission Staff Hearing Data Request, Item No. 3, *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 (Filed November 9, 2012).

170 Transcript of Hearing, Case No. 2012-00226 at 93-94 (Ky. P.S.C. November 1, 2012) (Ranie K. Wohnhas).

171 *See* pages 11-12 *supra*.

172 Attorney General's Comments, *In the Matter Of: 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 1(Filed July 12, 2007).

the benefits that that would accrue from such a reduction. In short, the only result of the discriminatory treatment is to favor the ten customers.

Finally, KIUC's construction of Tariff RTP risks placing an excessive burden on Kentucky Power's other ratepayers. KIUC contends that Kentucky Power's lost revenues under Tariff RTP are not recoverable because they will be one-time and non-recurring assuming that Tariff RTP is allowed to expire by the terms of the Settlement,"[173] the Company nevertheless could seek deferral of the lost revenues. Moreover, KIUC's argument that its construction of Tariff RTP will not burden Kentucky Power's other ratepayers ignores its own witness' testimony. When asked by his own attorney in his pre-filed testimony "Do you believe that Tariff RTP should be allowed to expire on June 30, 2013,"[174] he unequivocally answered "No."[175] Although Mr. Baron later attempted to recant his pre-filed testimony,[176] it is undisputed that even the remaining testimony, which he continues to embrace,[177] leaves open the possibility Tariff RTP would continue beyond June 30, 2013.[178] In such a case, Kentucky Power anticipates that the lost revenues would continue through at least 2016,[179] which even under KIUC's

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[173] Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 24 (Filed August 27, 2012).

[174] *Id.* at 24.

[175] *Id.*

[176] Transcript of Hearing, Case No. 2012-00226 at 184-185 (Ky. P.S.C. November 1, 2012) (Stephen J. Baron).

[177] *Id.*

[178] Mr. Baron indicated, without any plausible explanation, that the first two sentences of his answer were included by mistake. *Id.* But even in the remaining two sentences he never concludes that the tariff should not expire in 2013. To the contrary, he simply states that "at this point it would be premature to rule that Tariff RTP should expire on June 30, 2013." Pre-filed Direct Testimony Of Stephen J. Baron, *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 at 24 (Filed August 27, 2012).

[179] Response by Kentucky Power Company to Commission Staff's First Set of Data Requests, Item No. 3, *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 (Filed September 21, 2012).

argument would make the losses recoverable. Either way, KIUC construction of Tariff RTP subjects Kentucky Power's remaining ratepayers, or some sub-group,[180] to the risk that they would be required to fund the millions of dollars of windfall accruing to the ten customers taking service under Tariff RTP.

A tariff that confers millions of dollars of benefits on a handful of large customers for doing nothing, deprives Kentucky Power of millions of dollars in revenue, threatens an excessive burden on Kentucky Power's other customers, all the while providing no commensurate benefits to the Company or its remaining customers, by definition adversely affects the public interest and may be set aside under the *Mobile-Sierra* Doctrine.

C. The Filed Rate Doctrine Is Inapplicable To These Proceedings.

In response to Item No. 6 of the Commission Staff's Second Set of Data Requests, Kentucky Power indicated that it "plans to review the ten customers' operations under Tariff R.T.P. and to take such further action as is appropriate, including, but not limited to, back-billing the customers whose operations do not comport with the intended applicability of the tariff." At the November 1, 2012 hearing KIUC argued that "the filed rate is the filed rate and it can only be changed going forward. It is the prohibition of retroactive ratemaking."[181] The Commission asked that the parties address the applicability of the Filed Rate Doctrine and "what does that mean under these circumstances."[182]

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[180] Response by Kentucky Power Company to Commission Staff's Second Set of Data Requests, Item No. 1, *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 (Filed September 21, 2012).

[181] Transcript of Hearing, Case No. 2012-00226 at 214 (Ky. P.S.C. November 1, 2012) (Statement by Mr. Kurtz).

[182] Transcript of Hearing, Case No. 2012-00226 at 213 (Ky. P.S.C. November 1, 2012) (Statement by Vice Chairman Gardner).

The Filed Rate Doctrine in Kentucky is codified at KRS 278.160. It provides in pertinent part:

> (1) [E]ach utility shall file with the commission... schedules showing all rates and conditions for service established by it and collected or enforced....
>
> (2) No utility shall charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

The Filed Rate Doctrine thus consists of two parts. First, a utility must file tariffs reflecting its rates and terms of service.[183] Second, the utility may charge only its tariffed rates; conversely the customer must pay the appropriate tariffed rates.[184]

Kentucky Power's proposal to back-bill, using Tariff CIP-TOD or Tariff QP, those customers receiving service under Tariff RTP in violation of the tariff's requirement that they shift the RTP load fully comports with the Filed Rate Doctrine. Both Tariff CIP-TOD and Tariff QP are schedules filed with and approved by the Commission "showing all rates and conditions for service...."[185] Kentucky Power's proposal to back-bill those customers receiving service under Tariff RTP in violation of its terms at the rates they should have paid under either the customers' standard tariff (either the duly filed CIP-TOD or the duly filed QP) not only comports with KRS 278.160(2), but is required by it. If Kentucky Power were to do otherwise it would be charging, demanding, collecting and receiving "a greater or less compensation for ... [a] service rendered ... than that prescribed its filed schedules," and the ten customers would be receiving

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[183] KRS 278.160(1)

[184] KRS 278.160(2).

[185] KRS 278.160(1).

service from Kentucky Power "for a compensation greater or less than that prescribed in such schedules."[186]

Stated otherwise, Kentucky Power proposes to charge the ten customers what they should have paid under the correct duly filed tariff. To hold otherwise would mean that any billing error arising as the result of the application of the incorrect tariff – whether in favor of the customer or the utility – would become immediately and eternally uncorrectable as soon as the bill was rendered. The Filed Rate Doctrine does not permit, much less compel, such an absurd result.

Nor is Kentucky Power proposing to modify retroactively the filed rate in violation of the prohibition against retroactive ratemaking.[187] The applicable CIP-TOD or QP rate Kentucky Power proposes to charge the ten customers during the period they take service under Tariff RTP in violation of its express terms will be the exact CIP-TOD or QP rate on file with the Commission during the applicable period. Kentucky Power is not proposing in this proceeding any change – retroactively or prospectively – to the Company's duly filed and approved CIP-TOD and QP rates. As such, KIUC's retroactive ratemaking argument falls far short of the mark.

Conclusion

Kentucky Power respectfully requests that the Commission enter an Order granting its applications to withdraw Tariff RTP and to substitute Rider RTP in its stead. Even if the Commission were hesitant to grant the Company's application to withdraw Tariff RTP and replace it with Rider RTP, the Commission can issue an Order declaring that service under Tariff

[186] KRS 278.160(2).

[187] *See Cincinnati Bell Telephone Co. v. Kentucky Public Service Commission*, 223 S.W.3d 829, 839 (Ky. App. 2007).

RTP is limited to that load the ten customers can shift in response to price signals and that the ten customers have been using the tariff in violation of its express requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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