COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER COMPANY TO WITHDRAW ITS TARIFF RTP PENDING SUBMISSION BY THE COMPANY AND APPROVAL BY THE COMMISSION OF A NEW REAL-TIME PRICING TARIFF	)))))	CASE NO. 2012-00226

ORDER

On June 1, 2012, Kentucky Power Company ("Kentucky Power") filed an Application ("June 1 Application") pursuant to KRS 278.180 and 807 KAR 5:011 for authority to withdraw its experimental Real-Time Pricing ("RTP") tariff ("Tariff RTP"). In support of its request to withdraw the tariff, Kentucky Power stated that the tariff has not achieved its objective of encouraging customers to manage their energy costs by shifting their load periods. It further stated that it will incur substantial losses if the customers who have expressed interest in having their load served under the Tariff RTP were to do so. Kentucky Power stated that, based upon 2011 load data for the three customers who have inquired about Tariff RTP, it could experience a revenue loss of approximately $10 million to $20 million during the period July 1, 2012 to June 30, 2013.[1] Kentucky Power stated that it recognized its obligation under the Commission's

[1] June 1 Application, p. 4.

Order in Case No.2009-00459[2] to offer Tariff RTP through June 29, 2013, recognized the interest of both the Commission and certain customers in the continued availability of an RTP tariff, and committed to file, on or before June 11, 2012, a new RTP tariff.

PROCEDURAL BACKGROUND

On June 7, 2012, Kentucky Industrial Utility Customers, Inc. ("KIUC") filed a Response and Motion to Dismiss ("Response") in opposition to Kentucky Power's Application to withdraw its Tariff RTP and a Petition to Intervene on behalf of Air Liquide Large Industries U.S. LP, AK Steel Corporation, Air Products & Chemicals, Inc., EQT Corporation and Catlettsburg Refining LLC, a subsidiary of Marathon Petroleum LP.[3] KIUC argued that Kentucky Power's Application to withdraw Tariff RTP is in direct violation of the Commission-approved Unanimous Settlement Agreement in Case No. 2009-00459,[4] and, further, is not in the public interest. KIUC requested that the Commission dismiss Kentucky Power's June 1 Application, or, in the alternative, deny the June 1 Application as not being in the public interest. KIUC also argued that if the Commission opens an investigation into this matter, the three KIUC customers who are in the process of switching load to Tariff RTP should be allowed to do so under the existing RTP tariff, including capacity pricing at the current PJM Reliability Pricing Model ("RPM") capacity rate of $16.46/MW-day during the investigation.[5]

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[2] Case No. 2009-00459, Application of Kentucky Power Company for a General Adjustment of Electric Rates (Ky. PSC June 28, 2010). In the June 28, 2010 Order, the Commission approved the continuation of Kentucky Power's experimental Real-Time Pricing tariff for three years, with customers able to enroll at any point during a year for a minimum period of 12 months.

[3] KIUC's motion stated that it will supplement the names of additional intervenors when necessary.

[4] Case No. 2009-00459 (Ky. PSC June 28, 2010).

[5] Response and Motion to Dismiss of Kentucky Industrial Utility Customers, Inc. in Opposition to Application to Withdraw Tariff R.T.P., filed June 7, 2012, p. 8.

On June 8, 2012, the Commission issued an Order that granted KIUC's petition to intervene, and established a limited procedural schedule.[6]

On June 11, 2012, Kentucky Power filed a second Application ("June 11 Application") pursuant to KRS 278.180 and 807 KAR 5:011 for approval of its Experimental Real-Time Pricing Rider ("Rider RTP") contingent upon the Commission's granting the request to withdraw its existing Tariff RTP. Kentucky Power's June 11 Application also requested that the Commission find good cause to allow the 30-day notice period required by KRS 278.180(1) to be shortened so that its proposed Rider RTP could become effective on July 1, 2012.

On June 15, 2012, Kentucky Power filed a response to KIUC's Motion to Dismiss the Kentucky Power June 1 Application to Withdraw Tariff RTP. Therein, Kentucky Power argued that KIUC's Motion to dismiss should be denied and that Kentucky Power's request to withdraw its existing Tariff RTP should be granted.

Our June 21, 2012 Order (1) directed that Kentucky Power's proposed Rider RTP be investigated as part of this case; (2) suspended Kentucky Power's proposed Rider RTP for five months from July 1, 2012, up to and including November 30, 2012; (3) took under advisement that portion of Kentucky Power's application[7] requesting the Commission to prohibit any customers from taking service under Tariff RTP after July 1,

[6] The June 8, 2012 Order established a deadline of June 15, 2012 for all motions to intervene and any responses to KIUC's Response.

[7] Although the Commission's June 21, 2012 Order articulated that it took under advisement that portion of Kentucky Power's "application" requesting the Commission to prohibit any customers from taking service under Tariff RTP after July 1, 2012, it was the June 1 Application wherein Kentucky Power made that request.

2012,[8] stating that this request would be ruled on at a later date; and (4) setting a procedural schedule.

On June 22, 2012, KIUC filed a motion for clarification, claiming that the Commission's language is somewhat ambiguous regarding what it is taking under advisement and whether customers are immediately barred from taking service under existing Tariff RTP.

Our June 28, 2012 Order found that: (1) to the extent that any ambiguity exists in the June 21 Order, KIUC's motion for clarification should be granted to the limited extent that the Commission will reiterate that the request of Kentucky Power to prohibit any customers from taking service under Tariff RTP after July 1, 2012 is taken under advisement and will be ruled on at a later date; (2) whether or not Kentucky Power must approve a customer's pre-July 1, 2012 request for service under Tariff RTP is an issue not addressed in the June 21 Order, in that the existing evidence of record is insufficient for the Commission to make findings as to whether any customers have actually requested service under Tariff RTP and, if so, whether those customers are eligible to be on that tariff, and that absent such evidence, the Commission has no basis to require Kentucky Power to serve a specific customer under Tariff RTP; (3) Kentucky Power's existing Tariff RTP has not been suspended and it remains in full force and effect, and that if any customer believes that it is eligible for service under Tariff RTP, or under any other tariff, and its request for that service has been denied, that customer has recourse by filing a complaint under KRS 278.260. The Order granted KIUC's motion for

[8] Kentucky Power's June 1 Application requested the Commission to enter an interim Order suspending Tariff RTP, or otherwise prohibiting any customers from taking service under Tariff RTP, if the Commission is unable to act on the Company's application by June 27, 2012, the latest date notification may be received for bills to be issued during Cycle 1 of the July, 2012 billing cycle.

clarification to the limited extent that if any ambiguity exists in the June 21 Order, the Commission reiterated that the request in Kentucky Power's application[9] that the Commission prohibit any customers from taking service under the existing Tariff RTP after July 1, 2012 is taken under advisement and will be ruled on at a later date; and (2) denied Kentucky Power's request that the existing Tariff RTP be suspended after July 1, 2012 during the pendency of this proceeding.

The Commission held a public hearing on this matter on November 1, 2012, and the Commission received post hearing briefs by November 26, 2012.

APPROVAL OF KENTUCKY POWER'S REAL-TIME PRICING TARIFF

Prior to the approval of Kentucky Power's current Tariff RTP, the Commission addressed experimental real-time pricing tariffs in Case No. 2006-00045.[10] Therein, the Commission required Kentucky Power, along with certain other electric utilities in the Commonwealth, to develop voluntary pilot real-time pricing programs for their large commercial and industrial customers. In its December 21, 2006 Order in that proceeding, the Commission stated the following:

> 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 further finds that the potential for significant savings from commercial and industrial real-time pricing programs has not been adequately investigated in the Commonwealth. To gain

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[9] In Kentucky Power's June 1 Application the Company requested the Commission to prohibit any customers from taking service under Tariff RTP after July 1, 2012.

[10] Case No. 2006-00045, Consideration of the Requirements of the Federal Energy Policy Act of 2005 Regarding Time-Based Metering, Demand Response, and Interconnection Service (Ky. PSC Dec. 21, 2006).

> information and attempt to ascertain the viability and effectiveness of real-time pricing for larger customers, the Commission will require that pilot programs be developed and offered to such customers.[11]

On April 20, 2007, Kentucky Power submitted an application for approval to implement a voluntary real-time pricing pilot program for its large commercial and industrial customers pursuant to the directive in Case No. 2006-00045. The Commission established Case No. 2007-00166[12] to address Kentucky Power's proposed experimental real-time pricing tariff.[13]

On February 1, 2008 the Commission issued an Order in Case No. 2007-00166 that approved the pilot RTP program for a period of three years beginning June 1, 2008 and authorized Kentucky Power to establish a deferred account in which to record unrecovered costs associated with the pilot RTP program.[14] The Order stated that:

> The proposed program will be a market-based, hourly RTP program in which <u>the customers will have the opportunity to manage their electric costs by shifting load periods</u>. Participating customers will choose the amount of load they are willing to have subject to standard tariff pricing with the remaining load for any given period subject to real-time pricing. All usage less than or equal to the designated demand level will be billed at standard tariff rates. All usage above the designated demand level will be billed at real-time rates. <u>A customer's total bill will be the sum of the standard tariff calculation and the RTP calculation</u>.[15]

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[11] *Id.* at p. 13.

[12] Case No. 2007-00166, Kentucky Power Company's Real-Time Pricing Pilot Program Tariff (Ky. PSC Feb. 1, 2008).

[13] KIUC was an intervenor in both Case No. 2006-00045 and Case No. 2007-00166.

[14] Kentucky Power proposed to start its three-year trial program no sooner than June 1, 2008 to coincide with PJM's planning years.

[15] *Id.* at p. 3, Emphasis Added.

The Order also discussed the manner in which the real-time price would be calculated. It stated that the real-time price would be based on the real-time prices established within the PJM Interconnection, LLC ("PJM") Regional Transmission Organization ("RTO") market "which are readily available from PJM"[16] and would consist of a capacity charge, an energy charge, a transmission charge, an "other market services"[17] charge, a distribution charge, and a program charge.[18]

Kentucky Power's proposed RTP program did not contain a Customer Baseline Load ("CBL") Approach; and the Attorney General expressed his concern.

> The AG argues that it appears the power usage of typical large industrial and commercial participants would not fit that profile (high demand spikes; i.e., high demand with little associated usage) of customers Kentucky Power says might benefit from the program.[19]

The AG further stated:

> For high load factor customers, it may not be beneficial to participate. They are using power evenly throughout the time period and thus are less likely to be able to shift their usage pattern to put more usage off-peak. Lower load factor customers, on the other hand, may benefit if they can modify their usage pattern to reduce their peak load or move load to off-peak time periods which is the intent of the program. [20]

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[16] *Id.*

[17] *Id.*, at p. 4.

[18] The various charges are discussed in detail at *Id.*, pp. 3-6.

[19] *Id.*, at p. 10.

[20] *Id.*, at pp. 10-11.

THE EXTENSION OF KENTUCKY POWER'S REAL-TIME PRICING TARIFF

Subsequent to Case No. 2007-00166, a request to extend Kentucky Power's Tariff RTP for "an additional three-year period" was before the Commission in Case No. 2009-00459,[21] Kentucky Power's most recent general rate case. There, the Commission was presented with a Unanimous Settlement Agreement ("Settlement") for approval pursuant to KRS 278.190. The terms of the Settlement indicated that "Kentucky Power and the Intervenors[22] hereto believe that this Unanimous Settlement Agreement provides for fair, just and reasonable rates." [23] Specifically at paragraph 9, the Settlement discussed the Quantity Power ("QP"), RTP, and Commercial and Industrial Power – Time-of-Day ("CIP-TOD") rate design and tariffs:

> (a) The existing RTP Tariff shall be extended for an additional three-year period; further the tariff shall be amended to permit customers to enroll at any point during a year for a minimum twelve consecutive month period. [24]

THE CURRENT PROCEEDING

As previously stated, in its June 1 Application, Kentucky Power initially requests approval to withdraw Tariff RTP. In its June 11 Application, Kentucky Power requests Commission approval to implement Rider RTP *contingent* upon the Commission's granting its request, as set forth in its June 1 Application, to withdraw its existing Tariff

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[21] Case No. 2009-00459 (Ky. PSC June 28, 2010).

[22] The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention; Kentucky Industrial Utility Customers, Inc.; Community Action Kentucky, Inc.; Wal-Mart Stores East, LP and Sam's East, Inc. (collectively Wal-Mart"); Hazard Perry County Community Ministries, Inc.; and Kentucky School Boards Association were granted full intervention in Case No. 2009-00459. Pike County Senior Citizens Programs, Inc. requested and was granted limited intervention.

[23] Case No. 2009-00459, Unanimous Settlement Agreement, filed May 20, 2010, p. 3.

[24] *Id.* at p. 11.

RTP. Kentucky Power's June 1 Application states that "[t]o date, no customer has taken service under Tariff RTP"[25] and that "three large customers recently inquired about moving as much as 200 MW of load onto Tariff RTP. This stands in stark contract [sic] to the first four years of the tariff's existence during which there was no interest among the Company's customers in the tariff."[26] Kentucky Power further explained in its June 1 Application that

> It is the Company's understanding from discussions with these customers that for the most part the customers intend to maintain their current usage patterns. That is, the customers indicated they are not intending to shift significant amounts of their existing load (or any increased load) to off-peak periods.
>
> The Company understands from its discussions that <u>the principal reason for the recent interest in the Company's Tariff RTP is the substantial decrease in rates that can be achieved, even in the absence of shifting load, as a result of the precipitous drop in capacity prices, coupled with expected low locational marginal prices (LMP) for energy, between now and the June 29, 2013 scheduled end of the experimental period</u>.
>
> For the 2012/2013 planning year, the PJM RPM Resource Auction price for capacity, which is used to establish the cost of capacity under Tariff RTP, is $0.5012 per kW-month or $16.46 per MW-Day. This is approximately 3.8% of the Company's average embedded capacity costs for eligible RTP customers of $13.165 per KW-month. It is also less than 15% of capacity rate in the Company's current Tariff RTP of $3.346 kW-Month or $110.00 per MW-Day.
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> <u>This drop in the capacity rate for the year 2012-2013 has made it economically advantageous for customers to take most, if not all, of their load under Tariff RTP without shifting that portion of their load to off-peak periods</u>.[27]

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[25] June 1 Application, paragraph 2, at p. 2.

[26] *Id.* at paragraph 5, p. 3.

[27] *Id.*, paragraphs 6-9, pp. 3-4, Emphasis Added.

KENTUCKY POWER'S POSITION

In its brief, Kentucky Power argues that Tariff RTP mandates that it be used to shift load in response to price signals and that the Commission possesses full authority under the law to grant the relief requested by Kentucky Power. It further argues that even if the Commission were to determine that Tariff RTP is ambiguous, the subject matter of the tariff and the circumstances of its filing and approval make clear that service under Tariff RTP is available only to those customers able and willing to shift load in response to price signals. It claims that 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 threatens its ability to provide reasonable service. It argues that the Commission possesses full authority under the law to grant the relief requested by Kentucky Power and that the filed rate doctrine is inapplicable to these proceedings.

It states:

> Ten customers currently are taking service under Tariff RTP. 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: . . . .[28]

Kentucky Power claims that at the time it agreed to the extension of the availability of Tariff RTP, it knew the value of the capacity price customers taking service under Tariff RTP would pay beginning July 1, 2012. It further claims that two things were unknown at that time: (1) the decline in energy prices since the May, 2010 settlement was not known; and (2) it never anticipated that customers would attempt to

[28] Brief of Kentucky Power Company, filed Nov. 21, 2012, at p. 11.

contravene the express terms of the tariff by taking service under Tariff RTP without shifting load in response to price signals. Kentucky Power further argues that the "'reasonable bargain'"[29]

> 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. Moreover, they have shifted no load, thereby depriving Kentucky Power and its other customers of the benefits associated with time-based pricing.[30]

Kentucky Power contends that 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.[31]

Kentucky Power argues that its request for relief is not a breach of the Settlement in Case No. 2009-00459.[32] It argues that Paragraph 9(a)[33] of the Settlement extended the existing RTP tariff, and that 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

[29] *Id.*, at p. 14.

[30] *Id.*, internal footnotes omitted.

[31] *Id.*, at p. 28.

[32] Case No. 2009-00459, Order approving Unanimous Settlement Agreement (Ky. PSC June 28, 2010).

[33] *Id.* Paragraph 9(a) of the Unanimous Settlement Agreement states: "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."

> period. [sic] 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."[34]

Kentucky Power contends that the Settlement is equally binding on the ten customers represented by KIUC. It argues that 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."[35]

Kentucky Power further claims that even if the relief it requests constituted an abrogation of the Settlement – and it maintains it does not – it contends that the Commission enjoys broad plenary ratemaking authority under KRS 278.030 and KRS 278.040 to ensure that rates are fair, just and reasonable. It cites *Board of Education v. William Dohrman, Inc.*, 620 S.W. 2d 328 (Ky. App. 1981), in support of its argument that the Commission has continuing plenary authority to examine and to modify any rate, including Tariff RTP, without regard to any claimed contrary provisions of a contract.[36] Kentucky Power also cites the Commission's decision in *City of Jeffersonville v. Montgomery County Water District No. 1*,[37] where the Commission cited *William*

[34] Brief of Kentucky Power Company, filed Nov. 21, 2012, at p. 33.

[35] *Id.*

[36] *Id.*, at p. 35.

[37] Case No. 97-377, City of Jeffersonville v. Montgomery County Water District No. 1 (Ky. PSC Apr. 9, 1998).

Dohrman, Inc., supra and explained "[t]hat the parties have contracted for a certain rate ***does not immunize the agreed rate from modification***."[38]

Kentucky Power argues that KIUC's reliance on the *Mobile-Sierra*[39] doctrine and its public interest standard is misplaced. It argues that the *Mobile-Sierra* Doctrine is a product of federal statutory law, not Kentucky law[40] and that the Commission's authority under KRS Chapter 278 is a matter of state, not federal law.

KIUC'S POSITION

KIUC claims that Kentucky Power's request to withdraw its existing Tariff RTP and to establish a fundamentally different proposed Rider RTP would violate the explicit language of the Settlement in Case No. 2009-00459 and the Commission's June 28, 2010 Order approving that Settlement.[41] It argues that the immediate withdrawal of existing Tariff RTP "is directly contrary to the Settlement and the Commission's Order approving that Settlement."[42] It contends that there is no valid reason to justify the modification of the Settlement or the Commission's approval thereof. KIUC acknowledges that the Commission has ongoing authority to modify a utility's rates to ensure that the rates continue to be just and reasonable pursuant to KRS Chapter 278. It argues that "equating the Settlement to a contract, the *Mobile-Sierra* doctrine would allow the Commission to modify the Settlement if the Commission found that the

[38] Brief of Kentucky Power Company, filed November 21, 2012 at p. 36, citing Case No. 97-377, City of Jeffersonville v. Montgomery County Water District No. 1., Emphasis from Kentucky Power's brief.

[39] The *Mobile-Sierra* Doctrine takes its name from two United States Supreme Court cases: *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[40] Brief of Kentucky Power Company, filed Nov. 21, 2012 at p. 37.

[41] This case was Kentucky Power's most recent general rate case.

[42] Brief of Kentucky Industrial Utility Customers, Inc., filed Nov. 26, 2012, at p. 4.

Settlement would seriously harm the public interest."[43] It argues that Kentucky Power's argument that Tariff RTP has not satisfied its "intent" is contrary to the plain language of the tariff. It argues that the risk of future revenue losses was accepted by Kentucky Power in signing the Settlement, and that under no circumstances should the Commission allow Kentucky Power to backbill Tariff RTP customers because doing so would violate the filed-rate doctrine and would constitute retroactive ratemaking.[44] Finally, KIUC contends that customers did not violate the notice requirements of Tariff QP or CIP-TOD in transferring from those tariffs to Tariff RTP.

DISCUSSION

Kentucky Power's Request to Withdraw Tariff RTP

More than four years after issuing an Order in Case No. 2007-00166,[45] in which it approved Kentucky Power's RTP program, and some two years following the Settlement in Case No. 2009-00459 [46] in which the Commission approved a three-year extension of Tariff RTP, Kentucky Power requests approval to withdraw the tariff. This presents the Commission with a situation of a somewhat unique nature and an issue that it is rarely required to adjudicate.

The threshold issue for determination is whether Kentucky Power should be allowed to withdraw its Tariff RTP. In its ruling in Case No. 2009-00459, the Commission found that:

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[43] *Id.*, at p. 5, footnote omitted.

[44] Brief of Kentucky Power Company, filed November 21, 2012 at p. 37.

[45] Case No. 2007-00166 (Ky. PSC Feb. 1, 2008).

[46] Case No. 2009-00459 (Ky. PSC June 28, 2010).

> the Agreement is reasonable and in the public interest. It is the product of arm's-length negotiation among knowledgeable, capable parties and should be approved. Such approval is based solely on the reasonableness of the Agreement in total and does not constitute a precedent on any individual issue or rate-making theory or adjustment.[47]

In addition, Paragraph 16 of that Settlement acknowledged the Commission's continuing jurisdiction and set forth that "[t]his Unanimous Settlement Agreement shall in no way be deemed to divest the Commission of jurisdiction under Chapter 278 of the Kentucky Revised Statutes."[48]

KRS 278.030(1) states that every utility may demand, collect, and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person. KRS 278.040(2) states that the jurisdiction of the Commission shall extend to all utilities in this state, and that the Commission shall have exclusive jurisdiction over the regulation of rates and service of utilities.

Arguably, there could be situations in which the public interest could require the Commission to exercise its jurisdiction under KRS Chapter 278 to allow withdrawal of a tariff prior to its expiration under the terms of that particular tariff. The prevention of extreme financial difficulty or bankruptcy of a utility might be a situation in which the public interest could require the Commission to act pursuant to its authority under KRS Chapter 278 to allow a tariff to be withdrawn prior to its expiration date.

However, that is not the case here. Kentucky Power's RTP program was approved in Case No. 2007-00166.[49] The Settlement extending the "existing RTP Tariff

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[47] *Id.*, June 28, 2010 Order at p. 8, Emphasis Added.

[48] *Id.*, June 28, 2010 Order, Appendix A at paragraph 16, p. 15.

[49] Case No. 2007-00166 (Ky. PSC Feb. 1, 2008).

. . . . for an additional three-year period"[50] in Case No. 2009-00459 was approved by the Commission's June 28, 2010 Order issued in that case.

The Commission found that the terms and conditions of the Settlement were "fair, just and reasonable." As those terms remain fair, just and reasonable, the Commission finds that Kentucky Power's request to withdraw Tariff RTP should be denied. Further, because Kentucky Power's June 11 Application stated that if its application to withdraw Tariff RTP was denied, it would withdraw its request for approval of its proposed Rider RTP,[51] the Commission finds that Kentucky Power's request for approval of its proposed Rider RTP should be denied as moot.

<u>The Language of Kentucky Power's Tariff RTP</u>

Finding that the withdrawal of Tariff RTP should not be allowed, our discussion next turns to the language of the tariff. Kentucky Power argues that shifting load in response to price signals is one of the express terms of Tariff RTP, and hence a criterion for taking service thereunder.[52] Conversely, KIUC argues that the plain language of Tariff RTP does not require customers to alter their regular production schedules in response to market prices, but that the plain language does allow customers to place a designated portion of their load on PJM market capacity and energy pricing.[53] It argues:

> Kentucky Power relies heavily upon the following sentence within existing Tariff RTP in making its argument:

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[50] Case No. 2009-00459, paragraph 9(a) of the Unanimous Settlement Agreement, filed May 20, 2010, p. 11.

[51] June 11 Application, paragraph 13 at p. 5.

[52] Brief of Kentucky Power Company, filed Nov. 21, 2012, at p. 18.

[53] Brief of Kentucky Industrial Utility Customers, Inc., filed Nov. 26, 2012, at p. 5.

> *'The RTP Tariff will offer customer* [sic] *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.'*

> But nothing in this sentence expressly mandates that customers taking service under Tariff RTP must alter their regular production schedules by moving more production to off-peak hours. It only gives customers the *opportunity* to do so. Further, Kentucky Power conveniently ignores the next sentence of Tariff RTP, which provides for a wholesale real-time market-pricing option:

> *'The experimental pilot will also offer the customer the ability to experiment in the wholesale electricity market by designating a portion of the customer's load subject to standard tariff rates with the remainder of the load subject to real-time prices.'* [54]

The Commission notes that in its responses to comments of the Attorney General concerning its proposed RTP program in Case No. 2007-00166, Kentucky Power stated:

> As noted in its Response to Staff Data Request No. 2(d), First Set, the Company will publicize the program to all eligible customers. Further, Kentucky Power customer representatives will meet and work with any interested eligible customer to explain the program and to offer assistance to customers in evaluating any modifications required for participation. Thus, detailed information will be provided on a customer-specific basis. <u>Because the load and energy requirements of large industrial and commercial customers tend to be unique to each customer, a generalized presentation, as might work for a more homogeneous class such as residential customers, will not be particularly useful to eligible industrial and commercial</u>

[54] Brief of Kentucky Industrial Utility Customers, Inc., filed Nov. 26, 2012, at p. 6, Emphasis theirs.

customers. In any event, the determination of whether to participate can only be made by the customer.[55]

The fact that Kentucky Power articulated the fact that it would work with its eligible customers to explain any "modifications required for participation" is a clear indication that shifting load was a threshold requirement for any eligible customers who chose to participate in the program.

The Commission takes notice that the program approved in Case No. 2007-00166 was the "pilot RTP program proposed by Kentucky Power." [56] That program was a market-based, hourly RTP program through which large commercial and industrial customers would have the opportunity to manage their electric costs "by shifting load periods."[57] The Order in Case No. 2007-00166 approving the pilot RTP program also directed Kentucky Power to file revised tariff sheets "consistent with this Order stating the date of issue and that they were issued by the authority of this Order."[58] As a party to Case No. 2007-00166, KIUC was on notice that the RTP program approved by the Commission was one that offered Kentucky Power's large commercial and industrial customers the opportunity to manage their electric costs "by shifting load periods."

The language of Tariff RTP states that it

> 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

[55] Case No. 2007-00166, Responses of Kentucky Power Company to Comments of Attorney General and Request for an Informal Conference, filed July 23, 2007, at p. 2, Emphasis Added.

[56] Case No. 2007-00166, February 1, 2008 Order, at [unnumbered] p. 14, Emphasis Added.

[57] *Id.*, February 1, 2008 Order, at p. 3, Emphasis Added.

[58] *Id.*

> designating a portion of the customer's load subject to standard tariff rates with the remainder of the load subject to real-time prices. The designated portion of the customer's load is billed under the Company's standard Q.P. or C.I.P.-T.O.D. tariff. The remainder of the customer's capacity and energy load is billed at prices established in the PJM Interconnection, L.L.C. (PJM) RTO market.[59]

The entire purpose of the experimental RTP program was to offer customers the opportunity – or ability – to manage their costs by shifting load from higher cost to lower cost pricing periods or by adding new load during lower price periods. In addition, the experimental RTP program would *also* offer the customer the ability to experiment in the wholesale electricity market by designating a portion of the customer's load subject to standard tariff rates with the remaining load subject to real-time prices. Even if the plain language in Kentucky Power's Tariff RTP contained grammatical errors, it is clear that the "pilot RTP program proposed by Kentucky Power," approved by the Commission in Case No. 2007-00166, and extended for an additional three-year period in Case No. 2009-00459, was one that authorized a limited number of Kentucky Power's large commercial and industrial customers to manage their electric costs under the pilot Tariff "by shifting load periods."

As such, we find that the language of Tariff RTP requires the shifting of load from higher-cost to lower-cost pricing periods or the addition of new load during lower price periods in order to qualify to receive service under the tariff. Even if the language of Tariff RTP did not clearly articulate that to qualify to receive service under the tariff a customer is required to shift load from higher-cost to lower-cost pricing periods or to add

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[59] Tariff R.T.P. (Experimental Real-Time Pricing Tariff), 1st Revised Sheet No. 30-1, Canceling Original Sheet No. 30-1, effective July 29, 2011, Emphasis Added. This tariff was in effect at the time of Kentucky Power's filing of its June 1 Application. (This tariff sheet was cancelled July 1, 2012 and replaced with new Tariff sheet which reflected updated PJM rates).

new load during lower price periods, the evidence of record in the prior proceedings that dealt with this issue makes such a requirement clear. The record in Case No. 2006-00045, in which the Commission directed Kentucky Power and other electric utilities to develop voluntary pilot real-time pricing programs for large commercial and industrial customers; the record in Case No. 2007-00166, in which Kentucky Power's pilot RTP program was approved; and the record in Case No. 2009-00459, in which the Commission extended Kentucky Power's Tariff RTP for an additional three years – clearly indicate that shifting load from higher-cost to lower-cost pricing periods or adding new load during lower price periods is required in order to qualify to receive service under Tariff RTP.

As there is no evidence that any of the ten customers currently taking service under Tariff RTP have shifted load from higher-cost to lower-cost pricing periods or have added new load during lower-price periods, we find that none of those ten customers qualify to receive service under Tariff RTP. Further, none of the ten customers currently receiving service under Kentucky Power's Tariff RTP gave Kentucky Power "at least 12 months' written notice" of its intent to terminate either its CIP-TOD contract, or its QP contract. As the express terms of both Tariff CIP-TOD[60] and Tariff QP[61] state that the Tariff shall remain in effect "until either party shall give at least 12 months' written notice to the other of the intention to terminate the contract,"[62] and as none of the ten customers currently taking service under Tariff RTP gave

[60] Tariff C.I.P.-T.O.D. (Commercial and Industrial Power – Time-Of-Day) Original Sheet No. 11-3, effective date June 29, 2010.

[61] Tariff Q.P. (Quantity Power) Original Sheet No. 10-2, effective date June 29, 2010.

[62] *Id.*, and also FN 60.

Kentucky Power adequate notice to terminate either its CIP-TOD or QP contract, the Commission also finds that (1) as of January 1, 2013, those ten customers should be removed from Tariff RTP and (2) Kentucky Power should provide service to each of the ten customers under the applicable standard tariff – either Tariff CIP-TOD or QP – under which the customer was served immediately prior to taking service under Tariff RTP. As the language of Tariff RTP also states that "[c]ustomers must enroll for a 12-month period and must stay with the service for an entire year,"[63] with the tariff offered only through June, 2013, we find that no other customers could take service under Tariff RTP as the tariff will expire in less than one year.

BACK-BILLING

Kentucky Power stated that it "plans to review the ten customers' operations under Tariff RTP 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."[64] It claims that its proposal to back-bill using Tariff CIP-TOD or Tariff QP those customers that are receiving service under Tariff RTP without shifting load,[65] fully comports with the filed-rate doctrine. Kentucky Power argues that its 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

[63] Kentucky Power's Tariff R.T.P. (Experimental Real-Time Pricing Tariff) Original Sheet No. 30-3, stamped effective date June 29, 2010.

[64] Kentucky Power Company's Response to Commission Staff's Second Set of Data Requests, Response to Item No, 6, page 2, filed Aug. 10, 2012.

[65] Brief of Kentucky Power Company, filed Nov. 21, 2012, at p. 44.

> duly filed CIP-TOD or the duly filed QP) not only comports with KRS 278.160(2), but is required by it.[66]

To do otherwise, it argues, it would be charging, demanding, collecting and receiving a greater or less compensation for service rendered than that prescribed in its filed schedules.

KIUC argues that to allow Kentucky Power to back-bill the customers currently taking service under the Tariff RTP would constitute retroactive ratemaking and be a violation of the filed-rate doctrine. It argues that KRS 278.160 forbids a utility from charging any rate other than the rate in effect at the time that service was rendered.[67] It contends that the language of KRS 278.270 allows the Commission to set just and reasonable rates on a prospective basis only.

KRS 278.270 states:

> Whenever the commission, upon its own motion or upon complaint as provided in KRS 278.260, and after a hearing had upon reasonable notice, finds that any rate is unjust, unreasonable, in sufficient, unjustly discriminatory or otherwise in violation of any of the provisions of this chapter, the commission shall by order prescribe a just and reasonable rate to be followed in the future.

KRS 278.160 (2) states that

> 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.

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[66] *Id.*

[67] Brief of Kentucky Industrial Utility Customers, Inc., filed Nov. 26, 2012, at p. 19.

The issue of Kentucky Power back-billing the ten customers currently taking service under Tariff RTP involves an analysis of the filed-rate doctrine. The filed-rate doctrine provides that "when the legislature has established a comprehensive ratemaking scheme, the filed rate defines the legal relationship between the regulated utility and its customer with respect to the rate that the customer is obligated to pay and that the utility is authorized to collect."[68] Kentucky's statutory scheme for making utility rates requires that "each utility shall file with the commission ... schedules showing all rates and conditions for service established by it and collected or enforced...." KRS 278.160(1). Further, "[n]o 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...." KRS 278.160(2). Once the Commission establishes a rate by order, that order "shall continue in force until the expiration of the time, if any, named by the commission in the order, or until revoked or modified by the commission, unless the order is suspended, or vacated in whole or part, by order or decree of a court of competent jurisdiction" KRS 278.390.

Limited exceptions to the filed rate doctrine have been recognized by federal courts. The United States Court Appeals for the District of Columbia Circuit has recognized that,

> Predictability is an underlying purpose of both the filed rate doctrine and the rule against retroactive ratemaking. These doctrines are designed to allow "purchasers of gas to know the consequences of purchasing decisions they make." Accordingly, when determining whether a FERC order violates either the filed rate doctrine or the rule against retroactive ratemaking, this court inquires whether, as a

[68] *Cincinnati Bell V Kentucky Public Service Comm'n*, 223 S.W.3d 829, 837 (Ky. App. 2007).

> practical matter, the purchasers of the gas – such as petitioners here – had sufficient notice that the approved rate was subject to change.[69]

While exceptions present themselves on occasion, we believe such an exception does not exist in this instance. While the ten customers currently receiving service under Kentucky Power's Tariff RTP failed to shift load and hence failed to comport with the terms of the tariff, they were nonetheless placed on that tariff by Kentucky Power. We recognize that it is always the utility that places a customer on a given tariff; however, unlike the situation now before us, most tariffs do not require a change in customers' consumption patterns. Given that being placed on Tariff RTP carries such a requirement, it was Kentucky Power's responsibility to determine if those customers met that requirement. As Kentucky Power did not meet that responsibility in this instance, the Commission finds that the ten customers were properly billed under the terms of Tariff RTP. The Commission further finds, given these circumstances, that Kentucky Power should not be permitted to back-bill the ten customers for amounts they would have been billed under their respective Tariff CIP-TOD or Tariff QP for the period of time they received service under Tariff RTP.

Based on the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. Kentucky Power's June 1 application to withdraw its experimental real-time pricing tariff should be denied.

2. Kentucky Power's request in its June 1 application that the Commission prohibit any customers from taking service under the existing Tariff RTP after June 27,

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[69] *Public Utilities Commission of the State of California v. FERC,* 988 F.2d 154, 164 (D.C.Cir.1993), Internal Citations Omitted.

2012, the latest date notification could be received for bills to be issued during Cycle 1 of the July, 2012 billing cycle; or the effective date of the Company's to-be-filed real-time pricing tariff if the Commission does not permit Tariff RTP to be withdrawn should be denied as moot.

3. None of the ten customers currently taking service under Kentucky Power's Tariff RTP qualify for service under Tariff RTP, as none of the ten customers shifted load from higher-cost to lower-cost pricing periods or added new load during lower price periods.

4. As none of the ten customers currently taking service under Tariff RTP qualify for service thereunder, for service rendered on or after January 1, 2013, Kentucky Power should remove those customers from Tariff RTP and provide service to those ten customers under the applicable standard tariff -- either Tariff CIP-TOD or Tariff QP – under which the customer was served immediately prior to taking service under Tariff RTP.

5. As customers must remain with Tariff RTP service for an entire year, and as the time remaining under the terms of the tariff is less than a year, no other customer of Kentucky Power can take service under the Tariff RTP.

6. Kentucky Power's June 11 application for approval of its Experimental Real Time Pricing Rider, Rider RTP, should be denied as moot.

7. KIUC's motion to dismiss should be denied.

IT IS THEREFORE ORDERED that:

1. Kentucky Power's June 1 application to withdraw its experimental Tariff RTP is denied.

2. Kentucky Power's request in its June 1 application that the Commission prohibit any customers from taking service under the existing Tariff RTP after June 27, 2012, the latest date notification could be received for bills to be issued during Cycle 1 of the July, 2012 billing cycle; or the effective date of the Company's to- be-filed real-time pricing tariff if the Commission does not permit Tariff RTP to be withdrawn is denied as moot.

3. No customer of Kentucky Power shall take service under the Tariff RTP, as less than a year remains for the tariff's duration.

4. As none of the ten customers currently taking service under Tariff RTP qualify for service thereunder, for service rendered on and after January 1, 2013, Kentucky Power shall remove those customers from Tariff RTP and shall provide service to those ten customers under the applicable standard tariff – either Tariff CIP-TOD or Tariff QP – under which the customer was served immediately prior to taking service under Tariff RTP

5. Kentucky Power's June 11 application for approval of its Experimental Real Time Pricing Rider, Rider RTP, is denied as moot.

6. KIUC's motion to dismiss is denied.

By the Commission

Vice Chairman James W. Gardner
concurring in part; dissenting in part.

ENTERED

DEC 20 2012

KENTUCKY PUBLIC
SERVICE COMMISSION

ATTEST:

Executive Director

SEPARATE OPINION OF
JAMES W. GARDNER
CONCURRING IN PART; DISSENTING IN PART

I agree with the majority opinion of my colleagues in holding that the Real-Time Pricing ("RTP") tariff ("Tariff RTP") required the ability to shift load. Therefore none of the applicants are eligible to be billed under the Tariff RTP, but instead must be billed under the CIP-TOD or QP standard tariff, whichever is applicable.

I differ with my colleagues, however, with their further conclusion that the customers may not be back-billed for the six months under the proper tariff. Because the tariff is clear (i.e., load shifting is required), then it was a mistake by Kentucky Power to bill under the Tariff RTP. It is not retroactive ratemaking. It is merely back-billing due to a mistake. The Kentucky Court of Appeals relied on *Memphis Light, Gas and Water Division v. Auburndale School System*, 705 S.W.2d 652 (Tenn. 1986), when it disallowed an equitable estoppel argument raised by a customer and allowed the utility to collect the amount properly owed.

> "...it is a contravention of public policy to estop the utility from collecting the full amount due for utilities consumed even where the customer has been negligently under-billed." Id. at 653.

Boone County Sand and Gravel Company, Inc. vs. Owen County Rural Electric Cooperative Corporation, 779 S.W.2d 224, 225, Ky. App. 1989.

The case at bar demands the same relief because the facts are more supportive. In *Boone County, supra,* the customer relied on repeated assurances by the utility and was actually harmed, while in the case at hand the customers saw a mistake and aggressively sought to take advantage of it.

Additionally, once we have determined that the Tariff RTP requires load shifting and thus the customers are not eligible, the addendum to the contract is inapplicable. Once the addendum is found to be inapplicable, then the original contract governs and the customer owes the amount which the contract requires, i.e. CIP-TOD or QP.

For these reasons I believe that Kentucky Power may bill and collect under the original tariffs. To do otherwise would allow the customers to unjustly take advantage of Kentucky Power's mistake.

James W. Gardner

James W. Gardner, Vice Chairman
Kentucky Public Service Commission

ENTERED
DEC 20 2012
KENTUCKY PUBLIC SERVICE COMMISSION

ATTEST:

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