

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF BIG RIVERS)	
ELECTRIC CORPORATION AND KENERGY)	CASE NO.
CORP. TO IMPLEMENT A NEW STANDBY)	2021-00289
SERVICE TARIFF)	

ORDER

On March 23, 2022, Kimberly-Clark Corporation (Kimberly-Clark) filed a petition, pursuant to KRS 278.400, requesting rehearing of the Commission’s March 3, 2022 final Order that, among other things, approved a Large Industrial Customer Standby Service (LICSS) tariff to be offered on a pilot basis to large industrial customers on the Big Rivers Electric Corporation (BREC) system. On March 29, 2022, BREC filed a response to Kimberly-Clark’s rehearing petition. This matter now stands submitted for a decision.

KIMBERLY-CLARK’S PETITION FOR REHEARING

Alleged Shifting of the Burden of Proof from the Utility to the Customer

Kimberly-Clark alleged that the Commission violated KRS 278.190(3)¹ by finding that BREC did not provide enough detailed evidence to determine the most appropriate rates for LICSS Maintenance Power and Backup Power Service, and nonetheless approving the LICSS rate in its entirety.² Kimberly-Clark argued that the Commission based its decision on the rationale that BREC’s proposal was more reasonable than

¹ KRS 278.300(3) states in relevant part that “[a]t any hearing involving the rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility . . .”

² Petition for Rehearing at 2.

Kimberly-Clark's alternative proposals.³ Kimberly-Clark argued that this is an improper standard and shifts the burden of proof to the customer to provide evidence to support an appropriate rate.⁴

Kimberly-Clark argued that the Commission identified BREC's proposed \$3.80/kilowatt (kW) capacity credit as not supported by sufficient evidence and that the Commission identified several problems with BREC's proposed LICSS tariff.⁵ Kimberly-Clark argued that if a utility has not provided sufficient evidence to support its proposal, that the Commission should adjust the utility's proposal, or reject it entirely.⁶ Additionally, Kimberly-Clark argued that if BREC has not provided sufficient evidence to determine the most appropriate rates, then KRS 278.190 requires the Commission to not approve those rates.⁷

To remedy this alleged error Kimberly-Clark requests that the Commission reject BREC's LICSS tariff on the basis that BREC did not meet its burden of proof under KRS 278.190, and require BREC to refile its proposal to determine an appropriate rate.

Alleged Approval of More Onerous Terms than for LIC Service

Kimberly-Clark alleged that it is discriminatory for BREC to charge LICSS customers the same demand charge for standby service billed on a fixed basis as it charges Large Industrial Customers (LIC) for firm, variably billed service.⁸ Kimberly-Clark

³ *Id.* at 2–3.

⁴ *Id.* at 4.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Id.* at 5.

stated that this topic is not discussed in the Commission's Order, and argued that the LICSS tariff charges standby customers the standard LIC demand charge or \$10.715/kW-Month, even though the LICSS tariff contains a mandatory fixed monthly demand charge for a service that is effectively non-firm; while LIC is billed on a 100 percent monthly variable basis and is firm.⁹ Kimberly-Clark argued this is a discriminatory pricing structure, and that the LICSS customer is paying the LIC demand charge while being subjected to lower quality service and more onerous billing terms.¹⁰

Kimberly-Clark further argued that the \$3.80/kW capacity credit cannot be the justification for applying the LIC demand charge to non-firm, fixed billed service because BREC has indicated that the capacity credit is intended to pay the LICSS customer for the value of the additional capacity provided by a member's generation resource brings to the other members.¹¹

To remedy this alleged error Kimberly-Clark requests that the Commission consider its argument that it is not appropriate to charge LICSS customers \$10.715/kW demand charge for non-firm service billed on a fixed basis, while LIC is billed the same \$10.715/kW demand charge on a 100 percent monthly variable basis and is firm.

Alleged Requirement to Pay for 34 MW of Demand Every Month Regardless of Actual Usage

Kimberly-Clark alleges that the Commission's Order does not address Kimberly-Clark's arguments that BREC's LICSS tariff will require it to pay for 34 megawatts (MW)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

of demand every month, regardless of usage. Kimberly-Clark stated that its total load at its Owensboro mill is typically in the 31 through 33 MW range, and that roughly 14 MW of this is self-supplied, and about 18 MW is purchased from BREC.¹² Kimberly-Clark argued that under the LICSS tariff rate, it will be responsible for paying its contractual 20 MW minimum billing demand plus a fixed billing demand of 14 MW per the LICSS rate.¹³ Kimberly-Clark argued that the Commission's Order requires Kimberly-Clark to pay for a total fixed demand of 34 MW every month (20 MW contractual minimum demand, plus 14 MW LICSS fixed demand) despite the fact that actual usage at the mill is generally below 34 MW.¹⁴ Kimberly-Clark acknowledged that it agreed to a 20 MW minimum billing demand long before it installed its cogeneration unit, but Kimberly-Clark argued that the 14 MW fixed bill for self-supply capacity demand is imposed through the LICSS tariff.¹⁵ Kimberly-Clark argued that the Commission's Order requires Kimberly-Clark to pay for 34 MW of fixed demand without any relationship to actual future usage and it is therefore unreasonable and discriminatory.¹⁶

To remedy this error Kimberly-Clark requests that the Commission grant rehearing to correct this "flaw" in BREC's LICSS tariff.¹⁷

Alleged Misstatement of Facts

¹² *Id.* at 6.

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.*

Kimberly-Clark alleged that the Commission's rejection of its proposal to design a standby rate based on the existing, Commission-approved Qualified Facilities Service (QFS) rate for Maintenance and Backup Power service was based on a misstatement of facts. Kimberly-Clark argued that the Commission misstated the facts in its Order when the Commission stated that: "The nature of supplemental generation of the type Kimberly-Clark uses, and of a qualifying facility are materially different."¹⁸ Kimberly-Clark argued that its cogeneration unit is a Federal Energy Regulatory Commission (FERC) approved qualified facility.¹⁹ Further Kimberly-Clark argued that BREC provides Maintenance and Backup Power Service through the QFS tariff and this is the exact same service that Kimberly-Clark seeks, but that BREC will provide through the LICSS tariff at a much higher cost.

To remedy this error Kimberly-Clark requests that the Commission reconsider Kimberly-Clark's proposal that a LICSS tariff be based on the existing Commission-approved QFS standby rate.

BREC'S RESPONSE

The Commission did not Improperly Shift the Burden of Proof

BREC argued that rehearing should be denied on this issue because the Commission weighed the evidence and found BREC's proposal to be more appropriate than Kimberly-Clark's, and this was not an improper shifting of the burden of proof.²⁰ BREC argued that the Commission weighed the evidence and found that the proposed

¹⁸ *Id.*, quoting final Order at 21.

¹⁹ *Id.*

²⁰ BREC's Response to Petition for Rehearing at 1–2.

Supplemental Power Service rates were reasonable, and that BREC's proposed rates for Maintenance and Backup Power Service rates were reasonable on an interim basis, are essentially findings that BREC met its burden of proof to that extent.²¹ In response to Kimberly-Clark's argument that if a utility has not provided sufficient evidence to support its proposal that the Commission should reject a utility's proposal entirely or adjust the proposal, BREC argued that by weighing the evidence and finding that only adopting the proposed rates on an interim basis was fair, just and reasonable, the Commission did what Kimberly-Clark requested and adjusted BREC's proposal.²²

Further, BREC responded that Kimberly-Clark has not shown the Order contained a material error or omission or was unreasonable or unlawful, and rehearing should be denied on this issue.

The LICSS Tariff Rates are not More Onerous than the LIC Tariff Rates

BREC pointed out that this issue was first raised by Kimberly-Clark in its post-hearing brief.²³ BREC responded that this argument is not supported by BREC's tariffs or any evidence in this proceeding. BREC argued that both LIC customers and LICSS customers are able to demand that BREC serve the customer's full load, up to the customer's maximum demand, at any time, subject to outages.²⁴ Thus, BREC argued both tariffs provide for the same firm service; the standby service set forth in the LICSS tariff is not a lower quality service or a non-firm service as Kimberly-Clark asserts.²⁵

²¹ *Id.* at 2.

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ *Id.*

Further, BREC responded that Kimberly-Clark's argument on this issue is simply a rehashing of the arguments Kimberly-Clark made in its briefs and, as such, the Commission should deny rehearing on this issue.

The Commission's Order does not Require Kimberly-Clark to Pay for 34 MW of Demand Every Month

BREC responded that Kimberly-Clark's minimum demand obligation is not a requirement imposed by the LICSS tariff, rather it is imposed by Kimberly-Clark's retail electric service contract.²⁶ BREC argued that Kimberly-Clark offered no justification for concluding that the minimum demand obligation in its contract does not operate the way BREC explained in its response brief. BREC responded that the Commission should deny rehearing on this issue for these reasons.²⁷

The Commission Properly Rejected Kimberly-Clark's Proposal to Base Standby Service Rates on BREC's QFS Tariff

BREC argued that this allegation is a rehashing of the arguments raised during the case, and that there was more than sufficient evidence in the record to support the conclusion that Kimberly-Clark's self-generation is materially different from a QFS customer.²⁸

DISCUSSION AND FINDINGS

Legal Standard

²⁶ *Id.* at 7.

²⁷ *Id.*

²⁸ *Id.* at 8.

KRS 278.400, which establishes the standard of review for motions for rehearing, limits rehearing to new evidence not readily discoverable at the time of the original hearings, to correct any material errors or omissions, or to correct findings that are unreasonable or unlawful. A Commission Order is deemed unreasonable only when “the evidence presented leaves no room for difference of opinion among reasonable minds.”²⁹ An Order can only be unlawful if it violates a state or federal statute or constitutional provision.³⁰

By limiting rehearing to correct material errors or omissions, and findings that are unreasonable or unlawful, or to weigh new evidence not readily discoverable at the time of the original hearings, KRS 278.400 is intended to provide closure to Commission proceedings. Rehearing does not present parties with the opportunity to relitigate a matter fully addressed in the original Order.

Alleged Shifting of the Burden of Proof from the Utility to the Customer

Based upon the petition and the response, and being otherwise sufficiently advised, the Commission finds that Kimberly-Clark provided no evidence to support its allegation that the Commission shifted the burden of proof in this case from the utility to the customer, and thus rehearing is denied for this issue.

The Commission weighed the evidence in this case and provided an analysis of BREC’s proposal and Kimberly-Clark’s alternative proposals. March 3, 2022 final Order contained a detailed discussion concerning the various proposals. The Commission

²⁹ *Energy Regulatory Comm’n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

³⁰ *Public Service Comm’n v. Conway*, 324 S.W.3d 373, 377 (Ky. 2010); *Public Service Comm’n v. Jackson County Rural Elec. Coop. Corp.*, 50 S.W.3d 764, 766 (Ky. App. 2000); *National Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 509 (Ky. App. 1990).

found that there was not enough detailed evidence in the record to precisely determine the most appropriate rates for LICSS Maintenance Power Service and Backup Power Service;³¹ that maintaining the status quo of Kimberly-Clark paying the LIC tariff rate was not fair, just or reasonable;³² and that in the absence of a better alternative, BREC's proposed LICSS rates for Maintenance Power Service and Backup Power Service was a fair, just and reasonable initial arrangement, until a better alternative is supported and developed.³³

The Commission never stated that it was shifting the burden of proof to Kimberly-Clark, nor did the Commission's findings have that effect. The Commission weighed the evidence and found that BREC had met its burden of proof to the extent that the proposed LICSS rates for Maintenance and Backup Power Services were found to be a fair, just and reasonable initial arrangement for providing these services until more detailed information could be obtained to precisely determine the most appropriate rate.

Kimberly-Clark appears to have confused the Commission's finding that not enough detailed information existed in the record to precisely determine the most appropriate rates for Maintenance and Backup Power Service with a finding that the proposed rates were not fair, just or reasonable. The Commission never made such a finding. The Commission's finding that insufficient information existed to precisely determine the *most appropriate* rates is not the same as the Commission finding that the proposed rates were *not* fair, just or reasonable. The Commission found the proposed

³¹ Order (Ky. PSC Mar. 3, 2022) at 16.

³² *Id.*

³³ *Id.*

rates to be a fair, just and reasonable initial arrangement, but the Commission also articulated aspects of the LICSS tariff that the Commission found to be inappropriate on an ongoing, long-term basis, and found that BREC should file an updated LICSS tariff by September 1, 2023.³⁴

The March 3, 2022 final Order contains the Commission's discussion of different aspects of the LICSS tariff and of Kimberly Clark's proposed alternatives. The Commission included this discussion in the final Order to point out to BREC what the Commission found both flawed and meritorious about the LICSS tariff and the alternatives provided by Kimberly-Clark. The Commission communicated to BREC its expectations for an updated LICSS tariff filing by discussing various aspects of BREC's initial LICSS filing and the alternatives proposed by Kimberly-Clark.

The final Order stated that the Commission's approval of the LICSS tariff was an "interim step, and for lack of a better alternative."³⁵ This statement is not the equivalent of the Commission finding BREC's proposed LICSS tariff rates to be fair, just and reasonable *because* Kimberly-Clark did not supply a better alternative. The Commission did not make such a finding. The Commission made a finding that although there was insufficient evidence in the record to support the contention that BREC's proposed rates for Maintenance Power Service and Backup Power Service were the most appropriate rates, the proposed rates were nonetheless fair, just and reasonable as an interim measure. In other words, the Commission modified BREC's proposal to the extent necessary to permit the Commission to approve a tariff that is fair, just and reasonable.

³⁴ *Id.* at 16 and 17.

³⁵ *Id.* at 25

Kimberly-Clark has failed to demonstrate that the Commission made a material error or an unreasonable or unlawful finding in its March 3, 2022 final Order. For the above stated reasons Kimberly-Clark's petition for rehearing on this issue is denied.

Alleged Approval of More Onerous Terms Than for LIC Service

Based upon the petition and the response, and being otherwise sufficiently advised, the Commission finds that Kimberly-Clark failed to establish that the Commission's Order approved terms more onerous for Backup and Maintenance service than for LIC service. For the reasons set forth below the Commission finds that rehearing on this issue is denied.

Kimberly-Clark's argument that the LICSS tariff produces rates that are "more onerous" than the rates contained in BREC's Commission-approved LIC tariff is not supported by the evidence in this case. Service under the LICSS tariff is firm service, not non-firm service as Kimberly-Clark claimed. BREC is obligated, under the LICSS tariff, to provide Kimberly-Clark with service equal to the full demand level Kimberly-Clark had prior to installing self-generation.³⁶ BREC must be prepared to supply this demand at any moment with or without notice.³⁷ Because of this, the service offered under the LICSS tariff is firm service and is not lower quality service than that offered under the LIC tariff as Kimberly-Clark claimed. The Commission's Order discussed this,³⁸ albeit without using the terms "firm" or "non-firm."

³⁶ See BREC Standby Service Tariff Filing, Second Revised Sheet No. 69.01 (filed June 24, 2021).

³⁷ *Id.* Under the LICSS tariff, there are no limits on a customer's ability to take power up to the maximum demand in its contract in the event of an outage or a reduction in the customer's self-generation.

³⁸ Order (Ky. PSC Mar. 3, 2022) at 17–20.

The billing terms of the LICSS tariff are not more onerous than the billing terms of the LIC tariff. All of the customers taking service under the LIC tariff have retail electric service contracts in place that set out minimum demand and maximum demand provisions.³⁹ BREC is not required to provide power above the maximum demand set in the service contract. This is so that BREC can ensure that it has the infrastructure and capacity in place to meet that demand.⁴⁰ LIC tariff customers and LICSS customers are billed their actual demand usage, except when that usage falls below the minimum, in which case they are billed for the minimum demand as set in the service contract, except that the LICSS customer would then receive the \$3.80/kW credit for its self-supply capacity.⁴¹

In its response brief BREC provided examples of how Kimberly-Clark would be billed for demand under the LICSS tariff.⁴² BREC stated that Kimberly-Clark's billing demand in a typical month is around 32 MW, and under the proposed LICSS tariff Kimberly-Clark would be billed the LIC demand charge for Maintenance and Backup Service for its 14 MW of self-supply capacity, plus it would be billed the LIC demand charge for its Supplemental demand, which is the difference between its billing demand (32 MW in this example) and its self-supply capacity of 14 MW. In other words, Kimberly-Clark would be billed for a total of 32 MW⁴³ times the LIC demand charge. A LIC customer

³⁹ See Response Brief of Big Rivers Electric Corporation (BREC Response Brief) (filed Feb. 22, 2022) at 6–7.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 7–9.

⁴² *Id.*

⁴³ 14 MW of self-supply capacity + 18 MW of supplemental demand = 32 MW.

with 32 MW of billing demand in a month would also be billed for 32 MW times the LIC demand charge. However, unlike Kimberly-Clark under the LICSS tariff, the LIC customer does not receive a \$3.80/kW credit for self-supply capacity. Thus the discounted demand charge for LICSS customers will be less than the demand charge for a similarly- sized LIC customer.

Kimberly-Clark failed to provide evidence that the LICSS tariff produces rates that are more onerous than the Commission-approved LIC tariff rates. Therefore Kimberly-Clark failed to establish that the Commission made a material error or an unreasonable or unlawful finding in regard to this issue, and its request for rehearing is denied.

Alleged Requirement for Kimberly-Clark to Pay for 34 MW of Demand Every Month Regardless of Actual Usage

Based upon the petition and the response, and being otherwise sufficiently advised, the Commission finds that Kimberly-Clark has failed to establish that under the LICSS tariff it must pay for 34 MW of demand every month regardless of actual usage. For the reasons set forth below, the Commission finds that rehearing is denied for this issue.

Kimberly-Clark's minimum demand obligation is contained in its retail service agreement with BREC, not the LICSS tariff. The terms of the retail service agreement are in the hands of the parties and can be negotiated outside of this proceeding. Kimberly-Clark's petition provided no evidence to suggest that the LICSS tariff demand billing will operate contrary to BREC's explanation in its response brief. The explanation provided by BREC contained the example described above and clearly demonstrated that

Kimberly-Clark will not be required to pay for 34 MW of demand every month regardless of actual usage.

According to BREC's response brief, Kimberly Clark's contractual minimum demand is 20 MW, and Kimberly-Clark would only be charged a minimum demand charge if the sum of the demand billed for Maintenance/Backup Power and the demand billed for Supplemental Power is less than 20 MW.⁴⁴ BREC provided the following additional examples of LICSS tariff demand charge billing and how the minimum demand charge is applied. If Kimberly-Clark is billed for 14 MW of Maintenance/Backup Power demand, and its billing demand for Supplemental Power supplied by BREC is 4 MW, Kimberly-Clark would be 2 MW short of its minimum demand obligation and would be billed a minimum demand charge for that 2 MW.⁴⁵

If Kimberly-Clark is billed for 14 MW of Maintenance/Backup Power demand, and its billing demand for Supplemental Power supplied by BREC is 6 MW, Kimberly-Clark will have met its minimum demand obligation and would not be subject to a minimum demand charge.⁴⁶

Kimberly-Clark failed to establish that it must pay for 34 MW of demand every month regardless of actual usage, and therefore failed to establish that the Commission made a material error or an unreasonable or unlawful finding in regard to this issue, and its request for rehearing is denied.

Alleged Misstatement of Facts

⁴⁴ BREC Response Brief at 8.

⁴⁵ *Id.*

⁴⁶ *Id.*

Based upon the petition and the response, and being otherwise sufficiently advised, the Commission finds that Kimberly-Clark has failed to establish that the Commission rejected Kimberly-Clark's proposal to design a standby service rate based on a misstatement of facts.

The misstatement of facts to which Kimberly-Clark referred is found on page 21 of the Commission's March 3, 2022 final Order.

The Commission does not agree with Kimberly-Clark's recommendation to use BREC's QFS tariff rate structure. The nature of supplemental generation, of the type Kimberly-Clark uses, and of a qualifying facility are materially different. As such, there is no merit in applying the rates or methodology from the QFS tariff to the type of tariff before the Commission.

The Commission stated that Kimberly-Clark's generation was not a qualified facility when in actuality, it has been approved as such by FERC. Although Kimberly-Clark's self-generation is a qualified facility,⁴⁷ Kimberly Clark is not selling power to BREC at this time.⁴⁸ Therefore, Kimberly-Clark's self-generation is not functioning as a qualified facility as that term is used in the QFS tariff. It was this difference between a qualified facility under the QFS tariff and Kimberly-Clark's self-supply generation that the Commission found to be material in this instance.

Regardless of the Commission's characterization of Kimberly-Clark's generation, the fact remains that Kimberly-Clark does not sell power to BREC, and therefore applying

⁴⁷ Petition for Rehearing at 8, Footnote 12. Kimberly-Clark states that its QF application was approved by FERC.

⁴⁸ There is no mention in the record of Kimberly-Clark selling power to BREC or intending to do so in the future. See Petition for Rehearing at 7. The chart on page 7 of Kimberly-Clark's petition for rehearing also supports the proposition that Kimberly-Clark consumes all of the power generated by its facility.

the rates or methodology from the QFS tariff has no merit. Kimberly-Clark is not situated similarly to a QFS customer who both buys from and sells power to BREC.

Kimberly-Clark failed to demonstrate that the Commission made a material error or an unreasonable or unlawful finding in regard to this issue, and its request for rehearing is denied.

IT IS THEREFORE ORDERED that:

1. Kimberly-Clark's petition for rehearing is denied.
2. This matter is closed and removed from the Commission's docket.

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PUBLIC SERVICE COMMISSION



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Commissioner



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