

evidence presented leaves no room for difference of opinion among reasonable minds.”¹
An Order can only be unlawful if it violates a state or federal statute or constitutional provision.²

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.

JOINT DEFENDANT'S PETITION FOR REHEARING

The Joint Defendants asserted multiple reasons the March 27, 2023 Order should be vacated or amended.³ First, the Joint Defendants claimed the March 27, 2023 Order was arbitrary, unreasonable, unreasonably discriminatory, unsupported by evidence, and violated due process.⁴ The Joint Defendants stated that the Commission criticized the LICCS tariff because it charges the same price for Maintenance Power Service and Backup Power Service; however, the contract with Domtar also prices Maintenance Power Service and Backup Power Service in the same manner.⁵ Additionally, the Joint Defendants argued the March 27, 2023 Order is discriminatory because it does not

¹ *Energy Regulatory Comm'n v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980).

² *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).

³ See Defendants Joint Petition for Rehearing (filed Apr. 13, 2023).

⁴ Defendants Joint Petition for Rehearing at 2.

⁵ Defendants Joint Petition for Rehearing at 3.

explain why Domtar should pay different rates than other customers that are similarly situated.⁶

Second, the Joint Defendants argued the March 27, 2023 Order violates KRS 278.030(1), which allows all utilities to demand, collect and receive fair, just and reasonable rates.⁷ The Joint Defendants claimed that Domtar is receiving backup power without paying the associated fixed costs, so the contract pricing is not fair, just and reasonable.⁸

Third, the Joint Defendants asserted the March 27, 2023 Order approved rates without allowing Joint Defendants due process.⁹ The Joint Defendants argued there was not an opportunity for Joint Defendants to conduct discovery, present testimony, or cross-examine witnesses at a hearing, which violates KRS 278.260 and KRS 278.270.¹⁰ This inability, the Joint Defendants argued, deprived the companies of due process.

Fourth, the Joint Defendants argued the March 27, 2023 Order violates the filed rate doctrine and requires Joint Defendants to charge rates different than what is on file with the Commission.¹¹ The Joint Defendants stated that KRS 278.160(2) provides that no utility may charge any rate different than what is on file with the Commission.¹² The Joint Defendants argued that the contract with Domtar contained a provision allowing

⁶ Defendants Joint Petition for Rehearing at 3.

⁷ Defendants Joint Petition for Rehearing at 4.

⁸ Defendant's Joint Petition for Rehearing at 4.

⁹ Defendant's Joint Petition for Rehearing at 5.

¹⁰ Defendant's Joint Petition for Rehearing at 5.

¹¹ Defendant's Joint Petition for Rehearing at 6–7.

¹² Defendant's Joint Petition for Rehearing at 6.

cancellation of the contract with one year notice. Since Joint Defendants properly informed Domtar the contract would not be renewed, the Joint Defendants argued that the extension of the contract violates KRS 278.160(2) because Domtar should be taking service from the Joint Defendants the LICSS tariff rates.¹³ The Joint Defendants stated there was a termination provision in the contract, and the March 27, 2023 Order ordered the contract remain in effect until the new LICSS tariff is filed in September 2023. The Joint Defendants argued requiring the contract to remain in effect is contradictory to the contract itself because it voids the termination clause of the contract.¹⁴

Finally, the Joint Defendants argued the Commission improperly shifted the burden of proof to Joint Defendants.¹⁵ The Joint Defendants stated 807 KAR 5:001, Section 20 places the burden of proof on a complainant. The Joint Defendants argued Domtar has the burden of proving the LICSS tariff is not fair, just and reasonable and the Commission's decision to allow permit Domtar to continue to take service under until a future tariff filing shifts the burden of proof onto Joint Defendants.¹⁶

DOMTAR'S RESPONSE

Domtar argued that rehearing should be denied because the Commission properly extended its contract with Kenergy until the LICSS tariff filing in September 2023.¹⁷ Domtar alleged the petition itself should not be ruled upon because KRS 278.400 is

¹³ Defendant's Joint Petition for Rehearing at 6–7.

¹⁴ Defendant's Joint Petition for Rehearing at 7.

¹⁵ Defendant's Joint Petition for Rehearing at 7–8.

¹⁶ Defendant's Joint Petition for Rehearing at 8.

¹⁷ Response to Joint Petition for Rehearing (filed Apr. 21, 2023).

limited to cases where there was a hearing before the Commission.¹⁸ Domtar argued the remedy for the Joint Defendants is an appeal as provided for in KRS 278.410.¹⁹

Domtar stated that, if the Commission believes a petition for rehearing is appropriate, the Joint Defendants did not provide any new evidence that should lead the Commission to modify the March 27, 2023 Order.²⁰ Domtar argued the Joint Defendants assertion of the Commission's March 27, 2023 Order was unjust and unreasonable, and that discriminatory rates are not supported by the evidence.²¹ Domtar argued the basis of the Joint Defendant's petition for rehearing is the assertion that the long-standing contract rates do not cover the fixed costs of standby service,²² but that the Joint Defendants did not address why the Commission's extension of the contract was not supported by the evidence.

Domtar stated that the March 27, 2023 Order did not alter rates. Domtar argued the Order maintained the status quo until the Commission ordered refiling of the LICSS tariff in September 2023.²³ Domtar also argued that the Joint Defendants' claim that BREC is not recovering its fixed costs is not supported by BREC's actual earnings.²⁴

¹⁸ Response to Joint Petition for Rehearing at 5.

¹⁹ Response to Joint Petition for Rehearing at 5.

²⁰ Response to Joint Petition for Rehearing at 5.

²¹ Response to Joint Petition for Rehearing at 5.

²² Response to Joint Petition for Rehearing at 7.

²³ Response to Joint Petition for Rehearing at 8.

²⁴ Response to Joint Petition for Rehearing at 8.

Additionally, Domtar argued that the Joint Defendants' claim that it did not receive due process is incorrect.²⁵ Domtar stated that the Joint Defendants had the opportunity to present evidence during these proceedings.²⁶ Domtar argued that the Joint Defendants misinterpret KRS 278.180, KRS 278.260, and KRS 278.270 to support Joint Defendants' position that a hearing was necessary before the Commission could extend the contract.²⁷ Domtar argued that KRS 278.270 is only applicable when the Commission finds a rate violates a provision of KRS Chapter 278, and a new rate must be set.²⁸ Domtar also argued KRS 278.180 only requires a hearing when a rate is being changed. Domtar argued the rate being charged was not changing, the contract was being extended.²⁹

DISCUSSION AND FINDINGS

Based upon the petition and the response and being otherwise sufficiently advised, the Commission finds that the Joint Defendants provided no evidence to support their allegation that the Commission's March 27, 2023 Order should be vacated, Domtar's complaint should be dismissed, and Domtar should be ordered to pay the difference between the contract price and the LICSS tariff. KRS 278.400 limits rehearing to orders that are unreasonable or unlawful. There is no evidence in the record, and none presented in the petition for rehearing, that causes the findings in the March 27, 2023

²⁵ Response to Joint Petition for Rehearing at 8.

²⁶ Response to Joint Petition for Rehearing at 9.

²⁷ Response to Joint Petition for Rehearing at 9.

²⁸ Response to Joint Petition for Rehearing at 9.

²⁹ Response to Joint Petition for Rehearing at 9.

Order to be unreasonable. There has been no evidence presented that the March 27, 2023 Order violates state law, federal law or any constitutional provisions.

The finding in the March 27, 2023 Order was that, because LICSS tariff was only approved on a pilot basis and the Commission intended to investigate the LICSS tariff when the ordered filing was made in September 2023, Domtar should not be moved to the LICSS tariff when a long-standing contract existed between the parties.³⁰ The Commission further found Domtar's contract was not being extended indefinitely, only until the tariff filing and investigation.³¹ The Joint Defendants did not provide any information that would make those findings unreasonable. The Joint Defendants only argument the Order is unreasonable is that the contract allows the same pricing for Maintenance Power and Backup Power, which is one of the Commission's concerns about the LICSS tariff; that fact alone does not make the Commission's decision to maintain the status quo unreasonable. It highlights the necessity of the Joint Defendants to provide support for the LICSS contract in the September filing.

The Joint Defendants made no persuasive argument the March 27, 2023 Order violates a statute or constitutional provision. The Joint Defendants' argument the Order violates a constitutional provision is that it was not afforded due process. It has long been held that the fundamental concept of due process is the opportunity to be heard at a meaningful time and manner.³² Due process is flexible and does not require a hearing in

³⁰ Case No. 2023-00017, March 27, 2023 Order (Ky. PSC Mar. 27, 2023) at 4.

³¹ Case No. 2023-00017, March 27, 2023 Order at 5.

³² *Matthews v. Eldridge*, 424 US 319, 333 (1976).

every instance, only the protections each situation demands.³³ The concept of due process in administrative proceedings is flexible.³⁴ Due process can also be satisfied by the opportunity to present reasons in writing why the agency should or should not impose a certain decision.³⁵ In this case, Joint Defendants were afforded due process. The Joint Defendants had the opportunity to present evidence, including information about changes being considered for the LICSS tariff, or request a formal hearing before the Commission. The Joint Defendants did not do either of these things.

The Joint Defendants did not provide any evidence that the March 27, 2023 Order violated any statute. The Joint Defendants claimed the Order violated KRS 278.160, KRS 278.170, KRS 278.180, KRS 278.260, and KRS 278.270. KRS 278.160(2) prohibits any utility from charging a rate different than what is on file with the Commission. The Joint Defendants argued KRS 278.160 requires a utility to only file a rate that is on file with the Commission and allowing the contract violates this statute. The Commission is not allowing a special rate. The Commission is requiring the long-standing contract be extended until the LICSS tariff filing.

The Joint Defendants argued that KRS 278.170, KRS 278.180, KRS 278.260, and KRS 278.270 all require the Commission to hold a formal hearing before a rate can be changed. This argument is misplaced because the Commission did not change the rate. The Order only upheld the status quo until the LICSS tariff was fully investigated. The

³³ *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 590 (Ky. 1995).

³⁴ *Danville-Boyle County Planning and Zoning Com'n v. Prall*, 840 S.W. 2d 205, 207 (Ky. App. 1992).

³⁵ *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

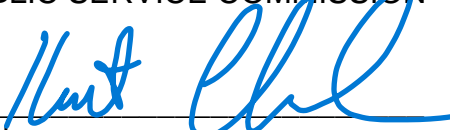
Joint Defendants have been on notice the Commission has ordered an updated LICSS tariff. Requiring Domtar to take service on the LICSS tariff before it is updated and investigated does not result in a fair, just and reasonable rate.

Finally, the Joint Defendants argued that the Commission shifted the burden of proof in 807 KAR 5:001E, Section 20, from Domtar to Joint Defendants. The Joint Defendants argued Domtar bore the burden of proving the LICSS tariff was not fair, just and reasonable. The Joint Defendants misstate the issue. Domtar did not allege the LICSS tariff was not fair, just and reasonable. Domtar requested the contract with Kenergy be extended until the Commission fully investigates the September 2023 tariff filing. The Commission did not shift the burden of proving this was reasonable to the Joint Defendants. The Commission found Domtar met the burden of proof and granted the request. For all the reasons stated above, the Commission finds the petition for rehearing should be denied.

IT IS THEREFORE ORDERED that:

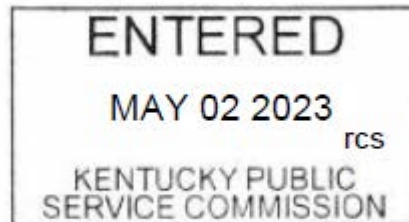
1. The Joint Defendants petition for rehearing is denied.
2. This matter is closed and removed from the Commission's docket.

PUBLIC SERVICE COMMISSION


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ATTEST:


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