COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC TARIFF FILING OF BIG RIVERS ELECTRIC CORPORATION FOR APPROVAL OF PROPOSED CHANGES TO ITS QUALIFIED COGENERATION AND SMALL POWER PRODUCTION FACILITIES TARIFFS	)))))	CASE NO. 2023-00102

O R D E R

On January 5, 2024, Big Rivers Electric Corporation (BREC) filed a petition, pursuant to KRS 278.400, requesting rehearing on the Order entered in this proceeding on December 15, 2023. In conjunction with the petition for rehearing, BREC filed a motion for an extension of time of 20 days to file tariffs after the Commission enters an Order on BREC's rehearing petition.

LEGAL STANDARD

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."[1]

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

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.

DISCUSSION AND FINDINGS

BREC stated that the final Order issued on December 15, 2023, was arbitrary, unreasonable, and unlawful.[3] BREC raised two issues for rehearing: rates and contract term length. BREC stated that the requirement of two-year and five-year contract terms is arbitrary, unreasonable, and not supported by the evidence.[4]

Contract Term Lengths

BREC stated that the Commission cited to 807 KAR 5:054, Section 5(1)(a), to support the two-year term.[5] BREC alleged that subsection only applies to electric utilities with more than 500 million kWhs of annual retail electric sales and it has no retail electric sales.[6] BREC also stated that the Commission relied on other cases involving other utilities as a basis instead the evidence in this case.[7]

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[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] BREC's Petition for Rehearing (filed Jan. 5, 2024) at 1–2.

[4] BREC's Petition for Rehearing at 1–2.

[5] BREC's Petition for Rehearing at 10.

[6] BREC's Petition for Rehearing at 10.

[7] BREC's Petition for Rehearing at 10.

BREC argued that a five-year contract term requirement at this time could only be reasonable if the contract was based on the capacity costs that BREC can avoid over the next five years.[8] BREC stated that it should not pay for capacity for the next five years based on the cost of a natural gas combined cycle (NGCC) unit that will not be constructed for at least five years, especially where there is no evidence that the unit will be delayed or avoided as a consequence of the capacity provided by qualifying facilities (QF) Customers.[9] BREC argued that the one year annual renewable contracts aligns with the MISO Planning Resource Auction (PRA) and is appropriate.[10]

BREC stated that the Commission failed to point to any evidence showing that depending on two- and five-year contracts for capacity from customer owned renewable generation is in any way equivalent to constructing a base load generating unit that will last for decades.[11] According to BREC, unless a QF Customer has a legally enforceable obligation (LEO) to provide capacity for a term similar to the life of a base load generating unit, there is no evidence in the record that the cost of constructing a base load generating unit that has a decades-long useful life is a reasonable proxy for the cost BREC avoids by purchasing a QF Customer's capacity over the next two or five years.[12] Instead, the actual cost BREC avoids by having a two- or five-year contract with a QF Customer is the capacity cost BREC would otherwise incur over that same

[8] BREC's Petition for Rehearing at 11.

[9] BREC's Petition for Rehearing at 11.

[10] BREC's Petition for Rehearing at 11.

[11] BREC's Petition for Rehearing at 8–9.

[12] BREC's Petition for Rehearing at 9.

time frame.[13] BREC alleged that the Commission's apparent belief that short-term contracts for capacity from customer-owned renewable generation can substitute for long-term, base load generating unit is unsupported by the evidence.[14]

Having considered the evidence, the Commission first notes, as a legal matter, BREC included the MISO Planning Resource Auction Results for Planning Year 2023-24 dated May 19, 2023, as an attachment to and in support of its petition for rehearing.[15] KRS 278.400, the statute governing rehearing of Commission orders provides for consideration of evidence that "could not with reasonable diligence have been offered on the former hearing." BREC could have introduced this into the record during the proceeding. BREC was fully aware of the issues the Commission was considering in this case, that BREC bears the burden of proof and could have filed this document during the evidentiary phase of this proceeding. The Commission, therefore, will afford no weight to the document and does not consider it as a basis for rehearing.

The Commission finds that the petition for rehearing should be denied in its entirety. BREC's arguments raised in its petition for rehearing are discussed below.

In support of its petition for rehearing, BREC referred to the Commission's findings in Case No. 2021-00198.[16] BREC stated that the Commission's finding and the corresponding language in that case was the basis for BREC's proposal to rely on the

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[13] BREC's Petition for Rehearing at 10.

[14] BREC's Petition for Rehearing at 10.

[15] BREC's Petition for Rehearing at PDF page 18–66.

[16] Case No. 2021-00198, *Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and Its Member Distribution Cooperatives for Approval of Proposed Changes to Their Qualified Cogeneration and Small Power Production Facilities Tariffs* (filed Mar. 22, 2021) (The Commission found that the use of the most recent BRA capacity market clearing price is more appropriate and should be used as the proxy for the avoided capacity cost component of the COGEN/SPP tariffs.).

MISO Planning Resource Auction (PRA) Auction Clearing Price (ACP) for avoided capacity costs in the QF tariff.[17]

In that case, the Commission found, and subsequently reiterated, that the Commission did not allow East Kentucky Power Cooperative (EKPC) to use capacity market rates to determine actual avoided capacity costs but rather use them as an <u>interim</u> approximation of avoided costs and expected EKPC to develop a more robust record in its next filing.[18] Considering utilities file their Cogen/QF tariff's every two years, BREC's request to use MISO's PRA ACP relied on the language used in Case No. 2021-00198 rather than providing sufficient evidence or testimony that the MISO PRA ACP was the most appropriate capacity pricing option.

The Commission notes that it has been utilizing contract term lengths for multiple utilities over the years, with EKPC,[19] Kentucky Power Company,[20] and Louisville Gas and Electric Company,[21] and Kentucky Utilities Company[22]. The Commission has found that contracts for the sale of capacity should be for a longer term than one year because

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[17] BREC's Response to Commission Staff's First Request for Information, Item 7(a).

[18] See Case No. 2021-00198, Oct. 26, 2021 Order at 9 and Nov. 11, 2021 Order at 3–5.

[19] Case No. 2023-00153, *Electronic Tariff Filing of East Kentucky Power Cooperative, Inc. and Its Member Distribution Cooperatives for Approval of Proposed Changes to Their Qualified Cogeneration and Small Power Production Facilities Tariffs* (Ky PSC Oct. 31, 2023).

[20] Case No. 2020-00174, *Electronic Application of Kentucky Power Company for (1) a General Adjustment of Its Rates for Electric Service; (2) Approval of Tariffs and Riders; (3) Approval of Accounting Practices to Establish Regulatory Assets and Liabilities; (4) Approval of a Certificate of Public Convenience and Necessity; and (5) All Other Required Approvals and Relief* (Ky PSC May 14, 2021).

[21] Case No. 2020-00349, *Electronic Application of Kentucky Utilities Company for an Adjustment of Its Electric Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit* (Ky. PSC Sept. 24, 2021) Order at 27.

[22] Case No. 2020-00350, *Electronic Application of Louisville Gas and Electric Company for an Adjustment of Its Electric and Gas Rates, a Certificate of Public Convenience and Necessity to Deploy Advanced Metering Infrastructure, Approval of Certain Regulatory and Accounting Treatments, and Establishment of a One-Year Surcredit* (Ky. PSC Sept. 24, 2021) Order at 27.

capacity planning and acquisition is fundamentally a long-term exercise and the associated avoided capacity costs are long-term as well. BREC's argument that the Commission relied on other cases involving other utilities as a basis instead of the evidence in this case is inaccurate and flawed. The Commission did not rely solely on other cases involving electric utilities as the basis for this case. Rather, the Commission has been encouraging longer-term utility QF contracts because the contracts are already year-to-year. By requiring longer-term contracts, the Commission allows utilities to provide a reasonable alternative for QFs that do not want a long-term commitment. Contracts that are on five- or seven-year terms, for example, are due in part to the long-term planning of a utility's avoided capacity costs and the capital costs of building future generation for that utility. Therefore, the Commission utilized a two-year and five-year contract term since the regulation requires updated avoided costs every two years and a five-year term with rates effective from 2023 to 2028 since BREC is proposing to build generation in or by 2029.

The Commission notes that it authorized utilities to participate in RTOs as a benefit to the utility itself and to its customers. In Case No. 2010-00043,[23] the Commission found that BREC joining MISO was the most reasonable alternative at that time for BREC to comply with North American Electric Reliability Corporation's (NERC) contingency reserve requirement; that it was for a proper purpose; and was consistent with the public interest.[24] However, the Commission authorizing BREC to join MISO in 2010 did not override or negate the Commission's authority to regulate the utility's

[23] Case No. 2010-00043, *Application of Big Rivers Electric Corporation for Approval to Transfer Functional Control of Its Transmission System to Midwest Independent System Operator, Inc.* (Ky PSC Nov. 1, 2010).

[24] Case No. 2010-00043, Nov. 1, 2010 Order at 4 and 9–10.

generation resource planning and acquisition or rates including QF's. Additionally, this Commission has no interest in allowing a utility to rely solely on an RTO's long-term capacity planning requirements as the basis for its own capacity resource planning. A utility's long-term plan should satisfy both the resource requirements of its own system independently of, and in conjunction with, that of its RTO requirements.

The final Order stated that because the QF contracts continue "from year-to-year thereafter," the contract term is tantamount to a long-term contract. Additionally, the final Order stated that the Federal Energy Regulatory Commission (FERC) has not established minimum or maximum terms for QF contracts, instead leaving that decision to the states, and therefore, the Commission can make a determination as to the appropriate length based on the evidence presented in each case.

Rates

BREC argued that the rates calculated by the Commission were arbitrary and unreasonable.[25] BREC asserted that it should not be required to purchase a QF customer's capacity now based on the projected cost of a NGCC unit that will not be built until at least 2029.[26] BREC alleged that the Commission failed to show that BREC can avoid the cost of an NGCC unit in 2024 or 2025 or 2026 or 2027 or 2028, since no NGCC unit is planned or could feasibly be constructed in those years.[27] BREC cited to 807 KAR 5:054 to support the argument that the avoided cost now is the cost it can avoid now by purchasing a QF's Customer's capacity.[28] BREC also stated that

[25] BREC's Petition for Rehearing at 1.

[26] BREC's Petition for Rehearing at 3.

[27] BREC's Petition for Rehearing at 3.

[28] BREC's Petition for Rehearing at 3.

currently no QF customer is allowing BREC to avoid the cost of an NGCC unit.[29] Instead, BREC stated it would purchase the capacity otherwise provided by the QF Customer in the MISO PRA.[30]

BREC alleged that a utility's avoided cost is the upper limit on QF rates allowed by the Public Utility Regulatory Policies Act.[31] BREC stated that the Commission misread the FERC Order cited in the EKPC QF rehearing Order[32] recently issued in Case No. 2023-00153.[33] Allegedly, the Commission's interpretation is at odds with the FERC Order, when read in its entirety.[34] BREC claimed that the FERC order reaffirms that a utility's avoided cost capacity purchase rate would include the cost of a new unit only when the QF enabled the utility to avoid or delay construction of that unit.[35]

As stated above, the Commission denies the petition for rehearing based on the rates discussed and calculated in the final Order. In its Integrated Resource Plan (IRP) filed in Case No. 2023-00310,[36] BREC included the retirement of its two Green units[37] in 2029 and the addition of a 635 MW NGCC unit in 2029.[38] BREC provided the avoided

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[29] BREC's Petition for Rehearing at 3–4.

[30] BREC's Petition for Rehearing at 4.

[31] BREC's Petition for Rehearing at 4.

[32] Case No. 2023-00153, Dec. 8, 2023 Order.

[33] BREC's Petition for Rehearing at 6–8.

[34] BREC's Petition for Rehearing at 6–8.

[35] BREC's Petition for Rehearing at 7–8.

[36] Case No. 2023-00310, *Electronic 2023 Integrated Resource Plan of Big Rivers Electric Corporation* (Ky. PSC Sept. 23, 2023).

[37] Robert Green Plant, Sebree, Kentucky: two turbines converted to natural gas in 2022.

[38] Case No. 2023-00310, *Electronic 2023 Integrated Resource Plan of Big Rivers Electric Corporation* (Ky. PSC Sept. 23, 2023), Table 2.3, at 35.

capacity costs based upon BREC's NGCC unit anticipated in 2029 while using the National Renewable Energy Laboratory (NREL) Annual Technology Baseline (ATB).[39] To be clear, the calculations that were provided in the Appendix of the December 15, 2023 Order, were BREC's calculations that it provided in response to Staff's Second Request. The Commission found the calculations accurate, reliable, and utilized the information in calculating the QF rate. The only adjustment the Commission made was discounting the costs back from 2029 to 2024.

The Commission has an expectation that utilities will invest in their service territories and have "steel in the ground." BREC's long-term plan indicates it plans on building an NGCC unit; and BREC has not provided any evidence as to whether it plans on procuring any other generation sufficient to replace the indicated two retired Green units. The Commission acknowledges that it would have accepted a combustion turbine (CT) as a proxy had BREC provided sufficient evidence that it does not intend to build a NGCC unit in the near future. Rather, when the Commission asked BREC whether it still planned to add an NGCC unit to its generation fleet, BREC stated that it was still finalizing studies surrounding its 2023 IRP, and that the studies included the option of adding an NGCC unit.[40] BREC filed its response to Staff's Third Request in August 2023 then filed its IRP in September 2023, which included the proposed addition of an NGCC unit in 2029. In the absence of any evidence to the contrary, the Commission presumed that BREC's current plan is to build an NGCC unit. The Commission based its decision on information and documents provided by BREC

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[39] BREC's Response to Commission Staff's Second Request for Information (Staff's Second Request) (filed May 26, 2023), Item 10(b).

[40] BREC's Response to Commission Staff's Third Request for Information (Staff's Third Request) (filed August 18, 2023), Item 6(c).

during the evidentiary phase of this proceeding, none of which indicated that BREC intended to add a CT unit, or any other type of replacement generation related to "steel in the ground." Without any additional evidence regarding the specific reliability contribution of certain resources to meet BREC's identified needs, the Commission prudently and reasonably adopted avoided costs based on generation generally available year-round.

BREC argued that the MISO PRA ACP is an accurate representation of its avoided capacity costs because the MISO PRA ACP is the market clearing price at which MISO provides capacity, the price at which BREC is compensated for its generating capacity offered into the market, and the price at which BREC would purchase additional capacity if needed. BREC's assertion is incorrect. The Commission notes that the MISO PRA ACP is not an accurate representation of BREC's avoided capacity costs. The Commission found in Case No. 2023-00153 that, if the Commission does not expect to allow a utility to depend on market-purchases for its long-term capacity needs, then it follows that the market capacity is not the cost the utility is avoiding.[41] Considering MISO has turned to a seasonal capacity construct, MISO's seasonal capacity construct could directly impact the calculation of the utility's avoided capacity costs, especially when considering that the utility's peaking needs differ from what is being procured in the market.[42] Therefore, the Commission finds that

[41] Case No. 2023-00153, Oct. 31, 2023 Order at 11.

[42] The Commission notes that in NERC's 2023 Long-Term Reliability Assessment (Report (nerc.com), at 41), it noted that with MISO transitioning to a seasonal capacity construct, the market responded with higher capacity prices in 2022 and beginning in 2028, MISO is projected to have a 4.7 GW shortfall if expected generator retirements occur. The Commission reiterates that a utility should not rely on the market to cover its long-term capacity deficits in lieu of having "steel in the ground" due to the reliability risks associated with the market.

BREC has not provided sufficient evidence to make the argument that the MISO PRA ACP is representative of BREC's avoided capacity costs rather than the NGCC unit generation costs indicated by its long-term plan.

Alleged Subsidization

BREC alleged that the final Order forces residential, commercial, and small industrial customers on the BREC system to subsidize retail customers who chose to install their own renewable generation.[43] According to the motion, BREC claimed that the Commission's Order overcompensates QF customers by requiring BREC to pay a rate based on the cost of an NGCC unit that will not be constructed until at least 2029.[44] BREC alleged that the Order treats BREC as if it is always capacity short.[45] BREC provided a mathematical calculation to support its position that it is overpaying QF customers.[46]

The Commission denies rehearing on this issue. The Commission never claimed that BREC always was operating at a capacity deficit. The Commission noted in the final Order that BREC has seasonal capacity deficits.[47] Specifically, BREC projected a capacity deficit each winter from 2024 to 2028 with other additional season, summer and spring, deficits occurring between 2024 to 2028.[48] However, as noted above,

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[43] BREC's Petition for Rehearing at 12.

[44] BREC's Petition for Rehearing at 12.

[45] BREC's Petition for Rehearing at 13.

[46] BREC's Petition for Rehearing at 13.

[47] Order (Ky. PSC Dec. 15, 2023) at 8.

[48] *See* BREC's Response to Staff's Third Request, Item 1b and Item 6, Attachment. *See also* Case No. 2023-00312, Electronic Tariff Filing of Big Rivers Electric Corporation and Kenergy Corp. To Revise the Large Industrial Customer Standby Service Tariff (filed Oct. 27, 2023), BREC's Response to Staff's First Request, Item 4.

BREC did not provide sufficient evidence as to why the Commission should accept the MISO PRA ACP as the most reasonable avoided capacity option and instead took language from Case No. 2021-00198 as its basis for proposing to use the MISO PRA ACP.

Motion for an Extension of Time to file Its Tariff Sheets

BREC requested an extension of time in which to file its tariffs, stating that if BREC is successful on any of its issues raised above, the approved rates will change from the amounts contained in the Appendix to final Order.[49] The Order required BREC to file its tariffs within 20 days of the date of service of the Order.[50] BREC stated that putting the rates into effect now and possibly having them change will cause confusion for the members and cause unreasonable administrative expense.[51] BREC has requested the extension until twenty days after the Commission issues a decision on the petition for rehearing.[52]

Finding good cause, the Commission grants the extension and requires BREC to file its tariffs within 20 days of the date of service of the Order.

IT IS THEREFORE ORDERED that:

1. BREC's petition for rehearing is denied.

2. BREC's motion for an extension of time to file tariff sheets is granted.

3. Within 20 days of the date of service of this Order, BREC shall file with the Commission, using the Commission's electronic Tariff Filing System, new tariff sheets

[49] BREC's Motion for an Extension (filed Jan. 5, 2023).

[50] Order (Ky PSC Dec. 15, 2023) at 13, ordering paragraph 4.

[51] BREC's Motion for an Extension at 1–2.

[52] BREC's Motion for an Extension at 1–2.

setting forth the terms, rates and charges approved by the Commission's December 15, 2023 Order in this proceeding and reflecting their effective date and that they were approved by this Order and the Commission's December 15, 2023 Order in this proceeding.

4. This case is closed and removed from the Commission's docket.

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PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ENTERED

JAN 25 2024 rcs

KENTUCKY PUBLIC SERVICE COMMISSION

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