

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE)	CASE NO.
SERVICE, RATES AND FACILITIES OF)	2021-00370
KENTUCKY POWER COMPANY)	

ORDER

On August 25, 2023, Kentucky Power Company (Kentucky Power) filed a motion requesting to dismiss the procedure initiated pursuant to KRS 278.018(3). Kentucky Industrial Utility Customers, Inc. (KIUC) filed a response to the motion on September 1, 2023. Kentucky Power filed a reply to KIUC's response on September 6, 2023. This motion now stands submitted for a decision by the Commission.

LEGAL STANDARD

KRS 278.030(2) states that every utility shall furnish adequate, efficient and reasonable service. KRS 278.010(14) defines adequate service as having sufficient capacity to meet the maximum estimated requirements of the customer to be served during the year following the commencement of permanent service and to meet the maximum estimated requirements of other actual customers to be supplied from the same lines or facilities during such year and to assure such customers of reasonable continuity of service.

KRS 278.018(3) provides that the Commission may, after a hearing had upon due notice, make findings supported by proof as to whether any retail electric supplier operating in a certified territory is rendering adequate service to an electric-consuming

facility. KRS 278.018(3) further provides that if the Commission finds that the retail electric supplier is not rendering adequate service, then the Commission may enter an order specifying how the retail electric supplier failed to render adequate service and order that such failure be corrected within a reasonable time established in the order. Further, if the retail electric supplier fails to correct the failure, and thus fails to comply with a Commission order, the Commission may authorize another retail electric supplier to furnish retail electric service to such facility.

KRS 278.010(8) defines electric-consuming facilities as “everything that utilizes electric energy from a central station source.” KRS 278.010(11) defines "Facility" to include “all property, means, and instrumentalities owned, operated, leased, licensed, used, furnished, or supplied for, by, or in connection with the business of any utility.”

JUNE 23, 2023 SHOW CAUSE ORDER

On June 23, 2023, the Commission issued an Order requiring Kentucky Power to show cause why it should not be subject to the remedy for failure to provide adequate service in its service territory under KRS 278.018(3) and why it should not be subject to an assessment of civil penalties under KRS 278.990 for Kentucky Power’s alleged violation of KRS 278.030. This issue arose from Kentucky Power’s alleged failure to procure adequate generating capacity as documented in Case No. 2023-00145, Kentucky Power’s request to defer approximately \$11.5 million in non-fuel adjustment clause (non-FAC) eligible purchased power costs that occurred in connection with Winter Storm Elliott in December 2022.¹ During Winter Storm Elliott, Kentucky Power had to purchase power

¹ Case No. 2023-00145, *Electronic Application of Kentucky Power Company for an Order Approving Accounting Practices to Establish a Regulatory Asset Related to the Extraordinary Fuel Charges Incurred by Kentucky Power Company in Connection with Winter Storm Elliott in December 2022* (filed May 3, 2023).

from the market due, in part, to operational issues at Kentucky Power's generating units at Mitchell Generating Station and Big Sandy Unit 1 unrelated to the extreme weather conditions.²

In the show cause Order in this proceeding, the Commission explained that, pursuant to hearing testimony provided in Case No. 2022-00283,³ Kentucky Power was on notice that the December 8, 2022 termination of the Rockport Unit Purchase Agreement (UPA) represented a reduction in generation that resulted in Kentucky Power having an inadequate amount of available generation to produce energy to meet its peak native demands. Sufficient generation capacity that can be used to serve the entirety of native demand acts as a physical hedge to market energy prices. Without adequate generation capacity, Kentucky Power and its customers are subject to higher prices from market purchases for at least the amount the utility is short of its native demand. In Case No. 2022-00283, Kentucky Power's witness agreed that having a physical hedge against power prices is better than not having a hedge.⁴ Regarding the ratemaking implication of the end of Rockport UPA energy as a physical hedge to power prices, Kentucky Power admitted that, in the event of sustained high energy prices, even if all of Kentucky Power's generation were operating at full capacity, Kentucky Power's customers were subject to the sustained high energy prices in a way that customers were not before the end of the Rockport UPA.⁵

² Case No. 2023-00145, June 23, 2023 Order at 4.

³ Case No. 2022-00283, *Electronic Investigation of Kentucky Power Company Rockport Deferral Mechanism*, November 28, 2022 Hearing Video Testimony (Nov. 28, 2022 HVT) at 10:28:33–10:39:49.

⁴ Case No. 2022-00283, Nov. 28, 2022 HVT at 10:29:54.

⁵ Case No. 2022-00283, Nov. 28, 2022 HVT at 10:36:16.

In the June 23, 2023 show cause Order, Kentucky Power was directed to respond to allegation that it failed to comply with statutory obligations in KRS 278.030(2) and, pursuant to KRS 278.018(3), to explain how Kentucky Power proposed to render adequate service and the reasonable time frame in which Kentucky Power intends to correct its failures.

KENTUCKY POWER'S MOTION TO DISMISS

In its motion to dismiss, Kentucky Power argued that KRS 278.018(3) is inapplicable to this matter, thus the Commission must dismiss the allegation pertaining to KRS 278.018(3). Kentucky Power asserted that the legislative intent in enacting KRS 278.018(3) was to resolve disputes over which electric utility had the right and obligation to serve customers in a specific area. Kentucky Power further asserted that the use of the term "electric-consuming facility" in KRS 278.018(3) refers to a particular facility in a service territory, and not to the entirety of the service territory.

In support of its argument, Kentucky Power pointed to a state court decision in *Owen County Rural Electric Cooperative Corporation v. Public Service Commission*, 689 S.W.2d 599 (Ky. App. 1985) that Kentucky Power asserted stood for the proposition that KRS 278.018(3) has a narrow scope and does not apply to all electric-consuming facilities in a certified territory. In that matter, the court upheld the Commission's finding that an electric-consuming facility could be the entirety of an industrial park and not limited to one building. The court stated that "the definition [of an electric-consuming facility] does not limit a facility to being a building. The definition is broad enough for the PSC to reasonably interpret it to mean the entire industrial park, which will be served from the central station

source.”⁶ Kentucky Power maintained that “[i]f there was a question as to whether the definition [of an electric-consuming facility] could be expanded to include a single industrial park, it would be unreasonable, based on the plain language of the statute, to further expand the definition to apply to all customers or all electric-consuming facilities in Kentucky Power’s entire certified territory.”⁷

Kentucky Power also argued that the Commission has applied KRS 278.018(3) only to situations in which one customer requested to receive service from a different electric service provider due to service inadequacy from the electric service provider in whose service territory the customer resided.

Kentucky Power asserted that adequate service as defined in KRS 278.010(14) has a narrower application than used in the show cause Order. Kentucky Power further asserted that the statutory definition of adequate service refers to a singular customer regarding maximum established requirements. Kentucky Power claimed that KRS 278.010(14) limited the “adequate service” requirement to one year after establishing permanent service.

Kentucky Power argued that, when KRS 278.010(4) and KRS 278.018(3) are read together, the provisions of KRS 278.018(3) are triggered only when there are concerns that a retail electric supply has sufficient capacity to serve a single, new customer and other customers served by the same lines or facilities.

Finally, Kentucky Power argued that adequate service under KRS 278.018(3) is a question of distribution and transmission system efficiency and not generation capacity.

⁶ *Owen County Rural Electric Cooperative Corporation v. Public Service Commission*, 689 S.W.2d 599, 600 (Ky. App. 1985).

⁷ Kentucky Power’s Motion to Dismiss (filed Aug. 25, 2023) at 10–11.

Kentucky Power maintained that the Commission's authority to review service adequacy under KRS 278.030(2) occurs in the context of rate cases and Certificate of Public Convenience and Necessity (CPCN) cases under the prudency review the Commission conducts in such cases.

KIUC RESPONSE

KIUC requested that the Commission deny Kentucky Power's request to dismiss the KRS 278.018(3) component of the show cause matter. KIUC argued that Kentucky Power's narrow interpretation of the Commission's authority under KRS 278.018(3) is incorrect. KIUC further argued that Kentucky Power seeks to evade Commission review through an overly restrictive interpretation of KRS 278.018(3) that would apply to a very specific set of circumstances.

KIUC asserted that KRS 278.018(3) is a consumer protection against monopoly abuse because, without the statutory protection that enables the Commission to step in to cure service issues, retail customers could be stranded in a monopoly service territory without adequate service and without any recourse.

KIUC rejected Kentucky Power's attempt to narrow the definition of "electric-consuming facility" to a single facility, arguing that such an interpretation is contrary to the statutory definition of such a facility – everything that utilizes electric energy from a central station source – and to the court case cited by Kentucky Power. KIUC posited that, even if the Commission narrowed the definition to a single electric-consuming facility, the Commission could apply the statute to each individual facility within Kentucky Power's service territory.

KIUC argued that Kentucky Power misstated the plain language of KRS 278.010(14) in three ways. First, KIUC argued that Kentucky Power incorrectly asserted that KRS 278.010(14) applied only to new customers, asserting that “adequate service” applies to new and existing customers under the plain language of the statute. Next, KIUC argued that Kentucky Power incorrectly limited the term “facilities” to distribution and transmission as used in KRS 278.010(14), but that the definition of facility under KRS 278.010(11) does not exclude generation resources. Finally, KIUC argued that Kentucky Power incorrectly applied the statutory obligation to provide adequate service to one year after service is established, asserting that Kentucky Power ignored the statutory language “reasonable continuity of service,” which is not time limited and represents an ongoing obligation to provide adequate service.

KENTUCKY POWER’S REPLY TO KIUC’S RESPONSE

In its response to KIUC, Kentucky Power disputed KIUC’s statement that Kentucky Power was attempting to evade Commission review and pointed to other options for Commission review of service adequacy, including a review of Kentucky Power’s compliance with KRS 278.030(2) in rate and CPCN proceedings, with the assessment of civil penalties under KRS 278.990 upon a finding of a willful violation.

DISCUSSION AND FINDINGS

Based on the motion, response, reply, and case record, and being otherwise sufficiently advised, the Commission finds that Kentucky Power’s motion to dismiss should be denied for the following reasons. Kentucky Power’s strained reading of KRS 278.018(3), KRS 278.010(8), KRS 278.030(2), and KRS 278.010(14) would lead to an absurd result if the Commission was limited to determining service adequacy to a

particular facility or particular customer as opposed to service adequacy provided to actual customers such that customers are assured of a reasonable continuity of service. KRS 278.030(2) does not limit the requirement for a utility to provide adequate, efficient and reasonable service to a discrete time period; the statutory requirement to provide adequate service is an ongoing obligation of Kentucky Power as a regulated monopoly. KRS 278.010(8) clearly defines an electric-consuming facility as “everything” that utilizes electric energy from a central station source; there is no statutory language that limits an electric-consuming facility to a single location or single customer. Similarly, KRS 278.010(11) expressly states that “facility” includes “all property, means, and instrumentalities” used by a utility in connection with providing service. The Commission concurs with KIUC that the Commission’s statutory duty includes investigating and addressing service issues, and that Kentucky Power’s narrow reading of cited statutes would result in Kentucky Power’s customers being stranded in a service territory without adequate service and without any recourse.

That Kentucky Power could not find other Commission cases brought under KRS 278.018(3) that address service issues broader than a single complaint is not dispositive that KRS 278.018(3) applies only to a single customer or facility. The lack of similar cases reflects the unusual and extraordinary circumstance of a jurisdictional electric utility being investigated for an alleged inability to meet its statutory obligation to provide adequate service to its customers. As noted in the Order opening this case, “the Commission is concerned about the future of Kentucky Power as a utility and about the customers it serves in Eastern Kentucky” regarding Kentucky Power’s ability to provide

adequate, efficient and reasonable service.⁸ As discussed in the June 23, 2023 show cause Order, Kentucky Power has been on notice that it “does not have sufficient capacity available to serve customers' energy needs, has been aware of that shortcoming for a significant amount of time, understands the detriment that insufficiency can cause customers, has described the speed and ease by which it could fix that shortcoming, and yet has chosen not to address its inadequacy of service.”⁹

Regarding Kentucky Power's argument regarding *Owen County Rural Electric Cooperative Corporation v. Public Service Commission*, Kentucky Power ignores that there is nothing in the court's order that defines an electric-consuming facility as narrowly as Kentucky Power implies. Kentucky Power appears to argue that the fact that there was an appeal of a Commission finding is more relevant than the court's decision upholding a Commission order.

Finally, in the June 23, 2023 show cause Order, the Commission expressly stated that the subject of this investigation is service adequacy and that there are two potential remedies for service inadequacy: (1) the remedy provided in KRS 278.018(3), which includes the opportunity for a utility to cure the service inadequacy; and (2) the potential for civil penalties under KRS 278.990.¹⁰ The Commission is not persuaded by Kentucky Power that the remedy for service inadequacy should be limited to civil penalties under KRS 278.990 given the Commission's statutory duty to ensure that Kentucky Power provides adequate, efficient and reasonable service to its customers.

⁸ Order (Ky. PSC Sept. 15, 2021) at 6.


⁹ Order (Ky. PSC June 23, 2023) at 7.

¹⁰ Order (Ky. PSC June 23, 2023) at 1.

IT IS THEREFORE ORDERED that Kentucky Power's motion to dismiss the potential remedy for service inadequacy under KRS 278.018(3) is denied.

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PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ENTERED
SEP 27 2023 rcs
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