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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AN EXAMINATION OF THE APPLICATION OF THE FUEL ADJUSTMENT CLAUSE OF AMERICAN ELECTRIC POWER COMPANY FROM NOVEMBER 1, 2004 TO OCTOBER 31, 2006	)	CASE NO. 2006-00507

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KENTUCKY POWER COMPANY'S BRIEF ON THE LEGALITY OF ITS FUEL ADJUSTMENT CHARGE

Introduction

A fuel adjustment clause has been a part of Kentucky Power Company's tariffs since at least 1936. To Kentucky Power's knowledge the Attorney General has never questioned the authority of the Public Service Commission of Kentucky to approve Kentucky Power's fuel adjustment clause, or Kentucky Power's ability to adjust its rates in accordance with the clause, during that seventy-year period. Now, based entirely upon four sentences[1] in an opinion in a case in which Kentucky Power was not a party, and in which the fuel adjustment clause was not and could not have been at issue, the Attorney General argues Kentucky Power's fuel adjustment clause is unlawful and that the Commission's approval of the rates charged pursuant to it is beyond its inherent or implied authority.

[1] Attorney General's Memorandum of Law Regarding Lawfulness of Relief Petitioner Seeks, *In the Matter of: An Examination of the Application of the Fuel Adjustment Clause of American Electric Power Company From November 1, 2004 Through October 31, 2006*, P.S.C. Case No. 2006-00507 at 3n.2 (Filed August 24, 2007) ("Attorney General's Memorandum").

The record is clear that Kentucky Power's fuel adjustment clause, and the Commission's authority to approve it, are grounded in the Commission's express statutory authority. Moreover, the Franklin Circuit Opinion and Order does not – and in fact can not – affect Kentucky Power's right to recover under its filed tariff. Finally, any attempt to invalidate Kentucky Power's fuel adjustment clause in this proceeding would violate Kentucky Power's rights under Chapter 278 and the Constitutions of the United States and Kentucky.

Background

A. The Fuel Adjustment Clause Has Been An Important And Unchallenged Part Of The Commission's Rate Making Authority For Decades.

No party to this proceeding contends that the costs Kentucky Power seeks to recover through its fuel adjustment clause are inappropriate or otherwise not recoverable under Kentucky Power's tariff or 807 KAR 5:056. Likewise, even the Attorney General (the only party challenging Kentucky Power's right to recover under its fuel adjustment clause in this proceeding)[2] concedes that fuel adjustment clauses benefit ratepayers.[3] These benefits to ratepayer and utility alike include allowing quicker recovery by utilities of variations in fuel costs,[4] thereby avoiding the cost and

[2] KIUC takes the position that "[t]he Franklin Circuit Court's decision has no immediate impact on the validity of the Fuel Adjustment Clause ("FAC") and is not relevant to this FAC review case.... The Commission should not undertake a review of Kentucky's various surcharges and surcredits on the basis that an unpublished opinion of the Franklin Circuit Court contains *obiter dicta* questioning the validity of single-issue rate adjustments."

[3] *Id.* at 3 ("While the Attorney General does not contest that fuel adjustment clauses provide rate stability for ratepayers by allowing a utility to pass through its fuel costs on a dollar for dollar basis without affording any profit, or return on investment, there does not appear to be any explicit, direct statutory power and authority for the Commission to order such relief.")

[4] Order, *In the Matter of Kentucky Power Company, East Kentucky Power Cooperative, Louisville Gas and Electric Company, Kentucky Utilities Company and Big Rivers Electric Corporation*, P.S.C. Case No. 6877 at 2 (December 15, 1977) (Exhibit 1).

burden of more frequent general rate cases,[5] providing a mechanism for current Commission scrutiny of utility fuel procurement practices and costs[6] and providing incentives to utility management to control fuel costs.[7] In fact, the Commission has opined that the complete elimination of the fuel adjustment clause would be "irresponsible."[8]

Not surprisingly in light of these benefits, fuel adjustment clauses long have been a feature of the Kentucky regulatory landscape. Kentucky Power's records indicate that at least as early as October 1, 1936 the Commission approved a "Coal Clause" under which Kentucky Power recovered from certain ratepayers a portion of its fuel costs outside of base rates.[9] Over the next twenty years, Kentucky Power amended its tariffs to change the operation of its coal clause.[10] During this period, the coal clause and its operation were regularly examined by the Commission.[11]

Effective October 1, 1959, Kentucky Power adopted a fuel clause to recover many of the expenses that were the subject of its former coal clause.[12] Kentucky Power's fuel clause was one of several such rate adjustment mechanisms approved by

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[5] The Commission as recently as August 27, 2007 estimated that invalidating the fuel adjustment clause and other surcharge mechanisms may result in an immediate 33% growth in its caseload and the potential for an exponential increase in general rate cases thereafter. Motion for Intermediate Relief Pursuant to CR 76.33, *Public Service Commission v. Commonwealth of Kentucky ex rel. Gregory D. Stumbo* at 5 (Ky. App. Filed August 27, 2007).

[6] *Id* at 14.

[7] *Id.* at 15.

[8] *Id.* 5.

[9] *See*, Exhibit 2.

[10] *See*, Exhibit 3.

[11] *See, e.g.*, II Transcript of Evidence, *In the Matter of Kentucky and West Virginia Power Company, Incorporated – Application for Adjustment of Rates*, Case No. 1834 at 7-8 (May 10, 1949) (Exhibit 4).

[12] *See*, Exhibit 5.

the Commission in the 1950's.[13] Unlike the current fuel adjustment clause, where a single formula is employed by all utilities, these earlier fuel clauses varied among utilities as to "base fuel costs, what other costs ... [were] included in fuel costs, fuel cost translators, the frequency of fuel cost calculation, when the fuel clause charge or credit is applied to the consumers bill, or the rate schedules to which the fuel clause applies."[14]

In 1977 the Commission initiated Case No. 6877 to examine existing fuel clauses employed by the Commonwealth's generating utilities.[15] In that case the Commission considered whether the clause should be eliminated[16] and if not, investigated "what changes, if any, should be mandated by the Commission, devise[d] any needed changes and establish[ed] appropriate procedures for implementing them."[17] Ultimately, the Commission adopted a regulation, 807 KAR 5:056,[18] providing for a standard fuel adjustment clause.[19] That regulation became effective June 7, 1978.[20]

The Attorney General was a full participant in Case No. 6877. Kentucky Power's review of the those portions of the record of that proceeding available to it do not indicate the Attorney General ever contended the Commission lacked the authority to approve fuel adjustment clauses. Nor is Kentucky Power aware of any appeal by the

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[13] Order, *In the Matter of Kentucky Power Company, East Kentucky Power Cooperative, Louisville Gas and Electric Company, Kentucky Utilities Company and Big Rivers Electric Corporation*, P.S.C. Case No. 6877 at 2 (December 15, 1977).

[14] *Id.* at 3.

[15] *Id.* at 1.

[16] *Id.*

[17] *Id.* at 4.

[18] The Commission's fuel adjustment clause regulation apparently was complied originally at 807 KAR 2:055. *See*, Order, *In the Matter of: Kentucky Power Company's Fuel Adjustment Clause Filing*, Case No. 7213 at 1 (Ky. P.S.C. September 11, 1978).

[19] Order, *In the Matter of: An Investigation of the Fuel Adjustment Clause Regulation 807KAR 5:056*, Administrative Case No. 309 at 1 (September 3, 1986) (Exhibit 6).

[20] *Id.*

Attorney General of the regulation that was promulgated by the Commission as a result of the proceedings in Case No. 6877. In fact, in that case the Attorney General urged the Commission to provide for a "purchase power adjustment clause" that would impose a surcharge or surcredit with respect to the varying cost of a utility's purchased power.[21] That is, the Commission urged the Commission to promulgate a regulation permitting utilities to impose a surcharge that would adjust the rates paid by consumers between general rate cases based upon changes in a single expense and without reference to the utility's other revenues and costs – the very thing the Attorney General now contends the Commission lacks the authority to do absent a specific statutory authority.

Even more telling is that the Attorney General promoted his own fuel adjustment clause in Case No. 6877.[22] Although it differed from the regulation ultimately adopted by the Commission, the clause advanced by the Attorney General allowed utilities to adjust their rates based upon variations in a single expense, fuel, outside the context of a general rate case. Clearly, as early as the late 1970's the Attorney General understood the Commission's authority under Chapter 278, which has not been changed in any relevant fashion since then, to include the promulgation of regulations permitting utilities to adjust their rates between general rate cases based upon variations in a single expense.

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[21] Order, *In the Matter of Kentucky Power Company, East Kentucky Power Cooperative, Louisville Gas and Electric Company, Kentucky Utilities Company and Big Rivers Electric Corporation*, P.S.C. Case No. 6877 at 10 (December 15, 1977).

[22] *See*, Office of the Attorney General Proposed Regulation, *In the Matter of: The Examination of the Fuel Adjustment Tariff Provisions Kentucky Power Company, East Kentucky Power Cooperative, Louisville Gas and Electric Company, Kentucky Utilities Company and Big Rivers Electric Corporation*, P.S.C. Case No. 6877 (Exhibit 7).

On September 3,1986, the Commission instituted an administrative proceeding in which it again examined the workings of fuel adjustment clauses.[23] As part of the proceeding the Commission investigated "whether, due to changing circumstances, [the fuel adjustment clause] should be modified or eliminated and to develop a proposed regulation if changes are needed."[24] Again, the Attorney General was a full participant in the proceedings and in fact sponsored an expert who provided testimony.[25] Although the Attorney General recommended the Commission abolish the fuel adjustment clause, his position was not premised upon any apparent concerns the Commission lacked authority under Chapter 278 to adjust rates between base rate cases. Rather, the Attorney General and his witness argued "it would be more appropriate to send price signals of a more permanent nature through periodic price changes as determined in a general rate case."[26] Even then, the Attorney General recognized that under certain circumstances interim rate changes based upon variations in the cost of fuel would be appropriate and urged the Commission to adopt a threshold mechanism.[27]

In 1988 in Administrative Case No. 309 the Commission rejected the Attorney General's proposal that the fuel adjustment clause be eliminated and instead proposed certain changes to the then existing fuel adjustment clause regulation.[28] Commenting on proposed changes to the regulation, the Attorney General:

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[23] Order, *In the Matter of: An Investigation of the Fuel Adjustment Clause Regulation 807 KAR 5:056*, Administrative Case No. 309 (September 3, 1986).

[24] *Id.* at 1.

[25] Order, *In the Matter of: An Investigation of the Fuel Adjustment Clause Regulation 807 KAR 5:056*, Administrative Case No. 309 at 3 (September 21, 1988) (Exhibit 8).

[26] *Id.* at 10.

[27] *Id.* at 12. (Attorney General recommended "a safety valve against the effects of rapid changes in fuel costs... [employing] [a] special rate hearing focused specifically on fuel costs..." whenever changes in costs exceeded a predetermined threshold in a fixed period.)

[28] *Id.* at 30.

> did not propose to modify the Commission's draft regulation. Rather the AG supported the Commission's efforts and characterized them as a "significant first step in providing true incentives that encourage electric utilities to control fuel costs." To provide even greater incentives, the AG asked for reconsideration of its initial recommendation that FAC passthroughs be limited from 50 to 75 percent deviations from base rates.[29]

Thus, although objecting to certain specifics of the fuel adjustment clause, the Attorney General for the second time in a major industry-wide proceeding examining the operation of the clause not only failed to object that the Commission lacked the authority to adjust rates between general rate cases based upon variations in a single expense, but proposed a surcharge mechanism to do just that – albeit upon a much more limited basis.

Since the Commission's December 18, 1989 Order in Administrative Case No. 309, Kentucky Power has continued to operate its business premised upon the availability of relief through its duly adopted and approved fuel adjustment charge. Kentucky Power has made monthly filings with the Commission and has had the operation of its clause regularly reviewed in six-month and two-year proceedings.[30] Kentucky Power has served the Attorney General with its filings in these proceedings even when the Attorney General has elected not to intervene. Prior to its August 24, 2007 brief in this proceeding, the Attorney General never suggested in any of these

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[29] Order, *In the Matter of: An Investigation of the Fuel Adjustment Clause Regulation 807 KAR 5:056*, Administrative Case No. 309 at 4 (December 18, 1989) (Exhibit 9).

[30] *See, e.g., In the Matter of: The Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Kentucky American Power from May 1, 1999 to October 31, 1999*, P.S.C. Case No. 98-562-B; *In the Matter of: An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Kentucky American Power from November 1, 2000 to October 31, 2002*, P.S.C. Case No. 2002-00431.

proceedings that the Commission lacks authority under Chapter 278 to review and administer Kentucky Power's fuel adjustment clause.

In sum, for the more than seventy years Kentucky Power has operated its business with a fuel adjustment clause, the Attorney General has never questioned in a Kentucky Power proceeding the Company's right to adjust its rates between general rates cases to reflect variations in the cost of fuel pursuant to such clauses. Nor, during that period, has the Attorney General challenged the Commission's authority to permit such adjustments in a Kentucky Power proceeding. Such a long-standing understanding of the Commission's authority to permit utilities to recover and refund variations in fuel costs through the fuel adjustment clause by the Commonwealth's Chief Law Enforcement Officer, although not immutably carved in stone, is indicative of the reasonableness of the Commission's construction of its statutory authority.

B. The Duke Energy Rider AMRP And The Franklin Circuit Court Proceedings Involving The Commission's Approval of the Rider.

Although the Attorney General's memorandum is limited to the question posed by the Commission in its August 21, 2007 Order in this two-year review of the operation of Kentucky Power's fuel adjustment clause – "whether the relief sought by American Electric Power Company ("AEP") is lawful"[31] – the clear import of his memorandum is that the Company's fuel adjustment clause is unlawful and that Kentucky Power should not be permitted to continue to adjust its rates pursuant to the clause.[32] Specifically, the Attorney General contends that:

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[31] Order, *In the Matter of: An Examination of the Application of the Fuel Adjustment Clause of American Electric Power Company From November 1, 2004 Through October 31, 2006*, P.S.C. Case No. 2006-00507 at 1 (Ky. P.S.C. August 21, 2007)

[32] As is typical in such proceedings, Kentucky Power is not seeking approval in this proceeding of its fuel adjustment clause or its right to adjust it rates in accordance with its duly filed and approved tariff establishing the clause. Rather, the specific relief sought is a change in the factors f_b and s_b from

> The Opinion and Order [in *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269] places the Commission on notice that the Commission lacks the inherent or implied authority to engage in interim single-issue rate adjustments **except when done with specific statutory authorization**.... there does not appear to be any explicit statutory power and authority for the Commission to order such relief.... Until such time, if at all, that Union and/or Commission succeeds in overturning the Opinion and Order by way of further appeal, any potential appeal of a decision by the Commission involving a surcharge without a specific statutory basis will be remanded [by the Franklin Circuit Court] in accordance with the provisions of the Opinion and Order.[33]

The Attorney General's position is unambiguously premised upon the Franklin Circuit Court's August 1, 2007 Opinion and Order in *Commonwealth ex rel. Stumbo v. Public Service Commission.*[34]

Although the non-controlling nature of the Franklin Circuit Court's Opinion and Order with respect to the lawfulness of Kentucky Power's fuel adjustment clause is addressed in more detail below, four facts concerning the Circuit Court's Order and Opinion and Kentucky Power's fuel adjustment clause are worth emphasizing:

- Kentucky Power was not a party to either the Commission proceeding or the subsequent appeal giving rise to the Opinion and Order. Kentucky Power had no means of litigating the lawfulness of its fuel adjustment clause in that proceeding.

- The lawfulness of Kentucky Power's fuel adjustment clause, as well as the lawfulness of fuel adjustment clauses in general, was not before the Commission or the Franklin Circuit Court in the proceedings resulting in the Opinion and Order.[35] The issue never has been litigated.

$8,703,98 to $13,933,754 and from 527,226,00 kWh to 655,865,000 kWh, respectively, as used in the fuel adjustment clause formula established at 807 KAR 5.056, Section 1(1). Kentucky Power's realized rate will not change regardless of whether the change in the variables sought in this proceeding is approved or not.

[33] Attorney General's Memorandum at 2-3, 3-4. (emphasis in original).

[34] *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269 (Franklin Circuit Court August 1, 2007) ("Opinion and Order.")

[35] *See, e.g.,* Complaint, *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269 at 1, 2, 3, 4 (Filed February 22, 2006); Opinion and Order at 5-8.

- The Attorney General recognized in his circuit court reply that fuel adjustment clauses were different than the Rider AMRP that he challenged before the Commission and the Franklin Circuit Court.[36]

- Although challenging the Rider AMRP as unauthorized single-issue rate making between 2001 and 2007 before the Commission and the Franklin Circuit Court, the Attorney General never intervened, much less challenged Kentucky Power's fuel adjustment clause as being in excess of the Commission's statutory authority.

Argument

A. The Opinion and Order In No Way Obligates The Commission To Invalidate Kentucky Power's Fuel Adjustment Clause.

1. The Only Issue Before The Franklin Circuit Was The Lawfulness Of Duke Energy's Rider AMRP.

The only surcharge before the Franklin Circuit Court in *Stumbo v. Public Service Commission* was Union Light, Heat and Power Company's Accelerated Mains Replacement Program Rider ("AMRP Rider"). No other surcharge, including the Fuel Adjustment Clause, was before the court. Likewise, the only orders before the circuit court were the Commission's orders granting Union Light, Heat and Power Company (n/k/a "Duke Energy") the right to impose the surcharge and approving subsequent adjustments.

The circumscribed scope of the Franklin Circuit Court's proceedings in *Commonwealth ex rel. Stumbo v. Public Service Commission* necessarily was driven by the pleadings before the Commission and the Franklin Circuit Court. Commission Case No. 2005-00042, in which the Commission again approved Duke Energy's Rider AMRP and which gave rise to the action in which the Opinion and Order was entered, was a

[36] Reply of the Attorney General to Responses Briefs of Defendant-Appellee Union Light, Heat and Power Company and Defendant Kentucky Public Service Commission, *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269 at 7-8 (Filed October 17, 2006).

general rate case in which Duke sought only to adjust its gas rates.[37] As a result, the fuel adjustment clause was not at issue. Indeed, the Attorney General the only surcharge challenged by the Attorney General in his post-hearing brief was the Rider AMRP.[38]

The Attorney General's complaint upon appeal in Civil Action No. 06-CI-00269 (in which the Opinion and Order was issued) similarly involved only a challenge to the Rider AMRP:

> 1. This is an action brought pursuant to KRS 278.410 for review of orders of the defendant Public Service Commission of Kentucky ("Commission") in Case Number 2005-00042, *In the Matter of: An Adjustment of the Gas Rates of Union Light, Heat and Power Company.*
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> ...
>
> 9. Union proposed a tariff, Rider AMRP, to recover the costs of its mains replacement program between rate cases that bears the same language as preceding Rider AMRP used by Union before the enactment of KRS 278.509.
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> ...
>
> 11. By Order dated December 22, 2005, a copy of which is attached as Exhibit A, the Commission authorized Union to place the tariff, Rider AMRP, on file and ruled it will allow Union to amend that tariff annually to recover the added costs of its main replacement program.
>
> **WHEREFORE**, the Commonwealth of Kentucky, ex rel. Gregory D. Stumbo, Attorney General, respectfully requests this Court to:
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> A. Declare void *ab initio* and vacate the Commission's Orders of December 22, 2005, and February 2, 2006 [order denying rehearing], and restrain and enjoin the Commission from authorizing between rate case increases in the Rider AMRP or including a return on investment in the cost recovery under Rider AMRP....[39]

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[37] Significantly, the Attorney General did not challenge Duke Energy's gas cost adjustment – which in many respects is identical to the fuel adjustment clause – in either Duke Energy's base gas rate case, Commission Case No. 2005-00042, or the separate 2005 proceeding addressing changes to Duke Energy's gas cost adjustment.

[38] Post-Hearing Brief of the Attorney General, *In the Matter of: An Adjustment of the Gas Rates of Union Light, Heat and Power Company*, P.S.C. Case No. 2005-00042 at 30-36 (Filed September 21, 2005).

[39] Complaint, *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269 at 1, 2, 3, 4 (Franklin Circuit Court Filed February 22, 2006).

Thus, on its face, the Attorney General's appeal sought review only of the Commission's orders in cases involving a single utility – Duke Energy – and establishing and adjusting a single surcharge – the Rider AMRP.

In briefing his challenge to the Rider AMRP, the Attorney General was careful to distinguish that surcharge from the fuel adjustment clause at issue here. Thus, although addressing an issue other than the Commission's authority to adjust rates outside the confines of a general rate case, the Attorney General contrasted the operation of the AMRP with the fuel adjustment clause:

> The Rider AMRP does not recover recurring current costs like fuel costs or gas supply costs. The costs it will consider are not currently being incurred. They are not volatile, but are readily ascertainable. ***They are not pass-through costs on which the utility makes no profit***, but long term investment on which a return is sought.[40]

Without regard to his current position, at the time he filed his Reply in the circuit court the Attorney General clearly understood the Rider AMRP as being materially different from the fuel adjustment clause.

The Franklin Circuit Court also limited its Opinion and Order to the question of the lawfulness of the Rider AMRP. As the court initially explained "[t]his action is before the Court for final resolution of the Attorney General's appeal of the final order of the Public Service Commission (PSC), allowing Union Light, Heat and Power (Union) to adjust its rates to reflect pipeline replacement expenditures through an interim rate review, passing those costs on to its customers through a surcharge on its base rate."[41] By the same token, the court limited the relief granted in its conclusion:

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[40] Reply of the Attorney General to Response Briefs of Defendant-Appellee Union Light, Heat and Power Company and Defendant Kentucky Public Service Commission, *Commonwealth ex rel. Stumbo v. Public Service Commission,* Civil Action 06-CI-00269 at 7-8 (Filed October 17, 2006) (emphasis supplied).

[41] Opinion and Order at 1.

> "Absent statutory authority for an interim review and surcharge, ***the cost of the AMRP*** must be considered in the context of a rate case.... Accordingly, ***the final administrative order of the Public Service Commission*** is REVERSED and ***this action*** is REMANDED to the Public Service Commission for further proceedings not inconsistent with this judgment."[42]

By any reasonable reading of the Opinion and Order the court's ruling was limited to the Rider AMRP. The only actions remanded to the Commission for further proceedings were the appeals by the Attorney General of the Commission's orders establishing and adjusting the Rider AMRP for Duke Energy. In short, nothing in the Opinion and Order affects any surcharge other than the Rider AMRP or any utility other than Duke Energy. Nor could it.

Underscoring the limited scope of the Opinion and Order and its inapplicability to Kentucky Power's fuel adjustment clause is the analysis employed by the Franklin Circuit Court in concluding that the Rider AMRP was beyond the Commission authority. Specifically, the court looked to the fact that the General Assembly enacted legislation in 2005 granting the Commission express authority to approve such surcharges.[43] Based upon the principle that "legislation should not be construed to lack meaning, but rather that the legislature intends to do something by its action,"[44] the court concluded "[s]tatutory creation of a mechanism for interim review of a cost would be unnecessary if the PSC possessed such implied inherent authority."[45]

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[42] *Id.* at 8. (emphasis supplied).

[43] Opinion and Order at 5-6.

[44] *Id.* at 5.

[45] *Id.* at 6. The court's conclusion that the General Assembly's subsequent enactment of legislation providing for main replacement surcharges was a compelling if not conclusive indication the Commission lacked such authority prior to the enactment of KRS 278.509 seems incorrect. It is equally if not more probable the General Assembly enacted the legislation to confirm the Commission's existing express authority under the general ratemaking statutes in light of the multiple pending actions by the Attorney General challenging the Rider AMRP. For example, amendments to a statute following judicial construction of the statute have been interpreted as recognizing the Attorney General's already existing

Here, by contrast, the General Assembly has not enacted legislation specifically addressing fuel adjustment clauses despite the fact similar clauses have existed in Kentucky for more than seventy years. It would be anomalous at best to condemn Kentucky Power's fuel adjustment clause, which has found its statutory support for more than seventy years in the Commission's express general ratemaking powers, based upon a circuit court opinion holding the Commission lacked the inherent authority to approve a different surcharge in large part because of the recent enactment of a specific statute providing for such surcharges, when no such legislation has been enacted specifically dealing with fuel adjustment clauses.

Because the Opinion and Order is limited to the Rider AMRP the Attorney General's reliance upon it as it sole authority for challenging Kentucky Power's fuel adjustment clause is misplaced.

2. The Franklin Circuit Court's August 1, 2007 Order In *Stumbo v. Public Service Commission*[46] Can Not Bind The Commission In This Case.

A court has authority to decide only the issues squarely before it and even then only as to the parties to that action.[47] In *Matthews v. Ward*, for example, a declaratory

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authority to take certain actions. *See*, *Kentucky Democratic Party v. Graham*, 976 S.W.2d 423, 728-429 (Ky. 1998). Even more telling is the General Assembly amendment of KRS 278.020 to add subsections (5) and (6) granting the Commission express authority to regulate transfers of utility ownership despite the Court's decision more 30 years earlier in *Public Service Commission v. City of Southgate*, 268 S.W.2d 19, 21 (Ky. 1954) holding the Commission's authority to regulate transfers of utility was "necessarily implied" from KRS 278.040 and other statutes. Indisputably, the General Assembly has acted to provide specific statutory authority for Commission action even though the Commission already possessed such express authority under the broad statutory grants of jurisdiction to the Commission.

Equally important, statutes such as the environmental surcharge statute do not necessarily bestow upon the Commission authority it previously lacked. As the Supreme Court recognized in *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 500 (Ky. 1998), KRS 278.183 created a new right in utilities. A utility's right is irrelevant to the Commission's authority to grant such relief in its discretion under its general ratemaking authority. That is, the General Assembly's enactment of specific surcharge statutes simply makes what formerly lay within the Commission's discretion to grant or deny a matter of right.

[46] Civil Action 06-CI-00269 (Franklin Circuit Court August 1, 2007).

judgment action was brought challenging a Highway Department regulation and contract granting employees lump sum payments in lieu of actual relocation expenses. Premising its decision on the Commonwealth's inherent authority to pay such expenses, the circuit court determined the contract was proper.[48] On appeal, the Court noted that KRS 64.710, which had not been argued before the trial court, expressly prohibited lump sum payments. As a result, the Court held the contract was illegal.[49] Turning to the question of whether the Commonwealth had authority to make lump sum payments, the Court held that it lacked authority to decide that issue:

> The parties in their briefs debate the question of whether or not, as a general proposition, expenses of this character could properly be paid. It is not within the scope of our proper function to decide questions not in issue.... Our views concerning the general authority of the department with respect to the payment of employees' expenses would be no more than obiter dictum. The only real controversy (which KRS 418.020 requires) concerns a particular procedure painstakingly established by the Department.[50]

Kentucky law likewise is clear that contrary to the Attorney General's belief the Opinion and Order is in no way binding on Kentucky Power or determinative of the Commission's resolution of the Attorney General's challenge to Kentucky Power's fuel adjustment clause.[51] Indeed, in *Veith v. City of Louisville*,[52] the Court was presented with and rejected an argument similar to that advanced by the Attorney General

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[47] *Matthews v. Ward*, 350 S.W.2d 500, 501-502 (Ky. 1961); *Funk v. Milliken*, 317 S.W.2d 499, 513 (Ky. 1958).

[48] *Matthews*, 350 S.W.2d at 501.

[49] *Id.*

[50] *Id. See also*, *Funk*, 317 S.W.2d at 508 ("the question of whether the fiscal court could have paid it directly out of the county treasury was not in issue and should not have been adjudicated."); *Edrington v. Edrington*, 459 S.W.2d 141, 143 (Ky. 1970) ("this part of the judgment [indicating Maryland courts had jurisdiction over child custody issues] is not binding on any court of the Commonwealth in the future....")

[51] *See*, *Baker v. McIntosh*, 294 Ky. 527, 172 S.W.2d 29, 32 (1943) ("It is entirely unnecessary to cite authorities in support of the proposition that no one is bound by a judgment without being a party thereto.")

[52] 355 S.W.2d 295 (Ky. 1962).

concerning the effect to be accorded the Opinion and Order. At issue in *Veith* was the effect of an earlier unappealed decision of the Jefferson Circuit Court. In the earlier action, a taxpayer challenged the Louisville Free Public Library director's salary as violating statutory and constitutional limits on public employees' salaries. The Circuit Court held that with limited exceptions the statute and constitutional salary limits were inapplicable to local public employees.

Notwithstanding the circuit court's decision in the earlier action, city officials in *Vieth* refused to sign paychecks that exceeded the statutory and constitutional limitations found to be inapplicable in the earlier action. On appeal from an injunction directing the city officials to sign the checks the employees argued that the city, which was a party to the earlier action, was bound by the circuit court's determination regarding the effect of the statutory and constitutional limitations on public employees salaries. Rejecting the employees' argument, the Court reversed. In so doing, it explained: "[i]n any event, if the [earlier] judgment could be construed as effectively determining the validity of the Library Board resolution [fixing the director's salary in excess of the limits] ***it cannot be given the authoritative force of finally determining prospective legal rights who were not affected by such resolution.***"[53] That is, the determination in the earlier action that the constitutional and statutory limitations were inapplicable to most local public employees in no way bound the city, which was a party, to follow it with respect to the salaries of other local public employees.

Finally, hand and glove with these principles is the equally long-standing recognition that broad statements of general legal principles, such as the Franklin

[53] *Id.* at 297 (emphasis supplied).

Circuit Court's statement "this Court finds the PSC may not allow a surcharge without specific statutory authorization,"[54] are not binding beyond the facts of the case in which they are made even where they form part of the legal basis for the holding of the case. Illustrative of the continuing viability of this are two recent United States Supreme Court decisions. In *Seminole Tribe of Florida v. Florida*,[55] the Supreme Court held that the Indian Commerce Clause did not empower Congress to abrogate the States' Eleventh Amendment immunity. In the course of its reasoning the Court broadly observed that "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting States."[56] In fact, the Supreme Court continued in *Seminole Tribe* by making clear that the broad principle it announced was equally applicable to the enforcement of the bankruptcy laws – another area of exclusive federal jurisdiction – in actions against the States in federal courts.[57]

Ten years later, and directly contrary to the general principle set out in *Seminole Tribe*, the Supreme Court held in *Central Virginia Community College v. Katz*[58] that Congress had the authority under the Bankruptcy Clause of the Constitution to abrogate the States' immunity under the Eleventh Amendment with respect to adversary claims in bankruptcy. In so holding, the *Katz* Court recognized that its holding was inconsistent with both the broad principle relied upon by the majority in *Seminole Tribe* to support its

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[54] Opinion and Order at 7. The same is true of the other statements in the Opinion and Order seized upon by the Attorney General, including "[t]he recovery of expenses in the interim between rate cases is not a right encompassed [in] the PSC's general power" and "there is no inherent authority to perform interim single-issue rate adjustments because such a mechanism would undermine the statutory scheme." *Id.* at 6.

[55] 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

[56] *Seminole Tribe*, 116 S.Ct. at 1131.

[57] *Id.* at 1131-1132 n.16.

[58] __ U.S. __, 126 S.Ct. 990, 996 (2006).

holding in that case, as well as the Court's further discussion in *Seminole Tribe* concerning applicability of the principle to actions brought pursuant to the Bankruptcy Clause:

> We acknowledge that statements in both the majority and dissenting opinions in ... [*Seminole Tribe*] reflected an assumption that the holding in that case would apply to the Bankruptcy Clause.... For the reasons stated by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat 264, 5 L.Ed. 257 (1821), we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated..... "It is a maxim not to be disregarded, ***that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.*** If they go beyond the case, they may be respected***, but ought not to control the judgment in the subsequent suit when the very point is presented for decision.***"

Id. (emphasis supplied). Kentucky follows *Cohens*[59] and as a result even the Franklin Circuit Court is not bound by the dicta in the Opinion and Order when deciding a subsequent appeal, particularly one involving different facts.

Each of the principles above is embodied in the Franklin Circuit Court's directions on remand "for further proceedings not inconsistent ***with this judgment***."[60] That is, remand was limited to proceedings consistent with the court's judgment and not its Order and Opinion. A judgment, by definition, is "a court's final determination of the rights and obligations of the parties in a case."[61] Kentucky Power was not a party to the proceedings giving rise to the appeals and its rights and obligations under its fuel adjustment clause were not, and could not be, determined by the Order and Opinion.

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[59] *See*, *Louisville Water Company v. Weis*, 25 Ky. L. Rptr. 808, 76 S.W. 356 (1903) (quoting *Cohens*).

[60] Opinion and Order at 8 (emphasis supplied).

[61] Black's Law Dictionary 846 (7th Ed. 1999).

B. The Commission Is Expressly Authorized By Statute To Adjust Rates Outside General Rate Cases Based Upon Changes In A Single Expense.

1. The Opinion and Order Failed To Address The Question Of Whether The Commission Has Express Statutory Authority Pursuant to Chapter 278 To Administer Interim Rate Adjustment Mechanisms.

The Franklin Circuit Court's Opinion invalidating Duke Energy's AMRP nowhere squarely addresses the question of the Commission's express statutory authority to adjust rates outside the confines of a general rate case. Rather, its analysis of the Commission's authority is limited to the issue of whether Commission enjoys inherent authority to implement single item rate adjustments[62] pursuant to its exclusive jurisdiction over utilities and their rates and services.[63] The court nowhere examined the language of KRS 278.180 and KRS 278.190, the two statutes expressly granting the Commission general authority to adjust rates outside a general rate case. Indeed, its discussion of the Commission's authority to adjust rates outside a general rate case is entitled "Inherent Authority."[64] At most, it seems the court simply assumed the absence of express statutory authority to adjust rates outside the confines of a general rate case.[65]

A circuit court decision premised upon the assumption the Commission lacks express statutory authority under its general rate making authority to fashion procedures for the approval of rate adjustments between general rate cases falls far

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[62] Opinion and Order at 5-8.

[63] KRS 278.040; *See also*, KRS 278.030. In fact, the statutory grant of authority is "necessarily implied" from KRS 278.040 and KRS 278.030. *See*, *Public Service Commission v. City of Southgate*, 268 S.W.2d 19, 21 (Ky. 1954).

[64] Opinion and Order at 5.

[65] *Id.* at 6.

short of supporting the Attorney General's contention that Kentucky Power's fuel adjustment charge, which finds support in just such authority, is unlawful.

2. Chapter 278 Provides The Commission With Express Statutory Authority To Adjust Rates Between Rate Cases Based Upon Changes In Single Expenses.

Chapter 278 makes clear the Commission enjoys express authority to adjust rates; it nowhere limits that authority to a general rate case in which all revenues and costs are examined and all rates are subject to adjustment. In addition to the broad grants of authority provided the Commission by KRS 278.030 and KRS 278.040,[66] two statutes in particular bear on the issue.

First, KRS 278.180, which is entitled "Changes in Rates, How Made," expressly recognizes that an individual rate can be adjusted:

> Except as provided in subsection (2) of this section, no change shall be made by any utility in ***any rate*** except upon thirty (30) days' notice to the commission....[67]

If the General Assembly had intended to limit the Commission to adjusting rates only in the context of a general rate case, KRS 278.180(1) would have provided "no change shall be made by any utility in any rate except *by means of a general rate case and* except upon thirty (30) days' notice to the commission...."

Second, KRS 278.190, which prescribes the procedure by which the Commission may review a proposed change in a rate, provides:

> (2) Pending the hearing and decision thereon, and after notice to the utility, the commission may ... defer the use of ***the rate, charge, classification, or service*** ....
>
> (3) At any hearing involving ***the rate or charge*** to be increased....[68]

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[66] *See*, *Public Service Commission v. City of Southgate*, 268 S.W.2d 19, 21 (Ky. 1954).

[67] KRS 278.180(1) (emphasis supplied).

[68] KRS 278.190(2), (3) (emphasis supplied). Kentucky Power recognizes that other portions of the statute use the terms "rates" and "charges." The General Assembly apparently did so in those parts of the

The General Assembly's use of the phrases "the rate, charge" and "the rate or charge" again expressly provides for the adjustment of a single rate.

These express grants of authority to adjust "any rate" or "the rate or charge" stand in contrast to the absence of any language expressly limiting a utility to adjusting its rates only in a general rate case in which all revenues and expenses are examined and all rates are subject to change. In the absence of an ambiguity, neither the Commission nor the courts may add to or subtract from the language employed by the General Assembly in enacting statutes.[69] That is, the reach of a statute must be determined from "the words used in enacting statutes rather than surmising what may have been intended but was not expressed.'"[70] Nothing in KRS 278.180 or KRS 278.190 limits their provisions to general rate cases. Indeed, only by impermissibly reading such limitations into the statutes can they be so construed.

By contrast, the General Assembly clearly was aware of the concept of a general rate case and knew how to use that concept when that is what it intended. For example, KRS 278.192(1) prescribes the types of test years a utility may use in seeking to justify "the reasonableness of a ***general increase*** in rates...."[71] There would have been no need for the General Assembly to employ the adjective "general" in front of

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statute in the context of the specific syntax employed so as to ensure the statute applied to any and all rates changes. By contrast, if the General Assembly had intended to limit rates changes to general rate cases the syntax never would have required the use of "the rate or charge."

[69] *Posey v. Powell*, 965 S.W.2d 836, 838 (Ky. App. 1998).

[70] *Stopher v. Conliffe*, 170 S.W.3d 307, 309 (Ky. 2005).

[71] (Emphasis supplied.)

"increase in rates" in KRS 278.192 if the Commission's authority under KRS 278.180 and KRS 278.190 was restricted to general rate cases.[72]

In addition to the broad grant of authority under KRS 278.030 and KRS 278.040, the Commission was granted express statutory authority in KRS 278.180 and KRS 278.190 to adjust rates outside the confines of a general rate case. The Commission should not, and in fact can not, abandon that authority absent statutory direction from the General Assembly or until the Court of Appeals or Supreme Court hold there is no authority for the fuel adjustment clause.

3. Even If Chapter 278 Were Not Specific, The Commission's More Than Seventy Years Of Administration Of Fuel Adjustment Clauses Under Its Provisions Resolves Any Doubt Concerning The Existence Of The Commission's Express Statutory Authority In Favor Of The Commission's Authority To Implement and Administer Such Surcharges.

Since at least 1936 the Commission has reviewed and approved tariffs permitting Kentucky Power and customers to recover outside general rate cases changes in the cost of fuel. During that period the Commission conducted two extensive proceedings, in which the Attorney General fully participated, in which the Commission carefully reviewed the need for and operation of fuel adjustment clauses. During this entire seventy-year period the Commission, through its application and administration of Kentucky Power's fuel adjustment clause, consistently interpreted Chapter 278 to provide it with the authority to implement interim rate adjustments based upon variations in the cost of fuel. Likewise, Kentucky Power is unaware of the Attorney General having contended that Kentucky Power's fuel adjustment clause exceeded the

[72] *Stopher*, 170 S.W.3d at 309 (General Assembly's use of the adjective "defending" in front of attorney was required to be given effect and was intended to indicate legal counsel during a distinct stage of criminal proceedings.)

Commission's statutory authority prior to his August 16, 2007 statement to the Commission and his memorandum in this proceeding.

Although a practice that otherwise is beyond the Commission's authority can not be ratified by long-standing practice or the Attorney General's acquiescence, both are relevant to the question of whether the Commission possesses the authority in the first instance. Under Kentucky law, the "long standing statutory construction of a law by an administrative agency charged with its interpretation should be honored by a reviewing court."[73] Indeed, the doctrine of contemporaneous construction suggests that the Commission is restricted to its long-standing construction of its authority under Chapter 278 to implement fuel adjustment clauses.[74]

4. To The Extent The Opinion And Order Is Premised Upon The Principle That The Commission Is Limited To A Single Rate Making Methodology It Is Contrary To Established Kentucky Precedent.

Throughout the portion of the Opinion and Order addressing the Commission's inherent authority to establish rates outside of a general rate case the court referred to the need to consider changes in all costs and revenues in adjusting rates.[75] But nothing in Chapter 278, including KRS 278.190, mandates that the Commission set rates only in the context of a general rate case in which all costs and revenues are considered. Certainly, neither the circuit court in its Opinion and Order nor the Attorney General in

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[73] *Revenue Cabinet v. Kentucky-American Water Company*, 997 S.W.2d 2, 6 (Ky. 1999). *See also, McCreary County Board of Education v. Begley*, 89 S.W.3d 417, 421 (Ky. 2002) ("ordinarily an administrative body's construction of its own regulation is controlling, particularly when that construction is longstanding and consistent.")

[74] *See*, *Lexington-Fayette Urban County Health Department v. Lloyd*, 115 S.W.3d 343, 349-350 (Ky. App. 2003).

[75] *See*, e.g., Opinion and Order at 6, 7.

his memorandum in this proceeding identify any specific language in the statutes compelling such a result.

More fundamentally, the factors the Commission considers in setting rates, as well as the particular methodology it employs, lie within the Commission's indisputably broad discretion so long as the resulting rate is fair, just and reasonable.[76] In *National Southwire Aluminum*, for example, the Commission established a flexible rate for electricity that varied with the world price of aluminum. Thus, just as with the fuel adjustment clause, the initial rate was established in a general rate case but varied based upon subsequent changes in prices. On appeal, the court of appeals affirmed the Commission's use of a variable rate, concluding the Commission was not required to use a particular ratemaking methodology[77] and that a variable rate is not contrary to Kentucky statutes.[78] Similarly, in *Kentucky Industrial Utility Customers, Inc.* the Supreme Court held that the failure to consider all expenses and revenues in establishing a rate did not render the rate unreasonable.[79]

The Attorney General has not and can not demonstrate that the rate produced by Kentucky Power's fuel adjustment charge is unfair, unjust or unreasonable – either as a stand alone rate or as a part of the total rates authorized by the Commission.

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[76] *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 498 (Ky. 1998) ("it is not the method, but the result, which must be reasonable...."); *National Southwire Aluminum v. Big Rivers Electric Corporation*, 785 S.W.2d 503, 513-514 (Ky. App. 1990).

[77] 785 S.W.2d at 512.

[78] *Id.* at 514. The Franklin Circuit Court reasoned in the Opinion and Order that the Commission lacked the authority to approve the Rider AMRP even though it was approved in a general rate case. Opinion and Order at 6. Whatever the validity of the court's conclusion regarding the Rider AMRP, it seems clearly inapplicable to the fuel adjustment clause in light of *National-Southwire Aluminum*. Like the variable rate upheld there, the fuel adjustment both the surcharge and the formula by which it varies, are approved in a general rate case. Indeed, the Commission approves the base rates as being fair, just and reasonable in the context of the fuel adjustment clause.

[79] 983 S.W.2d at 498.

Accordingly, the Attorney General's objections to the methodology used are without moment.

C. Prior To Invalidating Kentucky Power's Fuel Adjustment Clause The Commission Must Comply With The Provisions of Chapter 278 For Rate Changes And The Company Must Be Afforded A Full Due Process Hearing.

The Commission may not abandon Kentucky Power's fuel adjustment clause at the instigation of the Attorney General without affording Kentucky Power its full statutory and constitutional rights. KRS 278.180(1) mandates that the Commission give Kentucky Power at least thirty days notices before ordering a rate change.[80] KRS 278.260(1) likewise provides that "no order affecting the rates or service complained of shall be entered by the Commission without a formal public hearing," while KRS 278.260(2) mandates the utility be given at least twenty days notice of such a hearing. Moreover, in any such hearing all parties must be granted the opportunity to introduce evidence.[81] Kentucky Power has been granted none of these protections in this proceeding with respect to the Attorney General's contention that Kentucky Power's fuel adjustment clause is unlawful.

Beyond these statutory protections, Kentucky Power is entitled to have its rates established in accordance with due process.[82] Although the minimal requirements for a due process hearing in the rate context have not been defined by the Kentucky Court, the Court in *Kentucky Industrial Utility Customers* suggested that discovery, full

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[80] KRS 278.010(12) broadly defines "rate" to include "any individual ... charge, rental, or other compensation for service rendered or to be rendered by a utility ... and any schedule or tariff or part of a schedule or tariff...." Kentucky Power's fuel adjustment clause indisputably falls within this definition.

[81] KRS 278.260(3).

[82] *Kentucky Power Company v. Energy Regulatory Commission of Kentucky*, 623 S.W.2d 904 (Ky. 1981) ("Even a public utility has some rights, one of which is the right to a final determination of its claim within a reasonable time and in accordance with due process."

participation in an evidentiary hearing, the use of expert witnesses, the right to cross-examine opposing witnesses and to file briefs satisfied due process in the rate context.[83] Most of these protections are lacking here. Moreover, this lack of notice and opportunity to be heard is exacerbated to the extent Kentucky Power's fuel adjustment clause is invalidated based upon a few sentences from a opinion in a proceeding in which Kentucky Power was not a party and which neither its fuel clause nor fuel clauses generically were at issue.

Administrative bodies, such as the Commission, are bound by the regulations they promulgate.[84] As a result, the Commission is obligated to follow its fuel clause regulation, 807 KAR 5:056. If the Commission wishes to abolish the regulation it can do so only if it conforms to Chapter 13A of the Kentucky Revised Statutes.

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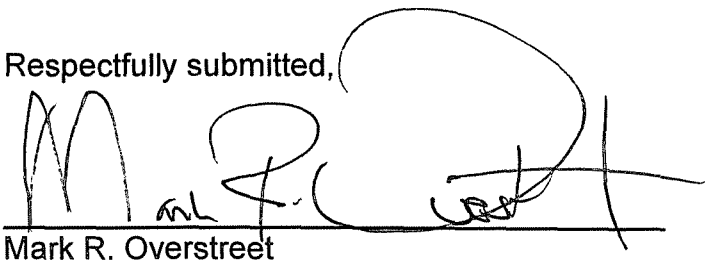
[83] 983 S.W.2d at 497. In another context, the court of appeals similarly indicated due process mandates some combination of "an actual hearing, the taking and weighing of evidence, a finding of fact based upon the evaluation of the evidence and conclusions of law ...." and the right to cross-examine. *Wyatt v. Transportation Cabinet*, 796 S.W.2d 872, 873 (Ky. App. 1990).) In addition to Kentucky Power's due process rights under the Fourteenth Amendment to the United States Constitution, Section 2 of the Kentucky Constitution "is broad enough to embrace the traditional concepts of due process and equal protection of the law." *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Company*, 691 S.W.2d 893, 899 (Ky. 1985).

[84] *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991).

Conclusion

Kentucky Power's fuel adjustment clause is firmly rooted in history and the Commission's express statutory authority. Even if the Opinion and Order were otherwise applicable, and it is not, the grant to Kentucky Power of the relief sought by it in this proceeding is fully consistent with the *Opinion and Order*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic transmission and first class mail, postage prepaid, upon the following parties of record, this 29th day of August, 2007.

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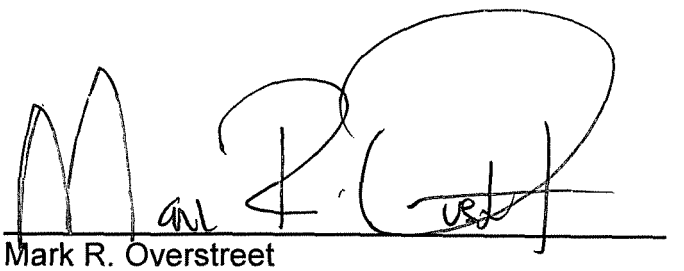

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December 15, 1977

Honorable Glenda Beard
Honorable Richard F. Newell
Honorable E. Gaines Davis, Jr.
Honorable Foster Collis
Honorable O. Grant Bruton
Honorable Dandridge F. Walton
Honorable James J. Mayer
Honorable Harry Sykes
Mr. E. K. Bristow
Mr. Tom Duncan
Mr. Wayne T. Ewing
Mr. Waldo S. La Fon
Mr. Ronald L. Rainson
Mr. J. B. Galloway
Mr. B. Hudson Milner
Mr. Marshall R. Dorsey
Mr. John T. Newton
Mr. Walter J. Ott
Honorable Gene Buchheit
Mr. William A. Duncan

Re: Case No. 6877

Dear Ms. Beard and Gentlemen:

Enclosed you will find one (1) attested copy of the Commission's Order in the above case.

Very truly yours,

PUBLIC SERVICE COMMISSION OF KENTUCKY

Richard D. Heman

Richard D. Heman, Jr., Secretary

RDH/jc

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

* * * * * *

In the Matter of:

KENTUCKY POWER COMPANY, EAST KENTUCKY POWER COOPERATIVE, LOUISVILLE GAS AND ELECTRIC COMPANY, KENTUCKY UTILITIES COMPANY, BIG RIVERS ELECTRIC CORPORATION	))))))	CASE NO. 6877

ORDER PROPOSING CERTAIN MODIFICATIONS IN THE FUEL ADJUSTMENT CLAUSE OF ELECTRIC UTILITIES AND SCHEDULING HEARING ON JANUARY 18, 1978

On August 25, 1977, the Public Service Commission of Kentucky ("Commission") initiated procedures for examining the fuel adjustment clauses currently being utilized by electrical generating utilities within the State of Kentucky. The purpose of this proceeding was to determine whether or not any modification of such fuel clauses is now warranted, or whether fuel adjustment clauses should be eliminated entirely. The Commission in this Order now proposes a standard fuel adjustment clause which would replace the existing fuel clauses of our utilities which are now authorized for use in Kentucky.

Purpose of this Proceeding

A fuel adjustment clause, as the FPC has defined it, is "A clause in a rate schedule that provides for an adjustment of

the customer's bill if the cost of fuel at the supplier's station varies from a specific unit cost." Thus, a fuel adjustment clause is a means for the utility to recover from its customers its current fuel expense through an automatic rate adjustment without the necessity for a full regulatory rate proceeding. This rate may increase or decrease from one billing cycle to the next depending on whether the utility's cost of fuel increased or decreased in the same period. The rate provides for a straight pass-through of fuel costs, with no allowance for a profit to the utility. The theory underlying this procedure is that in a time of rapid fluctuations in the price of fuel (mainly coal), a utility must be able to recover its fuel costs (which is a major component of the cost of generating electricity) more quickly than would be possible through a full rate making proceeding in order to maintain its overall financial integrity.

Automatic fuel adjustment clauses have been authorized for use by Kentucky electric generating companies for many years. They began appearing in tariffs filed with this Commission in the 1950's. During the 1950's and 1960's, an era of relatively inexpensive coal and declining unit costs of electricity, these fuel clauses attracted little attention. With the advent of the Arab Oil Embargo, sharply rising coal prices and increasing electricity rates in the early 1970's, these fuel clauses became highly visible.

A staff study document introduced into the record of this

hearing notes:

> "In 1976 alone at least $6 billion was collected through the use of the FAC by the nation's electric utilities. In Kentucky during the same period the five generating electric utilities under the Kentucky PSC's jurisdiction collected approximately $115 million through the application of the FAC, almost 20% of their total revenue."

Soder, "Fuel Adjustment Clause: Kentucky Electric Utilities," Case No. 6877, September 20, 1977, page 1.

Over the years each Kentucky company has been permitted to employ various forms of automatic fuel adjustment clause chose, subject to the approval of the Commission after hearings. companies have installed such clauses and, from time to time, in formal rate proceedings the Commission has permitted them to be modified. However, as a consequence of this case-by-case and company-by-company development, there is no single form of fuel clause, instead, there are as many different fuel clauses in Kentucky as there are companies. Thus there is no necessary correspondence among the various fuel clauses concerning their essential elements: base fuel costs, what other costs are included in fuel costs, fuel cost translators, the frequency of fuel cost calculation, when the fuel clause charge or credit is applied to the consumer's bill, or the rate schedules to which the fuel clause applies.

Consequently, because of this heterogeneity of fuel clauses, it becomes impossible to compare the operation of fuel clauses in Kentucky, or even the clauses of any two Kentucky companies.

Complicating matters further, is the fact that these companies frequently wholesale power to each other, and tracing fuel costs through these transactions is a difficult exercise at best.

Not only are there multiple fuel clauses currently in use in Kentucky, there are two distinctly different methods of fuel clause calculations currently in use in this state. Some clauses calculate fuel charges in terms of "cents per million btu's" -- Kentucky Power Company and Kentucky Utilities -- while others calculate them as "mills per kilowatt hour." --Big Rivers, East Kentucky Power, and Louisville Gas and Electric.

The purpose of this proceeding is to examine the operation of the fuel adjustment clause in Kentucky and determine what changes, if any, should be mandated by the Commission, devise any needed changes and establish appropriate procedures for implementing them. The first step in this proceeding was to institute a generic hearing on the subject.

Those utilities which generate electricity within the State of Kentucky were specifically ordered to appear before this Commission in a show cause hearing and explain how their current fuel adjustment clauses operate, how fuel costs are calculated and then passed through to the consumers. These parties appeared at a public hearing which was held at the Commission's offices in Frankfort on September 20, 1977. In addition, a number of non-utility parties participated in this hearing. The following parties presented evidence at this hearing: Kentucky Power Company,

Louisville Gas and Electric Company, Kentucky Utilities Company, Big Rivers Electric Corporation, East Kentucky Power Cooperative, Farmers Rural Electric, Concerned Consumers of Electric Energy, the National Retired Teachers' Association, the American Association of Retired Persons, the Kentucky Coal Association, the Peabody Coal Company, the Jefferson County Attorney's Office, and the Office of the Attorney General, Division of Consumer Protection.

Positions of the Parties and Discussion

The majority of the utility parties testifying urged that the Commission consider a standardization of the fuel adjustment clause in Kentucky along the lines of the Federal Power Commission's Order No. 517, which sets forth specific items which may be included within an electric utility's fuel adjustment clause. All of the investor-owned utilities operating within Kentucky already employ the FPC clause in their wholesale electric power transactions. A standardized Kentucky fuel adjustment clause would thus apply to their retail electricity sales.

This appears to the Commission to be the proper approach. Faced with the clear-cut, antithetical options of either making no change in the present arrangement with its bewildering array of fuel clauses and the ever present possibility of new and different ones being created at any time, or prohibiting fuel clauses altogether, both of which appear irresponsible, the Commission instead adopts the approach urged by these parties.

We believe that a least for these generating companies a standard fuel adjustment clause patterned on the FPC Order 517

model should be adopted in Kentucky. This action will substantially modify all the existing Kentucky fuel clauses, that of Louisville Gas and Electric least of all, and, perhaps Kentucky Power's most of all. Such a clause will have the virtues of making consistent state and federal fuel clauses, having been carefully drafted and tested in a wide variety of companies and, not least of all, have predictable effects on the companies, consumers, coal and capital markets. The clause proposed by Big Rivers in its testimony to the Commission, although carefully constructed and designed to address the special circumstances presented by G & T's and their RECC distributors, and not totally unlike the FPC clause, yet is not satisfactory to the Commission in that it allows recovery of estimated fuel costs on a six-month filing cycle. In addition, appropriate fuel clauses for rural electric cooperatives will be addressed in a subsequent proceeding. For now the Commission proposes to address the fuel clauses of generating companies without foreclosing unduly any options concerning the fuel clauses of these distribution companies.

Perhaps the most important characteristic of the FPC Order 517 Model, however, and one which is the decisive consideration to this Commission, is that it offers the best approach for achieving the Commission's major objectives:

1. Imposing an appropriate regulatory process on fuel cost charges to customers.

2. Minimizing the economic burden on ratepayers and

companies caused by fluctuating fuel costs.

3. Treating equitably all Kentucky generating companies, their ratepayers and investors.

Only one group, the Concerned Consumers of Electric Energy, urged the total elimination of the fuel adjustment clause and would have us require instead a full-scale rate hearing before this Commission each time the price of an electric utility's fuel fluctuated up or down. The Commission rejects this approach as both unnecessary and unworkable. Since it is foreseeable that fuel costs will continue to change in the future, this approach would commit us to frequent if not almost continual full rate proceedings on every company. The alternative to that would commit the utilities to a serious monetary "lag" between their fuel costs and their revenues and it would commit Kentucky ratepayers to even more drastic periodic electricity rate changes than is now the case. These intervenors also suggested that utilities do not now attempt to hold down their fuel costs with sufficient rigor, and they called for additional incentives to induce them to do so. See also Kubula, "Rising Electricity Rates: Current Issues," Legislative Research Commission Research Report No. 136, August 1977, lines 109-115. There is no evidence in this record to support these assertions, and, in fact, there is some evidence to the contrary. The 1975 Special Advisory Commission on Electrical Utility Rates and Regulation found:

> "In their study, Ernst & Ernst broadly examined the questions surrounding fuel procurement. One of their observations was that it appears that top management

is actively and continually involved in the fuel procurement process, and that they treat the issue as one of major importance to their utility. They are devoting adequate attention to fuel procurement in both the short and long run.

Another conclusion is that the preponderance of evidence supports the view that, with one exception, the companies are receiving fuel today at the best price. The "best price" means securing fuel (a) of the proper quality, (b) in the necessary volumes, (c) from a reliable vendor (i.e., a vendor who has the financial resources to stay in business and sufficient reserves to meet long-term needs), and (d) at the lowest price per million BTU.

Further, the centralization of fuel procurement, direct contact with top management, and heavy emphasis on full knowledge of fuel availability, would lead one to conclude that the utilities are continuing and will continue in the future to endeavor to secure fuel at the best price and to make their fuel procurement process even more effective....

In addition, there was substantial evidence that the companies still have a strong incentive to seek fuel at the best price. This evidence consisted of numerous examples of steps taken to reduce costs which could and would have otherwise been passed through the fuel clause to the ratepayer."

The Commission believes that additional incentives to encourage even greater utility efforts in this regard would be useful, and has built into the proposed clause several such features.

Both Peabody Coal Company and the Kentucky Coal Association contended that the price of coal has not yet sufficiently stabilized to enable fuel costs to be treated like other costs to the utility which are regulated through normal rate cases before this Commission, citing the costs of new federal and state mining and environmental protection requirements and the expected increase in demand for coal caused by the National Energy Plan as factors which will increase coal production costs

in the near future. The Commission believes that notwithstanding possible coal price increases in the future, the process whereby a utility recoups its fuel costs from its customers should not be outside regulatory scrutiny by the Commission. Like increasing labor costs and construction costs and transportation costs, none of which are recouped by means of automatic rate adjustments, increasing fuel costs also should be subjected to appropriate regulatory review before being recovered from the customer.

The Jefferson County Attorney's Office urged that the fuel adjustment clause be restructured so as to reflect only the true "commodity" price of coal, with the total elimination of the associated "business expenses" of the coal industry. The Attorney General's Office expressed a similar theme of eliminating all but the cost of the coal from the fuel adjustment clause. Under this arrangement costs associated with fuel (such as fuel taxes, insurance, transportation charges, and brokerage fees) would be recovered through normal rate adjustment proceedings. As stated in the so-called "Muskie Report" surveying fuel clause practices nationwide:

> "But many commissions which do permit use of fuel adjustment clauses permit all sorts of nonfuel expenses to creep into these calculations. For example, regarding electric utilities, 22 commissions permit line losses to be included in FAC's. Eighteen include transportation charges. Fourteen include efficiency factors. Six include taxes and fees, and six include fuel handling costs. Three include fuel-related salaries and labor. Others permit an allowance for uncollectable expenses, a lag correction factor, wheeling charges, hydropower or geothermal power."

Committee Print, "Electric and Gas Utility Rate and Fuel Adjustment

Clause Increases, 1976." U.S. Senate Subcommittee on Intergovernmental Relations and the Subcommittee on Reports, Accounting and Management of the Committee on Governmental Affairs, 95th Cong. 1st Sess., July 1977, p.vi.

There is nothing in this record or the experience of this Commission to indicate that these Kentucky utilities have in any manner abused their rights under their fuel clauses, and the Commission does not intend to suggest otherwise. Nevertheless, the contention that associated fuel costs be excluded has merit. Fuel costs fluctuate, rising and falling over time in response to economic forces of supply and demand, but "associated fuel costs" do not fluctuate much, if at all, and certainly do not fluctuate in accordance with the value of the fuel with which they may be associated. Cheap coal costs as much to transport, load and unload as expensive coal. As noted before, fuel associated transportation, labor and equipment costs may be outside the company's control, but that does not distinguish them from non-fuel transportation, labor and equipment costs.

The Commission favors elimination from the fuel adjustment clause all such associated fuel costs, and in the proposed clause will permit only the cost of the fuel itself to be automatically passed through to the utility's customers.

The Attorney General also advocated the adoption of a separate purchase power adjustment clause to encourage utilities to purchase electric power from other generating sources when to do so would be more economical than to generate it in the company's own plants. The Commission feels that a separate

purchase power clause is neither necessary nor desirable at this time as not sufficiently protective of consumers, and instead, has provided in the proposed fuel clause itself an appropriate incentive for utilities to purchase power from others when that would be economically beneficial to their customers.

Conclusions

Having determined that the proper approach is standardization of the fuel clause along the lines of FPC Order 517, the Commission then determined to tailor the clause to address the Kentucky situation and meet these objectives. The following aspects of the FPC clause were modified by the Commission for these purposes and are embodied in the proposed clause:

1. What expenses will be allowed as fuel costs. The FPC clause allows expenses listed in Account 151 to be included as the cost of fuel. These are:

a. Invoice price of fuel less any cash or other discounts;

b. Freight, switching, demurrage and other transportation charges, not including, however, any charges for unloading from the shipping medium;

c. Excise taxes, purchasing agents' commissions, insurance and other expenses directly assignable to cost of fuel;

d. Operating, maintenance and depreciation expenses and ad valorem taxes on utility-owned transportation

equipment used to transport fuel from the point of acquisition to the unloading point;

e. Lease or rental costs of transportaion equipment used to transport fuel from the point of acquisition to the unloading point.

The Commission believes that only item a., the bare cost of fuel itself, should be considered fuel costs for purposes of an automatic adjustment clause. As previously noted, while fuel costs may fluctuate considerably and thus may be said to be unpredictable, these associated costs do not and can be anticipated by both the Commission and the utility and the costs accommodated in their permanent rates. These associated costs may well rise over time because of inflation, just as do labor costs, construction costs, taxes, and other operating expenses. The normal ratemaking procedure is designed to address this phenomenon and thus no automatic passthrough is justified.

2. Whether utilities should be permitted to estimate their future fuel costs for each billing period, or will be permitted to recoup only their actual costs for each billing period. Each utility now recoups only actual costs and suffers only a one month "lag" between their fuel costs and revenues, and then only in periods of rising fuel costs. There is a similar one month "lag" in savings for their customers when fuel costs decline. Related to this point is whether utilities must file their monthly cost data with the Commission before billing customers to recover prior fuel costs or file it after they have begun billing. The

former procedure adds to the "lag" period; the latter forestalls Commission review prior to an increase in rates to the customer. The Commission believes that utilities should be permitted to recoup only their actual fuel costs and regulatory review should precede an increase in rates to customers. The proposed clause reflects these choices.

3. Whether all, none or only a portion of utilities' fuel costs should be put into their base rates. The FPC clause contains no periodic readjustment mechanism. One state, Maryland, have opted to take all fuel costs out of base rates and put them in a prominently displayed fuel charge item on the customer's bill. This course has been taken by those states ostensibly in order to inform the ratepayer exactly what fuel costs they are paying. The current Kentucky fuel clauses reflect this approach. The Commission believes that fuel costs should be placed in the base rates at the beginning, and reviewed and readjusted every two years, with a view to reinserting any accumulated fuel charges into the base rates, should fuel costs steadily increase over the period, or lower base rates if fuel costs decline. While the Maryland approach conveys to the customer a "price signal" that fuel costs are, indeed, rising, and their electricity consumption is costing them more, most electricity consumers are not in a position to act on those signals nor is that their primary concern. Their concern is that the whole matter should be subjected to the State regulatory process so that the utilities justify and hold down these costs. This

Commission has the responsibility to protect the consumer in this respect and intends to do it. Consequently, fuel costs will be put into base rates at the beginning and to the extent reasonably possible under our regulatory capability, kept there.

In summary, the Commission envisions that this clause would remove all fuel charges as a separate item on the customer's bill at the outset. If fuel costs steadily rise, as some expect, a small fuel charge would appear on the bill in the fuel clause item and grow as fuel costs increased over a two-year period. If fuel costs steadily decline, a small fuel credit would appear on the bill in the fuel clause item and grow as fuel costs decreased over the period. Companies will file their fuel cost information monthly and the Commission Staff will monitor it and conduct monthly "fuel audits" on each company. Every six months a "review" hearing will be held on each company wherein their fuel clause accounting and billing will be evaluated, corrected if necessary by disallowing improper expenses and credits ordered if appropriate. Every two years an "adjustment" hearing will be held for each company wherein their two-year experience with their clause will be reviewed, analyzed, and base rates adjusted to reflect any accumulated fuel cost increases or decreases.

The Commission believes this proposed clause meets the major objectives evolved from its study of the matter and review of the record in this proceeding. First. It brings fuel charges under appropriate Commission regulatory processes. Second. It

standardizes the fuel clause for all Kentucky electric companies. Third. It inserts fuel charges into base rates. Fourth. It introduces certain incentives for management to hold down fuel costs. Finally. It represents a responsible, workable regulatory procedure for handling fuel clause matters in Kentucky.

Findings and Analysis

After extensive review of the testimony and comments elicited in this proceeding, and analyzing data previously filed with our Staff, the Commission has proposed a regulation based on the following considerations:

(1) The Commission finds that it is in the public interest to standarize the fuel adjustment clause for all Kentucky electric utilities so as to allow automatic rate adjustments for changes in the cost of fossil fuel used for generation of electric energy subject to new and more rigorous regulatory review by the Commission. The standard clause will automatically adjust for change in the system heat rate by calculating fuel costs as mills per kilowatt hour. The "lag" period will continue to be one month.

(2) The proposed rate adjustment clause will be similar to the standard FPC 517 clause with some significant differences. One difference will be that no increase in the adjustment will be allowed for increased fuel costs as a result of a forced outage, unless such outage can be attributed only to an "Act of God." Another will be periodic reviews and reconciliation of fuel costs and charges at six month intervals and readjustment of accumulated fuel charge rates in public hearings at not more than two year intervals.

(3) The adjustment factor will be based on the actual cost of fossil fuel consumed for the purpose of supplying energy to the utility's customers. Recognition of inter-system purchases and exchanges of energy may be provided by exclusion of fuel costs

incurred because of inter-system energy sales, including the fuel costs related to economy energy sales; by inclusion of the fuel cost of energy purchased from other systems; and where energy is purchased on an economic dispatch basis to replace the purchaser's own higher generating costs, the price paid for economy energy. In those instances when energy is in fact purchased on an economic dispatch basis (irrespective of the definition assigned to such transaction), the net energy cost may also be included in the cost of fuel.

(4) Where the cost of fuel includes fuel from company-owned-or-controlled sources, the fact shall be noted and described as part of any filing. Only the reasonable cost of such fuel may be included. Where the price of fuel is subject to the jurisdiction of a regulatory body, its costs shall be deemed to be reasonable and includable in the adjustment clause. The rates for all fuel purchases and any changes therein shall be filed with this Commission before being permitted to be included in the adjustment clause. Fuel charges which appear unreasonable may result in the suspension of part or all of the rate schedule. Amounts collected from customers in excess of reasonable cost shall be subject to refund.

(5) Every electric company which uses an automatic fuel adjustment clause will be required each billing period to verify and justify the adjusted fuel costs to the Commission. The Commission will order a company to charge off and amortize, by means of a temporary decrease of rates, any unjustified adjustments.

Proposed Regulation

To effect these changes in existing fuel adjustment clauses, the Commission, pursuant to its authority under KRS 278.040(2) and (3), hereby proposes to adopt the following regulation governing the fuel adjustment clause to be included in the tariff of each electric generating utility operating within the State of Kentucky:

Fuel Adjustment Clause

Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:

(1) The fuel clause shall be of the form that provides for periodic adjustment per Kwh of sales equal to the difference between the fuel costs per Kwh sale in the base period and in the current period.

$$\text{Adjustment Factor} = \frac{F(m)}{S(m)} - \frac{F(b)}{S(b)}$$

Where F is the expense of fossil fuel in the base (b) and current (m) periods; and S is sales in the base (b) and current (m) periods, all as defined below;

(2) FB/SB shall be so determined that on the effective date of the utility's application of the formula, the resultant adjustment will be equal to zero.

(3) Fuel costs (F) shall be the most recent actual monthly cost of:

(a) fossil fuel consumed in the utility's own plants, and the utility's share of fossil and nuclear fuel consumed in jointly owned or leased plants,[1] plus the cost of fuel which would have been used in plants suffering forced generation and transmission outages,[2] but less the cost of fuel related to substitute generation, plus

(b) the actual identifiable fossil and nuclear fuel costs associated with energy purchased for reasons other than identified in (c) below, but excluding the cost of fuel related to purchases to substitute the forced outages,[3] plus

(c) the cost of fossil fuel recovered through inter-system sales including the fuel costs related to economy energy sales and other energy sold on an economic dispatch basis.

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1 All such fuel costs shall be based on weighted average inventory costing.

2 Where forced outages are not as a result of faulty equipment, faulty manufacture, faulty design, faulty installations, faulty operation, or faulty maintenance, but are Acts of God, then the Company may, upon proper showing, with the approval of the Commission, include the fuel cost of substitute energy in the adjustment.

3 Id., footnote 2.

(4) Sales (S) shall be all Kwh's sold, excluding inter-system sales. Where, for any reason, billed system sales cannot be coordinated with fuel costs for the billing period, sales may be equated to the sum of (a) generation, (b) purchases, (c) interchange-in, less (d) energy associated with pumped storage operations, less (e) inter-system sales referred to in (3)(c) above, less (f) total system losses.

(5) The cost of fossil fuel shall include no items other than the invoice price of fuel less any cash or other discounts.

(6) At the time the fuel clause is initially filed, the company shall submit copies of each fossil fuel purchase contract not otherwise on file with the Commission and all other agreements, options or similar such documents, formal or otherwise, and all amendments and modifications thereof related to the procurement of fuel supply and purchases power. Incorporation by reference is permissible. However, any changes in the documents, or any new agreements entered into after the initial submittal, shall be submitted at the time they are entered into. Where fuel is purchased from company-owned or controlled sources, the fact shall be noted. Fuel charges which do not appear to be reasonable may result in the suspension of the fuel adjustment clause or cause an investigation thereof to be made by the Commission on its own motion.

(7) Any tariff filing which contains a fuel clause shall conform that clause with these Regulations within three months of the effectiveness of this Rulemaking. The tariff filing shall contain a description of the fuel clause with detailed cost support.

(8) The monthly fuel adjustment shall be filed with the Commission ten (10) days before it is scheduled to go into effect, along with all the necessary supporting data to justify the amount of the adjustment which shall include data and information required pursuant to FPC Form 423 and Kentucky PSC Forms _____ Appendices A, B and C,

(a) The explanation for an extraordinary sales or purchases.

(b) The explanation of any changes in purchased fuel prices.

(c) A description of any action the company is taking to improve its fuel position re quantity, quality, and price.

(d) All to be certified by an officer of the company.

(9) Copies of all supporting material filed with the Commission shall be open and made available at the same

time for public inspection at the main and branch offices of the companies.

(10) At six month intervals, the Commission will conduct public hearings on a utility's past fuel adjustments. The Commission will order a company to charge off and amortize, by means of a temporary decrease of rates, any adjustments it finds unjustified, because of improper calculation of the charge or the failure to use proper fuel procurement practices.

(11) Every two years following the initial effective date of each company's fuel clause the Commission in a public hearing will review and evaluate past operations of the clause, disallow improper expenses and to the extent appropriate, reintroduce into the company's base rates fuel charges, or remove from the base rates any fuel cost credits which may have accumulated over the past two-year period.

The Commission emphasizes that this proposed regulation is being circulated for comment. Any interested party may submit written comments suggesting modifications to this proposal on or before January 16, 1978. All such written submittals should be addressed to:

Public Service Commission of Kentucky
730 Schenkel Lane
Post Office Box 615
Frankfort, Kentucky 40602

The Commission will analyze and consider all such materials and will conduct a public hearing on this proposal before

promulgating a regulation in final form for submission to the Legislative Research Commission.

IT IS THEREFORE ORDERED that this matter be and it hereby is set for hearing on January 18, 1978, at 10:00 a.m., in the Commission's Office at Frankfort, Kentucky.

Done at Frankfort, Kentucky, this 15th day of December, 1977.

By the Commission

ATTEST:

Richard D. Logan Jr.
Secretary

825 North Capitol Street
Washington, D.C. 20426

Approved by GAO
No. B-100220 (R0105)
Expires 12/31/77

MONTHLY REPORT OF COST
AND
QUALITY OF FUELS FOR ELECTRIC PLANTS

GENERAL INSTRUCTIONS

1. A separate form is to be completed by each electric power producer for each of its electric generating plants (including leased plants) with a total combined steam-electric, combustion turbine and internal combustion engine powered generating capacity of 25 megawatts or greater during the reporting month. Units of fuel to be reported separately for the month are total quantities representing individual laboratory analysis, combination of samples or any other basis used for determining payment to each fuel supplier for the total receipts for the month.

2. The completed form is due the 45th day after the close of the reference month and is to be sent to the Secretary, Federal Power Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. (Send seven copies including the originals.)

SPECIFIC INSTRUCTIONS FOR EACH ITEM OR COLUMN ON PAGE ONE OF THE FORM

Show electric utility company and plant names, location and plant number as shown on FPC Form 67. If a new plant, obtain a plant number from the FPC.

Use a separate line for reporting each delivery of fuel received at the plant during the reporting month. [See also instruction for column (7).] Fill in each line completely; do not use ditto marks.

(8) For each purchase report separately the quantity of fuel that is to be used for (S) steam turbine, (GT) combustion turbine or (IC) internal combustion engine.

(1) Report separately for coal and oil purchases and use only the following codes: (S) for "spot" purchase, (NC) for new or newly renegotiated contract purchases under which deliveries were first made during the reporting month, (CE) for contract purchases under which the price is changed from the price of the previous delivery under an existing contract due to provisions for automatic price adjustment, or (C) for all other contract purchases.

For gas purchases use only the codes (I) for "interruptible", (F) for "firm" and (OP) for "off peak".

(2) For contract purchases indicate "Yes" if contract expires within 24 months following the reporting month; otherwise indicate "No".

(3) Identify fuels using the following abbreviations: For Coal - ANT = anthracite, BIT = bituminous, SUB = sub-bituminous, LIG = lignite; For Oil FO2, FO4, FO5, FO6, Cru = crude, TOP = topped crude, KER = kerosine, JF = jet fuel, LPG = liquef. petroleum gas, PC = petroleum coke; For Gas - NG = natural gas, SNG = synthetic natural gas, LNG = liquefied natural gas, RG = refinery gas, BFG = blast furnace gas, COG = coke oven gas; For Other Fuels WH = nathurst, otherwise X = specify in footnote. Include starter fuel.

(4) For coal show (S) for surface mined or (U) for underground mined.

(5) Show state and Bureau of Mines coal producing district.

(6) For coal, show name of mine and county from which coal originated, if available; for oil, show supplier and refinery or port of entry; for gas, show pipeline (supplier) or distributor, producing area by state or port of entry.

(7) Specify quantities in units of a thousand (use thousands of tons for coal, thousands of barrels for oil and other liquid fuels and thousands of Mcf for gas). For example, if 213,000 tons of coal is delivered during the reporting month, report 213. Show separate quantities for each class of fuel. To derive the quantity, group all fuels received within the month from the supplier for which the price was based upon a given or related set of laboratory analysis. For quantities of fuel received from a given supplier during the month for which no laboratory analysis is made, report on the basis of the last previous laboratory analysis upon which price paid was determined for that supplier or on the basis of contract specifications or estimates, and specify in a footnote the basis used.

(8) List the average BTU content of each fuel in terms of BTU per pound for coal, BTU per gallon for oil (and other liquid products), or BTU per cubic foot for gas.

(9) Show sulfur content of each unit of fuel in terms of percent sulfur by weight. Show accurate to nearest 0.01%.

(10) Show ash content of each unit of fuel in terms of percent ash by weight. Show accurate to nearest 0.1%.

(11) Specify in cents per million BTU FOB plant. Show accurate to

MONTHLY REPORT OF COST AND QUALITY OF FUELS FOR ELECTRIC PLANTS

1. Company-Plant Code	2. Report For: MO. YR.	3. Reporting Company	4. Page Number OF
Plant Name		6. Plant Location	
Name, Title and Address of person to be contacted concerning data entered on this form		Telephone No. Area Code ( ) Extension	
Signature of Official submitting this report		Title	Date Completed

TYPE PLANT S IC GT (0)	PURCHASES TYPE use code (1)	PURCHASES CONTRACT EXPIRES WITHIN 24 Mos. (Yes-Y) (2)	FUEL TYPE use code (3)	COAL MINES ONLY TYPE use code (4)	COAL MINES ONLY DISTRICT Number & State (5)	SOURCE For coal, show name of mine and county from which coal originated, if available. For oil, show suplier and refinery or port of entry. For gas, show pipeline (supplier) or distributor, producing area by state, or port of entry. (6)	QUANTITY RECEIVED 1000 Tons 1000 Barrels 1000 Mcf (7)	QUALITY (AS RECEIVED) Average Btu of Coal per lb. Oil per gal. Gas per cu. ft. (8)	QUALITY (AS RECEIVED) Sulfur To Nearest 0.01% (9)	QUALITY (AS RECEIVED) Ash To Nearest 0.1% (10)	COST IN ¢ PER MILLION Btu (to nearest 0.1 cent) (11)

APPENDIX B

MONTHLY REPORT OF COST OF FUEL CONSUMED BY ELECTRIC PLANTS

Report For Mo. Yr.	Reporting Company	Page Number Of
Name, Title and Address of person to be contacted concerning data on this form		Telephone No. Area Code ( ) Ext.
Signature of Officer submitting this report	Title	Date Completed

LINE NO.	PLANT	FUEL CONSUMED						KWH OUTPUT	HEAT RATE	Plant Factor (in per-cent)
	Name & Location	Type	Type	Quantity	Average BTU Content	COST				
						At Source	Av. Total In ¢ Per Million BTU			
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)	(J)

APPENDIX B

Specific Instructions For Each Item Or Column On The Form

Use a separate line for each electric generating plant and type fuel which is consumed. Fill in each line completely.

(a) Show plant name as indicated in the Annual Report, and geographical location. Include leased and jointly owned plants.

(b) Use the following codes: (S) for steam turbine, (GT) for combustion turbine, and (IC) for internal combustion engine.

(c) Use the following coses: (C) for coal, (O) for oil, (N) for nuclear, and (G) for gas.

(d) Specify quantities to the nearest whole unit (use tons of coal, barrels of oil and other liquid fuels, Mcf for gas, and MWHR (thermal) for nuclear fuel).

(e) List the weighted average Btu content of each fuel in terms of Btu per pound of coal, Btu per gallon of oil, and Btu per cubic foot of gas.

(f) The cost of fossil fuel shall include no items other than those listed in Account 151 of the FPC's Uniform System of Accounts, exclusive of transportatio costs.

(g) Express to the nearest 0.1 cent.

(h) Net generation, exclusive of plant use.

(i) Average Btu per Kwh net generation.

(j) Express to the nearest full percent.

APPENDIX C

INTER-SYSTEM ENERGY PURCHASES AND SALES

Section A. Energy Purchased on an Economic Dispatch Basis

1. Purchased from _____ Power Pool
   a. Purchased to substitute for own higher cost energy
      (1) Total kWh Purchased.....
      (2) Energy Charge for Total Purchase..... $

   b. Purchased to substitute for scheduled outage*
      (1) Total kWh Purchased.....
      (2) Energy Charge for total Purchase..... $

   c. Purchased to substitute for forced outage*
      (1) Total kWh Purchased.....
      (2) Energy Charge for Total Purchase..... $
      (3) Total Identifiable Fossil and Nuclear Fuel Costs of (2) above.....
      (4) Fuel Cost of Total kWh Purchased if Generated in this unit (or units)..... $

   d. Purchased to supplement own generated energy
      (1) Total kWh Purchased.....
      (2) Energy Charge for Total Purchase..... $
      (3) Total Identifiable Fossil and Nuclear Fuel Costs of (2) above..... $

   e. Emergency Purchase**
      (1) Total kWh Purchased.....
      (2) Energy Charge for Total Purchase..... $
      (3) Total Identifiable Fossil and Nuclear Fuel Costs of (2) above..... $

2. Purchased from (Name)
   (Same as for 1 above)

APPENDIX C (Continued)

SECTION B. Energy Purchased on Other than an Economic Dispatch Basis

1. Seller (Name)
   a. Total kWh purchased***
   b. Total Identifiable Fossil and Nuclear Costs Associated with this Purchase $

2. Seller_____
   a.
   b.

3. Seller_____
   a.
   b.

SECTION C. Inter-System Energy Sales

1. Purchaser (Name)
   a. Total kWh sold
   b. Total cost of Fuel Component
   c. TOTAL ENERGY COST
2. Purchaser_____
   a.
   b.
   c.
3. Purchaser_____
   a.
   b.
   c.

NOTE: In the case of an outage due to scheduled maintenance, supply the following information:

1. Name of plant.
2. Which unit or units, and their capacity ratings.
3. Brief description of type of maintenance.
4. Total hours out of service during this report period AND EST FUTURE HRS OUT
5. When was P.S.C. first notified that maintenance would take place.

In the case of a forced outage, supply the following information:

1. Name of plant.
2. Which unit or units, and their capacity ratings.
3. Cause of outage.
4. Repairs needed.
5. Time outage occurred.
6. Time P.S.C. was notified.
7. Total hours out of service during this report period, AND EST FUTURE HRS OUT
8. Where did substitute energy come from.

In the case any fossil fuel generation is used for hydro pumped storage, supply the following information:

1. Name of plant.
2. kWh supplied.

(N) TARIFF L. P. O.

(Large Power—Optional)

AVAILABILITY OF SERVICE.

Available for power service. Customers shall contract for a definite amount of electrical capacity in kilovolt-amperes, which shall be sufficient to meet normal maximum requirements but in no case shall the capacity contracted for be less than 50 kilovolt-amperes. The Company may not be required to supply capacity in excess of that contracted for except by mutual agreement. Contracts will be made in multiples of 25 kilovolt-amperes.

RATE.

Primary Portion:	Kilowatt-hours in an amount equal to the product of the first thirty (30) times the Kv-a. of Monthly Billing Demand, as determined below, will be designated as the primary portion and will be subject each month to the primary rate set forth below.	
Secondary Portion:	Kilowatt-hours in an amount equal to the product of the next one hundred and seventy (170) times the Kv-a. of Monthly Billing Demand, as determined below, will be designated as the secondary portion and will be subject each month to the secondary rate set forth below.	
Excess Portion:	The remainder of the energy used by customer each month in excess of the primary and secondary portions will be designated as the excess portion and will be subject to the excess rate set forth below.	
Primary Rate:	For the Kwhrs. of the primary portion as defined above	4.25 cents per Kwhr.
Secondary Rate:	For the first 3,000 Kwhrs. of the secondary portion as defined above	3.0 " " "
	For the next 7,000 Kwhrs. of the secondary portion as defined above	2.0 " " "
	For the next 90,000 Kwhrs. of the secondary portion as defined above	1.5 " " "
	For all over 100,000 Kwhrs. of the secondary portion as defined above	1.0 " " "
Excess Rate:	For the Kwhrs. of the excess portion as defined above	0.6 " " "

MINIMUM CHARGE.

This tariff is subject to a minimum monthly charge equal to the primary portion, for the month, computed at the primary rate.

DELAYED PAYMENT CHARGE.

The above tariff is net if account is paid in full within twenty (20) days of date of bill. On all accounts not so paid an additional charge of 2% of the amount of such bill will be made.

BILLING DEMAND.

Billing demand in kilovolt-amperes shall be taken each month as the highest fifteen-minute integrated peak in kilowatts as registered during the month by a fifteen-minute integrating demand meter or indicator, or at the Company's option as the highest registration of a thermal type demand meter or indicator, divided by the average monthly power factor established during the month corrected to the nearest kilovolt-ampere; but the monthly billing demand so established shall, in no event, be less than 60% of the contract capacity of the customer, nor shall it be less than 50 kilovolt-amperes.

DELIVERY VOLTAGE.

The tariff as set forth above is based on the delivery and measurement of energy at the transmission or distribution voltage established by the Company, but not less than 2200 volts. For the delivery and measurement at any voltage lower than that so established an additional charge will be made of 15 cents per month per Kv-a. of Monthly Billing Demand.

(N) Indicates New Tariff.

Issued by
M. C. FUNK, General Manager
Ashland, Kentucky

Issued September 10, 1936

Effective October 1, 1936

(N) TARIFF L. P. O. (Continued)

(Large Power—Optional)

POWER FACTOR.

The rates set forth in this tariff are based upon the maintenance by the customer of an average monthly power factor of 85% as shown by integrating instruments. When the average monthly power factor is above or below 85% the kilowatt hours as metered will be, for billing purposes, multiplied by the following constants:

Average Monthly Power Factor	Constant
1.00	.951
.95	.965
.90	.981
.85	1.000
.80	1.023
.75	1.050
.70	1.0835
.65	1.1255
.60	1.1785
.55	1.2455
.50	1.3335

Constants for power factors other than given above will be determined from the same formula used to determine those given.

COAL CLAUSE.

The above monthly rate is based upon the average price of coal at the Hazard Plant of Kentucky and West Virginia Power Company, Inc., and Cabin Creek, Glen Lyn, Kenova and Logan Plants of the Appalachian Electric Power Company, which price shall be understood to mean the cost of coal at the point of origin, to which shall be added transportation charges to the plants. It is understood that the coal when purchased or contracted for shall be purchased or contracted for in the most advantageous manner and on a basis of pure purchase and sale; and in the event coal shall be purchased from any mine in which either of said companies is interested, directly or indirectly, then at no time shall the price paid for coal exceed the price in the open market, at the time of delivery, exclusive of transportation.

If during any monthly period the average cost of coal delivered at the said generating plants is above $1.75 per ton of 2000 pounds, an additional charge per month shall be made on the actual Kwhrs. used at $.00035 per Kwhr. for each full fifty cents ($.50) increase in the cost of coal above $1.75 per ton.

If during any monthly period, the average cost of such coal is less than $1.75 per ton of 2000 pounds, the net bill rendered to the customer for the month shall be decreased by an amount equal to the actual Kwhrs. used at $.00035 per Kwhr. for each full fifty cents ($.50) decrease in the cost of coal below $1.75 per ton.

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MAIN OFFICE

TERM.

Variable contract, but not less than one year.

SPECIAL TERMS AND CONDITIONS.

See Pages 2, 3 and 4 for Standard Terms and Conditions of Service.

The above Tariff is also available to legitimate electric Public Utilities for resale and when such legitimate electric Public Utilities contract for service under this Tariff, the Incidental Power and Incidental Lighting clauses as set forth in the Standard Terms and Conditions of Service shall be waived by the Company.

(N) Indicates New Tariff.

Issued by
M. C. FUNK, General Manager
Ashland, Kentucky

Issued September 10, 1936

Effective October 1, 1936

(N) TARIFF R. C. S.
(Rural Cooperative Service)

AVAILABILITY.

Available for service to non-profit cooperative associations engaged primarily in furnishing electric service in rural areas and taking energy solely for resale and distribution to ultimate users, subject to terms and conditions hereinafter set forth, and such other standard regulations of the respective company as are filed with the Commission and not in conflict herewith. This service classification shall apply separately to each point of delivery.

CHARACTER OF SERVICE.

Power and energy to be delivered hereunder will be alternating current at sixty (60) cycles, the voltage and phase to be that available at the point of delivery on utility's transmission system. The cooperative association shall comply with such reasonable rules and regulations as may be approved by the Commission relating to the installation and operation of all substations connected to the utility's transmission lines. No breakdown or auxiliary service is permitted.

METERING.

The company shall have the option of metering either at primary or secondary voltage.

RATE.

Demand Charge:	First 50 kw. of maximum demand per month	$1.25 per kw.
	Next 150 " " " " " "	1.00 " "
	Over 200 " " " " " "	.75 " "
Energy Charge:	First 50 hours' use of maximum demand per month	1¢ per kw.
	Excess consumption	¾¢ " "

Minimum Charge: The monthly minimum charge shall be $1.25 per kw. of maximum 15-minute integrated demand per month for each point of delivery, but not less than $62.50 for each point of delivery, except that the $62.50 minimum will not be effective for the first 12 months after service is commenced.

DETERMINATION OF MAXIMUM DEMAND.

The maximum demand shall be the maximum average kilowatt load used by the customer for any period of fifteen (15) consecutive minutes of the month for which the bill is rendered, as shown by a maximum demand meter.

TERMS OF PAYMENT.

Customers' monthly bills will be computed at the net rates and there will be added a sum equivalent to two (2) per cent of the net bill on all accounts which are not paid in full within ten (10) days of the date of the bill.

POWER FACTOR PROVISION.

The customer shall at all times take and use power in such manner that the power factor at the time of maximum demand shall be as near 100% as is consistent with good engineering practice, but when the power factor at the time of monthly maximum demand is determined to be less than 80%, the maximum demand used for billing purposes shall be determined by multiplying the demand shown by the meter at the time of maximum demand by 80% and dividing the product thus obtained by the actual power factor at the time of such maximum demand.

COAL CLAUSE.

The above monthly rate is based upon the average price of coal at the Hazard Plant of Kentucky and West Virginia Power Company, Inc., and Cabin Creek, Glen Lyn, Kenova and Logan Plants of the

(N) Indicates New Tariff.

Issued by
M. C. FUNK, General Manager
Ashland, Kentucky

Issued November 10, 1937 — Effective December 1, 1937

Filed in compliance with Order No. 22
of the Public Service Commission of Kentucky dated May 15, 1937.

(D) Discontinue after 20 days Statuatory Notice — Effective February 21, 1965

(N) TARIFF R. C. S. (Continued)
(Rural Cooperative Service)

Appalachian Electric Power Company, which price shall be understood to mean the cost of coal at the point of origin, to which shall be added transportation charges to the plants. It is understood that the coal when purchased or contracted for shall be purchased or contracted for in the most advantageous manner and on a basis of pure purchase and sale; and in the event coal shall be purchased from any mine in which either of said companies is interested, directly or indirectly, then at no time shall the price paid for coal exceed the price in the open market, at the time of delivery, exclusive of transportation.

If during any monthly period the average cost of coal delivered at the said generating plants is above $1.75 per ton of 2000 pounds, an additional charge per month shall be made on the actual Kwhrs. used at $.00035 per Kwhr. for each full fifty cents ($.50) increase in the cost of coal above $1.75 per ton.

If during any monthly period, the average cost of such coal is less than $1.75 per ton of 2000 pounds, the net bill rendered to the customer for the month shall be decreased by an amount equal to the actual Kwhrs. used at $.00035 per Kwhr. for each full fifty cents ($.50) decrease in the cost of coal below $1.75 per ton.

TERMS OF CONTRACT.

Initial contracts under this rate shall be in force for a minimum period of two years from the date service under such contract is first rendered and shall continue in effect after the expiration of said initial contract period for yearly periods until cancelled by six months' written notice being given by one party to the other of its election to terminate this contract. Where mutually agreeable contracts for periods longer than two years may be entered into by the respective parties. However, no contract, for whatever period, precludes the right of the Commission to require revision in rates or conditions of service under this classification if such changes appear reasonable and necessary before expiration of such contracts.

SPECIAL TERMS AND CONDITIONS.

1. No substantial additional investment in transmission lines or substation facilities is contemplated under the above rate. Where connection of potential service loads under this rate makes it necessary to strengthen or increase the capacity of the Company's existing facilities, such cost, in excess of an amount equivalent to three times the expected annual gross revenue from the requested service, will be borne by the cooperative association, the intent of this clause being to limit the additional capital expenditure by the vendor company, incident to furnishing service under this rate to an amount not to exceed three times the annual expected revenue from the cooperative association, or associations, requesting service under such conditions. Contributions from cooperative associations under such conditions shall be required by the company furnishing the service only after review and approval by this Commission.

2. The exact point of delivery or connection between the lines of the company and the lines of the cooperative associations shall be determined by agreement between the cooperative and the company furnishing the service. The Commission will determine a reasonable and satisfactory point of delivery where agreement cannot be obtained between the parties.

3. The cooperative association shall bear the cost of all labor, materials and equipment that may be necessary or required in making the connection between its facilities and those of the company furnishing the service, except that the cooperative association shall not be required to furnish the watt-hour meter or demand meter or to install such metering equipment.

4. Service hereunder will be furnished at one location. If the cooperative association desires to purchase energy at two or more locations, each location shall be metered and billed separately from the others under the above rate.

5. The cooperative association will have complete responsibility for all operation and maintenance beyond the point of delivery and will save the company harmless against liability for injury or damages, resulting in any manner from construction, location, operation, or maintenance of the cooperative's lines and facilities.

6. See pages 2, 3 and 4 for standard terms and Conditions of Service.

(N) Indicates New Tariff

Issued by
M. C. FUNK, General Manager
Ashland, Kentucky

Issued November 10, 1937

Effective December 1, 1937

Filed in compliance with Order No. 22
of the Public Service Commission of Kentucky dated May 15, 1937.

KENTUCKY AND WEST VIRGINIA POWER CO., INC.
(See Sheet No. 1 for Applicability)

2nd Revision of Original Sheet No. 17A
P. S. C. Ky. No. 1
Cancelling
1st Revision of Original Sheet No. 17A

TARIFF L. P.
(Large Power)

AVAILABILITY OF SERVICE.

Available to power users contracting for a definite amount of electrical capacity but not less than 50 kilowatts.

(A) **RATE.**

Primary Portion.

For each kw of integrated monthly 15-minute maximum demand, $1.25 per kw, to which will be added:

Secondary Portion.

For the first	10,000	kwhrs	used	in	any	month	2.0	cents per kwhr
" " next	30,000	"	"	"	same	"	1.6	" " "
" " "	60,000	"	"	"	"	"	1.2	" " "
" " "	400,000	"	"	"	"	"	1.0	" " "
" " "	500,000	"	"	"	"	"	0.95	" " "
" " "	500,000	"	"	"	"	"	0.85	" " "
All over	1,500,000	"	"	"	"	"	0.80	" " "

DELIVERY AND VOLTAGE.

This tariff is based on the delivery and measurement of energy at the transmission or distribution voltage established by the company, but not less than 2,200 volts. For the delivery and measurement at any voltage lower than that so established, the primary portion charge shall be increased $.15 per month per kw of demand.

BILLING DEMAND.

Billing demand shall be based each month upon the highest registration of a 15-minute integrating demand meter or indicator. Monthly billing demand so established shall not be less than the customer's contract capacity except that where the customer purchases his entire requirements for electric light, heat and power under this tariff the monthly billing demand shall not be less than 60% of the contract capacity.

DELAYED PAYMENT CHARGE.

This tariff is net if account is paid in full within 20 days of date of bill. On all accounts not so paid an additional charge of 2% of the total amount billed will be made.

(A) **COAL CLAUSE.**

The above monthly rate is based upon the average price of coal at the Cabin Creek, Glen Lyn, and Logan Plants of the Appalachian Electric Power Company, which price shall be understood to mean the cost of coal at the point of origin, to which shall be added transportation charges to the plants. It is understood that the coal when purchased or contracted for shall be purchased or contracted for in the most advantageous manner and on a basis of pure purchase and sale; and in the event coal shall be purchased from any mine in which the said Appalachian Electric Power Company is interested, directly or indirectly, then at no time shall the price paid for coal exceed the price in the open market, at the time of delivery, exclusive of transportation.

If during any monthly period the average cost of coal delivered at the said generating plants of the Appalachian Electric Power Company is above $2.00 per ton of 2,000 pounds, an additional charge during the second month thereafter shall be made on the actual kwhrs used during said second month at $.00015 per kwhr for each $.25 increase in the cost of coal above $2.00 per ton.

If during any monthly period the average cost of such coal is less than $1.50 per ton of 2,000 pounds, the net bill rendered to the customer for the second succeeding month shall be decreased by an amount equal to the actual kwhrs used during said second month at $.00015 per kwhr for each $.25 decrease in the cost of coal below $1.50 per ton.

TERM OF CONTRACT.

Annual.

SPECIAL TERMS AND CONDITIONS.

See Sheets No. 2, 3, 4, and 4A for Terms and Conditions of Service.

This tariff is available to legitimate electric public utilities for resale and when such legitimate electric public utilities contract for service under this tariff the incidental power and incidental lighting clauses set forth in the Terms and Conditions of Service will be waived by the company.

This tariff is also available to customers having other sources of energy supply but who desire to purchase service from the company. Where such conditions exist the monthly billing demand shall not be less than the customer's contract capacity. The preceding sentence does not apply where customers served under this tariff had other sources of energy supply on August 1, 1940, and where the service is covered by a contract made prior to that date.

(A) Indicates advance.

Issued by
R. E. DOYLE, JR., General Manager
Ashland, Kentucky

Issued March 1, 1949

Effective for service delivered on and after March 21, 1949

P S C approval of case 1834 Mar 19, 1949