

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC APPLICATION OF DUKE ENERGY )  
KENTUCKY, INC. FOR: 1) AN ADJUSTMENT )  
OF THE ELECTRIC RATES; 2) APPROVAL OF )  
AN ENVIRONMENTAL COMPLIANCE PLAN )  
AND SURCHARGE MECHANISM; 3) APPROVAL ) CASE NO.  
OF NEW TARIFFS; 4) APPROVAL OF ACCOUNTING ) 2017-00321  
PRACTICES TO ESTABLISH REGULATORY ASSETS )  
AND LIABILITIES; AND 5) ALL OTHER REQUIRED )  
APPROVALS AND RELIEF )

**ATTORNEY GENERAL’S RESPONSE TO DUKE ENERGY KENTUCKY,  
INC.’S PETITION FOR REHEARING**

Comes now the Attorney General of the Commonwealth of Kentucky (“Attorney General”), by and through his Office of Rate Intervention, and submits this Response (“Response”) to Duke Energy Kentucky, Inc.’s (“Duke”) Petition for Rehearing (“Petition”) in this matter. In support of his Response, the Attorney General states as follows:

KRS 278.400 provides for rehearing on a determination made by the Commission in any hearing. Application for rehearing must be made within twenty (20) days after service of the order, with service being complete three (3) days after the date the order is mailed or sent by electronic submission.<sup>1</sup> KRS 278.400 “is intended to provide closure to Commission

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<sup>1</sup> KRS 278.400; KRS 278.380; *See* Case No. 2012-00578, In the Matter of: Application of Kentucky Power Company for (1) a Certificate of Public Convenience and Necessity Authorizing the Transfer to the Company of an Undivided Fifty Percent Interest in the Mitchell Generating Station and Associated Assets; (2) Approval of the Assumption by Kentucky Power Company of Certain Liabilities in Connection with the Transfer of the Mitchell Generating Station; (3) Declaratory Rulings; (4) Deferral of Costs Incurred in Connection with the Company’s efforts to Meet Federal Clean Air Act and Related Requirements; and (5) All Other Required Approvals and Relief, (Ky. PSC Nov. 22, 2013) at 2.

proceedings,” and provides “an opportunity for the Commission to address any errors or omissions” in its orders.<sup>2</sup>

On May 3, 2018, Duke filed its Petition in the matter, as did the Attorney General. Although Duke’s Petition insists, “there are certain important issues that appear to have been omitted from the Order or that require clarification, and other findings that were inconsistent with the Commission’s precedent,” importantly Duke did not provide any argument that the Commission-determined overall revenue requirement was unreasonable.<sup>3</sup> In fact, Duke’s Petition quibbles with the way the Commission reached its revenue requirement determination, rather than objecting to the overall level. The law is clear that upon appeal, a Commission’s order may only be vacated or set aside if it is found unreasonable or unlawful.<sup>4</sup> Further, “an order is unreasonable if it is not supported by substantial evidence and the evidence leaves no room for a difference of opinion among reasonable minds.”<sup>5</sup> Lastly, “[u]nder the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling.”<sup>6</sup> Not only was the Commission’s overall revenue requirement determination reasonable as required by the standards set forth by the law, but in fact the record actually contains evidence that the Commission is well within its power to *reduce* Duke’s *current* revenue requirement by approximately \$15,000,000.<sup>7</sup> If Duke is granted

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<sup>2</sup> Case No. 2012-00096, Application of Kentucky-American Water Company for a Certificate of Public Convenience and Necessity Authorizing Construction of the Northern Division Connection (Ky. PSC Jan. 23, 2014) at 4-5, citing Case No. 96-524, An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company from November 1, 1994 to October 31, 1996 (Ky. PSC Mar. 11, 1999) at 2; Case No. 2009-00127, DPI Teleconnect, LLC v. Bellsouth Telecommunications, Inc. d/b/a AT&T Kentucky (Ky. PSC Mar. 2, 2012) at 3.

<sup>3</sup> Duke Energy Kentucky, Inc.’s Petition for Rehearing (Ky. PSC May 3, 2018) at 1-2.

<sup>4</sup> KRS 278.410.

<sup>5</sup> National-Southwire Aluminum Co. v. Big Rivers Elec. Corp., 785 S.W.2d 503, 510 (Ky. App. 1990), *citing* Energy Regulatory Commission v. Kentucky Power Co., 605 S.W.2d 46 (Ky. App. 1980).

<sup>6</sup> Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S.Ct. 281, 288 (1944).

<sup>7</sup> *See generally* Attorney General’s Post-Hearing Brief- Public Redacted Version (Ky. PSC Apr. 2, 2018).

rehearing on *any* item contained in its Petition, the Attorney General expressly reserves its rights to wholly participate and object to any item or issue in this proceeding. In accordance with recent Commission precedent, the Attorney General requests that if Duke is granted rehearing on items that run the chance of increasing the revenue requirement he be presented the opportunity to litigate corresponding reductions.<sup>8</sup> Finally, silence in this Response on any particular subject raised in the Company's Petition should not be construed as acquiescence, approval or agreement.

### **Revenue Requirement**

Insofar as Duke requests the Commission provide additional explanation as to its determination of an approximately \$8.4M revenue requirement increase, the Attorney General agrees. In fact, in his own Petition for Rehearing, the Attorney General noted that although he doesn't necessarily disagree with the Commission's overall revenue requirement determination, he "does though request rehearing for the purpose of ascertaining the specific adjustments the Commission made . . . in order to conclude that an \$8,428,645 increase is reasonable."<sup>9</sup> Nevertheless, inasmuch as Duke's Petition attempts to inflate its allowed revenue requirement or reargue positions the Commission considered and rejected, the Attorney General objects and states that there is no need to increase the overall revenue

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<sup>8</sup> See Case No. 2017-00179 Electronic Application of Kentucky Power Company for (1) A General Adjustment of its Rates for Electric Service; (2) An Order Approving its 2017 Environmental Compliance Plan; (3) An Order Approving its Tariffs and Riders; (4) An Order Approving Accounting Practices to Establish Regulatory Assets and Liabilities; and (5) An Order Granting All Other Required Approvals and Relief, Order01 (Ky. PSC Feb. 27, 2017), holding that a corresponding, but related, issue raised in a Response to a Petition for Rehearing may be properly addressed on rehearing.

<sup>9</sup> Attorney General's Petition for Rehearing (Ky. PSC May 3, 2018) at eight.

requirement the Commission determined.<sup>10</sup> Specifically, the Attorney General objects to increases in the revenue requirement for the following issues:

- Vegetation Management Expense;
- Capitalization Adjustment for East Bend Deferral; and
- Restricted Stock Units (RSUs)

As for vegetation management expense, the Attorney General's witness provided evidence that the amount included in the test-year was "wildly excessive" when compared to the actual expense in years 2012-2016.<sup>11</sup> In his Post-Hearing Brief, the Attorney General noted his concern about the rate of increase in vegetation management expense.<sup>12</sup> Furthermore, in its order the Commission indicated significant concern regarding the Company's proposed test-year level of vegetation management expense and required Duke to study this issue further.<sup>13</sup> The record is complete with evidence as to the "large increase" in Duke's vegetation management expense, as well as concern for such a large increase that the Company will effectively pass directly on to customers. Given the parties' and Commission's concern, coupled with the evidence of the magnitude of the proposal, the test-year amount the Commission determined for vegetation management is reasonable.

In regards to East Bend, the Attorney General is appalled that Duke continues to request a return on the East Bend Deferral regulatory asset in excess of that approved by the Commission. Duke's Application included a debt-only rate of return on the regulatory asset

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<sup>10</sup> In fact, if the Commission chooses to grant rehearing on the issues in which Duke seeks to increase its revenue requirement, the Attorney General reserves his right to fully argue the record in the matter, supporting a decrease of nearly \$15,000,000.

<sup>11</sup> Direct Testimony of Lane Kollen (Ky. PSC Dec. 28, 2017) at 14-15.

<sup>12</sup> Attorney General's Post-Hearing Brief- Public Redacted Version (Ky. PSC Apr. 2, 2018) at 12-13.

<sup>13</sup> Order (Ky. PSC Apr. 13, 2018) at 18.

and in the revenue requirement while also including the regulatory asset in the capitalization, thus earning a grossed-up return at the weighted average cost of capital in the revenue requirement.<sup>14</sup> This had the effect of allowing Duke to 1) earn a debt-only rate on a sum of money, while also, 2) earning a grossed-up weighted average cost of capital *on the same sum of money for which it is earning a debt rate*. The Attorney General addressed Duke's request on this issue in his Brief, noting that although the Company agrees that it should only earn a return on the sum of money once, it is clear the Company wants that return to be at the grossed-up weighted average cost of capital.<sup>15</sup> It is clear from the Commission's Order that the Commission considered the evidence on this issue, including the Company's rebuttal testimony and decided against Duke. There is no need to address this issue on rehearing as Duke has provided no support to do so other than an explanation as to its "sour grapes" approach. The Commission's adjustment already provides for the "symmetry" that Duke seeks.

In support of its request to rehear the disallowance of \$541,424 "attributable solely to the Company's issuance of RSUs", Duke claims that RSUs are not "earnings based" and that "[t]he record is entirely devoid of evidence that indicates that the RSUs are in any way tied to the Company's financial performance."<sup>16</sup> The only way those comments are true is if one disregards the record in this matter and ignores common sense. Providing employees compensation in the form of stock units is in every sense of the term "compensation tied to financial performance." The Attorney General's witness, Mr. Kollen noted ". . . the Commission historically has disallowed and removed all inventive compensation expense . .

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<sup>14</sup> Direct Testimony of Lane Kollen (Ky. PSC Dec. 28, 2017) at 53.

<sup>15</sup> Attorney General's Post-Hearing Brief- Public Redacted Version (Ky. PSC Apr. 2, 2018) at 36.

<sup>16</sup> Duke Energy Kentucky, Inc.'s Petition for Rehearing (Ky. PSC May 3, 2018) at 6.

. that were incurred to incentivize the achievement of shareholder goals as measured by financial performance.”<sup>17</sup> The Attorney General states that by definition, no other compensation is more directly tied to shareholder goals than stock. If the Company has no intention of giving employees “skin in the game,” thus incentivizing those employees to make decisions that will ultimately lead to higher stock prices, then why does it feel compelled to provide them compensation in the form of stock? Duke chose to provide their employees with more than \$500,000 a year in RSUs for a reason. Duke’s use of RSUs and performance shares encourages employees to make decisions for the benefit of the Company, and as a shareholder, ultimately to the benefit of the employee himself. The Commission’s decision on RSUs is reasoned and supported by evidence, and thus the Commission should deny Duke’s petition on this subject.

### **Cogeneration Tariffs**

Duke raises two issues with the Commission’s order as it relates to cogeneration tariffs. The Attorney General has no concern with the first issue, but has significant concern with the second. Although Duke requests rehearing “to confirm that Duke Energy Kentucky’s mandatory capacity purchase obligation only applies when a qualifying facility is able to meet PJM’s Capacity Performance requirements,”<sup>18</sup> the Attorney General notes that the entire paragraph regarding this issue fails to cite a single instance in the evidentiary record where, 1) this particular issue was discussed, or 2) Duke requested relief on this subject. Though the Attorney General understands Duke’s concern, this matter is not properly before the Commission. In addition to Duke’s failure to cite any evidentiary support for the relief requested, the Attorney General can find no mention in the record of Duke’s concern, nor

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<sup>17</sup> Direct Testimony of Lane Kollen (Ky. PSC Dec. 28, 2017) at 19.

<sup>18</sup> Duke Energy Kentucky, Inc.’s Petition for Rehearing (Ky. PSC May 3, 2018) at 11.

can counsel for the Attorney General remember this particular issue being discussed at the hearing in this case. Furthermore, the Attorney General notes that although Duke refers to “recent Commission precedent” it fails to provide any citation or direction to same.<sup>19</sup> The Attorney General is aware of a recent Commission decision on this matter as he was a party to the case, but he notes that the order Duke is likely referring to was entered six (6) days before briefs were to be filed in this case. Duke is in no way barred from requesting relief on this issue, but this is neither the time nor the place. Rehearing is not the proper avenue to request relief on an issue for the first time.

### **Decommissioning Study Approval**

The Attorney General objects to rehearing on the approval of the Decommissioning Study provided by Mr. Jeffrey Kopp. Although the Commission did not adopt the Attorney General’s proposed adjustment regarding net salvage expense, the primary basis for his argument against that expense is pertinent to the Commission’s consideration on this issue. The Attorney General believes that it is imprudent to prematurely recover from customers costs associated with the most expensive and intensive option after generation is retired before any such decision is reached. Although the Commission allowed the Company to recover net salvage expense through rates, adopting Mr. Kopp’s study ensures that Duke spends that money, whether or not the actions contained in his study are the most reasonable options at the time of decommissioning. By allowing recovery of net salvage *and* approving the Decommissioning Study, the Commission would sanction the self-fulfilling nature of the proposal; ensuring customers’ money is expended regardless of the prudence of doing so. The

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<sup>19</sup> *Id.*

Commission should instead wait until a decision must be made regarding Duke's generation and decide then what option is in customers' best interests.

**WHEREFORE**, the Attorney General requests the Commission DENY Duke's Petition for Rehearing, except insofar as it seeks clarity on the determination of the \$8,428,645 increase in revenue requirements for accounting purposes.

Respectfully submitted,

ANDY BESHEAR  
ATTORNEY GENERAL



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