

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

RIVERSIDE GENERATING COMPANY, L.L.C.)	
)	
v.)	Case No. 2017-00472
)	
KENTUCKY POWER COMPANY)	

REPLY BRIEF OF RIVERSIDE GENERATING COMPANY, L.L.C.

Comes now Riverside Generating Company, L.L.C. (“Riverside”), by counsel, pursuant to the Commission’s Order entered September 18, 2018, and for its Reply to the Brief filed herein on November 5, 2018, by Kentucky Power Company (“Kentucky Power”), respectfully states as follows:

I. SUMMARY

Riverside’s complaint arises from Kentucky Power’s unreasonable interpretation and unjust imposition of its retail tariff, particularly with respect to the station power necessary to operate the Zelda and Foothills sites. Riverside contends that its generating sites should be permitted to supply their own energy, through the netting of generation and consumption over a monthly interval, in accordance with the station power protocol established for Market Sellers (like Riverside and Kentucky Power) within PJM’s OATT.¹ This conclusion is proper because: (i) Riverside satisfies the Special Terms and Conditions of Kentucky Power’s Tariff N.U.G., and thus

¹ To the extent Riverside’s sites experience “net negative” generation for a month (*i.e.*, consumption exceeds generation), Riverside expects to purchase the energy it requires from Kentucky Power at retail. *See* Riverside’s Brief, at 33-35. Riverside also expects to pay fixed and demand charges (among others) under Kentucky Power’s retail tariff, in addition to any volumetric energy charges, to ensure its power needs are met in the event consumption exceeds generation during a particular month. *See id.*, at 38-39.

“shall take service under” PJM’s OATT;² (ii) a monthly netting interval, and not Kentucky Power’s claimed “15-minute” netting interval, finds support in Kentucky Power’s tariff, has been adopted by FERC/PJM/MISO/etc., and is the netting interval Kentucky Power utilizes when addressing its own generation facilities’ station power needs; and (iii) Kentucky law does not require, and reason does not permit, Kentucky Power’s continued imposition of retail rates for energy that Riverside can simply supply itself.

Kentucky Power has taken the position that its tariff provides for the netting of consumption and generation on a 15-minute interval basis.³ Kentucky Power also contends that Riverside should be compelled to pay retail rates for the Zelda and Foothills sites’ net consumption each month because: (i) Riverside does not satisfy the Special Terms and Conditions of Tariff N.U.G.; and (ii) even if it does, Kentucky Power’s certified retail electric service territory and related Kentucky law require Riverside to satisfy all its energy needs with retail purchases from the utility. Kentucky Power is wrong in all respects.

II. COUNTER-ARGUMENT

A. The Zelda Site and the Foothills Site are not the same site.

The parties agree that the Special Terms and Conditions of Tariff N.U.G. permit certain non-utility generators the ability to “take service under” PJM’s OATT if specified conditions are satisfied. In written testimony filed on Kentucky Power’s behalf in this matter, Mr. Ranie

² Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-3 (effective Jan. 19, 2018).

³ *See, e.g.*, Kentucky Power’s Brief, at 3. While there are numerous problems with Kentucky Power’s claimed 15-minute netting interval (*see, e.g.*, Riverside’s Brief, at n. 66, 67, and 94 and accompanying text), the fact the Kentucky Power recognizes any netting period is important. Quite simply, it demonstrates that Kentucky Power views the netting of generation and consumption (*i.e.*, “positive generation” and “negative generation”) as an appropriate calculation to undertake; it is an implicit admission that not all kWh consumed are necessarily purchased from a third party at retail, but instead may be self-supplied and accounted for as “negative generation” that offsets a customer-generator’s output. Although the utility’s execution is severely flawed, Kentucky Power is actually in accord with essentially all the relevant players, including FERC and PJM, by embracing the concept of netting.

Wohnhas stated as follows: “Tariff N.U.G. requires two (2) conditions be met before a merchant generator can take advantage of the remote self-supply provisions: (1) that the generators are owned by the same individual business entity and (2) that the generators are not located at the same site.”⁴ There is no dispute as to Riverside’s satisfaction of the first condition regarding common ownership.⁵

The parties have described the various reasons why the sites should be considered one (1) site or two (2), and Riverside will spare the Commission a redundant recitation of the relevant points; that said, Riverside will merely underscore that its Zelda and Foothills sites are electrically isolated and can operate independently via unique and separately-metered interconnections with the power grid.⁶ These facts should be determinative, as they fundamentally establish the existence of distinct generators/sites capable of satisfying each other’s station power needs (remote self-supply), as contemplated by Tariff N.U.G.⁷

⁴ Wohnhas Written Testimony, at 10. These conditions are contained in the Special Terms and Conditions of Tariff N.U.G. (“Customers desiring to provide Startup and Station Power from other generation facilities, owned by the same individual business entity that are not located on the site of the customer’s generator (remote self-supply), shall take service under [PJM’s OATT]...”). Notably, however, Kentucky Power has suddenly asserted in its Brief an additional test under Tariff N.U.G. that ostensibly must be passed before a generator “shall take service under” PJM’s OATT: the two (2) relevant sites must be “remote.” This newfound criterion, apparently based on the inclusion of the phrase “(remote self-supply)” within the Special Terms and Conditions of Tariff N.U.G., is obviously erroneous. As discussed at the hearing in this matter and as no doubt apparent to this Commission, “remote self-supply” is a term of art when discussing station power and, certainly at the federal level, has absolutely nothing to do with the actual distance between two generators. *See* HVR, at 2:59:25 p.m./Hearing Transcript, Wohnhas Testimony, at 210-211 (“*Q. Okay. So I guess “term of art” is something that would be uniquely -- would be unique to the electric industry. / A. Okay. If that’s how you define it, the answer is yes. / Q. Which means that it may or may not be far or at a distance. So what I’m asking you is, is your definition of “remote” the same as your definition of what “remote self-supply” would be? / A. Yes.*”); *see also* Riverside’s Brief, at n. 103. Unfortunately, Kentucky Power’s repeated attempts to define (and redefine) the requirements of its Tariff N.U.G. reflect the utility’s desperation to maintain Riverside’s revenue stream, not its commitment to the reasonable interpretation and application of its own tariff in service to its customers.

⁵ *See* HVR, at 1:35:06 p.m./Hearing Transcript, Wohnhas, at 148; *see also* Hammond Rebuttal Testimony (filed June 14, 2018).

⁶ *See* Riverside’s Brief, at 6-7, 26-28.

⁷ According to Kentucky Power, the electrical isolation of the Zelda and Foothills sites is inconsequential to the question of separateness because “no one would contend” the utility’s own former and current generation units (at its Big Sandy and Mitchell Stations), which were/are also electrically isolated, should be considered separate sites. *See* Kentucky Power’s Brief, at 29. Of course, what Kentucky Power fails to appreciate or mention is that its units, like

Of course, Kentucky Power has made clear in this proceeding that it does not particularly care whether Zelda and Foothills are considered one site or two, or if Riverside is found to satisfy the terms of Tariff N.U.G. Indeed, Kentucky Power views it as “a great possibility” that it will seek to amend or eliminate Tariff N.U.G. if Riverside is successful in this case,⁸ and actually calls upon the Commission to amend or strike those portions of its tariff that fail to yield the utility’s desired results.⁹ In light of Kentucky Power’s unusual (if not drastic) tactics, Riverside has argued not only that it satisfies the Special Terms and Conditions of Tariff N.U.G., but also that it cannot be compelled to purchase at retail the same station power it can self-supply (or remote self-supply) by netting consumption and generation over a monthly interval. This latter contention is supported by Kentucky law, historical utility practices, established federal policy, and basic notions of fairness, as discussed in Riverside’s Brief and herein.

B. Riverside’s Requested Relief is Consistent with Kentucky Law.

In its Brief, Kentucky Power repeatedly asserts that Riverside currently takes and must continue to take retail electric service from Kentucky Power during the 90 percent of the hours each month that neither the Zelda nor Foothills units are generating.¹⁰ Kentucky Power also contends that, “[a]t bottom, Riverside Generating seeks to receive the benefits of Kentucky Power’s retail system for 90 percent of the hours in any year while shifting onto the Company’s

generators owned by utilities and other Market Sellers throughout PJM, are capable of self-supplying their station power (*i.e.*, netting their generation and consumption on a monthly basis) whether they are considered “separate” or not. Thus, there has been no need or occasion to examine whether Kentucky Power’s facilities are sufficiently “separate” to satisfy the terms of its retail Tariff N.U.G., primarily because Kentucky Power does not play by the same rules it imposes. *See* Kentucky Power’s Response to Riverside’s First Request for Information, Item 18 (filed June 1, 2018) (“Kentucky Power may avail itself of self-supply or netting opportunities under PJM’s OATT to the extent such opportunities are available to Kentucky Power.”).

⁸ *See* HVR, at 2:32:55 p.m.; *see also* Hearing Transcript, Wohnhas, at 189-190.

⁹ *See, e.g.*, Kentucky Power’s Brief, at 33-34.

¹⁰ *See* Kentucky Power’s Brief, at 1, 14-18, and 33; *id.* at 17 (“[Riverside] is taking, and appropriately paying retail rates for, service provided by Kentucky Power during the 90 percent of the hours the Riverside Generating units are not operating.”).

other customers the obligation to replace the \$1.1 million in lost revenues that would result if Riverside is permitted to take and pay for service at wholesale.”¹¹ Kentucky Power’s positions are misleading and erroneous.

First, although the data of record supports the conclusion that Riverside’s Zelda and Foothills sites consume energy approximately 90% of the hours each month, it is incorrect to state (as Kentucky Power repeatedly does) that Riverside takes “retail electric service” from Kentucky Power approximately 90% of the hours each month. Under KRS 278.010(7), “retail electric service” is defined as “electric service furnished to a consumer for ultimate consumption...” In this case, Riverside seeks to self-supply its own energy needs each month (*i.e.*, rely on its own generation to net against its usage), and it does not need nor want Kentucky Power to furnish energy it can supply itself. That said, because Riverside relies on Kentucky Power for energy when Riverside’s own generation is insufficient, Riverside expects to continue to contract with Kentucky Power for retail electric service and pay customer charges, demand charges, and charges for any energy Riverside actually needs (and Kentucky Power actually furnishes) each month. Riverside also expects to continue to take retail electric service (but not retail energy) from Kentucky Power 100% of the hours of the month, not 90% like Kentucky Power claims. While it may appear a matter of semantics, Kentucky Power’s mischaracterization of all energy consumed by the Zelda and Foothills sites as “retail electric service” pervades the utility’s argument in this case and is fundamentally wrong.

Of course, Kentucky Power’s emphasis on the “90 percent of the hours” in an average month that the Zelda and Foothills sites require energy to operate is, itself, misleading. While it is true that Riverside’s Zelda and Foothills sites consume energy much more often than they

¹¹ Kentucky Power’s Brief, at 33-34 (internal citations omitted).

generate it,¹² this fact has no bearing on what amounts, if any, are owed to Kentucky Power for the energy that is transmitted to the Zelda and Foothills sites each month. Indeed, the relevant inquiry when determining what retail charges can be legitimately imposed by Kentucky Power for energy consumed at the Zelda and Foothills sites is not the relative frequency of generation and consumption, but the relative volume of generation and consumption; therefore, the “90 percent of the hours” statistic oft-regurgitated by Kentucky Power is irrelevant and should be disregarded as the meaningless red-herring it is.¹³

A problem of even greater significance for Kentucky Power is its erroneous conclusion that Kentucky law precludes Riverside from receiving the relief it seeks in this case. In its briefing, Kentucky Power reminds the Commission that the utility embraces “the exclusive right to furnish retail electric service” within its certified territory, a statement of law Riverside does not contest.¹⁴ However, Riverside does not intend to obtain retail service—or wholesale service or any other type of service—from any party other than Kentucky Power. Instead, Riverside seeks to utilize PJM’s established station power framework and rely on its own available generation to address its energy needs each month. Because Kentucky Power will maintain its exclusive dominance over the relevant retail electric marketplace, no aspect of Kentucky’s certified territories jurisprudence is offended by Riverside’s desired course of action.¹⁵

¹² Due to the economic dispatch principles governing all PJM member-generators, each unit at either Zelda or Foothills will only operate when called upon to do so in light of market conditions. Notably, typical monthly output of both the Zelda and Foothills sites far exceeds consumption. *See* Kentucky Power Brief, at 16.

¹³ The same would be true if Riverside’s Zelda and Foothills units consumed energy only half the time, or even less frequently. The charges imposed by Kentucky Power do not fluctuate based on when or how often during a month Riverside consumes energy, but rather based on how much energy must be furnished. For this reason, there is simply no point to comparing the percentage of the month Kentucky Power’s meters register consumption with the percentage of the month they register generation.

¹⁴ *See* Kentucky Power’s Brief, at 19 (*citing* KRS 278.018(1)); *see also* Riverside’s Brief, at 33-34.

¹⁵ This is especially true in light of the stated purposes behind Kentucky certified territories laws: “[i]t is hereby declared to be in the public interest that, in order to encourage the orderly development of retail electric service, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the

Notably, Kentucky Power also claims that Riverside “is dependent on Kentucky Power for its electrical needs” whenever the Zelda and Foothills sites are not generating, and is thus no different “than any other large industrial or commercial retail customer of Kentucky Power during the more 7,800 hours in any year that Riverside Generating is not generating...”¹⁶ These statements, again, are not true.

Pursuant to the established, FERC-approved PJM protocol, a Market Seller like Riverside may self-supply (or remote self-supply) its station power needs by netting metered consumption against metered generation at a single site (or across multiple sites) over a monthly period. This framework is most certainly *not* available to typical industrial or commercial customers of Kentucky Power and allows Riverside to utilize its own energy to satisfy its electrical needs. For instance, had Kentucky Power reasonably acknowledged Riverside’s right and ability to self-supply its station power under PJM’s OATT in 2017, the Zelda and Foothills sites could have satisfied their own station power needs utilizing their own generation in all months but February. Thus, while Riverside would have remained a Kentucky Power retail customer at all relevant times (paying, *e.g.*, fixed and demand charges based on a contracted-for capacity), the only period during which Riverside would have actually needed to obtain energy from a third party was February 2017.¹⁷ Unfortunately, Kentucky Power’s decision to disregard the station power framework

Commonwealth of Kentucky, to prevent the waste of materials and natural resources, for the public convenience and necessity and to minimize disputes between retail electric suppliers which may result in inconvenience, diminished efficiency and higher costs in serving the consumer, the state be divided into geographical areas, establishing the areas within which each retail electric supplier is to provide the retail electric service as provided in KRS 278.016 to 278.020 and, except as otherwise provided, no retail electric supplier shall furnish retail electric service in the certified territory of another retail electric supplier.” KRS 278.016. It is a perversion of the statutory protections afforded Kentucky Power and other retail electric suppliers for a utility to rely on them to impose anticompetitive and unreasonable burdens upon a generator, as Kentucky Power has done here.

¹⁶ Kentucky Power Brief, at 18.

¹⁷ Riverside concedes that the relevant third-party supplier in this case is Kentucky Power, as it is the load serving entity (“LSE”) with the exclusive right and obligation to furnish retail electric service within its certified territory.

established for PJM Market Sellers precluded Riverside from self-supplying and forced it to purchase at retail all the kWh used at the Zelda and Foothills sites throughout the year. This treatment is unreasonable, precisely because it ignores the reality that Riverside is an interconnected PJM generator situated differently than typical industrial and commercial Kentucky Power customers.

To be clear, it is worth repeating that Riverside is not attempting to “take service at wholesale,” as Kentucky Power repetitively asserts in its briefing in this matter. Riverside does not seek to purchase energy or capacity from the PJM marketplace nor otherwise participate in any wholesale transaction as a purchaser of energy. Instead, consistent with PJM’s OATT, Riverside’s “consumption” as a Market Seller should be fairly treated as “negative” or “net” generation over the monthly netting interval, and thus be accounted for on a fair and uniform basis in harmony with the historical treatment of station power by utilities like Kentucky Power. Under this framework, there are only two (2) sources from which Riverside will ever satisfy its energy needs in a given month: its own generation or Kentucky Power retail service. In light of this fact, Kentucky Power’s exclusive statutory right to serve retail loads in its certified territory is fully respected if Riverside’s requested relief is granted—the Zelda and Foothills retail loads served by Kentucky Power, however, should appropriately reflect the reality of monthly netting made available to Riverside under PJM’s OATT.

C. Kentucky Power's Treatment of Riverside is Unreasonable.

Kentucky Power contends that Riverside's requested relief, if granted, will "produce[] rates that are not fair, nor just, nor reasonable," and will "...shift[] onto the Company's other customers the obligation to replace the \$1.1 million in lost revenues..."¹⁸ These are perhaps the greatest fictions espoused by Kentucky Power in this entire proceeding.

As discussed at length in Riverside's Brief, no Kentucky Power distribution facilities are utilized in connection with the transmission of energy to and from the Zelda and Foothills sites, and all of the relevant facilities and facility upgrades necessary for the Zelda and Foothills sites to receive and transmit energy are owned and maintained (or were paid for) by Riverside.¹⁹ As a result, the incremental capital and operations and maintenance expenses incurred by Kentucky Power for the Zelda and Foothills sites to consume energy (in addition to generate it) is essentially zero (\$0.00).²⁰

The only notable expense associated with Kentucky Power's sale of energy to Riverside at retail is the cost of that energy to Kentucky Power at wholesale. Of course, if Riverside is properly permitted to self-supply its station power as it requests, Kentucky Power's wholesale energy purchases will be limited only to those instances when Riverside actually needs retail service from Kentucky Power (like in February of 2017). Consequently, the total number of kWh sold by Kentucky Power at retail will decrease, but so will the kWh it purchases at wholesale. Additionally, as stated, Riverside expects to continue to pay for Kentucky Power's provision of capacity, as well as a monthly customer charge and other miscellaneous charges, based on the

¹⁸ Kentucky Power's Brief, at 33-34 (internal citations omitted).

¹⁹ See Riverside's Brief, at n. 13 and accompanying text.

²⁰ See Riverside's Brief, at n. 108 and accompanying text. It is worth noting that Kentucky Power's Brief is completely devoid of any discussion of the utility's cost to serve the Zelda and Foothills sites.

service Riverside actually receives. In other words, Riverside will continue to fully (if not excessively) compensate Kentucky Power for the service the utility provides, and any notion that Kentucky Power will somehow need to turn to its other customers to collect \$1.1 million in “lost revenues” is simply nonsense. Ultimately, the rates paid by Kentucky Power’s largest (non-residential) customers may need adjustment to reflect the utility’s decreased retail sales, but fairness requires Riverside be finally free from subsidizing the actual cost-causers served under Tariff I.G.S.

D. The Parties’ Course of Dealing Does Not Control

Kentucky Power finally contends that because Riverside and its predecessors-in-interest allowed an illogical, unreasonable and unlawful interpretation of Kentucky Power’s tariff to continue unchallenged for years this somehow estops Riverside from obtaining the relief sought in this case.²¹ This argument is without support in the law and defies common sense. The Commission has plenary authority under KRS 278.030 and KRS 278.040 to set and adjust rates to ensure they are fair, just and reasonable. There is no statute, regulation or case precedent that prohibits the Commission from exercising this statutory mandate merely because commercial parties may have both given erroneous effect for a period of time to an existing tariff. To hold otherwise would usurp the special authority and expertise of the Commission to oversee utilities in this Commonwealth; put simply, the “defense” of course of dealing and performance found in the common law of contracts and asserted by Kentucky Power in this proceeding is not supported by even one (1) authoritative citation, is antithetical to the Commission’s statutory authority, and has no place in this case.

²¹ See Kentucky Power’s Brief, at 13-14. Interestingly, Kentucky Power provides the Commission no legal authority of any kind in its brief in support of this position.

III. CONCLUSION

Pursuant to the station power protocol established within PJM's OATT, Riverside should be permitted to net its generation and consumption over a monthly interval. Correspondingly, this Commission should reject Kentucky Power's attempt to force Riverside to purchase at retail unneeded energy at unjustifiable rates.

WHEREFORE, on the basis of the foregoing, Riverside respectfully requests an Order from this Commission:

1. determining that Kentucky Power has unreasonably interpreted and inconsistently applied its filed tariff against Riverside;
2. finding that Riverside satisfies the Special Terms and Conditions of Kentucky Power's Tariff N.U.G., and thus directing that Riverside be permitted to take service under the terms and conditions contained within PJM's OATT;
3. requiring Kentucky Power to acknowledge the netting of consumption and generation by Riverside over a monthly interval; and/or
4. granting to Riverside all relief to which it may appear entitled.

Dated this 20th day of November, 2018.

Respectfully submitted,



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