

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)	

BRIEF OF RIVERSIDE GENERATING COMPANY, LLC

Comes now Riverside Generating Company, L.L.C. (“Riverside”), by counsel, pursuant to the Commission’s Order entered herein on September 18, 2018, and for its Brief addressing the issues presented in this complaint case against Kentucky Power Company (“Kentucky Power”), respectfully states as follows:

I. INTRODUCTION

Riverside should be permitted to net its generation and consumption over a monthly interval in accordance with the station power protocol established within the Open Access Transmission Tariff (“OATT”) of PJM Interconnection, LLC (“PJM”). This conclusion is consistent with the reasonable interpretation of Kentucky Power’s retail tariff, historical utility practices, established federal policy, the laws of this Commonwealth, and basic notions of fairness. Kentucky Power has refused Riverside’s requested relief based on an unreasonable interpretation and application of its filed tariff, and particularly the utility’s Tariff N.U.G. (Non-Utility Generator), thus necessitating action by this Commission.

Pursuant to the Special Terms and Conditions of Tariff N.U.G., a customer need not look exclusively to Kentucky Power in order to satisfy the power needs of the customer’s generation

facilities; instead, those power needs may be satisfied (through netting) with the output of other generation facilities, so long as the other facilities are: (i) owned by that same merchant generator; and (ii) “not located on the site of the customer’s generator (remote self-supply).”¹ Because Riverside meets these conditions in Kentucky Power’s tariff, it “shall take service under the terms and conditions contained within the applicable Open Access Transmission Tariff as filed with and accepted by the Federal Energy Regulatory Commission [(“FERC”),]” which here is the OATT of PJM. This conclusion is supported by the facts of this case and the plain language of the Special Terms and Conditions of Kentucky Power’s Tariff N.U.G.; accordingly, the Commission should confirm Riverside’s ability to satisfy the energy needs of its Zelda and Foothills sites utilizing the station power framework established for generators by PJM’s OATT.

Riverside’s desire to take service under PJM’s OATT is predicated, at least in part, on the method by which PJM accounts for the electric energy a generator utilizes to operate its facilities (*i.e.*, station power). As will be further described *infra*, the practices and procedures under PJM’s FERC-approved OATT with respect to station power explicitly permit the reasonable netting of consumption and generation by an interconnected generator (*i.e.*, self-supply and remote self-supply), in stark contrast to the unreasonable “15-minute interval” netting practices allegedly employed by Kentucky Power under its retail tariff. In fact, documents and information provided by Kentucky Power in this proceeding reveal that Kentucky Power’s netting practices are, essentially, a sham—not only incompatible with the netting practices accepted by FERC and PJM, but also unsupported by the plain language of the utility’s tariff and even erroneously applied, ostensibly for years, to Riverside’s significant detriment. Thus, should this Commission determine that Riverside is not permitted to “remote self-supply” under the Special Terms and Conditions of

¹ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-3 (effective Jan. 19, 2018).

Tariff N.U.G., Riverside should nonetheless be permitted to net the generation and consumption of its Zelda and Foothills sites over a monthly interval, consistent with other relevant portions of Kentucky Power’s tariff and PJM’s OATT.

Of course, Riverside ultimately seeks to pay only fair, just and reasonable rates for the retail electric service it actually receives from Kentucky Power when measured against the substantial power Riverside generates. The existing billing and netting scheme Kentucky Power enforces against Riverside—whereby Kentucky Power essentially creates wholesale and retail transactions when neither need occur—simply ignores the fact that Riverside is a PJM generator and instead treats Riverside as any other commercial or industrial customer. As a result, Riverside is forced to pay an exorbitant bill each month that is not justified by the service Kentucky Power provides nor justifiable considering the availability of the PJM OATT station power framework. Therefore, regardless of the text of Kentucky Power’s existing tariff,² the utility should not be permitted to unfairly require Riverside to take retail service on terms that are unjust, unreasonable, and inconsistent with law.

² It should be noted at the outset that Kentucky Power clearly has no intention of recognizing Riverside’s ability to net its station power consistent with PJM’s OATT, even if the terms of the utility’s current Tariff N.U.G. permit it. In its written testimony submitted in this case, Kentucky Power called for the elimination of Tariff N.U.G.’s remote self-supply provision in the event it is interpreted in Riverside’s favor; moreover, Kentucky Power’s witness at the hearing in this matter testified that it is “a great possibility” that Kentucky Power will seek to entirely eliminate Tariff N.U.G. if Riverside prevails in this case. *See* Hearing Video Record (“HVR”), at 2:32:55 p.m. (Sept. 18, 2018); *see also* the stenographic transcript of the Hearing held in this matter filed contemporaneously with this Brief (hereinafter the “Hearing Transcript”), Wohnhas, at 189-190; Direct Testimony of Ranie K. Wohnhas on behalf of Kentucky Power (filed May 4, 2018) (hereinafter “Wohnhas Written Testimony”), at 18 (“Finally, if the Commission were to conclude that the remote self-supply provision of Tariff N.U.G. should be interpreted as Riverside urges, and it should not, the remote self-supply provision of Tariff N.U.G. should be eliminated to eliminate any free-riding by Riverside and thereby protect the interests of the other Kentucky Power customers.”) However, should this Commission conclude in a manner similar to FERC with respect to the netting of station power (as discussed *infra*), the terms of Kentucky Power’s retail tariff will only be relevant in the event consumption exceeds generation in a given month (and thus a retail sale has actually occurred).

II. BACKGROUND

a. Parties

Riverside is a merchant power generator which owns and operates two (2) separate and distinct generation sites in Lawrence County, Kentucky, within Kentucky Power's certified retail electric service territory. Riverside's first site, which is identified and classified by PJM as the "Zelda" site, is located on real estate originally acquired in the year 2000 and includes three (3) natural gas-fired generating units. Riverside's second site, which is identified and classified by PJM as the "Foothills" site, is located on adjacent, later-acquired real estate and includes two (2) natural gas-fired generating units. Riverside is a member of a portfolio of generation companies located in various states owned by the LS Power Group ("LS Power"), and it sells the output of its Kentucky facilities, which have a total combined capacity of approximately 836 MW, at wholesale into the PJM market consistent with PJM's OATT.

Kentucky Power is a for-profit corporation engaged in the generation, purchase, transmission, distribution and sale of electric power. Pursuant to its tariff on file with and approved by the Commission, Kentucky Power serves approximately 166,400 customers at retail in twenty (20) eastern Kentucky counties: Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Johnson, Knott, Lawrence, Leslie, Letcher, Lewis, Magoffin, Martin, Morgan, Owsley, Perry, Pike and Rowan. Kentucky Power also supplies electric power at wholesale to other utilities and municipalities in Kentucky for resale. It is a wholly-owned subsidiary of American Electric Power Company, Inc. ("AEP"), which is a multi-state public utility holding company that provides electric service to customers in parts of eleven (11) states. Like Riverside, Kentucky Power is a member of PJM, having joined the organization on October 1, 2004.³

³ See Kentucky Power's Response to Riverside's First Request for Information, Item 9 (filed June 1, 2018).

b. Procedural History

Riverside filed its Complaint in this matter on December 13, 2017, following numerous attempted discussions with Kentucky Power regarding the proper interpretation and application of Tariff N.U.G.⁴ By Order entered January 9, 2018, the Commission directed Kentucky Power to satisfy or answer Riverside's Complaint and, on January 19, 2018, Kentucky Power filed its Answer. Consistent with the Commission's Order prescribing a procedural schedule entered February 27, 2018, both parties propounded and responded to requests for information, as well as filed written testimony, in advance of the hearing held in this matter on September 18, 2018. Pursuant to the Commission's Order entered that same date, post-hearing requests for information have been addressed and Riverside hereby submits its Brief.

⁴ As the Commission is aware, the dispute between the parties predates the filing of the Complaint by many months, during which time Riverside unsuccessfully sought to intervene in Kentucky Power's then-pending rate adjustment case before this Commission, Case No. 2017-00179, to ensure its interests were protected when Tariff N.U.G. was amended. See Riverside's Motion to Intervene, Case No. 2017-00179, *In the Matter of the 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 Accounting Practices to Establish Regulatory Assets and Liabilities, and (5) an Order Granting All Other Required Approvals and Relief* (filed July 14, 2018). In that case, Kentucky Power proposed to revise the Special Terms and Conditions of its Tariff N.U.G., *to wit*: "Customers desiring to provide Startup and Station Power from ~~commonly owned~~ 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" Kentucky Power objected to Riverside's intervention in the rate adjustment case on two (2) primary grounds: (i) because "[n]one of the changes proposed to [Kentucky Power's Tariff N.U.G.] affect the on-going discussions between [Kentucky Power] and Riverside with regard to the applicability of the remote self-supply provision of Tariff N.U.G. to Riverside's facility;" and (ii) because "Riverside's role as a direct competitor of Kentucky Power in the PJM wholesale market would impact the ability of the Company to provide confidential information in response to data requests..." See Kentucky Power's Response in Opposition to Riverside's Motion to Intervene, Case No. 2017-00179 (filed July 21, 2018). In the case presently before the Commission, however, Kentucky Power has (at one time or another) taken positions that *directly contradict* what it said to convince the Commission just months earlier to deny Riverside's proposed intervention in the rate case. See Wohnhas Written Testimony, at 4 ("The addition of the term 'other' [to the revised Tariff N.U.G.'s Special Terms and Conditions] was intended to emphasize the requirement of separate and distinct generating facilities."); HVR, beginning at 1:50:03 p.m./Hearing Transcript, at 156-170; HVR, at 2:34:14 p.m./Hearing Transcript, at 190-192 (wherein Kentucky Power's witness stated he did not view Riverside as Kentucky Power's competitor, but upon reviewing the utility's earlier-asserted position, stated that he "misspoke").

c. Facilities at Issue

i. Riverside's Zelda and Foothills Sites

The manner in which Riverside came to own and operate the Zelda and Foothills generation facilities is described in detail in the Rebuttal Testimony filed in this matter and sponsored by Riverside's Vice President, Mr. Anthony Hammond. As reflected in that Rebuttal Testimony, possession and control of each site by Riverside (or its predecessor-in-interest) began at different times, involved distinct parties, and was accompanied by discrete Payment-in-Lieu of Tax ("PILOT") agreements with the local taxing authority.⁵ The Zelda site and the Foothills site comprise the entirety of Riverside's generation portfolio.

Access to the adjacent Zelda and Foothills sites from U.S. Route 23 is via a shared road and railroad crossing that leads to two (2) secured gates, one each for the individually-fenced sites.⁶ Riverside's Zelda site houses three (3) natural gas-fired combustion turbines, Siemens Model 501F, each with a nameplate generation capacity of 195.5 MW.⁷ The Zelda site includes a switchyard with transformers and 345kV conductors for transmitting the power generated and consumed at the Zelda site, as well as a natural gas yard for receiving and distributing fuel to the Zelda units from Riverside's 9-mile lateral originating at the nearby Tennessee Gas interstate pipeline.⁸ The Zelda site also includes an administrative building with control room, two (2) 300,000 gallon water storage tanks, and associated balance of plant equipment and systems.⁹

⁵ See Rebuttal Testimony of Anthony Hammond on behalf of Riverside (filed June 14, 2018) (hereinafter "Hammond Rebuttal Testimony"), at 2-4; see also Riverside's Response to Commission Staff's First Request for Information, Item 8 (filed April 20, 2018).

⁶ HVR, at 10:07:14 a.m., 11:21:02 a.m./Hearing Transcript, Hammond, at 52, 93.

⁷ HVR, at 9:11:58 a.m./Hearing Transcript, Hammond, at 13.

⁸ Riverside's Response to Kentucky Power's First Request for Information, Item 1 (filed April 20, 2018); HVR, at 11:16:21 a.m. – 11:23:55 a.m./Hearing Transcript, Hammond, 86-95.

⁹ *Id.*

Riverside's Foothills site includes two (2) natural gas-fired combustion turbines, Siemens Model 501F, each also with a nameplate generation capacity of 195.5 MW.¹⁰ The Foothills site contains its own switchyard, natural gas yard, control room, water storage tank, and associated balance of plant equipment and systems.¹¹

Each of Riverside's sites is independently interconnected with the electric transmission grid via 345kV conductors and related equipment that run from each site's switchyard to Kentucky Power's nearby Baker Switchyard.¹² The energy generated at each Riverside site, as well as the power consumed at each site, traverses this infrastructure, which is owned and maintained entirely by Riverside.¹³ Each site has its own Interconnection Agreement with Kentucky Power,¹⁴ pursuant to which Riverside installed or paid for the installation of required network upgrades at the time of construction of each site (for a total financial outlay by Riverside of approximately \$12 million).¹⁵ Both the Zelda site and Foothills site are capable of being operated independently, as well as remotely or from the control room located on either site.¹⁶ The output and consumption

¹⁰ As noted by Mr. Hammond during the hearing in this matter, the Foothills site's generation facilities are similar to, though distinct from, the facilities at Riverside's Zelda site (a fact most evident from the shape of the units' exhaust stacks at each site—rectangular at Foothills, round at Zelda). The differences at each site are indicative of the fact that each site was developed and constructed at a unique time, by a unique contractor. *See* HVR, at 11:23:55 a.m./Hearing Transcript, Hammond, at 95-96.

¹¹ *See* Riverside's Response to Kentucky Power's First Request for Information, Item 1 (filed April 20, 2018); HVR, at 11:23:55 a.m. – 11:36:12 a.m./Hearing Transcript, Hammond, at 95-106.

¹² There is no cross feed/tie-breaker between the sites and no parasitic load; each site is electrically isolated from the other. *See, e.g.*, HVR, at 11:30:18 a.m./Hearing Transcript, Hammond, at 101.

¹³ *See* HVR, at 11:53:17 a.m. – 11:57:06 a.m./Hearing Transcript, Hammond at 120-121.

¹⁴ These separate Interconnection Agreements were provided by Kentucky Power in response to Commission Staff's Post-Hearing Request for Information, Item 4 (filed October 4, 2018). To further demonstrate that the Zelda and Foothills sites are and have always been treated as separate and distinct generation sites, it is important to realize that the Interconnection Agreements provide: (a) completely different descriptions of each "Facility Site"; (b) different designs of the electric facility upgrades necessary to effectuate the interconnection of each Facility Site; (c) different capital contributions from Riverside to Kentucky Power for the design and construction of these facility upgrades; (d) separate security deposits (designated in the Interconnection Agreements as "Financial Security"); and (e) different metering equipment necessary to account for the unique characteristics of each Facility Site.

¹⁵ *See* HVR, at 11:53:17 a.m. – 11:57:06 a.m./Hearing Transcript, Hammond, at 120-121.

¹⁶ *See* HVR, at 11:28:46 a.m. – 11:30:18 a.m./Hearing Transcript, Hammond, at 100-102.

of each of Riverside's generation sites is measured by a Kentucky Power meter, a separate meter for each site.

ii. Kentucky Power Facilities

A brief discussion of the Kentucky Power distribution facilities relevant to this proceeding is also appropriate. There are none.

d. Retail Tariff Schedules at Issue

i. Tariff N.U.G.

Kentucky Power's Tariff N.U.G. was originally approved by this Commission on September 27, 2001, and has subsequently been amended on four (4) occasions.¹⁷ According to Kentucky Power, "[t]he tariff was intended to address the Company's understanding of then-existing FERC regulations and the advent of independent power producers."¹⁸ Riverside is the only customer Kentucky Power has ever served under its Tariff N.U.G.¹⁹

According to its terms, Tariff N.U.G. is "applicable to customers with generation facilities which have a total design capacity of over 1,000 kW that intends to schedule, deliver and sell the net electric output of the facility at wholesale, and who require Commissioning Power, Startup Power and/or Station Power service from the Company."²⁰ Although an important exception exists, customers requiring station power (which is the primary service at issue in this proceeding, as discussed *infra*), "shall take service under the generally available demand-metered tariff

¹⁷ See Kentucky Power's Response to Riverside's First Request for Information, Item 7 (filed June 1, 2018) ("Kentucky Power sought to amend Tariff N.U.G. in Case Nos. 2005-00341, 2009-00459, 2014-00396, and 2017-00179.").

¹⁸ Kentucky Power's Response to Commission Staff's First Request for Information, Item 5 (filed June 1, 2018).

¹⁹ See Kentucky Power's Response to Riverside's First Request for Information, Item 7 (filed June 1, 2018).

²⁰ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-1 (effective Jan. 19, 2018).

appropriate for the customer's Station Power requirements;"²¹ customers requiring startup power "have the option of contracting for such service under the terms of this tariff or under the generally available demand-metered tariff appropriate for the customer's Startup Power requirements."²² Based on these provisions, Kentucky Power has historically charged Riverside the rates prescribed in its Tariff I.G.S. (Industrial General Service) (and, before that, its Tariff Q.P. (Quantity Power)), which is a schedule generally applicable to commercial and industrial customers of Kentucky Power with a minimum demand of 1000 kW.

Of course, of primary importance is the section of Tariff N.U.G. entitled "Special Terms and Conditions," which provides, in relevant part, as follows:

Customers desiring to provide Startup and Station Power from commonly owned generation facilities that are not located on the site of the customer's generator (remote self-supply), shall take service under the terms and conditions contained within the applicable Open Access Transmission Tariff as filed with and accepted by the Federal Energy Regulatory Commission.²³

It is pursuant to this provision that Riverside seeks to satisfy the energy needs of its Zelda and Foothills sites utilizing the station power framework established for generators within PJM's OATT. Notably, Kentucky Power's refusal to permit the Zelda and Foothills sites the ability to self-supply or remote self-supply station power has resulted in charges for Riverside under Tariff I.G.S. approaching \$1.1 million in 2017 alone.²⁴

²¹ *Id.* "Station Power" is defined under Tariff N.U.G. as "[t]he electrical energy and capacity supplied to the customer to serve the auxiliary loads at the customer's generation facilities, usually when the customer's generator is not operating. Station Power does not include Startup Power." "Startup Power" is defined as the "electrical energy and capacity supplied to the customer following a planned or forced outage of the customer's generator for the purpose of returning the customer's generator to synchronous operation." *Id.*

²² *Id.*

²³ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-1 (effective Jan. 19, 2018).

²⁴ Kentucky Power's Response to Commission Staff's First Request for Information, Item 3 (filed June 1, 2018).

ii. Tariff I.G.S.

Kentucky Power's Tariff I.G.S., as previously stated, is a rate schedule generally applicable to commercial and industrial customers of Kentucky Power with a minimum demand of 1000 kW. In addition to a monthly service charge, reactive demand charge, and various other surcharges and tariff-based adjustments, Riverside presently pays under Tariff I.G.S. an energy charge of 2.731 cents per kWh, an on-peak demand charge of \$13.26 per kWh, and an off-peak demand charge of \$1.49 per kWh.²⁵ Riverside's average monthly bill for the past twenty-four (24) months has totaled \$98,542.00.

While Tariff I.G.S. does contain at least one other noteworthy provision (to be discussed *infra*), of particular import is something Tariff I.G.S. does not contain: any terms addressing the netting of a consumer's generation against its consumption. Kentucky Power has claimed to rely on Tariff I.G.S. to govern the "15-minute interval" billing and netting practice it allegedly employs with respect to the Zelda and Foothills sites, but that practice finds no support in the text of the tariff schedule.²⁶

e. Service at Issue

Riverside's Zelda and Foothills sites require energy in order to function while not generating, and they have historically purchased that energy from Kentucky Power at retail rates under the aforementioned tariff schedules. The station power consumed at the Zelda and Foothills sites is for "things [as] simple as keeping the lights on" and "keeping the heat on in areas that are heated," but also for maintaining each site's respective peaking combustion turbines in a state of

²⁵ Tariff I.G.S., P.S.C. KY. No. 11 1st Revised Sheet No. 10-1 (effective June 28, 2018).

²⁶ HVR, at 1:43:28 p.m./Hearing Transcript, Wohnhas, at 155 ("So we do self -- they do take advantage of self-supply currently, but it's only a 15-minute interval. [*Q. Under Tariff IGS, not under the PJM OATT?*] That is correct.").

readiness to ensure responsiveness when called upon for dispatch by PJM.²⁷ The service at issue in this proceeding is not dissimilar to the service required by any peaking generation facility and is, in fact, common to essentially every utility or merchant generating facility that does not generate around-the-clock power (including facilities owned by Kentucky Power).²⁸

While the terms of Tariff N.U.G. contemplate a distinction between “station power” service and “startup power” service, there is no such distinction made in this respect by Kentucky Power in its provided metering data, monthly billing statements, or elsewhere. It would appear the purpose of the different services is to allow the parties to agree upon terms for startup power that recognize the nature of that particular service (which entails “a significant amount of power for a very short duration”); in reality, though, Riverside is charged by Kentucky Power at Tariff I.G.S. rates for all energy consumed at the Zelda and Foothills sites, most or all of which is appropriately considered station power under any definition of the phrase.²⁹ Of course, Tariff N.U.G.’s Special Terms and Conditions state specifically that “[c]ustomers desiring to provide Startup *and* Station Power from other generation facilities...shall take service under the terms and conditions

²⁷ HVR, at 9:34:21 – 9:35:20 a.m./Hearing Transcript, Hammond, at 30-31; *see also* HVR, at 11:56:00 a.m./Hearing Transcript, Hammond, at 122 (“PJM dispatches the sites, that is members of PJM, they’re offered into the – into the market daily. PJM dispatches all of the sites in PJM, both regulated and deregulated. If you’re a PJM member, you follow the PJM dispatch instruction.”); HVR, at 9:31:41 a.m./Hearing Transcript, Hammond, at 27 (“The units are economically dispatched by PJM based on the fuel – price of fuel and the price of power and the need.”).

²⁸ *See* Kentucky Power’s Response to Riverside’s First Request for Information, Item 18.

²⁹ *See, e.g.,* Wohnhas Written Testimony, at 7-8 (describing station power as serving “[a]uxiliary loads...such as the lighting, pumps, motors, HVAC equipment, safety equipment, and other equipment at the generation facility.”); *see also* PJM Tariff, Intra-PJM Tariffs, OATT Schedule I, Definitions – R – S, at 9 (“‘Station Power’ shall mean energy used for operating the electric equipment on the site of a generation facility located in the PJM Region or for the heating, lighting, air-conditioning and office equipment needs of buildings on the site of such a generation facility that are used in the operation, maintenance, or repair of the facility. Station Power does not include any energy (i) used to power synchronous condensers; (ii) used for pumping at a pumped storage facility; (iii) used for compressors at a compressed air energy storage facility; (iv) used for charging an Energy Storage Resource or a Capacity Storage Resource; or (v) used in association with restoration or black start service.”); 94 FERC ¶ 61,251 (“*PJM IP*”), *clarified and reh’g denied*, 95 FERC ¶ 61,333 (2001) (“*PJM IIP*”), at 61,889 (defining station power as “the electric energy used for the heating, lighting, air conditioning, and office equipment needs of the buildings on a generating facility’s site, and for operating the electric equipment that is on the generating facility’s site.”).

contained within the applicable [OATT],” so it would appear to be a distinction without a difference in that regard.³⁰

As previously stated, Riverside desires to satisfy the station power needs of its Zelda and Foothills sites utilizing the PJM OATT station power framework, as directed by Tariff N.U.G. Because station power service is a fundamental component of nearly every interconnected generator’s operations, it is a topic PJM and all regional transmission organizations (and, of course, FERC) have had extensive opportunity to examine, discuss, and characterize.

i. Treatment of Station Power Historically and at the Federal Level

FERC first set forth its policies with respect to station power service in a series of orders involving PJM issued in and around 2001.³¹ In those cases, PJM was attempting to establish the rules by which generators in its system could obtain the station power necessary to run their facilities, particularly as those generators became less vertically-integrated following FERC’s Order 888.³² The United States Court of Appeals, District of Columbia Circuit (“D.C. Circuit”) later summarized the relevant backdrop as follows:

Historically, electrical utilities were vertically integrated and typically acted as local monopolies—they owned generation, transmission, and distribution facilities and sold these services as a bundled package in their service areas. Utilities obviously did not charge themselves for the use of station power at their generating facilities; rather, they simply subtracted (“netted”) the energy consumed as station power against their gross output. But in 1996 FERC issued Order 888, which

³⁰ See Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-3 (effective Jan. 19, 2018) (emphasis added).

³¹ See *PJM II* and *PJM III*, *supra* n. 29; *PJM Interconnection LLC*, 95 FERC ¶ 61,470 (2001) (“*PJM IV*”). In an earlier order, *PJM Interconnection, LLC*, 93 FERC ¶ 61,061 (2000) (“*PJM P*”), FERC acknowledged questions concerning treatment of station power, but deferred its decision, consolidating PJM’s proceeding with others raising the same issue.

³² *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

effectively unbundled generating from transmission and distribution services. The Commission accomplished this goal by requiring utilities to file open-access tariffs that offered rates to all customers on an equal basis—basically, utilities could not prefer their own affiliates over independent generators. ... Order 888 was successful in causing major utilities nationwide to divest most of their generating facilities, but it raised questions as to how independent generators would be charged for their use of station power.³³

Similarly, the historical treatment of station power by vertically-integrated utilities as “net,” or “negative,” generation was summarized by PJM as follows:

In general, vertically-integrated utilities in the PJM control area historically have treated station power as “negative generation.” That is, the energy output of a generation facility typically was recorded as its gross output less the power consumed at the facility. Station power used during periods when the generator was not operating likewise was treated as negative generation. To the extent that a generation facility's station power needs were not met with on-site power production, the facility received the necessary energy from the utility's transmission and/or distribution facilities. In the case of an integrated utility, such energy typically was supplied by its other generation stations or, if the utility was part of a centrally dispatched power pool such as PJM, by the pool's then available energy supplies.³⁴

In light of these facts, PJM proposed amendments to its OATT designed to “...simply continue and formalize the prevailing treatment of station power within the PJM region, as it existed historically, but modified to recognize the establishment of the PJM Interchange Energy Market.”³⁵

FERC began its analysis of PJM’s proposed treatment of station power by determining whether it had jurisdiction over the provision of station power in the first instance, consistent with

³³ *Calpine Corp. v. FERC*, 702 F.3d 41, 42-43 (D.C. Cir. 2012).

³⁴ *PJM II*, at 61,890.

³⁵ *PJM II*, at 61,882 (*quoting* PJM’s Transmittal Letter in Docket No. ER00-3513-000, at 5).

federal law.³⁶ To do so, it considered whether and “when the provision of station power is a sale, in the sense that there is a transaction between two parties, with one party using resources of another party for some form of consideration.” “To that end,” FERC explained, it “examine[d] the varying circumstances under which station power is used, how it is provided, and what facilities are involved in its provision.”³⁷ According to FERC:

Station power may be provided to a generating facility in a variety of ways. The simplest scenario is when the generator is on-line and producing sufficient energy from on-site equipment to satisfy its station power requirements. In this case, the generator self-supplies 100 percent of its station power requirements from generation located “behind the meter” (that is, the energy does not pass through the metering point between the generator's facility and the network to which it is interconnected). Here, the generator's gross output exceeds (or at least equals) its station power requirements, so that it has a positive net output (or zero net output).

The situation becomes slightly more complex when the generator is either off-line, or on-line but not supplying enough energy to fully meet its station power needs. Here, the generator's gross output would be less than its station power requirements, and thus it has a negative net output. When a generator has negative net output, its station power requirements necessarily must be met with energy produced from an off-site source. This off-site source may be another (remote) generator owned by the same company or it may be a generator owned by a third party (including an affiliate of the generator). As PJM notes in the passage quoted above, in a tight power pool, a generator with negative net output “leans” on the interconnected network and takes its station power requirements from any generating resource located on that network, without regard to ownership.³⁸

³⁶ *PJM II*, at 61,891 (citing section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1) (1994)). Section 201(b) of the Act gives FERC jurisdiction over the “transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce,” as well as “all facilities for such transmission or sale.” 16 U.S.C. § 824(b)(1). States, however, retain jurisdiction over “any other sale of electric energy” and “facilities used in local distribution” of electricity. *Id.*

³⁷ *Id.*

³⁸ *Id.*

In sum, FERC concluded that there generally are three (3) possible ways in which a generating facility's station power requirements may be met: "(1) on-site self-supply (that is, from facilities located on the site of the generator itself); (2) remote self-supply (that is, from facilities that are not located on the site of the generator, but which are commonly owned); and (3) third-party supply (that is, from facilities that are owned by another entity)."³⁹ FERC then examined each method of supply to determine whether it constituted a transaction subject to its jurisdiction:

For both on-site self-supply and remote self-supply, the generator is using only its own generating resources. It is not consuming another party's energy. The generator typically accounts for its self-supply of station power by netting station power requirements against gross output.

Because a self-supplying generator is not using another's generating facilities, it is not causing another to incur costs associated with the usage of the other's generating resources that would warrant a form of consideration. In other words, there is no sale (for end use or otherwise) between two different parties, but only one party using its own generating resources for the purposes of self-supply and accounting for such usage through the practice of netting.

The parties have not cited, and we are not aware of, an instance in which we have treated the self-supply of station power through netting as a sale....

...

Thus, when a generator self-supplies its station power requirements and accounts for station power by netting its requirements against gross output, there is no sale (for end use or otherwise) in the first instance. In contrast, in the case of third-party supply, the source of the generator's station power requirements is other than its own generating facilities. Here, the generator is not self-supplying its own station power needs, but is using another party's generation facilities. Thus, the provision of station power under these circumstances involves a sale of energy by a third party that is not appropriately accounted for by netting. Moreover, the energy being sold is not sold for resale, and therefore it is not a transaction which we can regulate under the FPA...⁴⁰

³⁹ *PJM III*, at 62,182.

⁴⁰ *PJM II*, at 61,891-92 (emphasis added).

Under *PJM II* and its progeny, FERC determined, *inter alia*, that when a generator self-supplies or remote self-supplies station power consistent with the practices historically employed by vertically-integrated utilities (*i.e.*, through the use of netting consumption and generation over a reasonable interval), no sale subject to its jurisdiction occurs.⁴¹ Of course, as the Commission is aware, the determination of a “reasonable interval” over which a generator may net production and usage is a topic of considerable importance in this case and requires further investigation.

ii. Netting under PJM’s OATT, as approved by FERC

As part of its efforts in the early 2000’s to establish a station power framework for interconnected generators, PJM first proposed a netting interval of one (1) hour. FERC accepted this proposal, stating:

As we previously noted, we have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production. Thus, while a generator that is undergoing, for example, a two-or three-month scheduled outage could not obtain station power under PJM’s proposed amendments during the outage, fluctuations in gross output or station power requirements that produce momentary instances of negative net output during an appropriate time period are acceptable, so long as net output measured over the entire time period is positive.

PJM has chosen a one-hour period over which to measure netting, which is reasonable, since prices in the PJM Interchange Energy Market are determined hourly. However, we do not think that one hour is the only time period that would be reasonable. Longer intervals, such as a day or a week, also would be reasonable time periods over which station power may be netted. We would look favorably upon the use of a longer time period over which to measure netting.⁴²

⁴¹ To be clear, FERC actually held that no sale subject to *anyone’s* jurisdiction (state or federal authorities) occurred when a generator self-supplies or remote self-supplies through reasonable netting. As will be discussed *infra*, the D.C. Circuit effectively forced FERC to walk back this holding nearly a decade later; however, the fact remains that FERC does not view the self-supply and remote self-supply of station power as involving the sale or purchase of power.

⁴² *PJM II*, at 61,892.

Notably, FERC also made sure to respond in *PJM II* to concerns that vertically-integrated utilities were “allowing their own and affiliated generating facilities to continue to net station power, while requiring merchant generators to buy station power at retail rates.”⁴³ FERC held as follows:

In response to this concern, we emphasize that all generators that are self-supplying station power may net their station power requirements against gross output, without regard to the form of corporate ownership. Thus, a self-supplying generator cannot be required to purchase station power under a retail tariff simply because it is a merchant generator. A self-supplying generator may account for its station power requirements through netting regardless of whether it is owned by a vertically-integrated utility, an affiliate of a vertically-integrated utility, or a merchant generator. If a generating facility netted its station power requirements against its gross output when it was owned by a vertically-integrated utility, the former owner cannot require the new owner to discontinue the practice of netting, and require the new owner to buy station power under a retail tariff, simply because the generating facility in question has changed owners.

We believe that this determination is consistent with the FPA, will better ensure comparable treatment, and will address the concerns of the merchant generators that some vertically-integrated utilities are favoring their own or affiliated generating facilities to the competitive disadvantage of merchant generators.

...

Allowing self-supplying merchant generators to net will ensure that they do not bear a cost that has no relationship to any “service” purportedly being provided by another party. In this manner, we can limit if not fully eliminate disparities between merchant generators and vertically-integrated utilities.⁴⁴

Not long after FERC approved an hourly netting interval in *PJM II*, it accepted in *PJM IV* a modification of PJM’s station power tariff that extended the netting period from one (1) hour to

⁴³ *Id.*

⁴⁴ *PJM II*, at 61,892-93.

one (1) month.⁴⁵ FERC also approved monthly netting intervals with respect to station power for other grid operators, such as the Midwest Independent System Operator (“MISO”) and the New York Independent System Operator (“NYISO”);⁴⁶ before approving a monthly netting interval for the California Independent System Operator (“CAISO”), FERC noted that, “[w]hile it is correct that we have not previously mandated a one month netting interval, nonetheless, the monthly netting interval has evolved into the standard, and we would require a strong justification for proposing a different netting interval.”⁴⁷ Monthly netting intervals remain in place under the OATTs of all these system operators.⁴⁸

Perhaps unsurprisingly, load serving entities (“LSEs”) and local utilities objected for a number of reasons to FERC’s insistence on utilizing monthly netting periods for station power; in particular, LSEs and others objected when FERC determined that its station power precedent generally foreclosed any state retail tariff that “impairs the ability of merchant generators to utilize the netting provisions of [an ISO’s station power protocol, because it]... prevents [the generators] from self-supplying station power and forces them to pay for fictitious energy purchases when they are, in fact, self-supplying.”⁴⁹ FERC’s attempt in this manner to impose on states its views with respect to station power—principally its views concerning whether or not a “sale” (wholesale

⁴⁵ *PJM IV*, at 61,685.

⁴⁶ *Midwest Independent Transmission System Operator, Inc., et al.*, 106 FERC ¶ 61,073 (2004), *reh’g denied*, 110 FERC ¶ 61,383 (2005), *reh’g denied*, 112 FERC ¶ 61,211 (2005); *KeySpanRavenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 101 F.E.R.C. ¶ 61,230 (2002), *reh’g denied*, 107 F.E.R.C. ¶ 61,142 (2004).

⁴⁷ *Duke Energy Moss Landing v. California Independent System Operator, Inc.*, 109 FERC ¶ 61,170 (2004), *reh’g denied*, 111 FERC ¶ 61,451 (2005); *California Independent Operator Corp.*, 111 FERC ¶ 61,452 (2005).

⁴⁸ *See, e.g.*, MISO Tariff, Schedule 20, Treatment of Station Power.

⁴⁹ *See, e.g.*, *California Independent Operator Corp.*, 125 FERC ¶ 61,072 (2008), *opinion vacated by Southern Cal. Edison Co. v. F.E.R.C.*, 603 F.3d 996 (D.C. Cir. 2010) (wherein FERC also noted its position that “merchant generators need not pay transmission and local distribution charges for station power when they are neither purchasing at retail nor using local distribution facilities. Any attempt at the state level to assess (or to assess and then ‘waive’) charges for merchant generators on the basis of whether they net station power on a monthly or hourly basis would amount to an unlawful attempt to circumvent our authority over matters that are properly within our jurisdiction.”); *see also Niagara Mohawk Power Corp. v. F.E.R.C.*, 452 F.3d 822 (D.C. Cir. 2006).

or otherwise) occurs under a specified netting interval—was ultimately rejected by the D.C. Circuit:

[W]e do not understand why FERC is empowered to conclude that a retail sale has not taken place unless it can claim the transaction is, instead, a wholesale sale or a transmission [subject to its jurisdiction under the FPA]. To simply declare that the state lacks jurisdiction because FERC believes no retail sale has taken place really begs the jurisdictional question. Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it.⁵⁰

On remand from the D.C. Circuit, FERC acknowledged that it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale and indicated that netting intervals in the OATTs it approves only necessarily govern FERC-jurisdictional transmission charges, not any possible retail charges.⁵¹ FERC's order was affirmed by the D.C. Circuit.⁵²

Based on the foregoing, this Commission is not required by federal law to embrace FERC's positions with respect to station power. However, FERC has reasonably concluded that the provision of station power only involves a retail sale if a generator is net-negative—that is, it consumes more energy than is available to it from its own generation and that of any sister generators—as measured over the course of a reasonable netting interval, which FERC has found to be one (1) month.⁵³ Conversely, if a generator or group of generators (owned by the same entity) generate as much as or more than they consume during a monthly netting interval (and are thus

⁵⁰ *S. Cal. Edison*, 603 F.3d at 1000–01 (also stating that “FERC’s order does not just sideswipe state jurisdiction; it attacks it frontally.”).

⁵¹ *Duke Energy Moss Landing v. California Independent System Operator, Inc.*, 132 FERC ¶ 61,183 (2010).

⁵² *Calpine Corp. v. F.E.R.C.*, 702 F.3d 41 (D.C. Cir. 2012).

⁵³ As evidenced by the record of this case, over the past two (2) years Riverside’s Zelda site has typically produced approximately 27,031 MWh more than it consumed on a monthly basis and Riverside’s Foothills site typically produced approximately 16,236 MWh more than it consumed on a monthly basis. An exception occurred in February of 2017, when PJM did not dispatch any of the generation facilities at either site the entire month. *See* HVR, at 9:34:21 a.m./Hearing Transcript, Hammond, at 29; Wohnhas Written Testimony, at Exhibit RKW-1. In that instance, FERC precedent, PJM’s OATT, and Kentucky law would support a conclusion that Riverside purchased its station power needs by retail sale from a third-party (namely, Kentucky Power, pursuant to its retail Tariff I.G.S.).

net-positive), FERC says that no sale of station power, wholesale or retail, has taken place. This treatment of consumption as “negative generation” is consistent with historical practices by vertically-integrated utilities, including Kentucky Power itself,⁵⁴ and FERC’s fundamental conclusions in this area (save its “jurisdictional overzealousness,” so to speak) require thoughtful consideration by this Commission.

iii. Netting of Zelda and Foothills by Kentucky Power

Kentucky Power has repeatedly stated that it permits the Zelda and Foothills sites to net generation and consumption on a 15-minute interval basis. What follows are various excerpts from the record of this case reflecting Kentucky Power’s claimed treatment of station power netting:

[The Zelda and Foothills] meters measure the flow of power into the facility (usage) and the flow of power out of the facility (output) on a 15-minute interval basis. The separate meter outputs are then combined into the single net bill for the Riverside account. Based upon this metering approach, Riverside is only charged for deliveries from the Kentucky Power system and only to the extent that Riverside’s need for power exceeds the amount of power being generated during a single 15-minute interval.⁵⁵

Currently, and appropriately, the separate outputs of the two meters at the Riverside Station are netted within each 15-minute metering interval described earlier.⁵⁶

Each meter measures both inflows (usage) and outflows (generation) which is accumulated and billed for each meter in 15 minute increments. In real time any generation measured by the meter first offsets usage before outflow is registered on the same meter.⁵⁷

⁵⁴ 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.”).

⁵⁵ Wohnhas Written Testimony, at 8.

⁵⁶ *Id.*, at 9.

⁵⁷ Kentucky Power’s Response to Riverside’s First Request for Information, Item 13 (filed June 1, 2018).

Q. And so this tariff allows for remote self-supply, but it does not allow for self-supply?

A. No, that's not correct. All right. It -- and they're currently being billed self-supply, but it's on a 15-minute interval, versus under the OATT Transmission Tariff that is on a 30-day, that I think also Witness Hammond described as well. So we do self -- they do take advantage of self-supply currently, but it's only a 15-minute interval.⁵⁸

In order to fully understand the netting practices actually employed by Kentucky Power, it is first necessary to briefly discuss the consumption profiles of the Zelda and Foothills sites. During a typical month, Riverside is charged Kentucky Power's Tariff I.G.S. rates and line item adjustments based on approximately 500 MWh of metered consumption at the Zelda site and 300 MWhs of separately-metered consumption at the Foothills site.⁵⁹ According to detailed sample meter and billing data filed by Kentucky Power in this proceeding (hereinafter, the "Meter Data"),⁶⁰ consumption at the Zelda and Foothills sites is relatively steady at approximately 1,250 kWh when neither site's generators are generating power.⁶¹ The Meter Data further reveals that:

(i) spikes in consumption occur during the 15-minute increments a site's generator(s) begins to

⁵⁸ HVR, at 1:43:20 p.m./Hearing Transcript, Wohnhas, at 154-55; *see also* HVR, at 3:12:30 p.m./Hearing Transcript, Wohnhas, at 221 (... "But what we do, and what we do allow, is we allow Riverside to self-supply, but we do it on a 15-minute interval. But they do self-supply....").

⁵⁹ HVR, at 9:31:41 a.m./Hearing Transcript, Hammond, at 28.

⁶⁰ *See* Kentucky Power's Response to Commission Staff's First Request for Information, Item 2, Attachment (filed June 1, 2018). The data provided by Kentucky Power ostensibly reflects the usage and consumption measured by each of the relevant meters during each 15-minute interval of November 2017, as well as the amounts charged by Kentucky Power.

⁶¹ During the sample month of November 2017, the Zelda site consumed approximately 750 kW every fifteen (15) minutes when none of its three (3) generators were operating, while the Foothills site consumed approximately 500 kW every fifteen (15) minutes when neither of its two (2) generators were operating. Thus, when both sites were idle, Riverside paid Kentucky Power a combined energy charge of roughly \$9.50 every fifteen (15) minutes (plus applicable adjustments and other variable charges) based on roughly 1,250 kWh consumed. *See* Meter Data, generally.

generate;⁶² (ii) there are 15-minute increments when a meter measures both consumption and generation;⁶³ and (iii) there are 15-minute increments when consumption is measured as zero (0).⁶⁴

When one looks even closer at the Meter Data, it quickly becomes apparent that Kentucky Power's actual netting practices are not consistent with the methodology the Company has repeatedly described. For instance, below is a summary snapshot of the metering and billing information provided by Kentucky Power concerning the 15-minute interval beginning at 1:15 p.m. on November 1, 2017:

Meter	kW Consumed	kW Generated	Energy Charge
Zelda	3240	680	\$42.73
Foothills	2360	144	

Based on simple math and the quarter-hour rate provided by Kentucky Power, during the 15-minute interval depicted above the utility charged an amount derived from usage of 5,600 kWh, which is the combined consumption registered by the Zelda and Foothills meters during the period.⁶⁵ Inexplicably, the generation registered by the Zelda and Foothills meters during that same interval (680 kW and 144 kW, respectively) is not netted or otherwise taken into account.⁶⁶

⁶² See Meter Data, at the 15-minute interval beginning 6:30 a.m. on November 1, 2017 (which for Recorder ID 3700526x1 (hereinafter the "Zelda Meter") reflects consumption of 2,032 kW and generation of 1,060 kW, and for Record ID 3700531x3 (hereinafter the "Foothills Meter") reflects consumption of 1,944 kW and generation of 56 kW).

⁶³ *Id.*

⁶⁴ See Meter Data, at the 15-minute interval beginning at 6:45 a.m. on November 1, 2017; see also Kentucky Power's Response to Commission Staff's First Request for Information, Item 13 (filed June 1, 2018) ("... Each meter measures both inflows (usage) and outflows (generation) which is accumulated and billed for each meter in 15 minute increments. In real time any generation measured by the meter first offsets usage before outflow is registered on the same meter.").

⁶⁵ See Meter Data, which provides the Quarter Hour Rate (1/4) per kWh of energy as \$0.007630.

⁶⁶ In the Meter Data, Kentucky Power included a column grouping (third from the left) in which it combined the data from the Zelda and Foothills Meters and provided a "Net MWh" figure, immediately before displaying the rate it charged for the 15-minute interval. Because the rates charged by Kentucky Power do not reflect the netting of the two

The same is true over and over again in 15-minute intervals when both consumption and generation are present (generally on unit start-up and shut-down). Even in intervals when generation exceeds consumption at both sites (*i.e.*, each meter, netted solely against itself, is net positive for the 15-minute interval), Kentucky Power charges Riverside for consumption.⁶⁷

From the Meter Data provided, it appears Kentucky Power has imposed and continues to impose an energy charge on every single kWh either its Zelda Meter or Foothills Meter registers, without regard to the energy Riverside generates during the prescribed netting interval. In other words, Kentucky Power has embraced a practice FERC has squarely and forcefully rejected:

The New York Commission and the Transmission Owners would have us deem a generator to have made retail purchases of station power whenever there was a single momentary power fluctuation during the netting period, even though the generator has positive net output for the netting period. In other words, there would be no netting at all, only real-time measuring of output. This approach not only is impractical, and contrary to both traditional utility practice and our legal precedent, but it also is anti-competitive. Generators that have had a single instance of negative net output would be forced to purchase their station power requirements from a single supplier, the local utility, at rates that are likely to be higher than the costs of self-supply or competitive third-party supply. This would make the generator's own energy uncompetitive when compared to energy sold by the local utility, with which merchant generators compete for load, with resulting harm to ratepayers. Starting with our first station power decision (*PJM II*), we consistently have insisted that station power procurement and delivery rules operate to foster competition in electricity markets. We find that section 4.24 does precisely that, and that the interpretation that the New York Commission and the Transmission Owners again advance does not.⁶⁸

meters together (or even the two meters individually), it is unclear why Kentucky Power presented data in the manner it chose.

⁶⁷ See, e.g., Meter Data, at the 15-minute interval beginning at 9:45 a.m. on November 2, 2017. There, the Zelda Meter registered 260 kW (528 kVAR) in consumption and 131692 kW (5964 kVAR) in generation, while the Foothills Meter registered 0kW (0 kVAR) consumed and 337832 kW (21744 kVAR) generated. Riverside incurred an energy charge of \$1.98 (plus corresponding rider chargers) with respect to this period.

⁶⁸ *KeySpanRavenswood, Inc. v. New York Indep. Sys. Operator, Inc.*, 107 FERC ¶ 61,142, at 61,470 (2004), as clarified by 108 FERC ¶ 61,164 (2004) (internal citations omitted); see also *PJM II*, 94 F.E.R.C. at 61,892 (“[W]e have never required that net output be measured on a real time or second-by-second basis, but rather have taken the practical point

Rejecting any netting interval, as Kentucky Power appears to have done in practice, does not allow for fluctuations in electric production and forecloses the possibility that Riverside may net its generation against any metered consumption.⁶⁹ Moreover, Kentucky Power’s apparent practice of “real-time measuring of output” is clearly at direct odds with the station power netting protocol it claims to follow. These are serious issues that must be addressed by the Commission. Kentucky Power’s failure to abide by its own stated practice has resulted in substantial harm to Riverside.

As is no doubt apparent, matters related to station power (and the self-supply or remote self-supply thereof) can be complicated and demand a detailed analysis and review of numerous relevant considerations. It is against the preceding factual and legal backdrop that Riverside seeks relief from the Commission in this proceeding.

III. ARGUMENT

a. Riverside complies with Tariff N.U.G.’s Special Terms and Conditions, and thus “shall take service under” PJM’s OATT.

As stated previously, Riverside seeks to embrace the terms of Kentucky Power’s filed tariff and satisfy its station and startup power needs in accordance with PJM’s OATT. This will allow Riverside to net the generation and consumption of its Zelda and Foothills sites over a reasonable,

of view that net output should be measured over a reasonable time period, so as to take into account fluctuations in electric production. Thus, while a generator that is undergoing, for example, a two-or three-month scheduled outage could not obtain station power under PJM’s proposed amendments during the outage, fluctuations in gross output or station power requirements that produce momentary instances of negative net output during an appropriate time period are acceptable, so long as net output measured over the entire time period is positive.”).

⁶⁹ No consumption is registered on a meter when a generator is operating, as power can only flow one (1) direction at a time. See Kentucky Power’s Response to Riverside’s First Request for Information, Item 13 (filed June 1, 2018) (“In real time any generation measured by the meter first offsets usage before outflow is registered on the same meter.”). For this reason, Riverside does not technically “consume” any power while generating; instead, the power necessary for its operations is made available by its generators—behind the meter—and whatever power used while generating is simply a reduction to the amount of output Riverside has available to sell into PJM. Stated differently, while Riverside’s units are generating, there is no consumption for which Kentucky Power could even possibly charge, so there is really no netting occurring at all.

monthly interval, thereby significantly reducing or eliminating the amount of energy that it must obtain (and Kentucky Power must supply) each month at retail.

“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.”⁷⁰ In this proceeding, Kentucky Power has conceded that Riverside satisfies the first prong of the relevant test, as all the generators in question are owned by the same lowest-level corporate entity, Riverside Generating Company, L.L.C.⁷¹ The dispute thus focuses on whether the Zelda site and the Foothills site are really one (1) site or two (2).

The evidence presented in this case supports the conclusion that the Zelda site and the Foothills site are not the same site. The various notable factors have been listed and listed again, but many bear repeating: Riverside’s Zelda site and Foothills site sit upon unique parcels of real estate acquired at different times and involving different PILOT agreements; the facilities at each site were developed and built separately by two (2) different contractors; while the two (2) sites share a common property line, they are separately fenced and secured by separate card-access gates; each site is individually identified by PJM for various purposes and is uniquely reported to PJM; each site is uniquely metered and has its own infrastructure and connections to Kentucky Power’s nearby Baker Switchyard; there is no cross feed/tie-breaker between the sites, no parasitic load, and no need for the respective units to operate in unison.⁷² Indeed, and perhaps most

⁷⁰ Wohnhas Written Testimony, at 10.

⁷¹ See HVR, at 1:35:06 p.m./Hearing Transcript, Wohnhas, at 148; see also Hammond Rebuttal Testimony (filed June 14, 2018).

⁷² See, e.g., Riverside’s Complaint (filed December 13, 2017); HVR, at beginning at 11:16:21 a.m./Hearing Transcript, Hammond, beginning at 89.

importantly, the sites are electrically isolated, and they can be separately controlled and separately sold, if desired.

Kentucky Power, of course, has its own list of factors that it believes requires the conclusion that the Zelda and Foothills generation facilities are all located on one (1) site.⁷³ Indeed, the Zelda and Foothills sites do sit upon adjacent properties, and it would be irrational to deny the sites share certain commonalities and similarities. However, rational thinking also explains why those commonalities and similarities exist.

For instance, the record reflects that both the Zelda and Foothills sites contain independent control rooms, each capable of operating either or both sites' generators.⁷⁴ Kentucky Power cites the fact that Riverside generally utilizes only one (1) of these control rooms as evidence that Zelda and Foothills comprise a single site.⁷⁵ Of course, Riverside *could* staff and operate each control room separately each hour of each day, but a sensible business competing in a dynamic marketplace naturally and appropriately permits certain operational (primarily back-office) resources to be shared when the proximity of nearby assets reasonably permits it. Likewise, Riverside *could* engage separate employees or independent contractors to operate and maintain each site, but basic principles of convenience and efficiency fully support Riverside's judicious allocation of resources. Even the fact that Riverside receives one (1) bill under one (1) account

⁷³ See, e.g., Wohnhas Written Testimony, at 12-13 ("The Riverside Station is served as a single retail Kentucky Power Account. The Riverside Station has a single street address. The Station has a single administrative building and a single warehouse that serve both portions of the station. The Riverside Station is served by a single Big Sandy Water District line and has a single septic system. Natural gas for the two parts of the Riverside Station is provided through a single lateral. The Kentucky Department for Environmental Protection treats the Riverside Station as a single site: Riverside has only one Agency Identification Number, only one Title V air permit, and only one KPDES wastewater discharge permit. The Riverside Station is also staffed by one set of employees and is operated for a single control room. Even LS Power's own website repeatedly refers to the Riverside Station as a single 836 MW project and not two separate and smaller individual projects.").

⁷⁴ See, e.g., HVR, at 11:28:46 a.m./Hearing Transcript, Hammond, at 100.

⁷⁵ Wohnhas Written Testimony, at 13.

from Kentucky Power each month is a red herring, as the bill that Kentucky Power sends now (which reflects each site's usage, then combines them) could be effortlessly split in two (2) if the existing practice of bill consolidation became undesirable. These types of commonalities exist between the sites for convenience and/or because the sites are commonly-owned, not because they are truly the same site; accordingly, these and like similarities relied upon by Kentucky Power are inconsequential and thus unpersuasive.

Other commonalities between the sites exist as much out of necessity as for convenience. For example, Kentucky Power points out that the sites share a street address,⁷⁶ which is likely related to the single access road the sites share from U.S. Route 23. Although a separate access road is theoretically possible to serve the Foothills site exclusively, such a measure would require a second crossing of the adjacent railroad and, obviously, clearly-duplicative facilities. The same is true, *e.g.*, with respect to the public water facilities serving the sites, the natural gas facilities serving the sites, the high-line transmission poles supporting 345 kV conductors from both sites, even certain aspects of the sites' environmental permitting—in these instances, the sites are necessarily intertwined because reason (or, at least in the case of Riverside's Title V permit, the federal government)⁷⁷ requires it. However, these types of commonalities do not support a conclusion that the Zelda and Foothills sites are the same site, primarily because these matters can be (and routinely are) readily addressed by generators that find themselves owning adjacent, separate facilities.⁷⁸ Co-maintenance agreements, independent metering, shared-services agreements, easements, and similar arrangements are commonplace in the industry and allow

⁷⁶ *Id.*

⁷⁷ See HVR, at 12:05:27 p.m./Hearing Transcript, Hammond, at 129 (“...Zelda and Foothills, known as Riverside Generating, can only have one Title V permit under EPA regulation, because they’re on adjacent properties controlled by the same owner. ... [T]here are no options other than to have a single Title V.”).

⁷⁸ See HVR, beginning at 11:34:32 a.m./Hearing Transcript, Hammond, at 105-107.

adjacent, separate sites to maintain independent ownership yet recognize the reality of proximately-located facilities.⁷⁹ Such arrangements could be successfully utilized if Riverside decided to sell either the Zelda site or Foothills site, and Riverside’s ability to swiftly and independently sell the sites is certainly a strong indicator of their separateness.

Indeed, both the Zelda site and Foothills site are “saleable,” in that each is sufficiently self-contained and independent to be made readily available for purchase by a third party seeking to expand its generation footprint.⁸⁰ For instance, Riverside could sell its Zelda site to a third party and retain the Foothills site. The parties could agree that certain support facilities would be shared for efficiency, convenience or necessity, and they could seamlessly coexist at the adjacent sites. This is true because the sites are separate when it comes to the considerations that truly matter: the sites have separate generators and control rooms, they were separately-acquired and are separately-gated/secured parcels, and they maintain separate interconnects with complete electrical isolation.⁸¹ This Commission should reject any attempt by Kentucky Power to give unwarranted weight to matters largely irrelevant to any reasonable examination of whether a customer should be able to remote self-supply under Tariff’s N.U.G.’s Special Terms and Conditions.

Of course, Kentucky Power’s primary argument rests with the sites’ proximity to one another, as they do share a common fence line. Notably, however, Kentucky Power has yet to articulate any basis for its conclusion that adjacent sites cannot remote self-supply under Tariff N.U.G. (and thus take service pursuant to the PJM OATT); the tariff itself only requires that the relevant “generators are not located at the same site”⁸² and, put simply, adjacent sites are not the

⁷⁹ *Id.*

⁸⁰ See HVR, at 10:33:28 a.m., 11:35:10 a.m./Hearing Transcript, Hammond, at 73, 105.

⁸¹ See HVR, at 11:35:10 a.m./Hearing Transcript, at 105.

⁸² Wohnhas Written Testimony, at 10.

same site. Moreover, it is effectively impossible for even the most astute observer to identify how Kentucky Power might determine whether a generator is sufficiently “remote” to satisfy its Tariff N.U.G.; during the hearing in this matter, Kentucky Power’s witness stated the utility would allow remote self-supply under Tariff N.U.G. if Riverside constructed another generator in Pikeville⁸³ or Boyd County,⁸⁴ but also said “[i]t may be across the road, it may be 10 miles down.”⁸⁵ While it appears some distance between sites may be required by Kentucky Power, any particular foundation or reasoning for that requirement remains unclear:

Q. You say it's on one site and I respect your position, sir. All I'm trying to get from you, if you can tell me, is what Kentucky Power's position is as to what would constitute two sites.

A. I don't have -- you know, I don't know. Clearly, you know, I just don't have a -- what that would be.⁸⁶

Kentucky Power’s interpretation (or lack thereof) of its Tariff N.U.G. underscores the unreasonableness of the utility’s position in this case. Riverside’s sites are fully capable of netting their consumption and generation (self-supplying) under PJM’s OATT, but Kentucky Power has created an irrelevant, location-based obstacle to achieve its unmistakable goal: prevent Riverside from satisfying its station power needs with anything other than expensive Kentucky Power retail energy. Kentucky Power’s arbitrary and capricious approach to this matter is unfair, unjust and unreasonable, and it is inconsistent with both the letter and the spirit of its Tariff N.U.G. Because Riverside reasonably satisfies Tariff N.U.G.’s two (2) specified conditions for obtaining station and startup power under PJM’s OATT—common ownership and separate generation sites—Riverside is entitled to the relief it requests.

⁸³ HVR, at 2:27:15 p.m./Hearing Transcript, Wohnhas, at 185.

⁸⁴ HVR, at 2:39:15 p.m./Hearing Transcript, Wohnhas, at 192-93.

⁸⁵ HVR, at 2:27:39 p.m./Hearing Transcript, Wohnhas, at 186.

⁸⁶ *Id.*

b. If Riverside does not satisfy the terms of Tariff's N.U.G.'s Special Terms and Conditions, it nonetheless should be permitted to net consumption and generation on a monthly basis under Tariff N.U.G.

Based on the discussion *supra*, Riverside believes it satisfies Tariff N.U.G.'s Special Terms and Conditions and thus "shall take service under" PJM's OATT, thereby netting the consumption and generation of the Zelda and Foothills sites over a monthly interval. Should this Commission determine that the Zelda and Foothills sites are not, in fact, separate sites, Riverside believes Kentucky Power's retail tariff should still be interpreted to permit the reasonable netting of station power on a monthly basis.

As discussed earlier, Kentucky Power claims to permit the Zelda and Foothills sites to self-supply (*i.e.*, net generation against consumption) during each 15-minute interval each month. Ignoring, for the moment, the demonstrated spuriousness of that claim, one is first inclined to identify the exact portion of Kentucky Power's retail tariff that underpins the 15-minute netting interval it allegedly observes. Despite a thorough review of Tariff N.U.G. and Tariff I.G.S., the only reference to netting (besides, of course, the implied reference in Tariff N.U.G.'s Special Terms and Conditions) can be found in the opening sentence of Tariff N.U.G.:

This tariff is applicable to customers with generation facilities which have a total design capacity of over 1,000 kW that intends to schedule, deliver and sell the net electric output of the facility at wholesale, and who require Commissioning Power, Startup Power and/or Station Power service from the Company.

While this is the sole reference to netting in the relevant tariff schedules, Kentucky Power may attempt to rely upon another portion of Tariff N.U.G., specifically a paragraph entitled "Monthly Billing Energy," for the 15-minute interval it claims to employ for the Zelda and Foothills sites. That section states as follows:

MONTHLY BILLING ENERGY.

Interval billing energy shall be measured each 15-minute interval of the month as the total KWH registered by an energy meter or meters less the quotient of the Station Contract Capacity and four (4). In no event shall the interval billing energy be less than zero (0). Monthly billing energy shall be the sum of the interval billing energy for all intervals of the billing month.⁸⁷

Clearly, this provision of Tariff N.U.G. does not mention the netting of generation against consumption; moreover, it calls for a computation involving Station Contract Capacity that Kentucky Power most certainly does not conduct with respect to the Zelda and Foothills sites. Perhaps most problematic is the tariff schedule in which the provision is located—pursuant to Tariff N.U.G., and according to Kentucky Power, Riverside takes station and startup power *not* under the specific provisions of Tariff N.U.G., but “under the generally available demand-metered tariff appropriate for [its] requirements,” *i.e.*, Tariff I.G.S.⁸⁸ As mentioned *supra*, Tariff I.G.S. is silent as to an appropriate netting interval, most likely because it is explicitly designed for typical commercial and industrial customers (of which Riverside is not) and has no particular regard for grid-interconnected merchant generators like Riverside.

It is worth noting again, perhaps, that generators under Tariff N.U.G. do have “the option of contracting for ... service under the terms of [Tariff N.U.G.],” such that the Monthly Billing Energy provision and certain others contained in Tariff N.U.G. may be applicable. However, contracts under Tariff N.U.G. may only pertain to startup (as opposed to station) power and, in any event, no such contract is in place between the parties.⁸⁹ Consequently, terms purporting to govern monthly billing energy buried within Tariff N.U.G. have no applicability to a generator

⁸⁷ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-3 (effective Jan. 19, 2018).

⁸⁸ Tariff I.G.S., P.S.C. KY. No. 11 1st Revised Sheet No. 10-1 through 10-3 (effective June 28, 2018).

⁸⁹ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-1 (effective Jan. 19, 2018).

taking service under Tariff I.G.S., and it is patently unreasonable for Kentucky Power to attempt to selectively embrace only the terms of Tariff N.U.G. it deems most advantageous.⁹⁰

As mentioned, the most obvious (and really only) reference to netting contained in Kentucky Power's Tariff N.U.G. is in its opening paragraph. There, Kentucky Power describes to whom the tariff schedule applies, specifically those customers with sizeable generation facilities that intend "to schedule, deliver, and sell the net electric output of the facility at wholesale..."⁹¹ This broad reference in Tariff N.U.G.'s opening paragraph to "net electric output" affords this Commission significant latitude to appropriately interpret and effectuate the terms of Tariff N.U.G., particularly through the establishment of a reasonable netting interval.

Riverside contends that netting on a monthly basis is appropriate. Tariff N.U.G. applies to customers intending to "sell the net electric output of the facility at wholesale...[:]" as discussed at length *supra*, FERC and PJM (among others) have embraced monthly netting intervals when

⁹⁰ A casual review of the current version of Tariff N.U.G. may suggest that many of its provisions (such as "Monthly Energy Billing" and "Monthly Demand Billing") are generally-applicable to any generator to which the tariff applies, primarily because these paragraphs begin with fully-capitalized, bolded, and underlined headings like other generally-applicable provisions of the tariff (*e.g.*, "Availability of Service," "Definitions," "Startup Power Service," and "Special Terms and Conditions"). However, a close review of the various historical versions of Tariff N.U.G. reveals that, prior to June of 2010, certain paragraphs within Tariff N.U.G. (including "Monthly Billing Energy," "Monthly Billing Demand," and "Delayed Payment Charge") actually fell (categorically and typographically speaking) under the heading "Startup Power Service." Changes to these paragraph headings were made (with little, if any, discussion) as part of Kentucky Power's 2009 general rate adjustment case, when the Commission approved them in substantially the same form as they exist today. Case No. 2009-00459, *Application of Kentucky Power Company for a General Adjustment of Electric Rates* (Ky. P.S.C. June 29, 2010). Based on this history, and like in Kentucky Power's Oklahoma affiliate's suspended version of Tariff N.U.G., terms such as "Monthly Billing Energy" in Tariff N.U.G. are clearly only intended to apply if a customer selects the "option of contracting for" service under Tariff N.U.G., as opposed to contracting for service pursuant to the "generally available demand-metered schedule appropriate for the customer's ... requirements." See Kentucky Power's Response to Riverside's Post-Hearing Request for Information, Item 2, Attachment 1 (containing a copy of Public Service Company of Oklahoma's Schedule Non-Utility Generator (NUG) (suspended)). Again, Riverside is served in the first instance under Tariff N.U.G., but that schedule points to the terms and conditions for service under Tariff I.G.S. Moreover, the terms of Tariff N.U.G. permit only customers seeking startup power (and not station power) the option to contract for service under the terms of Tariff N.U.G.; therefore, the "Monthly Billing Energy" paragraph cannot possibly apply to the station power netting on which this case focuses. Any attempt by Kentucky Power to hand-pick a 15-minute interval arguably-referenced in Tariff N.U.G.'s "Monthly Billing Energy" paragraph and make it applicable (but only in part) to Riverside's service should be swiftly rejected.

⁹¹ Tariff N.U.G., P.S.C. KY. No. 11 Original Sheet No. 26-1 (effective Jan. 19, 2018). Riverside, of course, is the only Kentucky Power customer to have ever been served under Tariff N.U.G.

presented with this issue and, therefore, Tariff N.U.G.’s reference to a customer’s sale of net output “at wholesale” should logically correspond with established netting practices “at wholesale.” A monthly netting interval would also be consistent with Kentucky Power’s practice of netting customer consumption and generation under its Tariff N.M.S. (Net Metering Service), which contemplates a netting interval spanning one (1) billing period.⁹² Further, because (as Kentucky Power correctly notes) it “may avail itself of self-supply or netting opportunities under PJM’s OATT to the extent such opportunities are available,” a monthly netting interval for Riverside would be the same as that applicable to Kentucky Power when it calculates the station power needs of its generators.⁹³ A netting interval of some kind is implicit in Tariff N.U.G., and an interval of one (1) month should be accepted as reasonable for determining a customer’s “net electric output” thereunder.⁹⁴

Importantly, no matter the duration of the netting interval utilized, all energy consumed by Riverside that exceeds the amount it generates during the prescribed period must be purchased at retail from Kentucky Power. This is entirely consistent with Kentucky law, which affords Kentucky Power the exclusive right to provide retail electric service in its certified territory.⁹⁵

⁹² See Tariff N.M.S., P.S.C. KY. No. 11 Original Sheet No. 27-1 (effective January 19, 2018).

⁹³ See Kentucky Power’s Response to Riverside’s First Request for Information, Item 18(a).

⁹⁴ Kentucky Power conveniently took the position in this case that “net electric output” means “the power generated in excess of power consumed during the generation process,” and that it “does not include power consumed when not generating.” See Kentucky Power’s Response to Riverside’s First Request for Information, Item 8 (filed June 1, 2018). Quite simply, there is no reasonable basis for this conclusion. Kentucky Power has stated repeatedly and unequivocally that netting under its tariff is duration (interval) based, and thus not limited exclusively to moments of simultaneous generation. Although Kentucky Power does not appear to follow its own claimed netting practices, Kentucky Power’s purported observance of a 15-minute netting interval is proof that a netting interval of some duration is appropriate for merchant generators under Tariff N.U.G. Unfortunately, Kentucky Power refuses to observe a *reasonable* netting interval. As discussed *supra*, permitting so-called “netting” only during periods of generation has been rejected by FERC, is anticompetitive, is contrary to traditional utility practice, and is most certainly *not* reasonable. See n. 68 and 69, and accompanying text. For these same reasons and others, Kentucky Power’s claimed 15-minute netting interval is also indefensibly brief and should be rejected.

⁹⁵ See, e.g., KRS 278.018.

Indeed, as discussed *supra*, when Riverside (or any generator) has sufficient generation to cover its consumption during a netting interval, it is not, for accounting purposes or otherwise, purchasing any energy from a third party. Instead, its consumption is considered “negative generation” and it simply reduces the output available for sale at wholesale. For this reason, Kentucky Power’s exclusive retail electric service rights are not implicated unless and until Riverside’s consumption exceeds its generation over a netting interval, and thus a sale—and more specifically, a retail sale—has occurred.

This analysis is also consistent with FERC’s view of the matter⁹⁶ and PJM’s OATT,⁹⁷ both of which acknowledge that a “net-negative” generator must purchase its power at retail from a third party. Even the very terms of Kentucky Power’s Tariff I.G.S. (the demand-metered rate schedule to which Tariff N.U.G. points and under which the utility has historically served Riverside) specifically contemplate situations where Kentucky Power may serve a secondary role in the provision of power:

This tariff is also available to Customers having other sources of energy supply, but who desire to purchase standby or back-up electric service from the Company. Where such conditions exist the Customer shall contract for the maximum amount of demand in KW which the Company might be required to furnish, but not less than 1,000 KW. The Company shall not be obligated to supply demands in excess of that contracted capacity. Where service is supplied under the provisions of this paragraph, the billing demand each month shall be the highest determined for the current and previous two billing periods, and the minimum charge shall be as set forth under paragraph “Minimum Charge” above.⁹⁸

⁹⁶ See Section II(e)(i), *supra*.

⁹⁷ See PJM Tariff, Intra-PJM Tariffs, OATT Attachment K – Appendix, §1.7.10(d); PJM Manual 28: Operating Agreement Accounting; Revision 79; Section 13: Station Power Accounting.

⁹⁸ Tariff I.G.S., P.S.C. KY. No. 11 Original Sheet No. 10-3 (effective January 19, 2018). It would appear this is the exact service sought by Riverside in this case (assuming it is permitted to net on a reasonable, monthly basis, of course).

Based on the foregoing, this Commission should reasonably interpret and effectuate the terms of Kentucky Power's retail tariff to permit Riverside to net its consumption and generation over a reasonable, monthly netting interval, consistent with Kentucky Power's retail tariff and PJM's OATT.

c. If Riverside's requested relief cannot be granted under Kentucky Power's Tariff, then relief should be granted in spite of it.

As discussed above, the reasonable interpretation and application of Kentucky Power's filed tariff, including both Tariff N.U.G.'s Special Terms and Conditions and other areas of the tariff, should result in Riverside's ability to net its station power over a monthly interval, consistent with PJM's OATT. Indeed, Riverside's requested relief can be granted within the letter and spirit of Kentucky Power's existing tariff, so long as this Commission either: (i) rejects Kentucky Power's unreasonable conclusion that the Zelda site and Foothills site are a single site, and therefore ineligible for remote self-supply as described in Tariff N.U.G.'s Special Terms and Conditions; or (ii) rejects Kentucky Power's unfounded choice to implement its station power protocol utilizing an extremely short (or non-existent) netting interval. However, should this Commission determine that Kentucky Power's tariff must be disregarded or amended to ensure the provision of appropriate service to Riverside at fair, just, and reasonable rates, it should not hesitate to take such action pursuant to its statutory authority.

First, Kentucky Power's tariff must be reasonable both with regard to the rates that it applies and the discriminatory impact those rates may have upon various customers.⁹⁹ Tariff N.U.G. is not reasonable as applied against Riverside as it treats Riverside's consumption of power

⁹⁹ See KRS 278.030(1) ("Every utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person."); KRS 278.170(1) ("No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage....").

as a retail sale similar to that made to a large industrial customer, but it fails to adequately account – both in theory and in implementation – for the fact that Riverside is offsetting its consumption against greater self-supply and remote generation. Tariff N.U.G. thereby unfairly prejudices and disadvantages Riverside to its ultimate and significant detriment. Such discrimination is a violation of Kentucky law.¹⁰⁰

Kentucky Power’s interpretation and application of Tariff N.U.G. is not reasonable, and it places Riverside at a significant economic disadvantage *vis-a-vis* both existing and future electric power generators. First, Kentucky Power requires Riverside to obtain all its station power at retail and apparently without the use of netting, which is a burden rarely (if ever) imposed on interconnected PJM generators, even in regulated states like Virginia.¹⁰¹ As acknowledged by FERC, such monopolistic behavior by local utilities like Kentucky Power distorts the competitive balance and produces inefficiencies that ultimately harm ratepayers.¹⁰²

Moreover, the illogical manner in which Kentucky Power has interpreted Tariff N.U.G.’s Special Terms and Conditions necessarily leads to arbitrary distinctions and absurd results. Specifically, Kentucky Power’s decision to place fervent (yet vague) emphasis on the physical proximity of two (2) generators, rather than relying on some rational basis (like the two sites’ electrical isolation, PJM distinction, etc.) to determine eligibility for remote self-supply under Tariff N.U.G., means that a similarly-situated future competitor of Riverside’s in Kentucky Power’s service territory could avoid paying retail rates for its station power, all else being equal,

¹⁰⁰ See, e.g., *Public Service Comm’n of Kentucky. v. Commonwealth of Kentucky*, 320 S.W.3rd 660 (Ky. 2010) (construing the anti-discrimination parameters of KRS 278.170).

¹⁰¹ HVR, at 10:16:08 a.m./Hearing Transcript, Hammond, at 59-63. Riverside’s numerous sister companies throughout other PJM states including Virginia, as well as Kentucky Power itself, all net station power on monthly intervals consistent with the PJM OATT station power protocol. See HVR, beginning at 10:16:08 a.m./Hearing Transcript, Hammond, at 59-60; Kentucky Power’s Response to Riverside’s First Request for Information, Item 18(a).

¹⁰² See n. 68 and accompanying text, *supra*.

simply by intersecting its generation sites with U.S. Route 23 rather than building both sites alongside it.¹⁰³ A tariff interpretation that requires such an outcome is unreasonable, especially when the nature of the subject service and the cost (or lack thereof) to Kentucky Power to provide it are the same in either scenario.¹⁰⁴

Of course, Kentucky Power contends that it incurs costs to provide Riverside station power, and that if Riverside nets its station power under PJM's OATT, those costs will unfairly shift to other customers.¹⁰⁵ Kentucky Power is wrong. The facilities and equipment necessary to transmit power to and from Riverside's Zelda and Foothills sites, including step-up and step-down transformers, high-voltage transmission and on-site distribution lines, and the various poles and structures connecting the Zelda and Foothills sites to Kentucky Power's Baker Switchyard, are all owned and maintained by Riverside.¹⁰⁶ Additionally, Riverside paid roughly \$12 million for the network upgrades necessary to ensure the output of its generation sites could access Kentucky Power's transmission facilities and the greater electric grid.¹⁰⁷ In light of these facts, and because

¹⁰³ See HVR, at 2:27:39 p.m./Hearing Transcript, Wohnhas, at 186 ("I mean, what you're trying to do is pin me down to a specific distance, and I don't have a specific distance. I'm sorry. But, you know, remote, you know, clearly is not in the same site. It may be across the road, it may be 10 miles down..."). Notably, the unreasonableness of Kentucky Power's position hereby demonstrated is also evidenced in Kentucky Power's apparent decision to permit generators in its service territory to remote self-supply, but not self-supply, their station power needs. Under PJM's station power protocol, the question of self-supply versus remote self-supply is really an issue of whether a Market Seller has sufficient available generation on-site to cover its consumption during a netting interval, or whether that Market Seller needs to look to the output of one or more commonly-owned PJM generation sites to cover its consumption. Though power that is remote self-supplied may incur transmission charges under PJM's OATT, the location of a Market Seller's generators within the PJM system rightfully has no impact on whether that Market Seller may pool (then net) its generators' monthly consumption and generation. The same is obviously not true under Kentucky Power's rules, which is unreasonable.

¹⁰⁴ See HVR, at 2:39:51 p.m./Hearing Transcript, Wohnhas, at 195.

¹⁰⁵ See Wohnhas Written Testimony, at 18.

¹⁰⁶ *Supra* n. 13.

¹⁰⁷ *Supra* n. 16, and accompanying text; see also HVR, at 9:37:02 a.m./Hearing Transcript, Hammond, at 32 ("We use the equipment that was paid for by Riverside when Riverside was constructed. Riverside was -- when Zelda was constructed in 2000, we -- the Zelda site paid about \$9.2 million for network upgrades required to interconnect the Zelda site into the Baker substation. And, subsequently, when Foothills was built, Foothills paid about \$2.8 million for its upgrades at the Baker Substation. And those are the same upgrades which Zelda and Foothills paid for that are

the same Kentucky Power transmission facilities are utilized by Riverside in connection with energy consumption as are utilized in connection with energy generation, the incremental capital and operations and maintenance expenses incurred by Kentucky Power for the Zelda and Foothills sites to consume power is essentially zero (\$0.00).¹⁰⁸ As a result, Riverside currently pays (and, for many years, has paid) substantially more than its “fair share” of Kentucky Power’s costs, and any redistribution of those costs among commercial and industrial customers in a future Kentucky Power rate case will only further the cost-of-service principles the utility proclaims to embrace when establishing its rates.¹⁰⁹

Undoubtedly, Kentucky Power will continue to assert in its briefing of this matter that it simply cannot avoid certain costs related to Riverside because it is under a duty to serve Riverside, particularly during the period each month that no generator is operating at either the Zelda site or Foothills site.¹¹⁰ Again, Kentucky Power’s argument is baseless. As discussed, the incremental cost to Kentucky Power for Riverside to receive power off the grid at any given moment is negligible, as Kentucky Power has invested in no independent distribution facilities that contribute to that service. Furthermore, while Kentucky Power does have both the right and obligation to provide reasonable service to customers in its certified territory,¹¹¹ Kentucky Power is only

used for station service. So both the power going out and the power coming back in use all the same equipment and all the same lines.”)).

¹⁰⁸ HVR, at 11:53:17 a.m./Hearing Transcript, Hammond, at 121 (“Kentucky Power is not providing any additional equipment that [Riverside] didn’t already pay for or that we don’t use in the generation of our facilities. So we’re utilizing the same equipment that sends the power out that we paid for to bring power back in, and we’re doing it at about 2 percent of the usage of what we send out.”).

¹⁰⁹ Wohnhas Written Testimony, at 16 (“As with all of Kentucky Power’s rates, Tariff I.G.S. rates were established using cost of service principles and approved by the Commission as fair, just, and reasonable.”).

¹¹⁰ HVR, at 2:20:53 p.m./Hearing Transcript, Wohnhas, at 180-181.

¹¹¹ See KRS 278.016, *et seq.* Kentucky Power’s obligation to provide reasonable service does not give the utility the right to force Riverside to purchase power at retail.

obligated to plan for and secure the capacity and energy necessary to serve its expected load.¹¹² Although Riverside will need to contract with Kentucky Power for a certain amount of capacity to ensure its power needs are met in the event consumption exceeds generation during a particular month, Tariff I.G.S. conveniently contemplates such contracts¹¹³ and, in fact, the parties have entered into similar contracts on previous occasions.¹¹⁴

Indeed, to the extent it is not abundantly clear already, permitting Riverside to net its station power pursuant to PJM's OATT does not mean Riverside will no longer be a retail customer of Kentucky Power. If consumption at the Zelda and Foothills sites exceeds generation (as it did in February 2017), Riverside requires a third party to supply station power for that interval. Therefore, Riverside expects to remain Kentucky Power's retail customer and expects it will pay monthly customer and demand charges (among others) under the utility's retail tariff.¹¹⁵

Fundamentally, Kentucky Power's position in this case ignores the reality that, but for Kentucky Power's desire for additional revenue, Riverside is perfectly capable of satisfying its

¹¹² See HVR, at 3:17:12 p.m./Hearing Transcript, Wohnhas, at 223; see also Tariff I.G.S., P.S.C. KY. N0. 11 Original Sheet No. 10-3 (effective January 19, 2018) ("The Customer shall set forth the amount of capacity contracted for ('the contract capacity') in an amount equal to or greater than 1000 KW in multiples of 100 KW. The Company is not required to supply capacity in excess of such contract capacity except with the express written consent of the Company.").

¹¹³ See Tariff I.G.S., P.S.C. KY. No. 11 Original Sheet No. 10-1 (effective January 19, 2018) ("Customers shall contract for a definite amount of electrical capacity in kilowatts, which shall be sufficient to meet normal maximum requirements."). Obviously, "normal maximum requirements" for Riverside, assuming it is permitted to net in accordance with PJM's OATT, will be substantially less than that usage for which Riverside has been billed historically.

¹¹⁴ See Kentucky Power's Response to Riverside's First Request for Information, Item 4, Attachment 1, at 5 (filed June 1, 2018).

¹¹⁵ Kentucky Power takes an opposing position in response to a request from Commission Staff in this case: "If the Commission were to determine that Riverside is qualified to remote self-supply under Tariff N.U.G., Kentucky Power would no longer receive the entire amount, including revenues for customer or demand charges, under the retail tariff. All other items being equal, this would shift costs to other customers even though Kentucky Power assets would continue to be utilized by Riverside in the identical manner." Kentucky Power's Response to Commission Staff's First Request for Information, Item 3 (filed June 1, 2018). Kentucky Power's conclusions are not accompanied by any explanation.

station power needs utilizing the protocol available under PJM's OATT.¹¹⁶ As heretofore discussed, a functional framework exists by which PJM Market Sellers (such as Riverside) can self-supply and remote self-supply their station power through netting. This framework has been thoroughly reviewed and approved by PJM and FERC, and it recognizes the reality that interconnected generators are simply not the same as industrial and commercial customers. However, Kentucky Power, despite being a member of PJM, seeks to interfere with Riverside's enjoyment of the PJM station power protocol and require Riverside to satisfy its station power needs with retail purchases.

For nearly two (2) decades, Riverside has paid inflated rates that are grossly disproportionate to the service it receives from Kentucky Power. The Commission has the authority to ensure Kentucky Power's tariff is reasonably written and reasonably applied, and when the practices of a utility result in the unfair or unjust treatment of a customer, this Commission is empowered to provide a remedy. Moreover, this Commission is fully capable of ensuring the utilities subject to its jurisdiction do not exceed their authority or abuse the privilege they have to provide retail electric service in this Commonwealth. Thus, Riverside's Zelda and Foothills sites should be permitted to net their consumption and generation in accordance with the PJM OATT's station power protocol, regardless of the present or future terms of Kentucky Power's flawed retail tariff.

¹¹⁶ Again, in the event Riverside consumes more than it generates in a month, it would purchase the necessary consumption from Kentucky Power at retail rates. See n. 95-98 and accompanying text, *supra*. This is precisely the manner in which it appears to have been handled in Virginia between Rappahannock Electric Cooperative and Riverside's affiliate, Doswell Limited Partnership. See Riverside's Response to Commission Staff's Post-Hearing Request for Information, Item 1 (filed Oct. 5, 2018). There, as would be the case here, the generator remains a retail customer of the local distribution utility, but the amount of energy purchased at retail each month is appropriately limited to only that usage "left over" after accounting for all generation/consumption as prescribed by PJM's OATT station power protocol.

IV. 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. Such an outcome is consistent with the reasonable interpretation of Kentucky Power's tariff, historical utility practices, established federal policy, the laws of this Commonwealth, and basic notions of fairness. Kentucky Power has refused Riverside's requested relief based on an unreasonable interpretation and inconsistent application of its filed tariff, thus necessitating action by this Commission.

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 5th day of November, 2018.

Respectfully submitted,



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