

**COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

Riverside Generating Company, L.L.C.	)	
COMPLAINANT	)	
	)	
v.	)	Case No. 2017-00472
	)	
Kentucky Power Company	)	
DEFENDANT	)	

**Kentucky Power Company's Post-Hearing Brief**

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## I. INTRODUCTION

Do five generating units that: (a) are controlled as; (b) are physically laid as; and (c) function as a unity constitute two separate sites comprising three and two generating units? And if they do, can the two “sites,” which Riverside Generating Company, L.L.C. (“Riverside Generating”) characterizes as being adjacent, and that are separated only by a chain link fence, fairly be described as being “remote” from the other?

An answer of “yes” to either question would be unsupported by the record. More fundamentally it also would allow Riverside Generating to by-pass the requirements of Kentucky’s certified territory statutes and this Commission’s exclusive jurisdiction over the retail electric service Kentucky Power Company provides to Riverside Generating during 90 percent of the hours of any year. It also would require Kentucky Power’s other customers to replace the \$1.1 million in annual revenues now being provided by Riverside Generating to support Kentucky Power’s current rates.

The facts and the law require that each of the above questions be answered no and that Riverside Generating’s complaint be dismissed with prejudice.

## II. BACKGROUND

### A. Tariff N.U.G.

At issue is the remote self-supply provision of the “Special Terms and Conditions” section of the Company’s Tariff N.U.G – Non-Utility Generator. It states:

Customers desiring to provide Startup and Station Power from other generation facilities, owned by the same individual business entity that are not located on the site of the customer’s generator (remote self-supply), shall take service under the terms and conditions contained within the applicable Open Access Transmission Tariff as filed and accepted by the Federal Energy Regulatory Commission.<sup>1</sup>

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<sup>1</sup> Tariff Sheet 26-3.

The Commission first accepted Tariff N.U.G. in 2001.<sup>2</sup> An earlier version of the remote self-supply provision at issue here was a part of the originally approved tariff.<sup>3</sup> The tariff was created to address the Company's understanding of then-existing Federal Energy Regulatory Commission ("FERC") requirements following the advent of independent power producers.<sup>4</sup>

Riverside Generating is the only customer that is taking or that ever has taken service under Tariff N.U.G.<sup>5</sup> The tariff provides that customers like Riverside Generating, with generation facilities with a total design capacity in excess of 1,000 kW, must take station and startup power service under the demand-metered tariff appropriate for their operations.<sup>6</sup> It does not provide a separate rate for those services.

Riverside Generating began taking service from Kentucky Power on November 1, 2001, under the Company's Tariff Quantity Power (Q.P.), a predecessor to the Company's current Tariff Industrial General Service (I.G.S.)<sup>7</sup> Riverside Generating is presently a retail customer and consumes station power and startup power under Tariff I.G.S. in accordance with the provisions of Tariff N.U.G.<sup>8</sup>

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<sup>2</sup> Direct Testimony of Ranie K. Wohnhas, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 4 (Ky. P.S.C. Filed June 14, 2018) ("Wohnhas Direct") (citing Filing No. T62-1030).

<sup>3</sup> The intervening changes are not relevant to the issue presented.

<sup>4</sup> Kentucky Power Company's Response to KPSC 1-5, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed June 1, 2018) ("Kentucky Power Response to KPSC 1-\_\_"); Kentucky Power Company's Response to Riverside Generating 1-7(a), *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed June 1, 2018) ("Kentucky Power Response to Riverside Generating 1-\_\_"). The United States Court of Appeals for the District of Columbia subsequently rejected FERC's original construction of the law, upon which Kentucky Power's understanding was premised, and affirmed the state commissions' continuing jurisdiction over sales by public utilities such as Kentucky Power to merchant generators such as Riverside Generating. *See Calpine Corp. v. FERC*, 702 F.3d 41, 50 (D.C. Cir. 2012); *So. California Edison Co. v. FERC*, 603 F.3d 996, 999 (D.C. Cir. 2010).

<sup>5</sup> Wohnhas Direct at 4.

<sup>6</sup> *Id.* at 5; Tariff Sheet 26-1.

<sup>7</sup> Wohnhas Direct at 5.

<sup>8</sup> *Id.* at 7.

B. Riverside Generating's Claim

Riverside Generating instituted this action on December 13, 2017, after taking retail service from Kentucky Power Company under the demand-metered tariff appropriate for its operations for more than 15 years.<sup>9</sup> At no time prior to the first quarter of 2017 did Riverside Generating seek to take service from Kentucky Power under the remote self-supply provisions of Tariff N.U.G.<sup>10</sup>

Riverside Generating claims that its Riverside Station located on U.S. Highway 23 in Lawrence County, Kentucky in fact comprises two *separate* and *remote* generating stations – Zelda and Foothills.<sup>11</sup> Riverside Generating further alleges that based on these contentions it qualifies under the remote self-supply provision of Tariff N.U.G. to take service in accordance with the PJM Interconnection LLC Open Access Tariff (“OATT”) instead of Tariff I.G.S.<sup>12</sup> Taking service under the PJM OATT would allow Riverside Generating to net the output of the Foothills and Zelda portions of its Riverside Station on a monthly basis (as provided by the PJM Open Access Transmission Tariff) rather than on a 15-minute interval basis as required by Tariff I.G.S.<sup>13</sup> It also would allow Riverside Generating to receive the same retail electric service it currently receives from Kentucky Power at a reduced annual cost to Riverside Generating of approximately \$1.1 million.<sup>14</sup> Riverside Generating's requested relief thus would enable

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<sup>9</sup> *Id.* at 5

<sup>10</sup> Video Record of September 18, 2018 Hearing 9:21:45, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed October 5, 2018) (“VR”).

<sup>11</sup> See Complaint, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at ¶6 (Ky. P.S.C. Received December 13, 2017) (“Riverside Complaint”).

<sup>12</sup> *Id.*

<sup>13</sup> Wohnhas Direct at 9.

<sup>14</sup> Kentucky Power Response to KPSC 1-3.

Riverside Generating effectively to use “Kentucky Power’s system for free”<sup>15</sup> while requiring the Company’s other retail customers to replace the \$1.1 million in lost revenues through higher rates.<sup>16</sup>

C. The Riverside Facility Physically And Operationally Comprises A Single Site.

Riverside Generating contends that the Foothills and Zelda sections of its Riverside Facility are not only separate sites, but that the two are remote from each other. The record is unambiguously to the contrary.

1. The Riverside Facility.

Riverside Generating’s Riverside Facility is located in Lawrence County, Kentucky.<sup>17</sup> Its street address is 25038 U.S. Highway 23, Catlettsburg, Kentucky.<sup>18</sup> It comprises two sections: Zelda and Foothills. The Zelda section “includes three (3) natural gas-fired generating units.”<sup>19</sup> The Foothills section of the Riverside Facility consists of two “natural gas-fired generating units.”<sup>20</sup> The total installed capacity of the five units is 836 MW.<sup>21</sup>

Riverside Generating, while contending the two sections in fact are separate and remote sites, admits that the two sections of the Riverside Facility are adjacent and separated only by chain link fence.<sup>22</sup>

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<sup>15</sup> Wohnhas Direct at 15.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> Riverside Complaint at ¶ 3.

<sup>18</sup> VR 10:10:21; Wohnhas Direct at 6.

<sup>19</sup> Direct Testimony of Anthony Hammond, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 2-3 (Ky. P.S.C. Filed March 23, 2018) (“Hammond Direct”).

<sup>20</sup> *Id.* at 3.

<sup>21</sup> Riverside Complaint at ¶ 3.

<sup>22</sup> Hammond Direct at 2; Riverside Complaint at ¶ 3.

2. The Development Of The Zelda And Riverside Sections Of The Riverside Facility.

A leasehold interest in the real property underlying the Zelda section of the Riverside Facility was acquired by a subsidiary of Dynegy, Inc. (Lawrence County Riverside Trust 2000) in 2000.<sup>23</sup> The leasehold interest in the real property comprising the Foothills section of the facility was acquired the same year by a different Dynegy, Inc. subsidiary (Foothills Generating, L.L.C.)<sup>24</sup> Thus, although acquired in the names of two different subsidiaries, the two sections of the Riverside Facility were acquired contemporaneously by two subsidiaries of Dynegy, Inc.

Riverside Generating acquired the leasehold interest in the Foothills section of the Riverside Facility through sub-lease on May 31, 2002.<sup>25</sup> Through merger Riverside Generating acquired the leasehold interest in the Zelda section of the Riverside Facility on November 20, 2009.<sup>26</sup> Thus, no later than November 20, 2009 Riverside Generating held the leasehold interest in both the Zelda and Foothills sections of the Riverside Facility. Approximately ten days later, and subsequent to the combining of these two leasehold interests in Riverside Generating, LS Power acquired Riverside Generating (and thus the Riverside Facility) from Dynegy, Inc. on December 1, 2009.<sup>27</sup>

LS Power's website announced its purchase of the Riverside Facility as the acquisition of a single 836 MW facility and not the purchase of two separate and smaller facilities named Zelda

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<sup>23</sup> Hammond Rebuttal at 2-3.

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> Rebuttal Testimony of Anthony Hammond, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 at 3 (Ky. P.S.C. Filed June 14, 2018) ("Hammond Rebuttal").

<sup>27</sup> Wohnhas Direct at 13 & n.14 (citing <https://www.lspower.com/ls-power-completes-purchase-generating-assets-dynegy/>)



and Foothills.<sup>28</sup> As recently as three years ago LS Power characterized the Riverside Facility as a single facility (and not separate Zelda and Foothills sites) in connection with LS Power's December 9, 2015 announcement of its refinancing of the Riverside Facility.<sup>29</sup>

The Zelda section of the Riverside Facility began taking service from Kentucky Power in November 2000.<sup>30</sup> The Foothills section of the facility began taking service from the Company less than two years later.<sup>31</sup> The Zelda section began commercial operations in 2001<sup>32</sup> and the Foothills section began commercial operations in 2002.<sup>33</sup> Thus, both sections of the Riverside Facility were acquired, developed, and began commercial operations roughly contemporaneously in the same two year time period.

3. What Riverside Generating Characterizes As The Zelda And Foothills Sites In Fact Are Two Parts Of The Same Facility.

The Riverside Facility is located east of U.S. Highway 23 between the highway and the Big Sandy River in Lawrence County, Kentucky.<sup>34</sup> The southern edge of the Zelda section abuts the northern edge of the Foothills section.<sup>35</sup> The two sections form a single continuous tract and there are no intervening parcels separating the two.<sup>36</sup> The two sections of the Riverside Facility

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (citing <https://www.lspower.com/ls-power-completes-refinancing-university-park-north-university-park-south-riverside-projects/>)

<sup>30</sup> Riverside Generating Response to KPSC 1-1(a), *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed April 20, 2018) ("Riverside Generating Response to KPSC 1-\_\_").

<sup>31</sup> *Id.* at 1-1(b).

<sup>32</sup> VR 9:21:08 (Hammond).

<sup>33</sup> VR 9:21:26 (Hammond).

<sup>34</sup> Riverside Generating Response to KPSC 1-7 at 2.

<sup>35</sup> *Id.*

<sup>36</sup> VR 11:23:07; *see generally*, Riverside Generating Response to Kentucky Power 1-1 at 4-9, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed April 20, 2018) ("Riverside Generating Response to Kentucky Power 1-\_\_").

are separated only by chain link fence.<sup>37</sup> A continuous chain link fence encloses both the Zelda and Foothills sections of the Riverside Facility.<sup>38</sup>

Second, no reasonable person would characterize Riverside Hearing Exhibit 1 as probative of the second fact that Riverside Generating must prove to prevail: that the Zelda and Foothills sections of the Riverside Facility are “remote” from each other.

a. A Common Driveway And Shared Access.

Entrance to the Zelda and Foothills sections of the Riverside Facility is gained from U.S. Highway 23 by means of a single approximately 30-foot long common driveway.<sup>39</sup> The common driveway is located on the Zelda portion of the Riverside Facility.<sup>40</sup> A narrower driveway branches left (north) off the common driveway to a gate that provides access to the three Zelda combustion turbines.<sup>41</sup>

A similarly narrow driveway branches right (south) off the common driveway to a gate still located on the Zelda portion of the site.<sup>42</sup> Beyond this gate is a paved road providing access to what Riverside Generating characterizes as the Foothills site and its two generating units.<sup>43</sup> This access road continues across the Zelda portion of the Riverside Facility after passing through the gate for a distance prior to reaching the Foothills section of the facility.<sup>44</sup> There is no

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<sup>37</sup> *Id.*

<sup>38</sup> *See e.g.* Riverside Generating Response to Kentucky Power 1-1 at 4-9; Wohnhas Direct at 7 (“what Riverside calls its Zelda and Foothills sites in fact are a single site sitting atop a continuous footprint separated by a chain link fence.”)

<sup>39</sup> VR 10:07:14.

<sup>40</sup> VR 10:08:05.

<sup>41</sup> VR 10:09:00.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

second gate on the access road to Foothills units at what Riverside Generating contends is the common boundary between two separate and remote sites.<sup>45</sup>

Riverside Generating manages access to the Foothills section of the Riverside Facility consistent with Zelda and Foothills being a unity. Although a chain link fence separates the Zelda and Foothills sections of the facility, the fence does not continue across the access road to the Foothills units.<sup>46</sup> Thus, access from U.S. 23 to the driveway to the Foothills section of the facility is gained by passing through a single gate located on the Zelda portion of the facility and proceeding unimpeded across the Zelda Section to the Foothills section and its two units.<sup>47</sup>

b. Uniform Signage.

Riverside Generating Hearing Exhibit 1 and the aerial photographs produced by Riverside Generating in response to Kentucky Power's data requests reveal a sign on each side of the common driveway near U.S. Highway 23.<sup>48</sup> Nothing in the record suggests, and Riverside Generating does not contend to the contrary, that the two signs, both of which are located on the Zelda portion of the facility, are used to differentiate the Foothills and Zelda sections of the plant or that they are labeled Foothills and Zelda.

c. Shared Facilities And Infrastructure.

Consistent with the Zelda and Foothills sections of the Riverside Facility being part of a single site, the two sections share multiple common facilities. These common facilities and attributes, in addition to the common driveway, include:

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<sup>45</sup> VR 10:09:57.

<sup>46</sup> *Id.*; Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>47</sup> Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>48</sup> Riverside Generating Hearing Exhibit 1; Riverside Generating Response to Kentucky Power 1-1 at 4-9.

◇ The Zelda and Foothills portions of the Riverside Facility share a common street address.<sup>49</sup>

◇ The three Zelda units and the two Foothills units receive natural gas from the same nine-mile 20-inch natural gas primary pipeline connecting to the same Tennessee Gas Pipeline station.<sup>50</sup> The nine-mile 20-inch natural gas primary pipeline is owned only by Riverside Generating<sup>51</sup> and not both Foothills Generating and Riverside Generating as presumably would be the case if the two in fact were separate sites.

◇ The nine-mile 20-inch natural gas primary pipeline does not separately enter the Zelda and Foothills portions of the Riverside Facility. Instead, it enters the Zelda portion of the facility and only then branches off to provide natural gas to the Foothills units.<sup>52</sup>

◇ The Zelda and Foothills portions of the Riverside Facility are served by a single six-inch water line.<sup>53</sup> Consistent with Riverside Generating's use of the site as a single facility the waterline enters the site on the Foothills side of the facility<sup>54</sup> (unlike 20-inch natural gas primary pipeline that also serves both sides of the facility but enters on the Zelda portion).

◇ A single water meter<sup>55</sup> located on the Foothills portion<sup>56</sup> of the facility meters water usage by the three Zelda units and the two Foothills units.

◇ Most of the Riverside Facility's interconnections with utilities serving the Foothills portion of the facility are located on the Zelda side of the site.<sup>57</sup>

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<sup>49</sup> VR 10:10:21.

<sup>50</sup> Riverside Generating Response to Kentucky Power 1-1(e).

<sup>51</sup> VR 9:53:47.

<sup>52</sup> VR 9:54:00; Riverside Generating Response to Kentucky Power 1-1(e) ("the Zelda [natural gas] yard (located adjacent to the north side of the [shared] Administration Building) is served directly from the 20-inch primary pipeline and the Foothills yard (located adjacent to the northwest corner of Foothills Unit 1) is served by a dedicated 16-inch pipeline connected to the primary pipeline.").

<sup>53</sup> VR 9:58:23; VR 11:45:56; Riverside Generating Response to Kentucky Power 1-1(h) ("Water for fire protection, pilot water injection and CTG power augmentation inlet fogging is received from Big Sandy Water District through a 6" line entering the site from the west under the railroad tracks."); *id.* at 1-1(j); *id.* at 1-1 at 8.

<sup>54</sup> VR 11:45:56.

<sup>55</sup> VR 11:45:13; Riverside Generating Response to Kentucky Power 1-1(i) ("Both sites are metered from the same Big Sandy Water District meter located between the sites."); *id.* at 1-1 at 8.

<sup>56</sup> VR 11:45:56; Riverside Generating Response to Kentucky Power 1-1(i) at 8.

<sup>57</sup> VR 11:38:55 ("Most of the interconnects with utilities are at the Zelda site....").

◇ Both portions of the Riverside Facility are jointly served by a single Administrative Building<sup>58</sup> located on the Zelda portion of the facility.<sup>59</sup>

◇ Both portions of the Riverside Facility are jointly served by a single warehouse located on the Zelda portion of the facility.<sup>60</sup> The warehouse performs common functions for both the Foothills and Zelda portions of the Riverside Facility.<sup>61</sup>

◇ Although there are control rooms located on both the Zelda and Foothills portions of the Riverside Facility, the two control rooms are configured so that all five units may be operated from either control room. That is, the control room located on the Zelda Site can operate the two Foothills units as well as the three Zelda units.<sup>62</sup> Similarly, the control room located on the Foothills side of the fence can operate the three Zelda units as well as the two Foothills units.<sup>63</sup>

◇ A single septic system serves both portions of the Riverside Facility.<sup>64</sup>

◇ A single outfall serves the entire Riverside Facility.<sup>65</sup> The outfall delivers water used in cooling all five units, as well as storm water runoff from both sites,<sup>66</sup> to the Big Sandy River in conformity with the facility's National Pollution Discharge Elimination System permit.<sup>67</sup> The permit is issued in the name of Riverside Generating and not Foothills or Zelda.<sup>68</sup>

◇ Although the Zelda and Foothills portions of the Riverside Facility are separately connected to Kentucky Power's Baker Substation the conductors use common structures beginning approximately one-quarter of a mile from the Riverside Facility.<sup>69</sup>

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<sup>58</sup> VR 9:51:55; Riverside Generating Response to Kentucky Power 1-1(c) ("An administrative building located on the Zelda site serves both the Zelda and Foothills sites.").

<sup>59</sup> VR 9:52:26; Riverside Generating Response to Kentucky Power 1-1(c); *id.* at 5.

<sup>60</sup> VR 9:54:19; Riverside Generating Response to Kentucky Power 1-1 at 5.

<sup>61</sup> VR 9:57:39; Riverside Generating Response to Kentucky Power 1-1(g) (listing the Administrative Building in response to data request asking for "common or shared facility or facilities or building or buildings used in the operation of the Zelda and Foothills Facilities.").

<sup>62</sup> VR 11:28:46 ("So these control rooms are both redundant to each other. You can control the Zelda and Foothills sites from the Zelda control room and you can control the Zelda and Foothills sites from the Foothills control room. For convenience, we generally control both sites from the Zelda control room....").

<sup>63</sup> *Id.*

<sup>64</sup> VR 9:59:24; Riverside Generating Response to Kentucky Power 1-1(m); *id.* at 9.

<sup>65</sup> VR 10:05:19.

<sup>66</sup> VR 10:44:20.

<sup>67</sup> VR 10:04:23.

<sup>68</sup> Kentucky Power Hearing Exhibit 2; VR 10:02:06.

<sup>69</sup> VR 11:31:09.

Constructing a fence between the two parts of the Riverside Facility does not transform the single facility into two distinct and independent sites.<sup>70</sup> Instead, the Zelda and Foothills portions of the site are knitted together by their joint use of their multiple common facilities.

d. Shared Operations.

Riverside Generating also operates the facility as a single site. The Foothills and Zelda portions of the site share a common mailing address.<sup>71</sup> Riverside Generating argues that its contention the Zelda and Foothills “were developed and built separately by two (2) different contractors,”<sup>72</sup> constitutes evidence the two parts of the facility are separate sites. But whatever probative weight separate ownership at the time of development might carry if it continued to the present – and it would be slight if any – the assets now appear only on the books of a single entity: Riverside Generating.<sup>73</sup>

Although the Zelda and Foothills portions of the facility are separately metered,<sup>74</sup> Riverside Generating admits it is not uncommon for a power producer (like many industrial sites) to have multiple meters.<sup>75</sup> More fundamentally, despite the separate Zelda and Foothills meters, Riverside Generating receives a single bill<sup>76</sup> from Kentucky Power reflecting a single Kentucky Power retail account<sup>77</sup> for the energy consumed at the Zelda and Foothills sections of the facility.

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<sup>70</sup> Wohnhas Direct at 14-15.

<sup>71</sup> VR 10:10:50.

<sup>72</sup> Hammond Direct at 6.

<sup>73</sup> VR 9:13:17.

<sup>74</sup> Hammond Direct at 7.

<sup>75</sup> VR 9:47:27 (“I am not aware of Kentucky Power’s customers metering situations, but I would say that having more than one meter at a power facility is not highly unusual.”).

<sup>76</sup> Riverside Generating Response to KPSC 1-1; Wohnhas Direct at 8.

<sup>77</sup> Wohnhas Direct at 12-13.

Riverside Generating also staffs the five units as a single facility. No Riverside Generating employees operate the five units.<sup>78</sup> The third-party contractor employees that staff and operate the three Zelda units also operate the two Foothills units.<sup>79</sup> Conversely, the same eight employees that staff and operate the two Foothills units also staff and operate the three Zelda units.<sup>80</sup> Contrary to what might be expected with two distinct and remote sites, the third-party contractor employees provide service to the Zelda and Foothills sections of the facility without regard to whether services are being provided to what Riverside Generating characterizes as the Zelda site or the Foothills site.<sup>81</sup> Similarly, the same clerical and office staff provide services to the both the Zelda and Foothills operations.<sup>82</sup> Indeed, they answer the phone “Riverside” and not Foothills or Zelda.<sup>83</sup>

Most telling is the manner in which Riverside Generating operates the three Zelda and two Foothills units as a single facility. Although Riverside Generating has the operational capability of operating the Zelda units from the Zelda control room and the two Foothills units from the Foothills control room,<sup>84</sup> it typically elects to operate all five units from the same control facility:

So these control rooms are both redundant to each other. You can control the Zelda and Foothills sites from the Zelda control room and you can control the Zelda and Foothills sites from the Foothills control room. For convenience, we generally control both sites from the Zelda control room

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<sup>78</sup> VR 12:16:54.

<sup>79</sup> VR 12:18:12.

<sup>80</sup> *Id.*; Riverside Generating Response to Kentucky Power 1-6.

<sup>81</sup> VR 12:18:12; Riverside Generating Response to Kentucky Power 1-7.

<sup>82</sup> VR 12:18:31.

<sup>83</sup> VR 12:15:31.

<sup>84</sup> Riverside Generating Response to Kentucky Power 1-1(a).

<sup>85</sup> VR 11:28:46.



Stated otherwise, Riverside Generating treats the Zelda and Foothills units as a single site when operational convenience demands it do so. But the same three Zelda units and two Foothills units are separate (and remote) sites when financial expediency demands it:

Of course, because the retail electric service provided by Kentucky Power is significantly more expensive than the wholesale power Riverside sells into PJM, Riverside has examined with particularity its ability to self-supply (or “net”) its Station Power in accordance with the terms of PJM’s OATT.<sup>86</sup>

e. Course Of Dealing And Performance

The Commission approved Kentucky Power’s Tariff N.U.G. and the remote self-supply provision at issue here in 2001.<sup>87</sup> The three Zelda units began commercial operation in 2001<sup>88</sup> and the two Foothills units began commercial operations in 2002.<sup>89</sup> The course of dealing between Riverside Generating and Kentucky Power during the subsequent 15 years remained unchanged: Riverside Generating took and paid for service at retail in conformity with the Company’s Commission-approved commercial and industrial tariff<sup>90</sup> and received a single bill for that service<sup>91</sup> for the 90 percent of the hours its five units did not generate electricity.<sup>92</sup> Only in 2017 did Riverside Generating first contend that the three Zelda units and the two Foothills

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<sup>86</sup> Hammond Direct at 4; VR 9:17:26 (“So I won’t deny that there’s an economic motivation to it. I think we want to self-supply because there is an economic motivation but it’s also within the rules of the PJM Open Access Transmission Tariff to do so....”); VR 10:12:45 (confirming that “self-supplying is always going to be less expensive than purchasing retail from Kentucky Power....”).

<sup>87</sup> Wohnhas Direct at 5.

<sup>88</sup> VR 9:21:08.

<sup>89</sup> VR 9:21:26.

<sup>90</sup> VR 9:22:06; *see also* Hammond Direct at 4 (“Despite this fact, historically Riverside has sold all of its output from the Zelda and Foothills sites into the PJM marketplace, and satisfied its operational power needs (Station Power) with purchases from Kentucky Power.”).

<sup>91</sup> VR 9:47:27.

<sup>92</sup> Wohnhas Direct, Exhibit RKW-1.



units constitute separate sites that are eligible to remote self-supply under the PJM OATT.<sup>93</sup> As

Mr. Hammond responded at the hearing:

Q. Would it be fair to say that the course of dealing between Kentucky Power and Riverside in the intervening 14 or 15 years between when Foothills first started operating and you first approached (you being Riverside) first approached Kentucky Power was that Riverside would take power from Kentucky Power and pay retail rates?

A. That's accurate.<sup>94</sup>

Despite multiple opportunities to do so in direct testimony, rebuttal testimony, and in response to specific questioning on the stand,<sup>95</sup> Riverside Generating has yet to offer an explanation – other than it “didn’t look hard enough” and it became “smarter” (neither of which is particularly credible coming from one of the largest merchant generators in the nation) – for its 15-year course of dealing with Kentucky Power, or its delay in asserting its contention that Zelda and Foothills constitute two sites. Certainly, it was not occasioned by a change in the nature of the facility’s operations. The Riverside Facility’s operations have not changed since the Foothills portion of the facility began commercial operations in 2002.<sup>96</sup>

D. The Riverside Generating Units Are Peaking Units That Require Kentucky Power To Provide Retail Electric Service To Them For Approximately 90 Percent Of The Hours In Any Year.

The Three Zelda units and the two Foothills units are peaking units that are always available and kept on stand-by Riverside Generating:

but they are peaking units which are always available, they start up in about 20 minutes, so they can be called at any time. So we keep those units in a standby state – they are on what we call turning gear, where the CT rotor and generator are spinning at a very low RPM, about 3 RPM, right? And that maintains the ability for PJM to call

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<sup>93</sup> VR 9:21:45; Riverside Generating Response to KPSC 1-4.

<sup>94</sup> VR 9:22:06.

<sup>95</sup> VR 10:12:45.

<sup>96</sup> Wohnhas Direct at 5.

and say please dispatch that unit immediately and within 20 minutes we can pull that unit's output onto the grid. And that, what we call auxiliary load, is used to keep that plant in a state of readiness as well as some simple things like lights and heat and, you know, that type of usage.<sup>97</sup>

This stand-by status, along with the normal electrical service demands required by any commercial operation, mean that the Riverside Facility takes retail electric service from Kentucky Power during the periods when none of the five units are generating electricity.<sup>98</sup>

That service is not insignificant in either quantity or the periods of time that the Riverside Facility relies on Kentucky Power to maintain Riverside Generating's operations. The five Riverside Facility units are dispatched only when it is economically advantageous for Riverside Generating to do so:

The units are economically dispatched by PJM based on price of fuel and the price of power and the need, and during the month of February, there was not a need for the Riverside units to generate, so they did not.<sup>99</sup>

As a result, the Riverside Facility produced electricity for approximately ten percent of the 8,760 hours of 2017.<sup>100</sup> The Riverside Facility took retail electric service from Kentucky Power for approximately the other 7,884 hours of 2017.<sup>101</sup>

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<sup>97</sup> VR 9:34:21.

<sup>98</sup> Hammond Direct at 4 (explaining that Riverside Generating "satisfie[s] its operational power needs (Station Power) with purchases from Kentucky Power....").

<sup>99</sup> VR 9:31:41.

<sup>100</sup> VR 9:43:03 ("that's a round number that probably requires a little additional facts, or additional detail, but just to put a round number on it, these units operate at about a 10% capacity factor, you know... we could just say that, you know, the plant is generating about 10% of the time and not generating about 90% of the time."); Wohnhas Direct at 7; Wohnhas Direct, Exhibit RKW-1.

<sup>101</sup> *Id.* [0.9 x 8,760 = 7,884].

The Riverside Facility during 2017 consumed on average approximately 814 MWh each month.<sup>102</sup> The monthly consumption ranged from a low of 755 MWh in October 2017 to a high of 862 MWh in February 2017 when none of the five units operated because it was not economic to do so. By way of context, the Riverside Facility's approximate 814 MWh of monthly consumption is more than 6,350 times the average monthly consumption of a Kentucky Power residential customer.<sup>103</sup>

Despite the fact that the Riverside Facility is generating electricity approximately only ten percent of the hours in any month, its generation during that ten percent far outstrips its consumption during the remaining 90 percent of the month. As Mr. Hammond explained at the hearing:

I would say that Zelda generated about 30 times the auxiliary power usage if you're trying to equate the two, is that what you're trying to do?

...

I think the units being separate is confusing, it looks, but the generation exceeded the usage by a factor of about 30.

...

Foothills also looks at about 30, maybe 20, 25 [times consumption], something like that.<sup>104</sup>

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<sup>102</sup> Wohnhas Direct, Exhibit RKW-1 (9,769 MWh ÷ 12 = 814 MWh); *see also* VR ("The Zelda site uses about 500 megawatts [hours] and the Foothills site uses about 300 megawatts [hours] in a given month.").

<sup>103</sup> The average monthly consumption of a Kentucky Power retail customer for the 12-month period ended April 30, 2018 was 1,281 kWh. *See* Kentucky Power Company Response to KPSC 1-6, *In the Matter of: An Electronic Examination By The Public Service Commission Of The Environmental Surcharge Mechanism Of Kentucky Power Company For The Six-Month Billing Period Ended June 30, 2018*, Case No. 2018-00307 (Ky. P.S.C. Filed October 17, 2018).

<sup>104</sup> VR 9:29:13.

To be clear: Riverside Generating is not being forced, as Mr. Hammond contended under cross-examination, to “overpay[] for a service that it can generate itself.”<sup>105</sup> It is taking, and appropriately paying retail rates for, service provided by Kentucky Power during the 90 percent of the hours the Riverside Generating units are not operating.<sup>106</sup>

It is this mismatch between the hours the Riverside Facility takes retail electric service from Kentucky Power (90 percent) and the amount of electricity the Riverside Facility produces during the ten percent of the hours it is generating (20 to 30 times its consumption), coupled with the difference in the netting periods under the PJM OATT and Kentucky Power’s Tariff I.G.S.,<sup>107</sup> that Riverside Generating seeks to leverage in this proceeding. If permitted to do so, Riverside will receive – unlike any other Kentucky Power residential, commercial, or industrial customer – more than 800 MWh of retail electric service month in and month out with little or no payment to the Company.<sup>108</sup>

### III. ARGUMENT

#### A. This Commission Has Exclusive Jurisdiction Over Kentucky Power’s Retail Sale of Electricity to Riverside Generating.

##### 1. Kentucky Power And Riverside Generating Have A Retail Relationship.

Kentucky Power is a Kentucky utility and a retail electric supplier.<sup>109</sup> As a retail electric supplier, the Company has “the exclusive right to furnish retail electric service to all electric-

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<sup>105</sup> VR 10:30:43.

<sup>106</sup> VR 12:14:53.

<sup>107</sup> Wohnhas Direct at 9 (“Currently, and appropriately, the separate outputs of the two meters at the Riverside Station are netted within each 15-minute metering interval described earlier. Under the PJM OATT provisions, remote self-supply occurs so long as the combined output for the entire month of the local and remote generators exceeds the combined usage of those generators for the entire month.”).

<sup>108</sup> Riverside Generating Response to KPSC 1-9(b) (“While the specific details of the station power settlement process in this hypothetical are unknown, Riverside would expect a net zero settlement for the sites unless generation was insufficient to offset consumption.”).

<sup>109</sup> KRS 278.010(3)(a); KRS 278.010(4).

consuming facilities located within its certified territory....”<sup>110</sup> “Retail electric service” is “electric service furnished to a consumer for ultimate consumption” and “does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale.”<sup>111</sup>

Riverside Generating is a consumer of electric service from the Company for Riverside Generating’s own consumption; it does not purchase electric energy from Kentucky Power for resale.<sup>112</sup> Indeed, Riverside Generating has received, and paid for, retail electric service from Kentucky Power for more than a decade, and Riverside Generating has enjoyed the benefits of being part of Kentucky Power’s integrated retail service electric network that was developed and maintained to serve it along with Kentucky Power’s other customers.<sup>113</sup>

Riverside Generating relies on Kentucky Power for its electric service needs for approximately 90 percent of hours in any year.<sup>114</sup> Riverside Generating thus is no differently situated – and should receive no different treatment – than any other large industrial or commercial retail customer of Kentucky Power during the more 7,800 hours in any year that Riverside Generating is not generating and instead is dependent on Kentucky Power for its electrical needs. This type of retail electric service, which Riverside Generating has taken under Kentucky Power’s Tariff I.G.S. and Tariff Q.P. in conformity with Tariff N.U.G, and which it will continue to receive for as long as Riverside Generating remains a retail customer, is

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<sup>110</sup> KRS 278.018(1).

<sup>111</sup> KRS 278.010(7).

<sup>112</sup> Hammond Direct at 4.

<sup>113</sup> *Id.*

<sup>114</sup> Wohnhas Direct, Exhibit RKW-1.

governed by the Kentucky Power's Commission-approved retail tariffs.<sup>115</sup> Nothing in the evidentiary record in this case supports the conclusion that Riverside Generating is a wholesale customer of Kentucky Power, or that it is entitled to take service at wholesale as it admits would be the case if it were granted the relief it seeks here:

Q. Isn't it true that the net effect, if you will, of being able to self-supply is that Riverside is paying wholesale rates for the power that is consumed at the Zelda and Foothills sites?

A. That's correct.<sup>116</sup>

2. Riverside Generating Must Take Service From The Company Pursuant To Kentucky Power's Approved Retail Tariffs Over Which This Commission Has Exclusive Jurisdiction.

This Commission has "exclusive jurisdiction over the regulation of rates and service of utilities" in this state.<sup>117</sup> Every utility subject to the Commission's jurisdiction "may demand, collect[,] and receive fair, just[,] and reasonable rates for the services rendered."<sup>118</sup> Kentucky Power, as a provider of retail electric service has "the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory..., " including Riverside.<sup>119</sup>

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<sup>115</sup> See e.g. *New York v. FERC*, 535 U.S. 1, 12 n. 9 (2002) (noting FERC's recognition of "[s]tate regulation of most power production and virtually all distribution and consumption of electric energy..."); KRS 278.010(7) ("Retail electric service" means *electric service furnished to a consumer for ultimate consumption*, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale") (emphasis supplied).

<sup>116</sup> VR 9:18:44.

<sup>117</sup> KRS 278.040(2); see also 16 U.S.C. § 824(b)(1) (providing that the States retain jurisdiction over the sale of electric energy other than that transmitted or sold at wholesale in interstate commerce, as well as over facilities used in local distribution, only for intrastate transmission of electric energy, and for the transmission of electric energy that is consumed wholly by the transmitter). As discussed above, Kentucky Power's sale of electric energy to Riverside is not a wholesale transaction.

<sup>118</sup> KRS 278.030(1).

<sup>119</sup> KRS 278.018(1).

As the Commission recognized as recently as last year in *East Kentucky Power Cooperative*, the Kentucky General Assembly “has not enacted any statute that allows retail electric customers ... to participate in any fashion in wholesale electric markets.”<sup>120</sup> Thus, the Commission held, “[n]o retail electric customer is authorized to participate directly or indirectly in any PJM wholesale market ... except under a tariff or special contract on file with the Commission.”<sup>121</sup> Accordingly, absent a tariff or contract filed with or approved by the Commission, Kentucky retail customers, including Riverside Generating, are prohibited from participating in the PJM markets.<sup>122</sup>

The Commission’s holding in *East Kentucky Power Cooperative* is consistent with federal decisional authority affirming state public service commissions’ jurisdiction over retail electric service and rates, including the netting period for a generator’s use of station power and generation of energy. In *So. California Edison Co. v. FERC*, Southern California Edison challenged a FERC order approving a tariff filed by California Independent System Operator (“CAISO”).<sup>123</sup> Southern California Edison argued that FERC exceeded its jurisdiction by establishing a monthly netting period for generators’ use of station power and generation of energy.<sup>124</sup> The United States Court of Appeals for the District of Columbia Circuit agreed, holding that FERC’s approval of the tariff exceeded the agency’s jurisdiction over interstate transmission and rejecting the argument that FERC’s interest in competition among generators

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<sup>120</sup> *In the Matter of: Application Of East Kentucky Power Cooperative, Inc. For A Declaratory Order Confirming The Effect Of Kentucky Law And Commission Precedent On Retail Electric Customers’ Participation In Wholesale Electric Markets*, Case No. 2017-00129, 2017 WL 2483774, \*7 (Ky. P.S.C. June 8, 2017).

<sup>121</sup> *Id.* at \*13.

<sup>122</sup> *Id.* at \*11.

<sup>123</sup> *So. California Edison Co. v. FERC*, 603 F.3d 996, 997 (D.C. Cir. 2010).

<sup>124</sup> *Id.* at 997-999.



was sufficient to preempt “the state’s authority to set ... the pricing mechanism” for station power.<sup>125</sup> The D.C. Circuit’s decision was based on its recognition that “when ... generating facilities use station power—even when they get it from their own facilities—it is arguably functionally equivalent to a retail sale falling within the jurisdiction of the states, not FERC.”<sup>126</sup> The D.C. Circuit vacated FERC’s order approving the CAISO tariff and remanded the matter for further proceedings.<sup>127</sup>

On remand, FERC determined that “it lacked a jurisdictional basis to determine when the provision of station power constitutes a retail sale” and indicated that “the netting interval in the CAISO tariff could only govern Commission-jurisdictional transmission charges, *not retail charges*.”<sup>128</sup> The D.C. Circuit affirmed, holding that FERC had not acted arbitrarily and capriciously in concluding that its jurisdiction over wholesale power transactions failed to provide an adequate jurisdictional basis for FERC “to regulate truly local charges” such as the netting period for station power sales.<sup>129</sup> In so holding, the court explained:

As our analysis thus far should make clear, the tariff’s netting interval does not “allocate power” between energy consumed as station power and energy available at wholesale; it simply determines under what conditions generators will be assessed transmission and retail charges for their use of station power. This question is one of *cost*, not allocation of power. While the regulation of transmission charges is undoubtedly within FERC’s, retail charges are not.<sup>130</sup>

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<sup>125</sup> *Id.* at 1000-1002.

<sup>126</sup> *Id.* at 997.

<sup>127</sup> *Id.* at 1002.

<sup>128</sup> *Calpine Corp. v. FERC*, 702 F.3d 41, 45 (D.C. Cir. 2012) (emphasis supplied).

<sup>129</sup> *Id.* at 50.

<sup>130</sup> *Id.* (emphasis in original).



FERC itself has also affirmed this Commission's exclusive jurisdiction over the Company's retail rates, services, and tariffs. Indeed, it did so when it approved the transfer of functional control of Kentucky Power's transmission assets to PJM in connection with the Company joining PJM.<sup>131</sup> In its order, FERC approved without modification a stipulation that "affirm[ed] the Kentucky Commission's jurisdiction over [the Company's] retail rates"<sup>132</sup> and confirmed that nothing in the stipulation altered the "jurisdictional authority of the [FERC] or the Kentucky Commission" or "Kentucky laws, rules, or policies that service to retail customers be provided through the provision of bundled retail electric service."<sup>133</sup>

As a retail customer of Kentucky Power, Riverside Generating must take service from the Company in accordance with the Company's retail tariffs approved and on file with this Commission. The only such tariff that permits a customer to take service under the PJM OATT is Tariff N.U.G. Riverside Generating thus must satisfy Tariff N.U.G.'s requirements before it is eligible to remote self-supply under the PJM OATT. For the reasons detailed below, Riverside Generating has not met and cannot meet its burden of demonstrating, as required by Tariff N.U.G., that the Zelda and Foothills units constitute separate and remote sites.

**B. Consistent With Its Course Of Dealing And Performance Over The Period 2002-2017 Riverside Generating's Operations Do Not Qualify For the Remote Self-Supply Provisions Of Kentucky Power Company's Tariff N.U.G.**

To qualify to remote self-supply under Tariff N.U.G., Riverside Generating must satisfy the two conditions at issue:

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<sup>131</sup> *In the Matter of New PJM Companies and PJM Interconnection, LLC*, Docket ER03-262009, Order, 107 FERC Paragraph 61,272 (FERC June 17, 2004).

<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.*

- (a) the self-supply must be from separate and distinct facilities and not from units located at a single site (“from other generation facilities, ... that are not located on the site of the customer’s generator...”<sup>134</sup>); and
- (b) the separate and distinct generating facilities must be remote from each other (“remote self-supply”<sup>135</sup>).

The Riverside Facility satisfies neither of these requirements.

1. The Riverside Facility Constitutes A Single Site.

- a. The Evidence Of Record Indisputably Establishes That The Three Zelda Units And The Two Riverside Units Physically And Operationally Constitute A Single Facility Located At A Single Site.

The Commission need look no further than the multiple photographs of the Riverside Facility of record in this proceeding to conclude that the five units constitute a single facility.<sup>136</sup>

A reasonable person viewing the photographs can reach only one conclusion: the Zelda and Foothills sections of the facility are simply two parts of a single operation at a single site.

Indeed, any person looking at Riverside Generating’s Hearing Exhibit 1 for the first time would be hard pressed to conclude that the five generating units and associated equipment comprise anything other than a single site:

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<sup>134</sup> Tariff Sheet 26-3.

<sup>135</sup> *Id.*

<sup>136</sup> See Riverside Generating Response to KPSC 1-7 at 2; Riverside Generating Response to Kentucky Power 1-1 at 4-9; Riverside Generating Hearing Exhibit 1.



RIVERSIDE  
EXHIBIT 1



The Riverside Facility uses a single common entrance<sup>137</sup> and is enclosed by a continuous fence.<sup>138</sup> There is no intervening parcel between the two sections of the facility.<sup>139</sup> Access to what Riverside Generating characterizes as the Foothills site may be gained only by means of an access road across the Zelda portion of the site.<sup>140</sup> Indeed, secured access to the Foothills site is

<sup>137</sup> VR 10:07:14; VR 10:08:05; Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>138</sup> VR 11:23:07; Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>139</sup> Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>140</sup> *Id.*

maintained not at the claimed “boundary” between the Zelda and Foothills portions of the facility but on what Riverside Generating contends is the separate Zelda site.<sup>141</sup>

Even more telling are the multiple shared facilities that are used to operate the five units. These include the gas<sup>142</sup> and water service<sup>143</sup> – both of which reach the Riverside Facility property by means of a common “main” – as well the common sewerage facility maintained on the Zelda portion of the site.<sup>144</sup> Other common facilities include the single administrative building,<sup>145</sup> a single warehouse,<sup>146</sup> a single storm water outfall,<sup>147</sup> and an infrastructure that permits a single control room to operate all five units.<sup>148</sup>

Riverside Generating also operates the two halves of the facility as a unity. The five units are staffed by the same personnel.<sup>149</sup> The same contractor employees who operate the three Zelda units also operate the two Foothills units.<sup>150</sup> The contractor employees who operate the Foothills units also operate the Zelda units.<sup>151</sup> Even clerical services are provided without distinction.<sup>152</sup> The five units also are operated from a single control room – typically on the Zelda side of the fence.<sup>153</sup> Riverside Generating’s continuing reference to the fact that units

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<sup>141</sup> VR 10:09:07.

<sup>142</sup> VR 9:53:47; VR 9:54:00; Riverside Generating Response to Kentucky Power 1-1(e).

<sup>143</sup> VR 9:58:23; VR 11:45:56; Riverside Generating Response to Kentucky Power 1-1(i); *id.* at 8.

<sup>144</sup> VR 9:59:24; Riverside Generating Response to Kentucky Power 1-1(m); *id.* at 9.

<sup>145</sup> VR 9:51:55; Riverside Generating Response to Kentucky Power 1-1(c).

<sup>146</sup> VR 9:54:19; Riverside Generating Response to Kentucky Power 1-1 at 5.

<sup>147</sup> VR 10:05:19.

<sup>148</sup> VR 11:28:46.

<sup>149</sup> VR 12:18:12.

<sup>150</sup> *Id.*; Riverside Generating Response to Kentucky Power 1-6.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

could also be operated remotely from a location in another county or state<sup>154</sup> misses the point. The five units are being commonly operated as a matter of “convenience” from a single control house located within the continuous perimeter fence enclosing the five units.

The record is clear. The three Zelda units and the two Foothills units constitute a single site. The physical layout, the supporting infrastructure and utilities, and the manner in which the five units are staffed and operated, all point to but one conclusion: the five units constitute a single site. There is no reasoned, much less evidentiary, basis for accepting Riverside Generating’s argument fifteen years after commercial operations began to characterize the Riverside Facility for the first time as two sites.

- b. The Handful Of Indicia Riverside Generating Presents As Evidence The Facility Constitutes Two Sites Are Equally Applicable To A Single Site And Fail To Carry Riverside Generating’s Burden Of Proof.

Riverside Generating is the complainant and as such it, and not Kentucky Power, carries the burden of proof on its claim.<sup>155</sup> The evidence it offers in support of its contention that the three Zelda units and the two Foothills units constitute separate sites falls far short of carrying that burden even in the absence of the comprehensive and probative evidence to the contrary described above. Indeed, even if Riverside Generating were to make an unrebutted prima facie case that the Riverside Facility is two sites – and it indisputably fails to do so – it and not Kentucky Power would continue to bear the burden of proof.<sup>156</sup> The limited evidence that

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<sup>154</sup> Riverside Response to KPSC 1-1(a).

<sup>155</sup> *Energy Regulatory Com’n v. Kentucky Power Co.*, 605 S.W.2d 46, 50 (Ky. 1980) (“Applicants before an administrative agency have the burden of proof.”).

<sup>156</sup> *Id.* (“Repeated references are made to uncontradicted evidence and to the fact that no evidence to the contrary was introduced by the Commission. The circuit judge ruled that the Commission was required to come forward with an affirmative case whenever the applicant makes what might be termed a prima facie case before the agency. We believe the circuit court committed reversible error because it thereby would shift the burden from the applicant...”).

Riverside Generating offers is insufficient to make a prima facie case that the Zelda and Foothills units constitute two sites, much less overcome the physical and operational evidence that the five units are part of a single site.

Riverside Generating first points to the fact that the three Zelda units and the two Foothills units were constructed on separate – albeit adjacent – parcels by different contractors.<sup>157</sup> This argument not only ignores the fact that the Lawrence County Riverside Trust 2000 and Foothills Generating, L.L.C. were subsidiaries of the same parent, Dynegy, Inc., but that Riverside Generating claims the leasehold interest in both parcels now resides in a single entity, Riverside Generating, as a result of a merger and assignment.<sup>158</sup> To the extent that separate ownership is indicative of separate sites as Riverside Generating urges, the current unity of ownership is probative of a single site.

The small differences in the timing of the acquisition of the underlying parcels and the construction of the Zelda and Foothills units also fail to provide Riverside Generating with any succor. First, the parcels were acquired and the tracts developed contemporaneously with each other in the two year period between 2000 and 2002.<sup>159</sup> In any event, the development of generating facilities one or two years apart is probative of nothing. Big Sandy Unit 1 and Big Sandy Unit 2 – which comprised the single Big Sandy site – were constructed and placed in service five years apart.<sup>160</sup>

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<sup>157</sup> Hammond Direct at 6.

<sup>158</sup> Hammond Rebuttal at 2-4.

<sup>159</sup> *Id.*

<sup>160</sup> VR 2:20:53.



The fence between the two three Zelda units and the two Foothills units likewise does not advance Riverside Generating's argument that the units are located on separate sites.<sup>161</sup> Riverside Generating's reliance on the common dividing fence ignores the much larger, continuous fence that encloses the five units and associated equipment.<sup>162</sup> Riverside Generating's argument likewise ignores the fact that the controlled access road leading from the common driveway entrance on the Zelda portion of the site to the Foothills portion is not crossed by the fence.<sup>163</sup> Rather, access to the Foothills units is controlled by a gate located on the Zelda portion of the site.<sup>164</sup> Riverside Generating's argument also ignores the gas, water, and sewerage interconnections between the two halves of the Riverside Facility, the shared outflow, as well as common buildings located on the Zelda half of the site that are used to provide administrative and warehousing services to the Foothills portion of the Riverside Facility.<sup>165</sup>

Riverside Generating next pins its hopes to its claims that the Zelda and Foothills units are electrically isolated<sup>166</sup> and that they have separate electrical ties to the Baker Substation.<sup>167</sup> But the same was true of Big Sandy Unit 1 and Big Sandy Unit 2 prior to the May 2015 retirement of Big Sandy Unit 2.<sup>168</sup> Even today, Mitchell Unit 1 and Mitchell Unit 2 are

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<sup>161</sup> See e.g. Hammond Direct at 4.

<sup>162</sup> Riverside Generating Response to Kentucky Power 1-1 at 4-9; Riverside Generating Hearing Exhibit 1.

<sup>163</sup> Riverside Generating Response to Kentucky Power 1-1 at 4-9.

<sup>164</sup> *Id.*

<sup>165</sup> See generally *supra* at 8-16.

<sup>166</sup> See e.g. Hammond Direct Testimony at 7; Hammond Rebuttal at 4-5.

<sup>167</sup> *Id.*

<sup>168</sup> VR 3:52:28; Kentucky Power Company's Response to Riverside Generating PHDR 1-1, *In the Matter of: Riverside Generating Company, L.L.C. v. Kentucky Power Company*, Case No. 2017-00472 (Ky. P.S.C. Filed June 1, 2018) ("Kentucky Power Response to Riverside Generating PHDR 1-\_\_") ("Prior to the retirement of Big Sandy Unit 2 in 2015, Big Sandy Unit 1 and Big Sandy Unit 2 were electrically isolated. Generation could not flow from one unit at the Big Sandy generating station to the other except through the switchyard.")

electrically isolated.<sup>169</sup> Yet no one would contend that Big Sandy Unit 1 and Big Sandy Unit 2 constituted, or Mitchell Units 1 and 2 constitute, separate sites.<sup>170</sup>

The final two pieces of evidence offered by Riverside Generating are equally without avail. Although Riverside Generating initially argued that the separate metering of the three Zelda units and the two Foothills units was indicative that the two groups of units constituted separate sites,<sup>171</sup> Mr. Hammond conceded on the stand that “that having more than one meter at a power facility is not highly unusual.”<sup>172</sup> Indeed, it is common for larger industrial customers to have multiple meters at a single site.<sup>173</sup> In any event, the Riverside Facility is treated as a single retail account by Kentucky Power.<sup>174</sup>

Finally, the separate PJM identification numbers assigned the Zelda units and the Foothills units<sup>175</sup> do not aid Riverside Generating in carrying its burden of proof. The two Mitchell units similarly are assigned separate identification numbers by PJM.<sup>176</sup>

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<sup>169</sup> Kentucky Power Response to Riverside Generating PHDR 1-1 (“Units at the Mitchell generating station are electrically isolated. Generation cannot flow from one unit at the Mitchell station to the other except through the switchyard.”)

<sup>170</sup> Wohnhas Direct at 14 (noting that the separate interconnections to the Baker switchyard “simply reflect the engineering and operational decisions made in connection with the Company’s interconnection with the two portions of the Riverside Station.”)

<sup>171</sup> See e.g. Hammond Direct Testimony at 7; Hammond Rebuttal at 4.

<sup>172</sup> VR 9:45:24.

<sup>173</sup> *Id.*; Wohnhas Direct at 8 (“The use of multiple meters is consistent with Kentucky Power’s practice for customers with large loads or where, as with Riverside, the customer expands its operations.”) Mr. Hammond also conceded on the stand that metering configurations were far from indicative of the nature of the operations. VR 9:46:25 (“we visit a lot of sites in my line of work and we have seen different metering configurations with, I’d say without any specific rhyme or reason.”)

<sup>174</sup> Wohnhas Direct at 12-13.

<sup>175</sup> See e.g. Hammond Direct Testimony at 6-7.

<sup>176</sup> VR 3:53:46.



In sum, even ignoring the overwhelming evidence of record to the contrary, and weighing only the evidence Riverside Generating contends supports its position, Riverside Generating failed to carry its burden of proof.

2. The Zelda and Foothills Sections Of The Riverside Facility Are Not Remote.

Riverside Generating's complaint must be dismissed for a second, independent, and solely sufficient reason. The three Zelda units and two Foothills units are not remote from each other and would not qualify for remote self-supply even if they were to be (erroneously) characterized as separate sites.

A tariff – like any other written document (such as a contract)<sup>177</sup> that creates rights and liabilities between parties – must be interpreted in accordance with the plain and ordinary meaning of the words employed.<sup>178</sup> Likewise, effect must be given to all of the words employed if possible.<sup>179</sup> Tariff N.U.G. expressly incorporates the phrase “remote self-supply.”

The term “remote” as used in the tariff is commonly used and easily understood. Remote means “distant in place; not near; far off; far away.”<sup>180</sup> Black's Law Dictionary defines “remote” as “far removed or separated in time, space, or relation.”<sup>181</sup> Antonyms of “remote” include

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<sup>177</sup> See e.g. *Great N. Ry. Co. v. Merchants' Elevator Co.*, 259 U.S. 285, 291 (1922) (“what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.”); *Broadvox-CLEC, LLC v. AT&T Corp.*, 184 F. Supp. 3d 192, 201 (D. Md. 2016) (interpretation of tariffs “largely follows the rules of contract construction.”)

<sup>178</sup> *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 106 (Ky. 2003) (construction of a contract); *BellSouth Telecomms. Inc. v. Kerrigan*, 55 F.Supp.2d 1314, 1322 (N.D. Fla 1999) (“The terms of a tariff should be given their ordinary meaning, and strained or unnatural constructions are not permitted.”)

<sup>179</sup> *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986) (construction of a contract); *Great Northern R. Co. v. Commodity Credit Corp.*, 77 F. Supp. 780, 786 (D. Minn. 1948) (“In construing a railroad tariff, the entire instrument must be visualized and effect must be given to every word, clause, and sentence.”)

<sup>180</sup> WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY UNABRIDGED at 1528 (2<sup>nd</sup> ed. 1983).

<sup>181</sup> VR 3:41:00 (Chairman Schmitt speaking); See also *Datatresury Corp. v. Ingenico S.A.*, 2004 U.S. Dist. LEXIS 31457 at \* 13 (E.D. Tex. 2004) (relying upon dictionary to define remote as “separated by intervals greater than usual: far apart”; “far removed in space, time, relation, or likeness: not near or immediate: far, distant.”)

“adjacent, adjoining, contiguous.”<sup>182</sup> Significantly, Mr. Hammond used just such an antonym – “adjacent” – to describe the relationship between what he contends are the separate Zelda and Foothills sites: “adjacent sites are not one site.”<sup>183</sup>

The three Zelda units and the two Foothills units are in no sense “remote.” The five units not only share a common street address<sup>184</sup> and driveway,<sup>185</sup> but they also are enclosed by a common perimeter fence.<sup>186</sup> In addition, the “division fence,” which Riverside Generating relies upon to argue the Zelda and Foothills units are located on separate sites, by definition means the units and related facilities are “adjacent, adjoining, and contiguous” and thus not remote. Even the most cursory examination of the multiple photographs of record of the facility, including Riverside Generating Hearing Exhibit 1, conclusively puts to rest any argument that the units are remote and thus qualify for remote self-supply under Tariff N.U.G.

3. Any Doubt About The Meaning And Application Of The Remote Self-Supply Provision Of Tariff N.U.G. To Riverside Generating’s Operations Must Be Resolved In Kentucky Power’s Favor Based On The Parties’ Course of Dealing and Performance Over The Past 15 Years.

Kentucky law has long recognized that parties to a contract-like relationship may resolve any ambiguities in the written words through their consistent and well established course of dealing and course of performance under the written document:

[W]here the terms are not entirely clear, and the parties have themselves, through a long term of years, by a consistent course of dealing under the contract, with full knowledge of all the facts affecting their rights, construed its meaning and accordingly applied

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<sup>182</sup> <https://www.merriam-webster.com/thesaurus/remote> (last accessed October 31, 2018).

<sup>183</sup> Hammond Rebuttal at 5.

<sup>184</sup> Wohnhas Direct at 4, 6.

<sup>185</sup> VR 10:07:14.

<sup>186</sup> VR 11:23:07; Riverside Generating Response to Kentucky Power 1-1 at 4-9.

it, the usual labor of the courts is done. We have but to accept and enforce their own construction.<sup>187</sup>

The parties' course of deal or course of performance is equally applicable to the interpretation of tariff provisions.<sup>188</sup>

The text of the remote self-supply provision of Tariff N.U.G. unambiguously requires that Riverside Generating demonstrate that the Zelda and Foothills sections of the Riverside Facility are separate sites and that they are remote in order to self-supply. But to the extent that Riverside Generating contends that the provision is ambiguous and that something less is required, then its 15 year course of performance, and the parties' course of dealing over a like period, make clear that the Riverside Facility does not qualify to self-supply.

The record unambiguously establishes that Riverside took retail service beginning in 2001 from Kentucky Power under the applicable Kentucky Power commercial/industrial tariff (Tariff Q.P. and then Tariff I.G.S.) and not the remote self-supply provisions of the PJM Open Access Transmission Tariff.<sup>189</sup> Indeed, Riverside Generating (and its predecessor in interest) delayed nearly 15 years from the date the two Foothills units began commercial operation before first approaching Kentucky Power about remote self-supply.<sup>190</sup>

This long and consistent course of dealing between Riverside Generating and Kentucky Power fully supports Kentucky Power's construction of the remote self-supply provision of the tariff and its inapplicability to Riverside Generating's operation. Although Riverside Generating

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<sup>187</sup> *Pittsburg, C., C. & S. L. R. Co. v. Dodd*, 72 S.W. 822, 834 (Ky. 1903).

<sup>188</sup> *United States v. Pan American Mail Line, Inc.*, 359 F.Supp. 728, 735 n.5 (S.D.N.Y. 1972) (noting that resort to the parties' course of dealing is appropriate in interpreting a tariff where "there exists a custom or usage of a trade or course of dealing of the parties which, although not specified in the tariff, is such that it should be applied.")

<sup>189</sup> VR 9:22:06; *see also* Hammond Direct at 4.

<sup>190</sup> VR 9:21:45.

now seeks to change that construction going forward it has no doubts about its course of dealing with Kentucky Power over the past 15 years:

Q. Would it be fair to say that the course of dealing between Kentucky Power and Riverside in the intervening 14 or 15 years between when Foothills first started operating and you first approached (you being Riverside) first approached Kentucky Power was that Riverside would take power from Kentucky Power and pay retail rates?

A. That's accurate.<sup>191</sup>

The plain language of the tariff, as well as the parties' construction of that language over the past 15 years, underscores that Riverside Generating is not eligible to remote self-supply.

C. Riverside Generating's Construction Of The Remote Self-Supply Provision Of Tariff N.U.G. Is Unreasonable. If It Nevertheless Were To Prevail The Commission Should Eliminate That Portion Of The Tariff.

Riverside Generating's construction of the remote self-supply provision of Kentucky Power's Tariff N.U.G. is contrary to the plain language of the tariff. The five generating units are located on the same site and under no reading of the record can the units be characterized as remote. Riverside Generating's newly-found understanding<sup>192</sup> of the provision also contravenes its 15-year course of performance and the parties' course of dealing over the same period.<sup>193</sup> Riverside Generating's admitted effort to take service at wholesale<sup>194</sup> also is at war with the certified territory statutes<sup>195</sup> of the Commonwealth. At bottom, Riverside Generating seeks to receive the benefits of Kentucky Power's retail system for 90 percent of the hours in any year<sup>196</sup>

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<sup>191</sup> VR 9:22:06.

<sup>192</sup> VR 10:12:45.

<sup>193</sup> VR 9:22:06.

<sup>194</sup> VR 9:18:44.

<sup>195</sup> KRS 278.018(1) (granting retail electric suppliers such as Kentucky Power Company "the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory....")

<sup>196</sup> Wohnhas Direct, Exhibit RKW-1.

while shifting onto the Company's other customers the obligation to replace the \$1.1 million in lost revenues<sup>197</sup> that would result if Riverside is permitted to take and pay for service at wholesale.

Riverside Generating's construction of the remote self-supply provisions of the tariff produces rates that are not fair, nor just, nor reasonable. If the Commission were to conclude that the remote self-supply provision of Tariff N.U.G. permits Riverside Generating – unique among all of Kentucky Power's retail customers – to take service at wholesale, the Commission, should exercise its duty under KRS 278.030(1) to strike that portion of the tariff.<sup>198</sup>

#### IV. CONCLUSION

Riverside Generating's complaint lacks merit. Riverside Generating failed to carry its burden of demonstrating that it satisfies both requirements of the remote self-supply provision of the Company's Tariff N.U.G. For the reasons set forth herein, Kentucky Power Company respectfully requests that the Commission enter an order:

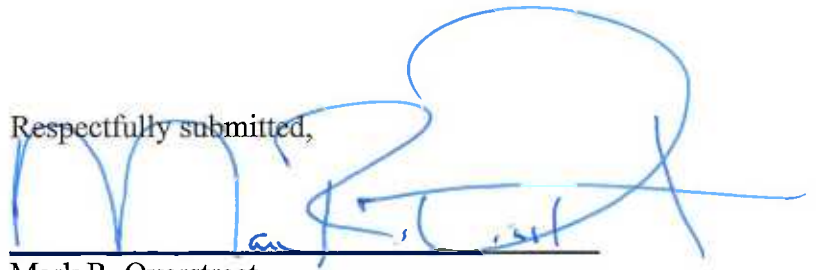
- (a) Dismissing Riverside Generating Company, L.L.C.'s complaint with prejudice;
- (b) In the alternative striking the remote self-supply provision of Tariff N.U.G. as unreasonable; and
- (c) Granting Kentucky Power Company all further relief to which it may be entitled.

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<sup>197</sup> Kentucky Power Response to KPSC 1-3.

<sup>198</sup> See, *Wade v. Kentucky Utilities Company*, Case No. 2006-00118 (Ky. P.S.C. October 18, 2006) (finding that tariff provision as applied "leads to unreasonable results" and striking tariff provision as unreasonable).

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Mark R. Overstreet', written over a horizontal line.

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